

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HERB JONKERS,
LOUIS B. ATHEY, and
EUGENE CAPRIOTTI,

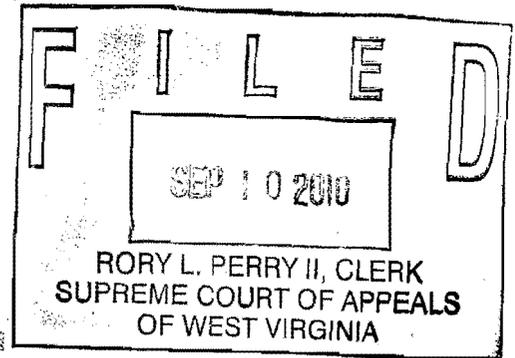
Appellants,

Appeal No. 35650

v.

TODD BALDAU,

Appellee.



APPELLANTS' REPLY TO RESPONSE OF APPELLEE

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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Appellants,

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v.

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Appellee.

Appellants' Reply to Response of Appellee

COMES NOW, Appellants, Herbert Jonkers, Louis B. Athey, and Eugene Capriotti, by counsel, and file this Reply to the Response of Appellee, stating in support as follows:

I. Introduction

The Response of Appellee, (hereinafter "Baldau") does not focus on the allegations contained in the Removal Petition, all of which were true rather than false. The Petitioners in the removal proceeding did not allege falsehoods, as everything they said was from a public record and was factual. The three-judge-panel declined to remove Baldau from office finding that his words, votes, and articulations regarding his understanding of the law were not malfeasance. In fact, the Court asserted that Baldau had a first amendment right to be wrong with regard to whether or not planning commissions had discretion.

Baldau's response fails to recognize that (1) *Noerr-Pennington*¹ immunity (*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) applies; therefore, the burden should have been on Baldau to demonstrate sham litigation, and he was relieved of this burden; (2) the three-judge-panel's decision did not decide probable cause and malice; and (3) the trial was tainted by the instruction that malice had been decided. Additionally, even if the Circuit Court had allowed the issue of probable cause to go to the jury, the facts, while interpreted very differently by Baldau and Appellants, conclusively show that probable cause existed.

Baldau spends much of his argument on facts that portray Baldau as an innocent and abused public servant. Each of the "facts" can be rebutted by specific trial testimony and will be addressed in this brief. However, this Honorable Court must keep in mind that this is not the ordinary lawsuit in which the basic elements of a malicious prosecution action—lack of probable cause and malice—are the only pertinent issues. This suit goes to the fundamental ability to petition the government for redress when one of its public officials is alleged to have overstepped his prescribed statutory duties. The three-judge-panel concluded that Baldau's words and actions were not a basis for removal. However, even if

¹ Baldau does not challenge the authority from the Federal Courts applying the *Noerr-Pennington* doctrine. Rather, on page 17 of the response Baldau cites *Bill Johnson's Restaurants, Inc.* 461 U.S. 731, 103 S. Ct. 2161 (1983) for the proposition that the first amendment does not protect against "intentional falsehoods" or "knowingly frivolous claims." None of the allegations in the removal petition were false. The Petitioners plainly asserted their conclusion that a planning commissioner could not exercise discretion, and that asserting discretion was malfeasance in office. The first amendment protects this Petition for redress.

the three-judge-panel disagreed strongly with the Petitioner's assertion that planning commissioners who advocate "discretion" should be removed (*See Kaufman v. Planning and Zoning Commission of the City of Fairmont, 171 W.Va. 174 (1982)*), the first amendment of the United States Constitution and West Virginia's Constitution protects citizens like Louis B. Athey, Eugene Capriotti and Herbert Jonkers when they seek redress in the courts for what they perceived to be misfeasance and malfeasance of a public official.

