

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD  
CHARLESTON, WEST VIRGINIA

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OCT 28 2024

ARTHUR E. MAXWELL,

Appellant,

Environmental Quality  
Board

v.

Appeal No. 24-10-EQB

JEREMY W. BANDY, DIRECTOR, DIVISION  
OF WATER AND WASTE MANAGEMENT,  
WEST VIRGINIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,

Appellee.

WVDEP'S MOTION TO DISMISS

COMES NOW, the Appellee, Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection ("WVDEP"), by counsel, and respectfully moves this Board, pursuant to West Virginia Code of State Rules § 46-4-1 *et seq.*, and Rules 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure, to enter an Order dismissing Arther E. Maxwell's (hereinafter "Appellant"), Appeal in the above-styled matter. In support of this Motion, the WVDEP states as follows:

**Standard of Review**

The West Virginia Legislature has authorized this Board to hear appeals of orders, permits, or official actions of the WVDEP. *See* W. Va. Code § 22B-1-7. Parties to an appeal before this Board may move for dismissal or make other such motions for review by this Board. *See* W. Va. Code R. § 46-4-1 *et seq.* In evaluating such motions, this Board has determined that the West Virginia Rules of Civil Procedure shall apply. *See* W. Va. Code R. § 46-4-6.13 ("[T]he appropriate Rules of Civil Procedure will guide the appeals process before this Board.").

Rule 12(b)(1) of the West Virginia Rules of Civil Procedure provides that a defendant may

assert as a defense by motion raising lack of jurisdiction over the subject matter. Once it is determined that jurisdiction does not exist, so as to entertain the subject matter on appeal, this Board must take no action other than to dismiss the action from the docket. See Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Center, Inc.*, 158 W. Va. 492, 211 S.E.2d 705 (1975). Rule 12(b)(6) of the West Virginia Rules of Civil Procedure provides that defendants may assert as a defense, by motion, a failure to state a claim upon which relief can be granted. W. Va. R. Civ. P. 12(b)(6). Motions to dismiss provide necessary relief in instances where a party requests relief that it cannot receive or attempts to enforce rights which it does not have. See, e.g., *State ex. Rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995) (motion to dismiss under Rule 12(b)(6) enables a court to weed out unfounded suits). Motions should also be granted when “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Forshey v. Jackson*, 222 W. Va. 743, 750, 671 S.E.2d 748, 755 (2008) (quoting *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1998)(additional citations omitted)).

### **Argument**

#### **As a General Partnership, Appellant Must Be Represented by a Lawyer**

The instant appeal contests the results of an Informal Hearing for Civil Administrative Penalty (“CAP”), Case No. 240007, which reduced the amount of a CAP previously issued to M&M Fiber Recyclers to an amount of Two Thousand Seven Hundred Forty Five Dollars (“\$2,745.00”). See Certified Record at p. 65.

M&M Fiber Recyclers is registered as a General Partnership with the West Virginia Secretary of State’s Office. See Certified Record at p. 1. However, the Notice of Appeal that has been filed before this Board names Arthur E. Maxwell as the Appellant and was filed by

Arthur E. Maxwell himself. A review of the West Virginia Board Directory reveals that Mr. Maxwell is not an attorney licensed to practice in West Virginia. Thus, the lack of an attorney's signature on the Notice of Appeal indicates an intention to proceed *pro se*, which is not an available option.

Pursuant to W. Va. Trial Ct. R. 4.03, [e]very party to proceedings before any court, except parties appearing *pro se*, shall be represented by a person admitted to practice before the Supreme Court of Appeals of West Virginia and in good standing as a member of its bar. W. Va. Trial Ct. R. 1.04(k) defines "*Pro se*" as "representing **one's self** without counsel of record," [emphasis added].

In this matter, the CAP that is the subject of this appeal was assessed to M&M Fiber Recycling as a business entity and not to Arthur E. Maxwell individually. Therefore, in accordance with W. Va. Trial Ct. R. 4.03, M&M Fibers Recycling must be represented by a duly licensed attorney during any and all legal proceedings in West Virginia. Even if M&M Fiber Recycling was to be substituted as the named appellant in the instant appeal, it would not change the requirement that the business entity be represented by a person admitted to practice before the Supreme Court of Appeals of West Virginia. If allowed to proceed without counsel, Mr. Maxwell would not only be representing himself in any subsequent proceedings but would also be representing the business as a legal entity, as well as additional partners in the business relationship.

