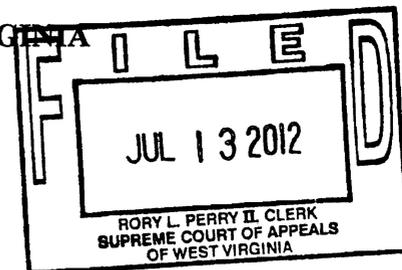


Docket No. 12-0734

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



State of West Virginia ex rel.,  
MTR Gaming Group, Inc.,

Petitioner,

v.

Civil Action No. 09-C-175R  
Hancock County Circuit Court

HONORABLE ARTHUR M. RECHT,  
Judge of the Circuit Court of Hancock County,  
West Virginia; and EDSON R. ARNEAULT,

Respondents.

**RESPONDENT, EDSON R. ARNEAULT'S RESPONSE TO PETITION  
FOR WRIT OF PROHIBITION**

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

Pursuant to Rule 16 of the Rules of Appellate Procedure, Respondent, Edson R. Arneault, responds to Petitioner, State of West Virginia ex rel., MTR Gaming Group, Inc., (MTR or alternatively Petitioner) Petition for Writ of Prohibition as follows:

### **I. QUESTIONS PRESENTED**

1. WHETHER PETITIONER MTR'S PETITION FOR A WRIT OF PROHIBITION SHOULD BE DENIED SINCE MTR HAS OTHER ADEQUATE MEANS TO OBTAIN THE DESIRED RELIEF?
2. WHETHER PETITIONER MTR'S PETITION FOR A WRIT OF PROHIBITION SHOULD BE DENIED SINCE MTR CANNOT SHOW THAT IT WILL BE DAMAGED OR PREJUDICED IN A WAY THAT IS NOT CORRECTABLE ON APPEAL?
3. WHETHER PETITIONER MTR'S PETITION FOR A WRIT OF PROHIBITION SHOULD BE DENIED WHERE THE ORDER OF THE CIRCUIT COURT OF HANCOCK COUNTY HOLDING MTR IN CONTEMPT WAS NOT CLEARLY ERRONEOUS?

### **II. STATEMENT OF THE CASE**

Petitioner MTR filed its Petition for a Writ of Prohibition (hereinafter "Petition") on or about June 18, 2012. This Petition challenges the determination of the Hancock County Circuit Court that Petitioner MTR was in contempt of an Order of that court dated March 1, 2010, entered in *Edson Arneault v. MTR Gaming Group, Inc., et al.*, Civil Action No. 09-C-0175.

The genesis of this contempt finding was a suit filed on October 8, 2009, by Mr. Arneault in the Hancock County Circuit Court arising from MTR's violation of a deferred compensation agreement between Mr. Arneault and MTR entered into after Mr. Arneault ceased serving at MTR's chairman and CEO. That complaint alleged, among other things, that MTR was required to continue to pay annual premiums on certain insurance policies under the deferred

compensation and employment agreements between MTR and Mr. Arneault.

MTR agreed to settle Mr. Arneault's claims, and the parties entered into a "Settlement Agreement and Release" on or about February 19, 2010, which was thereafter incorporated *in toto* into an Order of the Hancock County Circuit Court dated March 1, 2010, dismissing the action. (Appx. at 24 [March 1, 2010, Order]). The "Settlement Agreement and Release" contained in section 4.4 thereof a forum selection clause stating:

"Any dispute arising from this agreement shall be interpreted pursuant to the laws of West Virginia and venue shall exclusively vest with the Circuit Court of Hancock County, West Virginia".

(Appx. at 20 ["Settlement Agreement and Release"]). Since the "Settlement Agreement and Release" including this provision were incorporated *in toto* into the Hancock County Circuit Court's Order of March 1, 2010, said agreement was enforceable as an order of the court. *See Young v. McIntyre*, 223 W.Va. 60, 63 (2008)(stating that a marital settlement agreement incorporated into a divorce decree was enforceable using contempt powers).

On April 15, 2011, Mr. Arneault, along with a co-plaintiff, filed a lawsuit in the United States District Court for the Western District of Pennsylvania against, among other defendants, MTR. *Arneault v. O'Toole*, W.D.Pa. No. 1:11-cv-00095 (the "Civil Rights Case"). Later, Mr. Arneault and his co-plaintiff filed an Amended Complaint in the Civil Rights Case which set forth the same causes of action as the original Complaint, but added an additional co-plaintiff, set forth additional details concerning the claims, and made some minor corrections.

On or about September 26, 2011, MTR filed a civil action in the United States District Court for the Western District of Pennsylvania captioned *MTR Gaming Group, Inc. v. Edson R. Arneault*, No. 1:11-cv-00280 (the "Contract Case"). The Complaint in this action includes six (6) separate counts:

- Count I** Breach of contract arising out of a Consulting Agreement
- Count II** Breach of contract arising out of the Settlement Agreement and Release
- Count III** Tortious interference with contract
- Count IV** Breach of contract arising out of the Settlement Agreement and Release
- Count V** Breach of contract arising out of the Settlement Agreement and Release
- Count VI** Violation of Pennsylvania's Uniform Trade Secret Act

Of these six (6) counts, three (3) directly alleged breach of contract claims arising from the "Settlement Agreement and Release":

- \*Count II alleged that Mr. Arneault breached paragraph 3.1 of the Settlement Agreement and Release containing a covenant not to sue (Appx. at 32-35);
- \*Count IV alleged that Mr. Arneault breached paragraphs 2.5 and 2.4 of the Settlement Agreement and Release containing non-disclosure and confidentiality provisions (Appx. at 37-39); and
- \*Count V alleged that Mr. Arneault breached paragraph 2.8 of the Settlement Agreement and Release containing a non-disparagement provision.

(Appx. at 39-40).

On or about November 10, 2011, Mr. Arneault filed a Petition for A Rule to Show Cause in the Hancock County Circuit Court arising from Petitioner MTR's filing of the Contract Case and its blatant violation of the forum selection clause of the "Settlement Agreement and Release" including the March 3, 2011, Order of the Hancock County Circuit Court.

On or about November 29, 2011, MTR filed its response to said Petition for a Rule to Show Cause offering several responses in an attempt to excuse its clear violation of the forum selection clause of the "Settlement Agreement and Release": (a) Mr. Arneault somehow waived the forum selection clause of the "Settlement Agreement and Release" by filing certain claims in a case captioned as *Arneault v. O'Toole*, No. 1:11-cv-00095 (the "Civil Rights Case") in the United States District Court for the Western District of Pennsylvania (Appx. at 72-80); (b)

the Petition for a Rule to Show Cause risked inconsistent rulings between state and federal courts (Appx. at 80-81); and, (c) Mr. Arneault himself was in contempt of the Order of March 3, 2011 (Appx. at 81-82). Such an argument is unpersuasive.

The Civil Rights Case contains *no* claims “arising from” said agreement”, unlike the blatant violation by MTR of the “Settlement Agreement and Release” when it filed three (3) counts directly alleging a breach of said agreement. Indeed, the Civil Rights Case contains two (2) causes of action by Mr. Arneault naming MTR. The first, Count VII, is a conspiracy claim alleging that MTR and a number of other private individuals conspired with Pennsylvania Gaming Control Board (PGCB) officials to prevent Mr. Arneault from successfully renewing his gaming license. (Appx. at 220-22)[Count VII of the Amended Complaint in the Civil Rights Case]). The other one, Count VIII, contained promissory estoppel and unjust enrichment claims arising from MTR’s failure to reimburse Mr. Arneault for nearly 2 million dollars in legal fees he incurred in his fight to renew his gaming license as a Principal of MTR. (Appx. at 223-26 [Count VIII of the Amended Complaint in the Civil Rights Case]).

