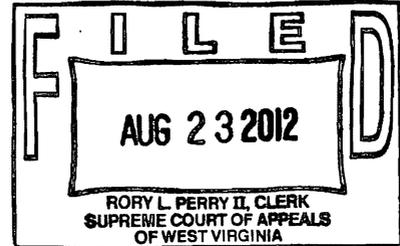


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0418



**MULTIPLEX, INC., a West Virginia corporation;
ART R. POFF; and PAMELA POFF, Petitioners**

vs.

TOWN OF CLAY, Respondent

Hon. Richard A. Facemire, Judge
Circuit Court of Clay County
Civil Action No. 10-C-82

REPLY BRIEF OF THE PETITIONERS

Counsel for Petitioners

Ancil G. Ramey, Esq.
WV Bar No. 3013
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington, WV 25722-2195
Telephone (304) 526-8133
ancil.ramey@steptoe-johnson.com

Counsel for Respondent

Carl J. Roncaglione, Jr. Esq.
WV Bar No. 5723
1018 Kanawha Blvd., East, Suite 401
Charleston, WV 25301
Telephone (304) 342-3945
carlironcaglionejr@yahoo.com

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in sanctioning petitioners when it ruled the preliminary injunction awarded petitioners was not obtained in bad faith. Because there is no authority for sanctioning a party who has not acted in bad faith, this Court should reverse the order of the Circuit Court and remand with directions to enter judgment for petitioners.

2. The trial court erred in entering a sanctions order without affording petitioners the right to engage in discovery; the right to the production of a copy of original invoices and payment records; and the right to an evidentiary hearing, and without making any of the required findings under *Pitrolo*. Because a party against whom sanctions is sought is entitled to these rights, this Court should reverse the order of the Circuit Court and remand for further proceedings.

3. The trial court erred in entering a sanctions order before respondent had complied with the trial court's own order to provide documentation regarding its alleged attorney fees and costs, and before the period for petitioners to respond to the special commissioner's proposed sanctions order had expired. Because the sanctions order was entered under these circumstances, this Court should reverse the order of the Circuit Court and remand for further proceedings.

4. The trial court erred in ordering the forfeiture of a \$25,000 injunction bond that does not exist and was never posted because the trial court permitted petitioners to make a cash deposit of \$2,500 to secure the preliminary injunction in lieu of a bond. Because the trial court has ordered the forfeiture of an injunction bond that does not exist, this Court should reverse and remand with directions that if any penalty be imposed on petitioners, it be limited to the \$2,500 cash deposited by petitioners to secure the preliminary injunction.

II. STATEMENT OF THE CASE

The respondent's brief is rife with error and misstatement.

First, despite respondent's statement that the fees and costs awarded were "tested for reasonableness in accordance with *Aetna v. Pitrolo*," Respondent's Brief at 1, nowhere in the record did the trial court apply the mandatory factors set forth in *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986).

Second, despite respondent's statement that "Petitioners are not entitled to an evidentiary hearing," Respondent's Brief at 1, the law is clear that before sanctions may be imposed, the party against whom sanctions are sought is entitled to an evidentiary hearing. See *Corporation of Harpers Ferry v. Taylor*, 227 W. Va. 501, 711 S.E.2d 571 (2011).

Third, despite respondent's statement that the parties "engaged in extensive discovery," Respondent's Brief at 1, respondent (1) refused to provide any responses to petitioners' written discovery; (2) the special commissioner and trial court refused to compel responses to petitioners' written discovery; and (3) respondent refused to respond to petitioners' FOIA requests claiming that invoices and payment checks are protected by the attorney/client privilege. Moreover, copies of purported invoices produced by respondent were erroneous on their face being addressed to a person who did not become mayor until after the date of the invoices.