II. Argument

A. The Trial Was Tainted by the Erroneous Partial Summary Judgment Ruling

Baldau would like for the constitutional errors made by the Circuit Court to be overlooked because he claims that Appellants had the opportunity to introduce all of the evidence they would have introduced in a trial on the merits to negate malice. But any intelligent jury would be confused and prejudiced by an instruction by the court declaring that Appellants were found to have acted maliciously, yet asking the jury to make a determination of malice. The court repeatedly told the jury that the Appellants acted maliciously. For example, the judge said mid-trial that, "*the Court had ruled at that point that a groundless petition to remove is per se or gives the inference of malice.*" Trial Transcript page 228, day 2 of trial. The judge also stated that, "*Judge Steptoe went on as the initial ruling on the summary judgment motion, to rule that a groundless petition was per se malicious prosecution. That is our starting point.*" Trial Transcript

page 229, day 2 of trial. The court later instructed the jury that, “*this Court has ordered that judgment be entered jointly and severally against each of the Defendants upon the issue of liability for the tort of malicious prosecution.*” Trial Transcript page 77, Day 3 of Trial. The court further instructed that “*where gross fraud, malice, oppression, or wanton, willful or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, the jury may assess exemplary, punitive or vindictive damages.*” Trial Transcript page 79, Day 3 of Trial. In other words, the court told the jury that the Appellants were guilty of malice, and if malice was shown, punitive damages were appropriate. The court essentially informed the members of the jury of what their verdict should be.

The court went on to say that “[*t*]o sustain a claim for punitive damages, the wrongful act must have been done maliciously,” and “[*a*] wrongful act, done under a bona fide claim of right, and without malice in any form, constitutes no basis for such damages.” Trial Transcript page 79, day 3 of trial. It is not surprising that a jury would determine that Appellants did not act under a bona fide claim of right when they were instructed that Appellants acted maliciously, and a bona fide claim of right and malice are mutually exclusive. In other words, the court’s instructions left the jury with no other option but to determine that the Appellants were not acting under bona fide claim of right. While the court later instructed that actual malice must be found by the jury and cannot be inferred from lack of probable cause, the court’s prior instruction tainted the jury’s objectivity on the issue of malice. Baldau’s fails to raise any argument that would show that

the jury was not prejudiced by the court's finding and instructions on the issue of malice.

Additionally, if the trial had progressed properly, evidence of probable cause, of which there is ample, would have negated a finding of malicious prosecution. The trial was also biased by the Circuit Court's failure to recognize *Noerr-Pennington* immunity, which would have placed the burden on Baldau to produce evidence that the litigation was a sham.

Baldau points to several excerpts in the trial transcript to support his contention that the absence of subjective and objective good faith was proven; therefore, the summary judgment ruling had no effect on the ultimate outcome of the case. The first error in this argument is evident when one considers that even if the testimony, which is taken out of context, could be considered supportive of Baldau's position, it does not rise to the level of proving sham litigation, and the burden was never on Baldau to prove bad faith. For example, sham litigation requires proof that no reasonable person instituting the litigation could realistically expect success in procuring the government action, result or outcome. *See Cove Road Development v. Western Cranston Industrial Park Associates*, 674 A.2d 1234, 1237 (R.I. 1996). None of the testimony, which is interpreted through Baldau's lens and is contradicted by Appellants' testimony and documentation, proves that the Removal Petition was objectively unreasonable under this test. Additionally, the sham litigation test requires that Baldau prove that the Removal Petition was subjectively baseless in the sense that it was actually an attempt to use the

governmental process itself for its own direct effects. Use of outcome or result of the process for its legitimate end is by definition not sham litigation. *See id.*

There is no proof, or even an allegation, that Appellants were abusing the *process* for its own direct effects.

Furthermore, any implication of bad faith can be negated by reading the full context of the testimony or by examining other parts of the trial transcript. For example, the first bullet point on page 7 of Baldau's brief implies that the petition was not technically accurate in stating that Baldau himself made decisions on subdivision applications. The bullet point is misleading and does not "prove" anything. The full testimony on page 161 of day two of trial shows that Mr. Athey merely acknowledged that application approval takes more than Baldau's one vote, which is, of course, the way any layperson understands the Planning Commission to work. Athey then said that Baldau "*was very influential in the votes in lots of cases certainly ones we have talked about.*" Trial Transcript page 161, Day 2 of Trial. Jonkers later testified that he carefully constructed a binder that supported all of the allegations made in the Removal Petition, which is why he knew that the allegations contained in the Petition were true and accurate. See Trial Transcript page 232-33, Day 2 of Trial.