Anyway, by a nunc pro tunc Order dated April 4, 2012, but effective as of January 25, 2012, the Hancock County Circuit Court held that MTR was in contempt of the March 1, 2010, Order because Counts II, IV, and V of the case MTR had filed in the Western District of Pennsylvania “arose from” the “Settlement Agreement and Release” (Appx. at 4); that Mr. Arneault’s claims in the Civil Rights Case case did not “arise from” the “Settlement Agreement and Release” (Appx. at 5); that Mr. Arneault did not waive the forum selection clause of the “Settlement Agreement and Release” (Appx. at 5); that the Circuit Court’s ruling did not risk inconsistent rulings between state and federal courts (Appx. at 5); and, that Mr. Arneault was not in contempt of the Circuit Court’s March 1, 2010, Order (Appx at 5).

Petitioner MTR has filed the instant Petition to challenge these findings and this is a response to the same.

### **III. STANDARD OF REVIEW**

A writ of prohibition is an extraordinary remedy. *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005). As such, “[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari”. *State ex rel. Johnson Controls, Inc. v. Tucker*, No. 11-1515, 2012 W.Va. LEXIS 306, \*11-\*12(June 13, 2012)(quoting Syl. pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953))(internal quotation marks omitted).

In cases such as the instant matter where the trial court is alleged to have exceeded its authority rather than lacking jurisdiction, this Court has articulated the following standard of review:

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.

*Id.* at \*12-\*13 (quoting Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996))(internal quotation marks omitted).

#### **IV. SUMMARY OF ARGUMENT**

Of the five (5) factors this Court has identified as relevant to the determination of whether to issue a writ of prohibition, MTR only addresses factors (1), (2) and (3). Because none of the applicable factors are present in the subject case, no writ of prohibition should issue.

First, MTR has other adequate means to obtain the desired relief. MTR could easily file an appeal of the Hancock County Circuit Court's Order, but for unknown reasons it chose not to do so. MTR should not be allowed to use an extraordinary writ as a substitute for the filing of an appeal.

Second, MTR cannot show that it will be damaged or prejudiced in a way that is not correctable on appeal since it has yet to dismiss its Contract Case claims in Pennsylvania and has yet to pay any fines. Certainly, any alleged damage or prejudice to MTR can be corrected on an ordinary appeal. Further, MTR can simply dismiss the offending claims in the Western district of Pennsylvania and then file a direct appeal from the Circuit Court's contempt order to this Court. This approach would not, as MTR argues, require MTR to abandon meritorious claims; rather, MTR simply needs to bring those claims in the Hancock County Circuit Court, which is the proper forum under the "Settlement Agreement and Release" which was prepared by MTR's own general counsel.

Third and finally, the Circuit Court's ruling was not clearly erroneous. The lower court was correct when it held: (a) that Mr. Arneault's claims against MTR in the Civil Rights Case did not "arise from" the Settlement Agreement and Release; (b) that Mr. Arneault had not waived the forum selection clause of the Settlement Agreement and Release; (c) that Mr. Arneault was not in contempt of the March 1, 2010 Order of the Hancock County Circuit Court;

and, (d) that it would not abstain from issuing a ruling until the United States District Court for the Western District of Pennsylvania ruled on Mr. Arneault's Motion to Dismiss in that case.

MTR has not established sufficient grounds to warrant the issuance of a writ of prohibition because it has other adequate means to obtain the desired result; it cannot show that it will be damaged or prejudiced in a way that is not correctable on appeal; and, it cannot establish that the complained of Hancock County Circuit Court rulings were clearly erroneous. MTR's Petition for Writ of Prohibition should, therefore, be denied.

## V. ARGUMENT

### **1. PETITIONER'S PETITION FOR A WRIT OF PROHIBITION SHOULD BE DENIED SINCE MTR HAS OTHER ADEQUATE MEANS TO OBTAIN THE DESIRED RELIEF.**

MTR argues that it has no other adequate means to obtain the desired relief.<sup>1</sup> Citing *Guido vs. Guido*, 202 W.Va. 198, 503 S.E.2d 511 (1998), MTR contends that the February 14, 2012, Order of the Hancock County Circuit Court is not final and appealable since there was no sanction imposed. *MTR's Petition for Writ of Prohibition*, p. 3. However, MTR should have appealed this case instead of challenging it by way of a writ of prohibition.

In *Guido* the circuit court did not impose sanctions, although it found the husband in contempt of court. The lower court ruling in *Guido* stated that "the Court reserves ruling upon [plaintiff's] request for sanctions against [Mr. Guido] for his previously adjudged contempt until such time as [Mr. Guido] has completed or is about to complete the service of his various

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<sup>1</sup> "In the present action, the civil contempt order will not be final until MTR dismisses Counts II, IV and V of its Complaint in the Western District of Pennsylvania and pays the fine imposed by the Circuit Court. Absent the present Petition, MTR's only other avenue to obtain appellate review of the Circuit Court's civil contempt order is to dismiss a meritorious complaint and pay a fine it argues should not have been imposed in the first instance. Accordingly, for these reasons, the exercise of original jurisdiction is proper". (Pet. at pp. 12-13).

criminal sentences as levied by Division II of this Circuit." *Id.*, at 515. This Court held that, "[u]ntil such time as a sanction against Mr. Guido is actually imposed, no final judgment has been rendered in the case". *Id.*

Here, the lower court did impose a sanction of Five Hundred Dollars (\$500.00) per day against MTR "*until such time as it dismisses Counts II, IV, and V* of Case No. 1:11-cv-00208". Thus, the January 25, 2012, Order is a final appealable order. Instead of filing a direct appeal from the Circuit Court's contempt order to this Court, MTR filed the subject Writ of Prohibition on June 18, 2012. MTR should not be permitted to improperly use a writ of prohibition when an ordinary appeal is required.

**2. PETITIONER'S PETITION FOR A WRIT OF PROHIBITION SHOULD BE DENIED SINCE MTR CANNOT SHOW THAT IT WILL BE DAMAGED OR PREJUDICED IN A WAY THAT IS NOT CORRECTABLE ON APPEAL.**

Although a Five Hundred Dollar (\$500.00) fine per day was imposed on MTR until it dismisses Counts II, IV and V of the Contract Case, it has yet to dismiss the case and has yet to pay the fine. (*See Appx.* at 5-6 [Findings of Fact and Concl. of Law]). In other words, MTR has chosen to keep its case in Pennsylvania and not pay any fine until this appeal is completed. Any damage or prejudice to MTR, then, can be corrected on an ordinary appeal.

Further, MTR has a clear path to render the contempt order appealable by ordinary means. MTR simply needs to obey the terms of the "Settlement Agreement and Release" to which MTR voluntarily agreed and dismiss the offending counts of the Contract Case. A dismissal of these counts would not, as MTR suggests, require it to abandon an allegedly "meritorious complaint", and MTR needs only to bring its complaint in the forum agreed upon by MTR and Mr. Arneault. (Pet. at pp. 12-13).

**3. PETITIONER’S PETITION FOR A WRIT OF PROHIBITION SHOULD BE DENIED BECAUSE THE ORDER OF THE CIRCUIT COURT OF HANCOCK COUNTY WAS NOT CLEARLY ERRONEOUS.**

MTR argues that “this case presents a clearly erroneous legal conclusion that is contrary to both the law and evidence before the Circuit Court . . . .” (Pet. at p. 12). While a petition for a writ of prohibition is a proper vehicle to challenge a contempt order that is not yet final because the contemnor has not purged itself of the contempt, this Court analyzes challenges to such orders under the same framework as other orders. *State ex rel. Zirkle v. Fox*, 203 W.Va. 668, 671, 510 S.E.2d 502, 505 (1998).