Fourth, despite respondent's statement that it is "the non-breaching party" and "[t]his case arises from the unexcused breach of the . . . Contract . . . by Petitioner, Multiplex, Inc.," Respondent's Brief at 2 and 3, there are suits for breach of contract currently pending in the Circuit Court of Clay County and the Circuit Court of Nicholas County, to determine whether it was the petitioners or the respondent which breached the subject contract, an issue expressly reserved when petitioners' voluntarily dismissed their injunction suit "without prejudice" to their

right to sue for breach of contract, and there is another suit pending in the Circuit Court of Clay County in which the funding agency for the project, the Water Development Authority, is seeking to take control of the project away from respondent and to place it into receivership.

Fifth, despite respondent's statement that entry of a judgment against petitioners, including payment of all of the special commissioner's fees and costs, was imposed "not as 'sanctions,'" Respondent's Brief at 1 and 2, the order which is the subject of this appeal incorporated by reference a special commissioner's report which states, "Your Commissioner found that the Town of Clay incurred substantial costs which arose from the apparently unfounded petition for an injunction. . . . [Y]our Commissioner finds that the amount for which Multiplex should be liable for abandoning its injunction without any indication that the petition had any merit [T]he undersigned Commissioner recommends to the Court the bond posted . . . be forfeited on the grounds of Multiplex's filing the unfounded action for an injunction" App. at 1749-1750.

Sixth, despite respondent's allegation, on the one hand, that petitioners "ran out of operating capital during construction," Respondent's Brief at 3, which has no support in the record, it also alleges, on the other hand, equally without evidentiary support, that "Petitioners . . . verified the Complaint . . . while vacationing at their beach home . . . " on the very same page of their brief.

Seventh, despite respondent's allegation that petitioners "walked off and abandoned the Town's Project . . . with no notice to the Town," the record is clear and documented with exhibits to contrary: "By correspondence dated October 22, 2010, Multiplex notified the Town and Engineer of claims asserted pursuant to Article 10.05 of the Contract. See Exhibit F;" "The total amount past due and owing for these items was \$383,442.65. See Exhibit G, Multiplex

Correspondence of September 15, 2010;” “The September 15, 2010, correspondence also sought answers to questions required for Multiplex to move forward with substantial completion of the work and its obligations under the Contract;” “On October 1, 2010, Multiplex again notified the Town and Engineer of numerous questions to which a response was required for Multiplex to move forward with substantial completion of the work and its obligations under the contract. See Exhibit H, Multiplex Correspondence dated October 1, 2010.” App. at 0009.

Eighth, despite respondent’s hyperbolic rhetoric about a “‘bombshell’ email,” “smoking-gun documents,” and declining “bonding capacity,” Respondent’s Brief at 4, this project was fully bonded which is why the surety was named as a defendant in the injunction proceedings. App. at 0006. Indeed, as referenced in respondent’s own brief, it has sued the surety as well as petitioners in a separate action for breach of contract. Respondent’s Brief at 4 n.2.

Ninth, despite respondent’s statement that, “The Town, the non-breaching party, prevailed in the action below,” Respondent’s Brief at 4 n. 2, it was petitioners who prevailed on their request for a preliminary injunction: “I’m going to, at this point, issue a temporary injunction in the matter, finding that there is immediate and irreparable injury and loss or damage that could occur to Multiplex.” App. at 0225.¹ Later, *upon petitioners’ motion*, the injunction was dissolved expressly “without prejudice” to petitioners’ substantive claims against respondent, which are currently pending and unresolved: “Accordingly, Plaintiffs’ request for preliminary injunction is hereby dismissed WITH PREJUDICE; all other claims and remedies are hereby dismissed WITHOUT PREJUDICE.” App. at 309-310.

¹ Indeed, unbridled by any perceived need for consistency or accuracy, respondent’s own brief states, “The circuit court granted Petitioners’ preliminary injunction request, enjoined the Town . . . from declaring Petitioners in default” Respondent’s Brief at 6.