The additional bullet points on page 7 of Baldau's brief are equally misleading and fail to demonstrate lack of good faith. Baldau claims that Athey admitted that another member of the Planning Commission, not Baldau, asserted that the Planning Commission had discretionary powers, and that Baldau neither

wrote nor signed the Benview decision. These points fail to prove lack of good faith because Athey's testimony cites Baldau on the record as encouraging his fellow Commission members to deny an application even though it met the requirements of the subdivision ordinance. See Trial Transcript page 128, Day 2 of Trial. Athey's testimony, therefore, supports his good faith belief that Baldau was acting outside the legal parameters of his office.

In another bullet point, Baldau claims that the allegation that he attended the Jefferson County Public Service District meeting in his capacity as a member of the Planning Commission proves that the Removal Petition is inaccurate. Baldau points to the record of the meeting in which he said he was there in his capacity as a citizen. However, when one reads what Baldau actually said before the PSD, it is clear that Appellants believed his declaration of purpose to be insincere. Specifically, Baldau says to the Planning Commission "*I would urge my colleagues on the Planning Commission to contact anyone who would be involved in this proposal or funding request . . . and actively oppose it.*" Trial Transcript page 155, Day 2 of Trial. This Court should ask how Baldau could appear in his *personal* capacity while promising to influence "*his colleagues*" on the Planning Commission. Appellants logically concluded that Baldau was actually attempting to use his official position to influence the PSD, while claiming to be appearing in his personal capacity. Appellants believed this to be evidence of his misuse of his position on the Planning Commission. None of the

other Planning Commission members attempted to influence the PSD in this manner, which is one of the reasons Baldau was “singled-out” for removal.

In another bullet point, Baldau argues that Jonkers exaggerated or fabricated testimony by asserting that Baldau “threatened” Corliss during a Planning Commission meeting. The issue again highlights that there are basic disputes regarding the facts, which only supports Appellants’ assertion of probable cause. Baldau’s argument can be countered by quoting what he said to Corliss:

Not to pick on you, Greg, but just because you’re the only one here that’s elected, we’re all appointed, but you’re elected, if you were to vote for this, I think you would owe it at the next County Commission meeting to tell your constituents, the people in that district, why you’re voting for it despite all the things that I’ve said. That’s my piece. If you want to vote for it, that’s your business, but then I think you owe it to those people to tell them why.
Trial Transcript page 20-21, day 3 of trial.

Corliss testified that the discussion was pointed and sharp. Trial Transcript page 44, Day 3 of Trial. A reasonable person could interpret Baldau’s statement as threatening to inform Corliss’s constituency if he voted for approval, which would lead to political ramifications. Accordingly, Appellants citation to this exchange does not support Baldau’s allegations of bad faith and malice.

Baldau also seeks to blame Appellants’ counsel, Mr. Cassell, for Baldau’s consideration of §8-24-30 as the basis of certain application denials. However, Cassell’s advice came prior to a more recent-serving prosecuting attorney Greg Jone’s letter advising the Commission that “*plat approval is a ministerial act and a planning commission has no discretion in approving the submitted application.*” See Petition for Removal Exhibit D. Accordingly, any reference to Cassell’s letter

is designed to distract this Court from the legal issues presented in Appellants' brief.

Baldau also cites Capriotti's deposition testimony to show bad faith; however, Athey and Jonkers thoroughly and cogently explained the probable cause that existed to file the Removal Petition. If probable cause existed to file the Removal Petition, Capriotti cannot as a matter of law be guilty of malicious prosecution. Further, Capriotti's statements cannot be imputed to Athey and Jonkers.

Baldau also cites footnote 3 of Appellants' Brief as evidence of bad faith, in which Appellants state that their Petition sought to influence legislative and executive functions. Any suggestion that footnote 3 reflects a sinister motive is a stretch of Baldau's imagination. Appellants statement was meant to recognize that when a government official is failing to do the job prescribed by statute, then a correction of that behavior through removal and reappointment necessarily improves legislative and executive functions. It not only corrects the improper behavior, but also informs and reminds other members of the Planning Commission of their responsibilities. Such improved government functioning is one aspect of the Removal Statute that sets it apart from a run-of-the-mill civil suit and is reason not to encumber its use by other citizens.

In sum, a review of Baldau's examples of "malice" demonstrate only disputed facts, which reasonable people could disagree upon. The disputed facts,

supported by documentation and testimony, unquestionably show that Appellants believed that they would prevail in their Removal Petition.