Thus, “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court”. Syl. pt. 2, *State ex rel. Kees v. Sanders*, 192 W. Va. 602, 453 S.E.2d 436 (1994)(quoting *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977)) (internal quotation marks omitted). In cases such as this where there is no question that the lower court had jurisdiction to enter the contempt order, this Court will not issue a writ of prohibition unless the trial court exceeded its legitimate powers. *Id.* Importantly, such a finding will be only be made if this Court finds that the trial court’s conclusions were *clearly erroneous* as a matter of law. *Zirkle*, 203 W.Va. at 673, 510 S.E.2d at 507.

**A. *The Circuit Court of Hancock County correctly held that MTR was in contempt of its March 1, 2010, Order***

On or about September 26, 2011, MTR filed the Contract Case against Mr. Arneault in the United States District Court for the Western District of Pennsylvania. MTR averred six (6) different causes of action against Mr. Arneault. (Appx. at 26-43). Of these, three (3) of the causes of action directly alleged breach of the “Settlement Agreement and Release”:

\*Count II directly alleges that Mr. Arneault breached paragraph 3.1 of the Settlement Agreement and Release, (Appx. at 32-35 [Complaint in the Contract Case]);

\*Count IV directly alleges that Mr. Arneault breached paragraphs 2.4 and 2.5 of the Settlement Agreement and Release, (Appx. at 37-39 [Complaint in the Contract Case]); and

\*Count V directly alleges that Mr. Arneault breached paragraph 2.8 of the Settlement Agreement and Release, (Appx. at 39-40 [Complaint in the Contract Case]).

None of these three (3) counts would exist without the “Settlement Agreement and Release” because each directly alleges a breach of said agreement by Mr. Arneault. Thus, the Hancock County Circuit Court correctly concluded that “Counts II, IV, and V of the Contract Case “arise from” the Settlement Agreement and Release”. (Appx. at 4 [Findings of Fact and Conclusions of Law, ¶ 13]).

MTR’s has never denied its blatant violation of the forum selection clause; instead, it offers several unpersuasive reasons why it should be excused from honoring it, including: that Mr. Arneault somehow waived the forum selection clause of the “Settlement Agreement and Release” by filing certain claims in the Civil Rights Case (Appx. at 72-80); that the Petition for a Rule to Show Cause risked inconsistent rulings between state and federal courts (Appx. at 80-81); and, that Mr. Arneault himself was in contempt of the Order of March 3, 2011 (Appx. at 81-82). As will be discussed below, these arguments are without merit.

***B. MTR’s allegations that the Hancock County Circuit Court’s rulings were clearly erroneous as a matter of law***

MTR has identified four (4) conclusions of the Hancock County Circuit Court which it apparently believes were “clearly erroneous as a matter of law”: (a) that Mr. Arneault’s claims against MTR in the Civil Rights Case did not “arise from” the “Settlement Agreement and Release”, (Pet. at p. 13); (b) that Mr. Arneault did not waive the forum selection clause of the “Settlement Agreement and Release”, (Pet. at p. 23); (c) that Mr. Arneault was not in contempt of the March 1, 2010, Order of the Circuit Court of Hancock County incorporating *in toto* the

“Settlement Agreement and Release” (Pet. at p. 29); and, (d) that the Circuit Court of Hancock County should have abstained from issuing a ruling on Mr. Arneault’s Petition to hold MTR in contempt until the United States District Court for the Western District of Pennsylvania issued a ruling on Mr. Arneault’s Motion to Dismiss the Contract Case, (Pet. at p. 31).

Mr. Arneault will address each of these issues in order.

***a. The Circuit Court of Hancock County correctly held that Mr. Arneault’s claims against MTR in the Civil Rights Case did not “arise from” the Settlement Agreement and Release***

MTR asserts that Mr. Arneault has breached the forum selection clause of the “Settlement Agreement and Release” when he filed the Civil Rights Case in the Western District of Pennsylvania and, therefore, has waived his right to complain about MTR’s filing of its Contract Case in Pennsylvania. The issue, then, is whether Mr. Arneault’s filing of the Civil Rights Case in Pennsylvania was subject to the forum selection clause of the “Settlement Agreement and Release”? Stated another way, could MTR have moved the court in the Western District of Pennsylvania to dismiss the Civil Rights case, or portions thereof, because of violations of the forum selection clause of the “Property Settlement Agreement and Release”? The short answer is, no.

By its terms, the forum selection clause contained in the “Settlement Agreement and Release” governs all claims “arising from” said agreement. (Appx. at 20 [Settlement Agreement and Release, §4.4]). The claims made in the Civil Rights Case --- unlike the claims made by MTR in the Contract Case --- do not “arise from” the “Settlement Agreement and Release” and are not subject to the forum selection clause.

The test for determining whether Mr. Arneault’s Civil Rights Case was subject to dismissal in Pennsylvania for violating the forum-selection clause is set forth in *Caperton v. A.T.*

*Massey Coal Co.*, 223 W.Va. 624, 637, 679 S.E.2d 223, 236 (2008), *rev'd on other grounds*, 556 U.S. 868 (2009). The *Caperton* Court, which adopted the four-part test announced by the United States Court of Appeals for the Second Circuit in *Phillips v. Audio Active Limited*, 494 F.3d 378 (2d Cir. 2007), held:

“[d]etermining whether to dismiss a claim based on a forum[-]selection clause involves a four-part analysis. The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. . . . The second step requires [classification of] the clause as mandatory or permissive, i.e., . . . whether the parties are required to bring any dispute to the designated forum or [are] simply permitted to do so. [The third query] asks whether the claims and parties involved in the suit are subject to the forum selection clause. . . .

If the [forum-selection] clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable. . . . The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that ‘enforcement would be unreasonable [and] unjust, or that the clause was invalid for such reasons as fraud or overreaching.’”

*Id.* (quoting *Phillips*, 494 F.3d at 383-84). Applying this four-step analysis it is evident that, under West Virginia law, MTR would not have been able to dismiss Mr. Arneault’s Civil Rights Case using the forum selection clause.<sup>2</sup>

A forum selection clause that governs claims that “arise out of” a contract does not “encompass[] all claims that have some possible relationship with the contract”, and is narrower than a clause that covers “claims that may only ‘relate to’, be ‘associated with’, or ‘arise in connection with’ the contract”. *Phillips* at p. 389. Instead, there must be some “causal

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<sup>2</sup> MTR filed a Motion to Dismiss and Memorandum of Law in support thereof with regard to the original Complaint pursuant to Fed. R. Civ. P. 12(b). MTR also filed a Motion to Dismiss and supporting Memorandum of Law with regard to the Amended Complaint. It is noteworthy that, despite MTR’s insistence that Mr. Arneault has breached the “Settlement Agreement and Release” by filing the Civil Rights Case in the Western District of Pennsylvania, *MTR never raised this issue in either of its motion to dismiss or supporting brief.*

Only now, after MTR filed a case in the Western District of Pennsylvania *directly alleging breach of the “Settlement Agreement and Release” in violation thereof*, does MTR attempt to argue that Mr. Arneault breached the “Settlement Agreement and Release” in a desperate attempt to evade responsibility for MTR’s clear

connection” between the claim and the contract. *Id.*

In *Phillips*, the court held that copyright infringement, unjust enrichment, and unfair competition claims are not covered by a forum selection clause in a recording contract stating that “any legal proceedings that may arise out of [the contract] are to be brought in England” because the right to bring these causes of action does not “originate from the recording contract”. *Id.* at pp. 382, 390-92. The plaintiff’s copyright infringement claims in this case were not causally related to the contract because the plaintiff’s cause of action arose when he authored the works he claimed were infringed. *Id.* Additionally, the court supported its holding by reasoning that “[b]ecause the recording contract is only relevant as a defense in this suit, we cannot say that [plaintiff’s] copyrights claims originate from, and therefore “arise out of”, the contract”. *Id.* at p. 391.

