IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

2011

State of West Virginia ex rel. Coal Age, Inc., The Baughan Group, Inc., and Gauley Robertson, Inc.,
Petitioners,

v. **Case No. 11-1404**

Honorable Warren R. McGraw, Judge of the Circuit Court of Wyoming County; and Jason D. O'Neal, et al.,
Respondents.

RESPONDENT WARREN R. MCGRAW'S RESPONSE IN OPPOSITION

Submitted by:

The Honorable Warren R. McGraw *(WV Bar # 2462)*
Chief Judge of the Circuit Court of Wyoming County, W.Va.
P.O. Box 581
Pineville, WV 24874
(304) 732-8000 x245 – Phone
(304) 732-7047 – Fax
Respondent herein

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

***SER* COAL AGE, INC., et al.,**
Petitioners,

v. **Case No. 11-1404**

HONORABLE WARREN R. MCGRAW,
Judge of the Circuit Court of Wyoming County, and
JASON D. O'NEAL, et al.,
Respondents.

RESPONDENT WARREN R. MCGRAW'S RESPONSE IN OPPOSITION

In accordance with the Scheduling Order entered in the above-styled matter, comes now respondent Warren R. McGraw, pursuant to Rule 16(h) of the Revised Rules of Appellate Procedure, and respectfully submits his summary response in opposition to the Petition for Writ of Prohibition filed herein by petitioners Coal Age, Inc. d/b/a CAI Industries, The Baughan Group, Inc., and Gauley Robertson, Inc. (Collectively, "CAI") As will be more fully set forth below, in its petition, CAI fails to fully set forth the standards of law applicable to the controversy presented and fails to set forth facts or law sufficient to support the petition.

Standards of Law

In its petition, CAI seeks, *inter alia,* an order from this Honorable Court vacating and setting aside the September 13, 2011 "Order Granting Plaintiffs Leave to File Second Amended Complaint and Continuing the Trial Date" entered in Wyoming County Circuit Court Case 10-C-20. While the petitioner does set forth valid points of law, those standards fail to fully encapsulate the law applicable to the facts at hand. In addition thereto, or in lieu thereof, the following standards of law apply here:

1. "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal

exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. Pt. 1, *SER Monongahela Power Co. v. Fox*, 227 W.Va, 531, 711 S.E.2d 601 (June 16, 2011) (quoting Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996)).

2. "The purpose of the words 'and leave [to amend] shall be freely given when justice so requires' in Rule 15(a) W. Va. R. Civ. P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue." Syl. Pt. 5, *Lloyd's, Inc. v. Lloyd*, 225 W.Va. 377, 693 S.E.2d 451 (2010)(internal quotes and citations omitted)(alteration in original).

Argument

As this Honorable Court enunciated in *SER Monongahela Power Co. v. Fox*, the primary factor justifying issuance of a writ of prohibition is that the lower tribunal's order was clearly erroneous as a matter of law. 227 W.Va. 531, 711 S.E.2d 601 (June 16, 2011). Inasmuch as the petitioner fails to set forth any authority to demonstrate clear legal error in the order entered by respondent Warren R. McGraw, the petition must be viewed as spurious to begin with. While CAI relies on cases where this Court upheld circuit court orders *denying* a motion to amend, its petition is devoid of any authority finding the granting of a motion to amend to have been error. Moreover, the cases relied upon by the petitioner are so factually dissimilar as to render them wholly inapposite to the case at bar. Thus, petitioner CAI has failed to establish the most important factor justifying a writ of prohibition.

With respect to the other factors, the petitioner has not alleged that the Wyoming County Circuit Court has erred, if at all, in a way that is often repeated or shows a persistent disregard for the law or that the order complained of raises new and important points of law or issues of first impression. Nor has the petitioner alleged that is has no other means of seeking redress for the claimed wrong, such as direct appeal, exist.

Finally, with respect to whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal, CAI's argument that it will incur additional legal expenses if it litigates the case to appeal as a matter of due course is hardly meritorious. Were that to be the case, then every interlocutory order could be claimed to give rise to damage or prejudice not correctable on appeal. While this respondent judge recognizes that there may be instances where additional costs of litigation might rise to such a level, such is not the case here.

To the extent that the petitioner intones that it was prejudiced by the fact that the Circuit Court continued the trial which was set for September 26, 2011, such an argument is untenable. In neither its "Motion in Opposition to Plaintiff's Motion for Leave" nor during oral argument thereon did the petitioner assert that it would be prejudiced by the naming of an additional defendant or the continuance of trial. Indeed, during the September 1, 2011 hearing in this matter before the Wyoming County Circuit Court, the petitioner stated on the record that continuing the trial in this matter would have been warranted even had the motion to amend not been granted. (Appendix at 152)

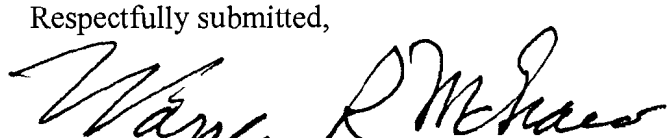
Furthermore, the petitioner has failed to enunciate the reasoning for its implied proposition that the respondent plaintiffs' delay in seeking to add an additional defendant was an unreasonable delay. Nor did CAI advance argument before the Wyoming County Circuit Court to convince this respondent judge that the delay was unreasonable. This is all the more true in light of the procedural complexities undergirding this case.

Conclusion

As demonstrated above, the petitioner has failed to satisfy the requirements necessary to entitle it to entry of a Writ of Prohibition.

Wherefore, respondent Warren R. McGraw, Judge of the Circuit Court of Wyoming County, respectfully prays that this Honorable Court enter an order DENYING the Petition for Writ of Prohibition filed herein by petitioners Coal Age, Inc. d/b/a CAI Industries, The Baughan Group, Inc., and Gauley Robertson, Inc.

Respectfully submitted,



The Honorable Warren R. McGraw,
Respondent (WV Bar 2462)

PO Box 581
Pineville, WV 24874

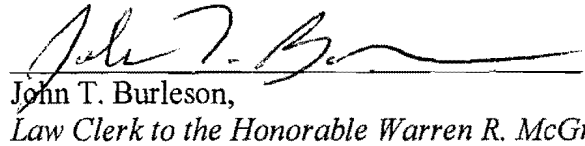
Certificate of Service

I certify that a true copy of the foregoing "Respondent Warren R. McGraw's Response in Opposition" was served upon the following counsel of record by facsimile transmission on this, the 20 day of October, 2011:

Mannion & Gray Co., LPA,
Counsel for Petitioner Defendants
Fax: (304) 513-4243

Pullen, Fowler, Flanagan, Brown, & Poe, PLLC,
Counsel for Petitioner Defendants
Fax: (304) 342-1545

The Calwell Practice, PLLC,
Counsel for Respondent Plaintiffs
Fax: (304) 344-3684



John T. Burleson,
Law Clerk to the Honorable Warren R. McGraw

John T. Burleson, Esq. (WV Bar 10645)
PO Box 581
Pineville, WV 24874
(304) 732-8000 x245