B. Appellants Did Not Waive Noerr-Pennington Immunity

Baldau argues that Appellants waived *Noerr-Pennington* immunity because it was not asserted as an affirmative defense. As noted by the Fourth Circuit, the *Noerr-Pennington* doctrine is a rebuttable presumption. See *IGEN International, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303 (4th Cir. 2003). Even if this court decides that the immunity should be asserted as an affirmative defense, *IGEN International* emphasizes that courts should allow an assertion of immunity to be added, even at late stages in the proceedings. See *IGEN International* at 311. Appellants refer the Court to the cases cited in their Appeal Brief that support the addition of affirmative defenses at late stages of the proceedings. See e.g. *Nellas v. Loucas*, 156 W.Va. 77, 191 S.E.2d 160 (1972); *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852 (5th Cir. 2000). Unquestionably, the Appellant's raised the first amendment and the *Noerr-Pennington* defense in response to Baldau's Motion for Summary Judgment. This issue was raised in October, 2008.

Baldau does not provide this Court with even a single reported case mandating that the defense of the first amendment protection is waived.² Further, Baldau cites *North Carolina Electric Membership Corp. v. Carolina Power and Light*, 666 F.2d. 50 (4th Cir. 1981), for the proposition that the Circuit Court

² Baldau addresses this issue on pages 22-27 of the Response, assuming that the first amendment defense must be raised by affirmative defense and was waived. None of the five (5) cases cited by Baldau stand for this proposition.

correctly concluded that the Appellants waived the first amendment and *Noerr-Pennington* defenses by failing to timely request leave to amend their affirmative defenses. Reliance on this authority from 1981 is disappointing, if not improper, given the holding in 2003 in *IGEN*, that a party is “not required to plead as an affirmative defense...” the protections under *Noerr-Pennington* and the first amendment. Unquestionably, in *IGEN*, the 4th Circuit reversed a District Court that held that the *Noerr-Pennington* defense must be raised as an affirmative defense. The Fourth Circuit also reversed the District Court for refusing to allow an amendment of the answer to raise the issue. *IGEN* is perfectly applicable to the facts at hand. Further, North Carolina Electric has nothing to do with *Noerr-Pennington* or the first amendment.

Baldau simply ignores, and perhaps concedes, the guidance from *IGEN*. Appellants refer this Court to additional cases cited in their Appeal Brief that support the addition of affirmative defenses at late stages of the proceedings. *See e.g. Nellas v. Loucas*, 156 W.Va. 77, 191 S.E.2d 160 (1972); *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852 (5th Cir. 2000). For example, the Eleventh Circuit held that “*Noerr-Pennington* immunity is not merely an affirmative defense,” and the burden fell upon the plaintiff to prove that *Noerr-Pennington* immunity did not attach. *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1558, n.2 (11th Cir. 1992).

A constitutional protection is not easily waived. *See e.g. West Virginia Citizens Action Group, inc. v. Daley*, 174 W.Va. 299, 324 S.E.2d 713 (1984). West Virginia Constitution art. III, § 1 provides in pertinent part that, “*All men*

are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity.” Applying this constitutional provision, this Court held in *Woodruff v. Board of Trustees of Cabell-Huntington Hospital*, 319 S.E.2d 372, 379 (W.Va.1984) that:

“These inherent rights, of which members of society may not by contract divest themselves, include the freedom . . . to petition under article III, § 16 of the West Virginia Constitution. No parallel provision to this section of our state constitution appears in the United States Constitution. Therefore, with respect to the waiver of fundamental constitutional rights, our state constitution is more stringent in its limitation on waiver than is the federal constitution.”

Accordingly, this Court recognizes that the right to petition the government for redress provided by the West Virginia Constitution cannot be waived, even by agreement, because of the supreme importance placed on petitioning.

C. **Probable Cause Existed to File the Removal Petition
Therefore the Litigation was not Baseless**

Baldau categorizes the Removal Petition as completely baseless and not deserving of complete immunity, thereby trying to avoid *Noerr-Pennington* analysis. However, Appellants do not claim that petitioning immunity is absolute. This Court’s holding in *Harris v. Adkins*, 189 W.Va. 465, 432 S.E.2d 549 (1993), conclusively grants *qualified* immunity to petitioning activity. Additionally, the volumes of public transcripts and official documents referenced to support the allegations contained in the Removal Petition decisively show that the litigation was not baseless.