A comparison of Mr. Arneault’s two (2) claims against MTR in the Civil Rights Case with MTR’s claims against Mr. Arneault in the Contract Case provides a textbook example of the difference between claims that “arise from” a contract and those that do not.

***(i) Mr. Arneault’s conspiracy claim against MTR in Count VII of the Civil Rights Case does not “arise from” the Settlement Agreement and Release***

The Civil Rights Case filed by Mr. Arneault in the Western District of Pennsylvania contains no causes of action that “arise from” a breach of the “Settlement Agreement and Release”. The allegations of the Civil Rights case revolve around the deprivation of Mr. Arneault’s civil rights by individual Commissioners, employees, agents, and attorneys of the Pennsylvania Gaming Control Board (PGCB) and other non-state actors who conspired with these PGCB Commissioners, employees, agents, and attorneys during the establishment and operation of the Presque Isle Downs (PID) racetrack and casino in Erie, Pennsylvania. Of the

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breach of the Hancock County Circuit Court’s Order of March 1, 2010. This argument is entirely without merit.

eleven (11) counts in the Amended Complaint, only two (2) include claims by Mr. Arneault against MTR: Count VII (conspiracy to violate civil rights) and Count VIII (promissory estoppel and unjust enrichment). (*See Appx. at 220-221*).

Both of these claims arise out of certain licensing proceedings under the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §1101, *et seq.* MTR, the parent company of Mountaineer Casino, Racetrack & Resort operator Mountaineer Park, Inc., operates a racetrack and casino near Erie, Pennsylvania through its subsidiary, PIDI. (*See Appx. at 101-102*). Mr. Arneault served as Chairman and President of MTR for a period of time including the time when MTR, through its subsidiary PIDI, developed and opened the Presque Isle Downs casino. (*See Appx. at 5-6 104-106*). In 2008, Mr. Arneault advised the MTR Board of Directors that he did not intend to continue serving as CEO of MTR, and he ceased being an officer, director, or employee of MTR in October of that year. (*See Appx. at 144*). Prior to resigning from MTR, however, he filed a Principal Renewal Application to renew his Pennsylvania gaming license as a part of, incident to, connected with, and required as part of the licensing of MTR for the Presque Isle Downs facility. (*See Appx. at 144*).

From November 2008 through February 2010, Mr. Arneault served as a consultant for MTR. *Id.* By March 2010, Arneault no longer had any employment or independent contractor relationship with MTR, and he no longer owned 5% or more of the total outstanding shares of MTR (which was the threshold for licensure under the PGCB regulations in effect at the time). *Id.* Nevertheless, the PGCB required that Mr. Arneault continue to be licensed as a Principal of PIDI and continued to process his renewal application as a part of, incident to, connected with, and required as part of the licensing renewal of MTR and PIDI. (*See Appx. at 144-145*).

After Mr. Arneault filed his renewal application, the Western Regional Office of the PGCB's Bureau of Investigations and Enforcement conducted a severely flawed investigation of Mr. Arneault and prepared a Report of Investigation in which they intentionally and improperly found falsehoods to contest the suitability of Mr. Arneault. (*See Appx. at 145*). Based upon this Report of Investigation, the PGCB's Office of Enforcement Counsel recommended that the PGCB deny Mr. Arneault's application for license renewal and issued a "Notice of Recommendation of Denial of the Principal Renewal Application of Edson R. Arneault," parts of which were made available to the public. *Id.* In order to successfully renew his license, which was required for MTR's license renewal to proceed, Mr. Arneault was then required to request a hearing on the Recommendation of Denial. (*See Appx. at 150*).

The Civil Rights Case alleges that various Pennsylvania state employees and officials violated Mr. Arneault's civil rights, including his right to be free of retaliation for exercising his First Amendment rights, his right to both procedural and substantive due process of law, and his right to equal protection of the law. (*See Appx. at 191-197, 207-209, 217-219*). Count VII avers that MTR, along with a number of co-defendants, engaged in actionable conduct pursuant to 42 U.S.C. §1983 by conspiring with those state employees to violate Mr. Arneault's civil rights, including the failure to provide Mr. Arneault with certain documents he required to prepare for and prevail in a Pennsylvania Gaming Control Board licensing hearing. (*See Appx. at 220 and 222*).

These allegations do not, however, "arise from" the "Settlement Agreement and Release". Even if the "Settlement Agreement and Release" did not contain section 2.7 requiring MTR to produce responsive documents, MTR would nonetheless still have fiduciary and statutory duties to turn over the documents in question. Indeed, the Civil Rights Case expressly

avers that MTR's duty to provide the requested documents derives from many different sources:

As a licensee of the PGCB, the Corporate Defendants had a legal and fiduciary duty to Mr. Arneault, whose renewal application was investigated, processed, connected with, and part of, the Renewal Application for PIDI's Category 1 Slot Operator License, to provide the requested documents to the PGCB and Mr. Arneault's counsel. Furthermore, the Corporate Defendants had a legal and fiduciary obligation to MTR's shareholders to provide the requested documents to the PGCB and Mr. Arneault's counsel. Finally, the Corporate Defendants had a legal and fiduciary obligation to the PGCB to provide the requested documents.

(Appx. at 221-22 [Amended Complaint in the Civil Rights Case, ¶ 421]).

Applying the principles discussed in *Phillips* and adopted by the Supreme Court of Appeals of West Virginia in *Caperton*, Count VII of the Civil Rights Case does not, therefore, "arise from" the "Settlement Agreement and Release" because there is no causal connection between the allegations of Count VII and said agreement.

***(ii) Mr. Arneault's promissory estoppel and unjust enrichment claims against MTR in Count VII of the Civil Rights Case do not "arise from" the Settlement Agreement and Release***

The other count against MTR in the Civil Rights Case is Count VIII, which contains promissory estoppel and unjust enrichment claims. (Appx. at 223-26 [Count VIII of the Civil Rights Case, ¶¶424-39]). The unjust enrichment claim arises entirely from MTR's failure and refusal to reimburse Mr. Arneault for expenses Mr. Arneault incurred in renewing his Pennsylvania gaming license despite the fact that, without Mr. Arneault's expenditures, MTR would not have been able to renew its own Pennsylvania gaming license for its racino facility located near Erie, Pennsylvania. (Appx. at 223-26 [Amended Complaint in the Civil Rights Case, ¶¶ 425-39]).

As with the allegations contained in Count VII, the unjust enrichment and promissory estoppel allegations of Count VIII do not "arise from" the "Settlement Agreement

and Release”. In fact, under Pennsylvania law a claim for unjust enrichment or promissory estoppel exists **only in the absence of a written contract** on the subject matter of the claim.

Instead, the “Settlement Agreement and Release” is relevant to Mr. Arneault’s unjust enrichment and promissory estoppel claims only because said agreement contains terms which may bar Mr. Arneault’s promissory estoppel claim:

3.3 No Future Payments. Arneault acknowledges and agrees that he is not entitled to any other payments from the MTR Defendants or any of their affiliates ***by virtue of any policy or practice*** of the MTR Defendants or any of their affiliates ***by any verbal or written contract*** between Arneault and the MTR Defendants or any of their affiliates.