Tenth, despite respondent's statement that, "The Town prevailed in the pathetic, vexatious and collusive WDA civil action styled: WDA v. Town of Clay, C.A. No. 11-C-49 (J. Facemire), who on January 27, 2012 granted the Town's motion for judgment as a matter of law, gutting that action," Respondent's Brief at 4 n. 2, respondent has not prevailed in that action which is still pending and, indeed, respondent's misstatement to this Court in its brief prompted the Water Development Authority to notify the judge in that action of respondent's misstatement and to reiterate its request that this project be placed into receivership. **Appendix A.**²

Eleventh, despite respondent's statement that petitioners' suit for respondent's wrongful termination and breach of the subject contract was "Rightly dubbed a 'ruse' below to mislead the circuit court," Respondent's Brief at 4 n.2, implying that either the special commissioner and/or the trial court made such finding, respondent's reference was to its own self-serving description of petitioners' claims in support of its own "Motion for . . . Sanctions" that respondent now repeatedly argues was not really a motion for sanctions. Compare Respondent's Brief at 1-2 with App. 0313-0327.

Twelfth, despite respondent's repeated and carefully crafted references to the trial court's "threatened dismissal and dissolution" of the injunction, Respondent's Brief at 7-8, it conveniently omits the trial court's references to the strengths of petitioners' claims and, more importantly, that the trial court concluded the subject hearing as follows:

² In respondent's response to the Water Development Authority's correspondence with the presiding judge in that matter, nowhere does respondent explain how it allegedly "prevailed" in that action based upon some granting of "the Town's motion for judgment as a matter of law, gutting that action." **Exhibit B.** Rather, respondent argues extensively to the presiding judge in that case as to why it should prevail in the receivership proceedings even though respondent indicated in its brief to this Court that it had already "prevailed." In any event, those matters are for the presiding judge in that case to resolve, just as petitioners' breach of contract claims against respondent are for the courts in which they are pending to be resolved, not for respondent to unilaterally resolve by adjectives and adverbs in its briefing and correspondence.

What I'm going to do is this, I'm going to take a brief recess and see if I can get Mr. Hicks on the line, and then I'm going to see if you can hook him up from your end to conference him in. And I expect that I'm going to require the parties to at least meet with Mr. Hicks in an attempt to mediate this matter. And, you know, I've expressed my concerns on both sides. But, quite frankly, my intent is to get this project moving and moving expeditiously. . . . And no disrespect to counsel, but I'm not concerned about all of the discovery, and I'm not concerned about the billable hours in the matter. . . . And I'm not going to be very happy if Mr. Hicks tells me that the parties do not negotiate in good faith to attempt to resolve this issue to get the moving.

App. at 0280-0281.

Thirteenth, respondent's claim that based upon what occurred at the hearing above, "Lacking any 'likelihood of success on the merits' against the Town . . . Petitioners' injunctive relief failed, and was, in fact, adjudicated adversely to Petitioners by the dissolution and dismissal," Respondent's Brief at 8, when the injunction was dismissed upon petitioners' own motion³ and in light of the trial court's comments above, is exceeded in degree of misrepresentation only by its allegation that it has prevailed in the receivership suit in which no ruling has been made regarding whether control of the project will be removed from respondent and placed into the hands of a receiver.⁴

Fourteenth, respondent's claim, made to deal with the fact that petitioners were denied any discovery related to respondent's motion for sanctions, including copies of the original

³ Again, in wanton disregard of any need for consistency, respondent acknowledges elsewhere that, "Petitioners voluntarily dismissed . . . their own action." Respondent's Brief at 9. How a voluntary dismissal of one's request for injunctive relief preserving one's right to sue for money damages which was done and remains unresolved justifies an argument that the enjoined party "prevailed" warranting the award of sanctions is beyond petitioners' understanding and without precedent.