Baldau references a number of “cases cited at footnote 7” of *Federal Prescription Service, Inc. v. American Pharmaceutical Ass’n*, 663 F.2d 253 (D.C. Cir. 1981), to support his argument that the Removal Petition was a frivolous case that does not deserve *Noerr-Pennington* immunity. An examination of the cases shows that they have no relevance and do not apply. For example, *Noerr-Pennington* protection, in the antitrust context, did not extend to “petitioning of government officials” by using threats, duress and other coercive measure in *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters and Helpers Local No. 150*, 440 F.2d 1096 (9th Cir. 1971). Similarly, *Noerr-Pennington* antitrust immunity did not apply to the filing of false documents with government regulators because the conduct “*was not action designed to influence policy, which is all the Noerr-Pennington rule seeks to protect.*” See *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971). The final case cited in footnote 7, also an antitrust suit, merely held that “*the immunity for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to public officials acting under competitive bidding statutes.*” See *George R. Whitten, Jr. Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970). The court noted that the rule did not encroach upon freedom of speech because “*the First Amendment does not provide the same degree of protection to purely commercial activity that it does to attempts at political persuasion.*” *Id.* at 33.

Cardtoons, L.C. v. Major League Baseball Players Ass'n, 208 F.3d 885 (10th Cir. 2000), cited by Baldau, also fails to support his claim that the present suit should not be protected by *Noerr-Pennington* immunity. *Cardtoons* held only that, according to the facts of the case, the allegedly libelous statements were not made *to the government*, therefore were not protected under the right to petition the government. *Cardtoons* at 891. Additionally, the *McDonald* case cited in *Cardtoons* and extensively quoted by Baldau, simply recognized that petitioning activity is not absolutely privileged—the same tenant recognized by this Court in *Harris v. Adkins*, 189 W.Va. 465, 432 S.E.2d 549 (1993). See *McDonald v. Smith*, 472 U.S. 479, 484-85 (1985).

The type of litigation that qualifies as knowingly frivolous involves “overtly corrupt conduct” such as bribing public officials, threats or the filing of false documentation. See *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253 (D.C. Cir. 1981). Baldau could not and did not prove that any corrupt conduct occurred in the removal proceeding because none existed. To the contrary, Appellants explained their legitimate reasons for believing that their Removal Petition would succeed on the merits and presented documentation to support each claim. Accordingly, the cases cited by Baldau for the proposition that the litigation is not constitutionally protected are unconvincing.

D. Cases Interpreting W.Va. §6-6-7 Supported the Removal Petition

Baldau presents the court with select quotations from cases interpreting the Removal Statute. These quotations are very limited and focus on willfully wasting or misappropriating public funds and gross immorality. Baldau's interpretation of the statute is the basis of his indignity and what he believes justifies a verdict for malicious prosecution. The record reflects that Baldau was not accused of misappropriating or wasting public funds, nor was he accused of engaging in immoral behavior such as habitual drunkenness, addition to narcotic drugs or adultery. Baldau was accused of failing to exercise the mandates of his office, under which circumstances there is abundant West Virginia law to support removal. Appellants carefully considered the following West Virginia law and concluded that it supported removal of Baldau prior to filing the first Removal Petition:

In order to succeed in removing a public official from office pursuant to W.Va. Code §6-6-7, a petitioner must present clear and convincing evidence of "*official misconduct, malfeasance in office, incompetence, neglect of duty, or gross immorality.*" See *Evans v. Hutchinson*, 158 W.Va. 359 (1975); see also W.Va. Code §6-6-7. Official misconduct has been defined by West Virginia courts as, "*any unlawful behavior by a public officer in relation to the duties of his office, willful in character,*" or "*the official neglect to do an act which ought to have been done*" even in absence of malice or corrupt intent. *Evans* at 378 (citing

23 Am. & Eng. Enc. Law (2nd ed.) and Blacks Law Dictionary and Mecham on Public Offices and Officers, §458).

Malfeasance occurs in the doing of an “*act which an officer had no legal right to do at all and that when an officer, through ignorance, inattention, or malice, does that which he has no legal right to do at all, or acts without any authority whatsoever, or exceeds, ignores or abuses his power, he is guilty of malfeasance.*” *Id.* For example, in *Summers Co. Citizens League v. Tassos*, 179 W.Va. 261, 272 (1988), a petition to remove was instituted against the Board of Education members for their pecuniary interest in contracts with the Board, in violation of a specific statute. While the lower court found that *there was no intentional bad act or financial loss to the County*, the members had “*simply disregarded an imperative statute which calls for their removal.*” *Summers Co. Citizens League v. Tassos*, 179 W.Va. 261, 272 (1988). This is precisely the issue that was presented in the Removal Petition—Appellants alleged that Baldau disregarded the ministerial nature of his approval powers, and cited the Benview decision and Baldau’s recorded statements, among other evidence, as proof.