(Appx. at 18 [Settlement Agreement and Release, §3.3](emphasis added)).

As MTR repeatedly points out in its Petition, Mr. Arneault acknowledged that this section barred the promissory estoppel portion of Count VIII of the Civil Rights Case (because the promissory estoppel claim was based upon a prior policy and practice of MTR), but not the unjust enrichment part. However, this does not mean that Mr. Arneault’s promissory estoppel claim “arises from” the “Settlement Agreement and Release”. In fact, as the court in *Phillips* reasoned, there is no causal connection between a contract and a cause of action when the contract is only relevant as a *defense* to the cause of action. *Phillips*, 494 F.3d at p. 391.

This principle is supported by common sense. It is impossible to argue that a cause of action “arises from” an agreement when, instead of providing the basis for the cause of action to be brought, the terms of the agreement serve as a bar to the cause of action. Thus, like Count VII, the promissory estoppel and unjust enrichment claims contained in Count VIII of the Civil Rights Case cannot be said to “arise from” the “Settlement Agreement and Release”.

***(iii) Neither the averments of the Civil Rights Case nor the argument contained in the plaintiffs' Response to the Motions to Dismiss in the Civil Rights Case support the conclusion that any of Mr. Arneault's claims against MTR in the Civil Rights Case "arise from" the "Settlement Agreement and Release".***

MTR attempts to escape the obvious conclusion that no part of the Civil Rights Case "arises from" the "Settlement Agreement and Release" by arguing that, because Mr. Arneault mentions said agreement several times in his Response to the Motions to Dismiss filed in the Civil Rights Case, there must be a causal relationship between the agreement and his claim. Of course, the number of times the "Settlement Agreement and Release" is referenced in Mr. Arneault's Response is irrelevant.

MTR further argues that Mr. Arneault's response to the defendants' Motions to Dismiss in the Civil Rights Case supports its claim that Counts VII and VIII of the Amended Complaint in the Civil Rights Case "arise from" the "Settlement Agreement and Release". Specifically, MTR states:

***"Arneault's brief in opposition to MTR's Motion to Dismiss the Related Action contains ten pages of legal argument specifically asserting the Settlement Agreement and its applicability to Arneault's claims". Appendix pp. 356-365.***

(Pet. at p. 19). This statement by MTR is demonstrably false.

Mr. Arneault references the "Settlement Agreement and Release" only when it was raised as a defense by MTR or an MTR official. For example, Defendant Griffin, a former President and CEO of MTR, asserted the "Settlement Agreement and Release" as a defense to Mr. Arneault's conspiracy claim. Mr. Arneault used the terms "Settlement Agreement" or "Settlement Agreement and Release" eight (8) times responding to this non-meritorious argument. (Appx. at 359-361 [Response to Motions to Dismiss at 95-97]).

Also, MTR itself, along with former MTR official Griffin, raised the “Settlement Agreement and Release” as a defense to Mr. Arneault’s unjust enrichment and promissory estoppel claims. Mr. Arneault used the term “Settlement Agreement and Release” five (5) times in responding to this unavailing argument. (Appx. at 363-64 [Response to Motion to Dismiss at pp. 99-100]).

Additionally, Mr. Arneault used the phrase “Settlement Agreement and Release” one more time to respond to yet another argument based on said agreement raised by MTR itself:

MTR and PIDI also argue that Section 3.3 of the Settlement Agreement and Release bars Mr. Arneault’s claims in Count VIII. Section 3.3 provides:  
3.3 No Future Payments. Arneault acknowledges and agrees that he is not entitled to any other payments from the MTR Defendants or any of their affiliates *by virtue of any policy or practice* of the MTR defendants or any of their affiliates *by any verbal or written contract* between Arneault and the MTR Defendants or any of their affiliates.

(Ex. B to Am. Cmplt.)(emphasis added). This provision admittedly bars Mr. Arneault’s claims insofar as they are based on a promissory estoppel theory, since this claim depends on the existence of a prior policy or practice of MTR and PIDI of paying for Mr. Arneault’s legal fees. It does not, however, bar Mr. Arneault’s unjust enrichment claim. (Appx. at 364 [Response to Motions to Dismiss at p. 100]).

The above examples are the only references to the “Settlement Agreement and Release” in the entire brief and, contrary to MTR’s assertion, they appear on just five (5) pages of the Response. More importantly, the “Settlement Agreement and Release” is referenced in the Response to the Motions to Dismiss only because MTR itself or a former MTR executive raised the “Settlement Agreement and Release” as a defense.

Finally, MTR suggests that Mr. Arneault's Pennsylvania counsel has somehow conceded that the counts of the Civil Rights Case naming MTR as a defendant "arise from" the "Settlement Agreement and Release" even though the case scarcely references the agreement.

MTR's argument is based upon several portions of the transcript from oral argument on the various Motions to Dismiss filed by the Defendants in the Civil Rights Case. In the first excerpt cited by MTR, Mr. Arneault's counsel merely reiterates the concession discussed above that Mr. Arneault's promissory estoppel claim is barred by the "Settlement Agreement and Release":

MR. MIZNER: . . . [W]ith respect to Count VIII, we concede that the Settlement Agreement and Release are [sic] Mr. Arneault's promissory estoppel claim only. We do not concede any other parts of the amended complaint, including without limitation, the due process claims of Counts III, IV and V. With respect to Count VIII, only the promissory estoppel, and we do not concede the unjust enrichment claim.

THE COURT: All right. So Count VIII was a dual claim, promissory estoppel and unjust enrichment.

MR. MIZNER: That is correct. And we'll only concede the promissory estoppel claim.

(Appx. at 408-09 [Transcript of 11/21/2011 Hearing]).

Because this excerpt merely concedes that the "Settlement Agreement and Release" contains language that bars the promissory estoppel claim, it cannot possibly lead to the conclusion that this claim "arises from" the "Settlement Agreement and Release". As discussed herein, the language "arises from" suggests that the claim must have its origin in the "Settlement Agreement and Release". Mr. Mizner's concession excerpted above compels the opposite conclusion: not only does the promissory estoppel claim not have an origin in the "Settlement Agreement and Release", but it is *precluded* by the "Settlement Agreement and Release". Therefore, this language does not support MTR's argument that the Civil Rights Case "arises from" the "Settlement Agreement and Release".

The other excerpts cited by MTR concern the relationship between the “Settlement Agreement and Release” and Mr. Arneault’s claims against MTR. In one Mr. Arneault’s counsel explained the importance of the documents which MTR was obligated to provide under the various sources of law set forth in the Amended Complaint:

MR. MIZNER: . . . What I’m saying is that they have an obligation to make sure that their investigators are properly trained, are properly monitored, are properly evaluated. Let me give you a case in point. The documents that MTR promised Mr. Arneault that they would provide, that was part of the Settlement Agreement. Everybody at MTR, Mr. Griffin, Mr. Hughes, general counsel Cayro, all of them, all of those people knew that those documents would be necessary for Mr. Arneault to prove his case.