Rule 11(a) of the West Virginia Rules of Civil Procedure requires that "every pleading, motion and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party." W. Va. R.

Civ. P. 11(a); *see also Morris v. Gates*, 124 W. Va. 275, 20 S.E.2d 118 (1942) (An unverified complaint that is not signed in the name of the complainant nor by responsible counsel acting for him cannot be treated as a pleading upon which either to grant or decline relief.).

Where a non-attorney engages in the unauthorized practice of law the result of such practice should not be an amenable defect. *Davenport v. Lee*, 348 Ark. 148, 160, 72 S.W.3d 85, 94 (2002). “A pleading signed by a person who is not licensed to practice law in this State is a nullity even if a duly licensed attorney subsequently appears in court.” *Ratcliffe v. Apantaku*, 318 Ill. App.3d 621, 626, 742 N.E.2d 843, 846 (2000); *see also Kone v. Wilson*, 272 Va. 59, 64, 630 S.E.2d 744, 746 (2006) (The court was unable to grant the non-lawyer plaintiff an amended pleading because “an amendment to a pleading presupposes a valid instrument as its object” and found that the original pleading, signed in a representative capacity by one unauthorized to practice law within Virginia, was invalid and without legal effect.); *Carlson v. Workforce Safety & Ins.*, 765 N.W.2d 691, 702 (ND 2009) (“The proper remedy when a corporation is represented by a non-attorney agent is to dismiss the action and strike as void all legal documents signed and filed by the non-attorney” for the reason that when a case is commenced by a non-attorney not authorized to practice law “all documents signed by the non-attorney are void from the beginning.”); *Matter of Estate of Nagel*, 950 P.2d 693, 694 (Colo. App. 1997) (A petition is null and void because it was not signed by an attorney such that the lower court erred by denying the motion to strike the petition.); *Berg v. Mid Am. Indus., Inc.*, 688 N.E.2d 699, 704 (Ill. App. 1997) (“Any proceedings that ensue in a case involving laypersons representing a corporation are null and void ab initio ... [t]his rule applies even where the lay agent merely filed the complaint over his own signature, and all subsequent court appearances are made by a duly licensed attorney.”).

This Board should follow the pattern of similar tribunals in similar circumstances, and all

pleadings by Mr. Arthur E. Maxwell, while acting in a representative capacity to M&M Fiber Recyclers, are **void ab initio** and must be stricken as a nullity. As this request to strike pleadings includes the Notice of Appeal, all claims brought by Mr. Arthur E. Maxwell on behalf of M&M Fiber Recyclers must be dismissed as there is no curative pleading that can amend a pleading that was void upon its filing. *Cf. Carlson*, at 702; *Kone*, at 746.

Finally, the Appeal, as filed by non-attorney Mr. Arthur E. Maxwell must be dismissed pursuant to West Virginia Rule of Civil Procedure 12(b)(1). The Board cannot hear the subject Appeal because the pleadings are void upon filing under Rule 11 of the West Virginia Rules of Civil Procedure and Rule 4.03 of the West Virginia Trial Court Rules as more fully stated herein. Further, where the Notice of Appeal in this matter has been presented by a non-attorney engaged in the unauthorized practice of law, such action must be dismissed as failing to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

### **Conclusion**

**WHEREFORE**, the WVDEP prays that this matter be dismissed for lack of standing, lack of jurisdiction, and for failure to state a claim upon which relief may be granted, and for such other relief as this Board deems just and equitable.

**Respectfully submitted,  
WEST VIRGINIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION  
by counsel,**

*/s/Jon Frame*

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**CERTIFICATE OF SERVICE**

I, Jonathan C. Frame, do hereby certify that service of the foregoing **WVDEP'S  
MOTION TO DISMISS** has been made this 28<sup>th</sup> day of October, 2024, via U.S. mail and/or  
electronic service, postage prepaid, to the following:

Kenna M. DeRaimo, Clerk  
West Virginia Environmental Quality Board  
601 57<sup>th</sup> Street, SE  
Charleston, West Virginia 25304

*Via Hand Deliver and Electronic  
Mail*

Arthur E. Maxwell  
4602 Ohio River Rd.  
Huntington, WV 25702

*Via U.S. and Electronic Mail*

/s/Jon Frame  
Jonathan C. Frame (WVSB 10182)  
West Virginia Department of  
Environmental Protection,  
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601 57th St. SE  
Charleston, WV 25304  
Phone: 304-926-0499