In another removal action, *Evans v. Hutchinson*, 158 W.Va. 359, 214 S.E.2d 453 (1975), the members of the Board of Education were accused of using public facilities for private use. The court determined that a “*board of education is a corporation created by statute with functions of a public nature expressly given, and no other; as such, it ‘can exercise only such power as is expressly conferred or fairly arises by necessary implication, and only in the mode*

prescribed or authorized by the statute.” *Id.* at 364 (quoting *Dooley v. Board of Education*, 80 W.Va. 648, 93 S.E. 766 (1917)). The court noted that there were extra-educational uses of the facilities approved by statute, but they did not include the type at issue in the case; therefore, removal was appropriate.

Applying *Evans* to this case, Baldau was exercising powers that were not expressly conferred or necessary by implication when he encouraged the other members of the Commission to look beyond the subdivision ordinance to find reasons to deny Appellants' applications.

Even if Baldau acted in good faith and believed that he had the power to reject applications even when they met all technical requirements, West Virginia case law holds that negligent failure to comply with a statute is grounds for removal. *See Powers v. Goodwin*, 174 W.Va. 287 (1984) (“*if the commissioners acted in good faith and non-negligently, then they could neither be removed from office nor be required to repay the attorneys' fees; if, however, they acted in good faith, but negligently, they could be removed*”).

The facts presented at trial show that Baldau was either acting to intentionally circumvent the subdivision ordinance requirements or was negligent in honestly believing that he could exercise discretion in his consideration of subdivision applications that met all technical requirements.

The Appellants were unable to prevail in their removal attempt, particularly given the clear and convincing evidence standard and prior courts' views that it is a “*drastic remedy.*” *See In the Matter of Bosco*, 160 W.Va. 38 (1977).

Nevertheless, Appellants had probable cause to believe that they would prevail, which is repeatedly reflected in the record and more specifically explained below.

E. Subjectively Reasonable Test Looks to Outcome/Result

Baldau is indignant over the cases cited by Appellants, which hold that litigation cannot be a sham if a plaintiff had a legitimate interest in the outcome of the procedure. While Baldau may not like the test, it was articulated by the United States Supreme Court and subsequently applied by other federal courts. See *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 40 (1993); see also *Cove Road Development v. Western Cranston Indus. Park Associates*, 674 A.2d 1234 (R.I. 1996). In fact, the Rhode Island General Assembly codified the conditional immunity test, and included the following precise language:

(a) A party's exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern shall be conditionally immune from civil claims, counterclaims, or cross-claims. Such immunity will apply as a bar to any civil claim, counterclaim, or cross-claim directed at petition or free speech as defined in subsection (e) of this section, except if the petition or free speech constitutes a sham. The petition or free speech constitutes a sham only if it is not genuinely aimed at procuring favorable government action, result, or outcome, regardless of ultimate motive or purpose. The Petition or free speech will be deemed to constitute a sham as defined in the previous sentence only if it is both:

(1) objectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring such government action, result, or outcome, and

(2) subjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects. Use of outcome or

result of the governmental process shall not constitute use of the governmental process itself for its own direct effects.”

Limits on Strategic Litigation Against Public Participation, Rhode Island Code § 9-33-2.

The Appellants instituted the Removal Petition for the legitimate outcome of removing Baldau from office. No evidence was presented to the Circuit Court indicating any other objection. The sham litigation test seeks to protect lawsuits, such as the one filed by Appellants, in which citizens seek to use the government process for its legitimate ends—in this case removal of a government official by the use of the legislatively sanctioned method set forth in West Virginia Code §6-6-7.