(Appx. at 480 [Transcript of 11/21/2011 Hearing]).<sup>3</sup>

In the next passage, Mr. Arneault’s counsel explains that the “Settlement Agreement and Release” has evidentiary value because it demonstrates how MTR was aware that withholding the documents in question from Mr. Arneault would be harmful to Mr. Arneault’s license renewal process:

MR. MIZNER: I don’t have the complaint in front of me, but I know I went to great lengths to plead that there was an understanding, a tacit understanding between the PGCB and MTR. It’s important to note that defendant Cayro was a PGCB lawyer. Then he went to the law firm of Rueben and Aaronson, which was counsel to MTR. And then he went inside to MTR. He knew exactly how the PGCB worked. He knew exactly what the PGCB thought about Mr. Rubino and Mr. Arneault. ***They all knew that these documents were important because it was in the Settlement Agreement that Mr. Griffin signed.*** This was a discussed and understood issue. You guys got documents that I need to prove myself right. That was part of a contractual understanding. And their understanding and it need not be an express agreement, but they were trying to help the PGCB, with the help of PGCB as regulators. . . . They were going to curry favor with the Gaming Board with the tacit understanding that if they got Rubino and Arneault out of the way, there would be a better life for both parties. . . . They all don’t have to sit at a meeting and draw up a plan and say here’s how we’re going to ruin the constitutional rights of Arneault and Rubino. But they all knew the game, they all knew what was going on and they all knew those documents were central, and they were never provided. Never. You heard this morning that they were at a

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<sup>3</sup> MTR references these quotations on page 21 of its Petition. While MTR only excerpts small portions of the transcript, Mr. Arneault has reproduced the context around each quotation for this Court’s reference.

storage facility. They could have gone -- your Honor, there's a contract that says you're going to cooperate, you're going to provide documents. Now it's, well, they didn't go to the storage facility to look for them. Your Honor, that was not the deal. That was not the deal. So yes, these entities are defendants. Did have an understanding, it may have been tacit, but they were all in the same boat and, most importantly, they shared a conspiratorial objective.

(Appx. at 512-13 [Transcript of 11/21/2011 Hearing](emphasis added)).

Lastly, in the final passage Mr. Arneault's counsel explains the legal basis for Mr. Arneault's conspiracy claim against MTR and its officers in a manner entirely consistent with the multiple sources of a duty by MTR to produce the documents in question identified in the Civil Rights Case:

THE COURT: All right. So just to wrap up, and the complaint speaks for itself. But tell me, then, for purpose of my own post-argument review, what the essence of your claim against MTR really is?

MR. MIZNER: The essence of the claim is twofold. Number one. They had a contractual *and a statutory obligation* to provide all these exculpatory documents to the Gaming Board and to Mr. Arneault. Their failure to do so, continued and aided in the state actors' violation of our constitutional rights.

(Appx. at 485 [Transcript of 11/21/2011 Hearing](emphasis added)).

Contrary to MTR's claims, *none* of these passages amounts to a concession by Mr. Arneault that his claims in the Civil Rights Case "arise from" the "Settlement Agreement and Release". Instead, they are entirely consistent with the Civil Rights Case's allegations that MTR had an obligation emanating from numerous different sources to provide the documents in question to Mr. Arneault.

Moreover, because Mr. Arneault's unjust enrichment, promissory estoppel, and conspiracy causes of action against MTR in the Civil Rights Case do not, as pleaded, depend upon the "Settlement Agreement and Release" to succeed, they cannot be said to "arise from" the "Settlement Agreement and Release". None of the quotations cited by MTR changes this fact;

rather, they demonstrate only that the “Settlement Agreement and Release” is *relevant to* Mr. Arneault’s claims.

Under the analysis of similar language applied by the Second Circuit in the *Phillips* case and cited with approval by this Court in *Caperton*, the fact that certain provisions of the “Settlement Agreement and Release” may be indirectly relevant to Mr. Arneault’s claims in the Civil Rights Case is not enough to establish that these claims “arise from” said agreement.

***b. Mr. Arneault has not waived the forum selection clause of the “Settlement Agreement and Release”.***

MTR next argues that the Hancock County Circuit Court erred by finding that Mr. Arneault had not waived the forum selection clause of the “Settlement Agreement and Release”. (Pet. at p. 23). MTR’s argument is faulty for two (2) reasons: (i) Mr. Arneault has not taken any action which could possibly be construed as a waiver; and, (ii) Mr. Arneault could not waive the forum selection clause insofar as it was enforced by the Hancock County Circuit Court as part an order of that court.

***(i) Mr. Arneault has not taken any action which could possibly be construed as a waiver.***

MTR argues at length that Mr. Arneault has waived the forum selection clause through his conduct. Specifically, MTR argues that Mr. Arneault’s filing of the Civil Rights Case in the United States District Court for the Western District of Pennsylvania constituted “*selecting* the Western District of Pennsylvania to adjudicate his own disputes arising from the Settlement Agreement against MTR . . . .” (Pet. at p. 24 (emphasis in original)).

MTR cites a great number of cases in support of its argument that a party may waive a forum selection clause by its conduct, but its argument fails since most of the conduct MTR cites in support of its contention that Mr. Arneault waived the forum selection clause

relates to his filing the Civil Rights in a federal court in Pennsylvania. (*See* Pet. at 23-29).

However, as discussed herein, Mr. Arneault has not performed any acts which could possibly be construed as a waiver of the forum selection clause of the “Settlement Agreement and Release”.

MTR also attempts to assert that Mr. Arneault’s re-filing of the unjust enrichment claim contained in Amended Count VIII of the Civil Rights Case in the Court of Common Pleas of Erie County, Pennsylvania is “disingenuous conduct” that “is further evidence of Arneault’s waiver of his right to enforce the forum selection clause”. (Pet. at p. 27). Since Count VIII of the Civil Rights Case did not “arise from” the “Settlement Agreement and Release”, Mr. Arneault’s action in the Court of Common Pleas of Erie County, Pennsylvania likewise does not “arise from” the “Settlement Agreement and Release”. Thus, Mr. Arneault’s court filings do not constitute a waiver of the forum selection clause thereof.

Finally, MTR also makes a “judicial estoppel” argument that Mr. Arneault should be estopped from arguing that the Civil Rights Case does not “arise from” the “Settlement Agreement and Release” because of the statements of his counsel cited herein. (Pet. at pp. 28-29). This argument is without merit as well because it, too, depends on the faulty premise that Mr. Arneault’s claims in Counts VII and VIII of the Civil Rights Case “arise from” the “Settlement Agreement and Release”.

In sum, since neither Mr. Arneault’s claims in the Civil Rights Case or his claim in the action filed in the Court of Common Pleas of Erie County, Pennsylvania<sup>4</sup> “arise from” the “Settlement Agreement and Release”, the argument by MTR that it should escape liability for its

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<sup>4</sup> Mr. Arneault does not concede that his actions *after* the Hancock County Circuit Court’s finding that MTR was in contempt of its March 1, 2010, Order are relevant to the instant inquiry whether this contempt finding was clearly erroneous as a matter of law; however, out of an abundance of caution, Mr. Arneault has addressed this argument without prejudice to his right to object to the inclusion of the Complaint filed by Mr. Arneault in the Court of Common Pleas of Erie County, Pennsylvania in the Appendix to MTR’s Petition.

clear contempt of the March 1, 2010, Order of the Hancock County Circuit Court should be rejected.

***(ii) Mr. Arneault could not waive the forum selection clause because it was enforced by the Circuit Court of Hancock County as part of an Order of that court.***

Assuming, *arguendo*, that Mr. Arneault somehow engaged in conduct that violated the forum selection clause of the “Settlement Agreement and Release”, the proper remedy for MTR would be to file a petition seeking to have Mr. Arneault held in contempt of the March 1, 2010, Order of the Hancock County Circuit Court rather than treat this court order as a legal nullity.

While a party may waive the provisions of a contract, the Settlement Agreement and Release has also been incorporated *in toto* as an Order of the Hancock County Circuit Court. (Appx. at 24 [Dismissal Order of 03/01/2010]). Mr. Arneault’s Petition for a Rule to Show Cause sought to hold MTR in contempt for its breach of the Hancock County Circuit Court’s Order, *not* to hold MTR liable for breach of contract. (Appx. at 9-10 [Mr. Arneault’s Petition for a Rule to Show Cause]).