⁴ Apparently, respondent's use of the word "collusive" in addition to the words "pathetic" and "vexatious" to described the Water Development Authority's receivership action references the petitioners who are apparently, according to respondent, "colluding" with the WDA to try to make the completely innocent respondent look bad to this and other courts in which actions against respondent arising from this project are pending.

invoices and any checks paid under those invoices, on the one hand, that petitioners “terminated the circuit court’s discovery process” by voluntarily dismissing their injunction action in favor of a damages action, Respondent’s Brief at 10 n.6, is facially inconsistent with respondent’s statements that “Petitioners engaged extensively in . . . discovery,” Respondent’s Brief at 8; “Petitioners engaged in . . . extensive discovery, issuing and serving . . . Notices of Deposition . . .,” and Respondent’s Brief at 8 n.4; “Petitioners themselves engaged extensively in discovery,” Respondent’s Brief at 9. In fact, both parties engaged in extensive discovery while the preliminary injunction was still pending and petitioners’ decision to voluntarily dismiss the injunction had nothing to do with the discovery process, but immediately followed the failure to settle the case at the court-ordered mediation. At that point, petitioners simply made the decision, as was their right, to pursue their claim for money damages, which is still pending and unresolved despite what one might conclude reading respondent’s brief, and to voluntarily dismiss the injunction proceedings.

Fifteenth, respondent’s statement that it was entitled “to recover the Town’s reasonable attorneys’ fees and costs . . . in securing the dissolution and dismissal . . . of the injunction,” Respondent’s Brief at 11, speaks for itself and is refuted by the plain language of the dismissal order which states, “Pursuant to Rule 41(a)(2) of the West Virginia Rules of Civil Procedure, an action shall not be dismissed at the plaintiff’s instance” App. at 0305. And, indeed, the subsequent dismissal order is entitled, “ORDER GRANTING VOLUNTARY DISMISSAL.” App. at 0307.⁵ The idea that respondent effectuated the dismissal of petitioners’ injunction proceedings is merely another figment of respondent’s imagination or worse.

⁵ Indeed, in yet another example of how respondent does not feel constrained by any need for consistency, it contradictorily states in its brief that, “the Special Commissioner correctly recommended . . . that the Town was entitled to . . . the Petitioners’ \$25,000 injunction bond as

Sixteenth, respondent's argument that the special commissioner's proposed briefing and evidentiary schedule, which was never adopted by the trial court, was supposed somehow to supersede the briefing and evidentiary schedule that was actually entered by the trial court, Respondent's Brief at 12, speaks for itself. Obviously, when a trial court enters an order before the trial court's own schedule for the submission of briefing and evidence has expired, it is hardly sufficient to argue that a special commissioner's proposed schedule which was never adopted by the trial court somehow was supposed to control even though it is undisputed the parties were awaiting a decision by the trial court on the special commissioner's proposal.

Finally, respondent's statement that the invoices eventually produced (after the initial invoices produced were obviously inauthentic addressed to a mayor who had not yet taken office, Respondent's Brief at 14 n.9), "can and should withstand any level of judicial scrutiny," implying such finding was made by either the special commissioner or the trial court, is actually the statement of respondent's own counsel in an affidavit he filed in support of the respondent's motion for sanctions. App. at 1692. Of course, whatever system counsel was using permitted users to somehow substitute the names of yet-to-be-elected public officials and whether they could "withstand any level of judicial scrutiny" has yet to be determined because (1) petitioners' were denied any ability to secure, for example, a copy of the original invoices which were addressed to a municipality, with petitioners' discovery requests unanswered and petitioners' FOIA requests met with objection on the grounds of attorney/client privilege as if a lawyer's invoices to a public agency are protected by attorney/client privilege and (2) respondent's

the Town proves that it suffered as an expense resulting [from] Multiplex's . . . abandoning its Complaint with no determination on the merits." Respondent's Brief at 11 (emphasis in original.). In other words, when on the one hand, respondent needs the voluntary dismissal order to have some preclusive effect, it argues that it was a decision on the merits, but when on the other hand, respondent needs to explain how it is entitled to sanctions in a case in which it lost the only substantive rulings made, it argues that it was not a decision on the merits.

invoices have never been subjected to any meaningful judicial scrutiny and are the subject of other pending litigation in which respondent has also refused to produce these invoices in the face of suspicions that the respondent may be attempting to secure a double recovery.