F. **Three-Judge-Panel’s Order Does Not Prove Lack of Probable Cause**

Baldau argues that the three-judge-panel’s decision, standing alone establishes lack of probable cause. Baldau cites two of the paragraphs from the panel’s order, including paragraph 19, to support his position. Paragraph 19, however, states that the evidence was not *clear and convincing* and did not support the *conclusions* presented by Appellants. The trial judge recognized that one could interpret the language of the Order to mean that there was no reason to conclude that the facts, even if true, supported removal. Specifically, Judge Sanders said: “*Mr. Cassell is making an important distinction from the vantage point of the Defendants that it doesn’t say there was not a scintilla of truth or not a scintilla of fact, but there was not a scintilla that even if the grounds listed were*

true, they support removal.” Trial Transcript page 221, Day 1 of trial. Whether he realized it or not, Judge Sanders recognized that the three-judge-panel’s order did not definitively show lack of probable cause. The quote cannot be interpreted otherwise because lack of support for removal does not equate with lack of probable cause. “*The fact that the plaintiff in th[e] proceeding failed in his purpose, does not, in any way, determine the question whether he had probable cause to prosecute the proceedings.*” *Hunter v. Beckley Newspapers Corp.* 129 W.Va. 302, 312, 40 S.E.2d 332, 338 (1946).

Baldau also cites Paragraph 17 of the three-judge-panel, which says that the votes of the other members of the Planning Commission were often similar to Baldau’s. Appellants addressed this issue, *supra*, by explaining that they believed that Baldau encouraged other members of the Planning Commission to use discretion in denying applications and that Appellants thought that they had the best evidence against Baldau for removal. Accordingly, the voting record of the other members has no relevance to whether Appellants had probable cause to file their Removal Petition.

G. Latterell Testimony and Failure to Dismiss Prior to Three-Judge-Panel’s Decision does not Support Malice

Baldau argues that Appellants’ decision not to dismiss their Removal Petition after the three-judge-panel’s hearing supports his allegation of bad faith and malice. However, the court in *Light v. Allstate Ins. Co.*, 48 F.Supp. 615 (S.D.W.Va. 1998), applied West Virginia law to hold that evidence of an offer of

settlement was not admissible to show bad faith. Furthermore, Baldau's conclusion that failure to dismiss shows bad faith is illogical. The only rational reason Appellants had for not dismissing their action after the hearing was their sincere belief that they had presented evidence sufficient for the panel to render a decision in their favor.

Baldau also cites Appellants prior suit against Dr. Latterell as evidence of their bad faith in this lawsuit. The suit against Latterell has no relevance to the Removal Petition, but more importantly, the context of that suit explains why it was instituted in the first place. Latterell's testimony at the trial demonstrates that he was actively involved in opposing numerous developments in Jefferson County. The following testimony explains the history between Appellants and Latterell:

Q: So the truth of the matter is that Thorn Hill and Highland Farm, you have been in court together for many years on many different disputes.

A: I think that is fair, yes.

Q: Most of the time you are the one who picked the fight, so to speak, by starting the appeal?

A: Apparently so.

The testimony shows that Latterell often appealed the Jefferson County Board of Zoning Appeals decisions to the Circuit Court and to this Honorable Court. On one occasion, Latterell made certain factual misrepresentations regarding Appellants' application, which was the basis of Appellants' suit against him. The litigation ultimately resulted in mediation and a settlement. Baldau cites

the court as saying that the Appellants have still not paid the resulting settlement; however, the settlement has been paid in full. In this context, their suit against Latterell should have no bearing on whether Appellants' Removal Petition was sham litigation or a legitimate attempt to petition the government for redress.

H. The Removal Action Against Baldau Only Is Irrelevant

Baldau makes much of being "singled out" for removal when other members of the Planning Commission who either voted similarly or drafted the decisions were not. First, there is no evidence in the record that the Appellants had any personal, malicious reason to select Baldau for removal.