This distinction is critical here as a contractual provision may be waived by a party thereto, but an order of court may not be. *See Kimble v. Kimble*, 176 W.Va. 45, 341 S.E.2d 420 (1986). In *Kimble*, this Court considered a mother’s appeal from a decision of the Circuit Court of Randolph County wherein the Circuit Court had held that the father of her child was relieved and discharged from his responsibilities to provide child support because he had executed a consent to the adoption of that child. This Court reversed the Circuit Court’s decision, explaining that the parties to a divorce decree could not contractually alter or change the terms thereof. *Id.* at p. 49.

A similar rule should apply here. Insofar as Mr. Arneault's "Settlement Agreement and Release" is incorporated *in toto* into an Order of the Circuit Court of Hancock County and Mr. Arneault seeks to enforce said agreement *only* as a court order using the Circuit Court's contempt powers, Mr. Arneault could not possibly waive the Circuit Court's right to enforce its own order. Therefore, even if Mr. Arneault had somehow waived the forum selection clause as a matter of contract rule, such waiver would not deprive the Hancock County Circuit Court of the right to enforce its own order. In short, any alleged waiver by Mr. Arneault would not render the decision of the Circuit Court to hold MTR in contempt clearly erroneous as a matter of law.

***c. Mr. Arneault was not in contempt of the March 1, 2010 Order of the Circuit Court of Hancock County.***

MTR argues in its brief that Mr. Arneault was in contempt of the Hancock County Circuit Court's March 1, 2010, Order due to his filing of the two (2) counts against MTR within the Civil Rights Case in the United States District Court for the Western District of Pennsylvania. (Pet. at p. 29). This argument is flawed.

First, this contention is premised on the contention that at least one (1) of the two (2) counts of the Civil Rights Case that named MTR as a defendant "arises from" the "Settlement Agreement and Release". For the reasons discussed herein, Mr. Arneault's Civil Rights Case cannot be said to "arise from" the Settlement Agreement and Release.

Second, MTR contends that the Circuit Court of Hancock County erred by "giv[ing] Arneault an opportunity to cure by allowing him to dismiss claims his counsel conceded arose from the Settlement Agreement . . . ." (Pet. at p. 29). As MTR puts it, "Arneault cannot rob a bank and then 'cure' that wrong by giving the money back". (Pet. at p. 30).

Mr. Arneault ***does not concede*** that any part of his claims in the Civil

Rights Case "arose from" the "Settlement Agreement and Release", that his counsel ever conceded that any part of the Civil Rights Case "arose from" the "Settlement Agreement and Release", or that Mr. Arneault was not held in contempt solely because his Pennsylvania counsel dismissed part of the Civil Rights Case.

However, even if MTR were correct that Mr. Arneault was not held in contempt because he cured his supposed contempt of the Circuit Court's order, it does not follow that the Circuit Court erred by not holding Mr. Arneault in contempt. It is the *very purpose* of civil contempt proceedings "to compel the contemner to comply with a court order . . . ." *State ex rel. Lambert v. Stephens*, 200 W. Va. 802, 806, 490 S.E.2d 891, 895 (1997). A party held in civil contempt may purge himself of that contempt by simply complying with the court order which he had disobeyed. *See Trecost v. Trecost*, 202 W. Va. 129, 132, 502 S.E.2d 445, 449 (1998)("[a]nother appropriate sanction in civil contempt cases is an order requiring the contemner to pay a fine as a form of compensation or damages to the party aggrieved by the contemptuous conduct").

If, as MTR argues, Mr. Arneault had been in contempt of the order of the Circuit Court by maintaining a claim in the United States District Court for the Western District of Pennsylvania and had remedied that contempt by voluntarily dismissing that claim, there would have been no reason for the Circuit Court to find Mr. Arneault in civil contempt.

Furthermore, this very same remedy is available to MTR. The Circuit Court's decision was clear that the daily fine imposed would continue only until MTR purged itself of its contempt by dismissing the offending causes of action in the Western District of Pennsylvania. This holding does not, as MTR suggests, require MTR "to dismiss a meritorious complaint",<sup>5</sup>

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<sup>5</sup> Mr. Arneault does not concede that any of the causes of action brought by MTR against Mr. Arneault in the Contract Case are meritorious.

(Pet. at p.12); rather, MTR simply needs to dismiss the offending counts of the Contract Case in the Western District of Pennsylvania and bring them, if it desires, in the Hancock County Circuit Court.

Finally, to the extent that MTR suggests that Mr. Arneault should have been fined for his conduct *prior* to a holding by the Circuit Court that he was in contempt, MTR's argument is invalid on its face because this Court has expressly noted that "a civil contempt sanction that sets monetary penalties before the hearing on contempt" cannot be enforced. *State Farm Mut. Ins. Co. v. Stephens*, 188 W. Va. 622, 632, 425 S.E.2d 577, 587 (1992). It is, therefore, irrelevant that Mr. Arneault was allegedly "in contempt at least from July 21, 2011 until January 25, 2012"<sup>6</sup> (Pet. at pp. 29-30), or that he supposedly violated the "confidentiality and non-disclosure provisions" of the "Settlement Agreement and Release".<sup>7</sup>

Mr. Arneault has not breached the "Settlement Agreement and Release" and, by MTR's own admission, if he did, any such alleged breach was cured. Thus, Mr. Arneault cannot be held in civil contempt for any acts committed before the contempt hearing occurred. The Hancock County Circuit Court correctly declined to hold Mr. Arneault in contempt of its March 1, 2010, Order.

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<sup>6</sup> Mr. Arneault maintains that he was *not* in contempt of the Hancock County Circuit Court's March 1, 2010, Order during this time period or at any other time.

<sup>7</sup> It is ironic that MTR accuses Mr. Arneault of violating the confidentiality and non-disclosure provisions of the Settlement Agreement and Release by attaching it to his Amended Complaint when *MTR itself first caused the "Settlement Agreement and Release" to become public by attaching it to a Motion to Dismiss in the very same case.*

This issue was discussed at length in Mr. Arneault's Brief in Opposition to MTR's Response to Mr. Arneault's Petition for a Rule to Show Cause. (See Appx. at 555-57 [Brief in Opposition]).

*d. The Circuit Court's decision to not abstain from issuing a ruling until the United States District Court for the Western District of Pennsylvania ruled on the same issue was not clearly erroneous.*

Finally, MTR attempts to argue that a writ of prohibition should issue because the Hancock County Circuit Court clearly erred by declining to abstain from issuing a ruling until a federal court located in another state had entered a ruling that, as MTR itself admits, is based on completely different underlying issues. (Pet. at p. 31)(“[T]he underlying issues in the two cases are different”). This argument is non-meritorious.

There can be no doubt that the Hancock County Circuit Court has the legal power to enforce its own orders using its contempt powers subject to the oversight of this Court. *See* W. Va. Code, §61-5-26(d)(“[t]he courts and the judges thereof may issue attachment for contempt and punish them summarily only in the following cases: . . . (d) disobedience to or resistance of any officer of the court, juror, witness, or other person, to any lawful process, judgment, decree or order of the said court”). The United States District Court for the Western District of Pennsylvania, a trial-level federal court located in another state, has no supervisory authority over the Hancock County Circuit Court. Of course, the Circuit Court of Hancock County is in the best position to interpret its own order.