III. SUMMARY OF ARGUMENT

The trial court has entered an order awarding the proceeds of a \$25,000 injunction bond that does not exist in order to reimburse respondent for its attorney fees and costs as a result of a preliminary injunction proceeding that it has been determined petitioners instituted in good faith and in which petitioners prevailed but voluntarily dismissed, without prejudice, in order to pursue damages claims, which are still pending. Moreover, this order was entered without requiring respondent to answer petitioners' legitimate discovery requests under *Pitrolo*; without any evidentiary proceeding at which petitioners could cross-examine respondent's questionable documentation of fees and costs allegedly incurred; and without any of the findings of fact or conclusion of law required under *Pitrolo* or the other decisions of this Court.

IV. ARGUMENT

A. STANDARD OF REVIEW

Although respondent argues that an order granting its motion for sanctions did not really impose the relief respondent was requesting, it argues, on the one hand, that as to the decision to impose sanctions, an "abuse of discretion" standard applies. Respondent's Brief at 19.⁶

⁶ Alternatively or perhaps simultaneously considering respondent's other conflicting positions, respondent argues that because a special commissioner was involved, the trial court's findings of fact should be reviewed under a clearly erroneous standard and its conclusions of law under a de novo standard. Respondent's Brief at 19. Of course, this is not a statutory action in which special commissioners are employed to conduct evidentiary proceedings and to make recommended decisions on disputed matters to a trial court. Indeed, one of petitioners' objections to what occurred was that no evidentiary proceeding was conducted.

Of course, as noted in petitioners' earlier brief, this is not a case in which a party has been sanctioned for violating a discovery order in which the standard of review is properly abuse of discretion. Syl. pt. 4, *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996). Likewise, here has never been any finding that petitioners violated R. Civ. P. 11, R. Civ. P. 16, or R. Civ. 37, all of which can serve as a basis for sanctions. Syl. pt. 1, *Bartles*. Indeed, not only are petitioners not charged with violating any court order, they prevailed in each and every substantive issue decided by the trial court. Accordingly, it would not appear that an "abuse of discretion" standard would be appropriate.

All the two-page sanctions order says with respect to any justification for imposing sanctions is: "The Town of Clay is entitled to the proceeds of the injunction bond . . . as the Town of Clay has proved to this Court that it suffered such an [sic] expenses and costs resulting from Multiplex's having filed a Complaint for a Temporary Injunction, and then abandoning the Complaint before the Court could determine the merits of the Complaint." App. 1765-1766.

There is no finding of bad faith. There is no reference to the fact that the trial court issued the preliminary injunction and ordered mediation, both over respondent's objections, or that the preliminary injunction was voluntarily dismissed without prejudice to the petitioners' right to pursue their damages claims which are still pending. Most importantly, not a single case is cited for the proposition that an enjoined party is entitled to sanctions when the moving party decides to pursue damages claims instead of injunctive relief, particularly where those damages claims are still pending and are unresolved. Additionally, there is absolutely no discussion of the *Pitrolo* factors or resolution of petitioners' motion to compel discovery responses and for an evidentiary proceeding.

Likewise, there is nothing in the special commissioner's report, which is incorporated by reference, that either (1) provides any legal basis for the imposition of sanctions or (2) addresses any the *Pitrolo* factors. App. 1022-1031. Indeed, in the trial court's own order entered on February 1, 2012, which was prepared by the special commissioner, it states: "Multiplex has not been shown to have acted in bad faith." App. 1735.

In *State ex rel. Hicks v. Bailey*, 227 W. Va. 448, 711 S.E.2d 270 (2011), which like this case involved an appeal of an award of attorney fees, this Court applied a *de novo* standard of review because, like this case, it involved legal issues as to when attorney fees can be awarded. Likewise, in this case, petitioners submit that a *de novo* standard of review is appropriate.

B. THE TRIAL COURT ERRED IN SANCTIONING PETITIONERS WHEN IT RULED THE PRELIMINARY INJUNCTION AWARDED PETITIONERS WAS NOT OBTAINED IN BAD FAITH.