The main reason that Appellants attempted to remove only Baldau and not his fellow Commission members is that Appellants believed that Baldau's actions most clearly demonstrated removable offenses. Baldau is on record in a Planning Commission meeting as saying that "*the only rationale given to approve [Appellants' application] is that it meets the bare minimum of our own zoning . . . and subdivision ordinances,*" but went on to say "*I honestly—I would like somebody on this commission to tell me how they can vote for this. I just don't get it.*" See Transcript page 128, Day 2 of Trial. Accordingly, the record reflects Baldau's acknowledgment that the application met the legal requirements, but then advocated for denial. Worse, Baldau attempted to influence his fellow Commissioners to do the same. At they later testified that it was his belief that Baldau was influencing the other members of the Planning Commission to

consider issues outside the ordinance that made him decide to file the Removal Petition against Baldau. See Trial Transcript page 161, Day 2 of Trial. Athey also testified that he had no personal animosity toward Baldau, but that he believed Baldau was acting outside the proper parameters of his office, which was grounds for removal. See Trial Transcript pages 147-48, Day 2 of Trial. Finally, Baldau's appearance before the PSD was evidence of improper use of his position that did not apply to the other members of the Planning Commission.

The fact that the Petitioners sought the removal only of Baldau is otherwise irrelevant.

I. Punitive Damages Not Justified

In light of Baldau's voluntary dive into the political arena, the non-penal nature of the Removal Statute, and the specific allegations made in the Removal Petition, Baldau's reaction to the removal petition was either exaggerated or unjustified. Despite the offense Baldau took to the Removal Petition, the trial testimony shows that he was assertive, opinionated and spirited in his discussions with his fellow commission members. He did not back down from a debate, and went as far as to use a four letter word when addressing Mr. Corliss. See Trial Testimony page 21, Day 3 of Trial. In other words, Baldau is not a particularly sensitive person, and the actions described are not of the type that would cause severe emotional distress in a person of average sensitivity.

All of the examples of "malice" cited in Baldau's Response brief have been explained and countered by specific testimony or documentation. Accordingly,

consideration of the *Garnes* factors do not support a punitive damages award.

Additionally, the fact that the entire trial was tainted with the instruction that the Appellants had acted maliciously prevented a fair examination of actual malice.

Finally, the cases cited by Baldau do not support an award for “*mental anguish, upset, annoyance and inconvenience,*” and there is no West Virginia authority that allows recovery pursuant to this standard. For example, in *Estep v. Brewer*, 192 W.Va. 511, 515, 453 S.E.2d 345, 349 (1994), cited by Baldau, the jury was instructed that it could award plaintiff damages in a malicious prosecution case for “*emotional distress and damage to reputation,*” which does not encompass annoyance and inconvenience. The other case cited by Baldau, *Pote v. Jarrell*, 186 W.Va. 369, 412 S.E.2d 770 (1991), involves a criminal prosecution, and Appellants acknowledged in their Appeal Brief that the law of West Virginia is more supportive of emotional damages in this context. Additionally, it is unclear how the jury in *Pote* was instructed because the defendant failed to preserve the issue for appeal. Nevertheless, the case does not support the idea that a plaintiff can be awarded damages for annoyance and inconvenience.

Every defendant to a lawsuit suffers some degree of annoyance and inconvenience, but recovery for these “damages” would allow every unsuccessful civil litigant to compensate for unavoidable minor and vague irritations that result from the litigation process.

III. Conclusion

A citizen's right to petition the government is a fundamental thread in the fabric of our democracy. It is a right that should be circumscribed only in the most extreme situations. Appellants encourage this Honorable Court to ask whether Baldau's sensitivity to a legitimately filed Removal Petition is the type of circumstance in which a constitutional right should be quashed. This Court may protect those rights by recognizing that Appellants had probable cause to initiate the removal proceeding. Appellants strongly believe that the record indicates that their Removal Petition could not be sham litigation because there is overwhelming evidence that they were using the Removal Statute for its legitimate ends. Alternatively, this Court may choose to apply the constitutional protections afforded in its *Webb* and *Harris* rulings on petitioning immunity, requiring Baldau to prove that the litigation was a sham. However, if this Court allows the erroneous summary judgment ruling and resulting tainted jury decision to stand, it will undermine the right to petition by weakening one of the vehicles designed to ensure proper government functioning, and in the process, will deprive Appellants of their constitutional rights.

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CERTIFICATE OF SERVICE

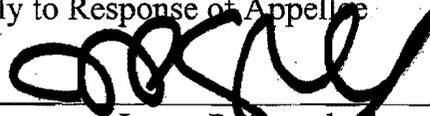
I hereby certify that service of a true copy of the foregoing has been made as follows:

Type of Service: Federal Express

Date of Service: September 9, 2010

Persons served and address: David M. Hammer, Esq.
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Item Served: Appellants' Reply to Response of Appellee



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