Furthermore, MTR's concern about “inconsistent rulings” is unwarranted given that the decision of the Hancock County Circuit Court with regard to the issue of waiver is binding under the principle of issue preclusion. As Mr. Arneault noted in his filings with the District Court, the test used in Pennsylvania for issue preclusion (applicable because the Contract Case is a diversity action) examines four (4) elements:

“Under Pennsylvania law, four essential elements must be present before issue preclusion may be applied: 1) the issue decided in the prior adjudication was identical with the one presented in the later action, 2) there was a final judgment on the merits, 3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication [‘identical parties’],

and 4) the party against whom it is asserted has had a full and fair opportunity to litigation the issue in question in a prior action”.

*Rider v. Pennsylvania*, 850 F.2d 982, 989-90 (3d Cir. 1988)(citing *Safeguard Mut. Ins. Co. v. Williams*, 463 Pa. 567, 574, 345 A.2d 664, 668 (1975)).

Here, each of these elements is in place when the Hancock County Circuit Court made the following findings:

11. Pursuant to the terms of the Settlement Agreement and Release, the Circuit Court of Hancock County, West Virginia was and continues to be the exclusive venue in which any dispute arising from the Settlement Agreement and Release may be heard, and the Counts II, IV, and V of Contract Case should be dismissed based upon the forum-selection clause. *Caperton v. A.T. Massey Coal Co.*, 223 W.Va. 624, 637, 679 S.E.2d 223, 226 (2008), *rev'd on other grounds*, 556 U.S. 868 (2009).

...

13. Counts II, IV, and V of the Contract Case arise from the Settlement Agreement and Release.

...

17. Plaintiff/Petitioner Mr. Arneault has not and could not waive the forum selection clause of the Settlement Agreement and Release, and was not estopped from alleging violations of the forum selection clause on the ground that he filed the Civil Rights Case.

(Appx. at 4-5 [Findings of Fact and Concl. of Law]).

Each of these findings addresses an issue identical to one under consideration on Mr. Arneault’s Motion to Dismiss the Contract Case. Paragraph 11 addresses a major argument made by Mr. Arneault in support of his Motion to Dismiss the Contract Case--that Counts II, IV, and V cannot be brought in the Western District of Pennsylvania because they are barred by the “Settlement Agreement and Release”. (Appx. at 576-79 [Brief in Support of Motion to Dismiss]). Paragraph 13 establishes that Counts II, IV, and V of MTR’s Contract Case do, in fact, “arise from” the “Settlement Agreement and Release”. Paragraph 17, rejects the very same waiver argument that MTR has attempted to make in opposition to Mr. Arneault’s Motion to Dismiss the Contract Case. Thus, the first element of issue preclusion is met.

The second element that there be a “final judgment on the merits” is met as well. The Findings of Fact and Conclusions of Law bear a notation that it has been entered in the Civil Order Book for the Circuit Court of Hancock County, West Virginia. (*See* Appx. at 1 [Findings of Fact and Concl. of Law]). Certainly, the Circuit Court made express findings of fact on the merits of Mr. Arneault’s contempt petition. Therefore, the Findings of Fact and Conclusions of Law are a “final judgment on the merits” for the purposes of Pennsylvania issue preclusion analysis and the second element is satisfied.

The third part of the issue preclusion test is satisfied because MTR and Mr. Arneault are the exact same two (2) parties involved in both the instant contempt proceedings and the Contract Case in the Western District of Pennsylvania.

The fourth and final element requires that MTR had a full and fair opportunity to litigate the issue in question. After Mr. Arneault filed his petition to hold MTR in contempt, MTR promptly filed a response. (*See* Appx. at 71 [Response to Petition for Rule to Show Cause]). As this Court is aware, the Hancock County Circuit Court held an oral argument on Mr. Arneault’s contempt petition which was attended by attorneys for MTR. (*See* Appx. at 656 [Transcript of 01/25/2012 Hearing on Petition for Rule to Show Cause]).

After the oral argument, Judge Recht, upon request of MTR, ordered Mr. Arneault to file proposed Findings of Fact and Conclusions of Law, and granted MTR permission to either file its own proposed Findings of Fact and Conclusions of Law or file objections to Mr. Arneault’s Findings of Fact and Conclusions of Law. MTR chose to do the latter. Given the extensive briefing and argument by MTR and the multiple opportunities given to MTR to respond to Mr. Arneault’s position, MTR had a full and fair opportunity to litigate all of the issues involved in the West Virginia contempt proceedings.

As a result, all of the elements of issue preclusion are satisfied, and MTR is precluded from again attempting to litigate before the Western District of Pennsylvania:

(a) whether the Hancock County Circuit Court is the exclusive venue in which a dispute arising from the Settlement Agreement and Release may be heard; (b) whether Counts II, IV, and V of the Contract Case “arise from” the “Settlement Agreement and Release”; (c) whether Counts II, IV, and V of the Contract Case should be dismissed; (d) whether Mr. Arneault has waived the forum selection clause of the “Settlement Agreement and Release”; and, (e) whether Mr. Arneault is estopped from alleging violations of the forum selection clause on the grounds that he filed the Civil Rights Case in the Western District of Pennsylvania.

In sum, there is no risk of inconsistent rulings between the Hancock County Circuit Court and the United States District Court for the Western District of Pennsylvania, as the Western District of Pennsylvania is bound by the doctrine of issue preclusion to follow the Circuit Court’s holdings insofar as they are applicable to the proceedings in the Contract Case.

## **VI. CONCLUSION**

MTR has attempted to obtain a writ of prohibition based on the argument that the Hancock County Circuit Court has exceeded its lawful powers. However, MTR has other adequate means to obtain the desired relief. MTR could easily file an appeal of the Hancock County Circuit Court’s Order, but for unknown reasons it chose not to do so. MTR should not be allowed to use an extraordinary writ as a substitute for the filing of an appeal.

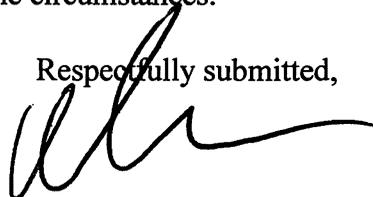
Moreover, MTR cannot show that it will be damaged or prejudiced in a way that is not correctable on appeal since it has yet to dismiss its Contract Case claims in Pennsylvania and has yet to pay any fines. Certainly, any alleged damage or prejudice to MTR can be corrected on an ordinary appeal.

Further, none of the four (4) rulings of the Hancock County Circuit Court cited by MTR are “clearly erroneous”, to wit: (a) that Mr. Arneault’s claims against MTR in the Civil Rights Case did not “arise from” the “Settlement Agreement and Release”, (b) that Mr. Arneault did not waive the forum selection clause of the “Settlement Agreement and Release”; (c) that Mr. Arneault was not in contempt of the March 1, 2010, Order of the Circuit Court of Hancock County incorporating *in toto* the “Settlement Agreement and Release”; and, (d) that the Circuit Court of Hancock County should have abstained from issuing a ruling on Mr. Arneault’s Petition to hold MTR in contempt until the United States District Court for the Western District of Pennsylvania issued a ruling on Mr. Arneault’s Motion to Dismiss the Contract Case.

Based upon the foregoing, MTR has failed to sustain its burden necessary to secure issuance of a writ of prohibition and Respondent Edson R. Arneault respectfully requests that this Honorable Court:

1. Deny Petitioner, MTR’s Petition for Writ of Prohibition;
2. Enter an Order awarding Respondent costs and attorneys fees; and,
3. Grant such other and further relief as this Honorable Court deems appropriate under the circumstances.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I have served this Response by mailing a true copy thereof in the

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DATED: This 12<sup>th</sup> day of July, 2012.



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