In response to petitioners' assignment of error that "The trial court erred in sanctioning petitioners when it ruled the preliminary injunction awarded petitioners was not obtained in bad faith," respondent does not meet the error assigned, but instead argues that even though it filed a "motion for sanctions" the order granting its motion was "not as 'sanctions.'" Respondent's Brief at 19.

Instead, even though respondent's own motion was styled a motion for sanctions and requested in its prayer, "the Town respectfully requests this Honorable Court to enter an Order granting . . . the Town's Motion for Attorney's Fees, Costs, and Sanctions in connection with Plaintiffs' institution and initiation of this proceeding in bad faith, and without legitimate basis in fact and law," App. at 0326, because the special commissioner and trial court found "good faith" and not bad faith, respondent argues that "sanctions" have nothing to do with this case.

Rather, respondent argues that under W. Va. Code § 53-5-9, whenever a plaintiff voluntarily dismisses an injunction proceeding, the defendant is automatically entitled to all of the defendant's attorney fees and costs incurred in opposing the injunction, even if the defendant was unsuccessful in opposing the preliminary injunction and even if the dismissal of the preliminary injunction was expressly without prejudice to the plaintiff's right to pursue damages claims against the preliminarily enjoined defendant which are still pending. Respondent's Brief at 19-25. Obviously, this is not the law in West Virginia or anywhere else.

First, there was never an "injunction bond" posted, but rather cash in the amount of \$2,500 was paid into Court, App. 1-5, to which the Town never objected and, accordingly, W. Va. Code § 53-5-9 has no application. See *Ballard v. Logan*, 68 W. Va. 655, 70 S.E. 558 (1911)(liability on an injunction bond does not extend beyond its terms).⁷ In its earlier brief, respondents predicted that the respondent would be unable to point this Court to the language of any injunction bond, upon which it could have insisted but did not, that provides for indemnification of its attorneys fees and costs incurred in unsuccessfully opposing the preliminary injunction. Thus, W. Va. Code § 53-5-9's provisions regarding such an injunction bond have no application.

Second, where an injunction is only ancillary to the main object of the suit, which was dismissed without prejudice to petitioners, attorney fees and costs incurred in the proceeding are not recoverable from an injunction bond. *State v. Carden*, 111 W. Va. 631, 163 S.E. 54 (1932). Respondent claims that "Petitioners neither define nor identify the 'main object of the suit,'"

⁷ The trial court's decision to require payment of \$2,500 into court was never intended to be used to reimburse respondent for its attorney fees and expenses. Indeed, respondent did not even request a bond at the hearing to secure the preliminary injunction, which was just being issued until the parties mediated, but the only potential "damages" referenced by respondent after the hearing was the liquidated damages under the contract. App. 230-232 (emphasis supplied).

Respondent's Brief at 22, but the damages claims which petitioners ultimately decided to pursue rather than the injunctive relief which failed to produce a settlement was well-identified in their earlier brief.

Third, respondent's argument that the voluntary dismissal of the preliminary injunction by petitioners in favor of pursuing their damages claims was somehow *res judicata* with respect to the motion for sanctions, Petitioner's Brief at 23 (*stare decisis* bars relitigation to avoid forfeiture") and Petitioner's Brief at 28 ("Petitioners may not re-litigate the same issues, to avoid forfeiture") is (1) wrong factually because the trial court allowed petitioners to withdraw their request for injunctive relief pursuant to R. Civ. P. 41 and never granted respondent's "Motion to Dismiss and in the Alternative to Dissolve Temporary Restraining Order" and (2) wrong legally because "Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a *final adjudication on the merits* in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either *must be identical* to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action,"⁸ and there never has been a final adjudication on the merits that the trial court's issuance of a preliminary injunction was either wrongful or wrongfully obtained and the issues presented to the trial court based upon respondent's motion for sanctions are obviously not identical with issues presented in the preliminary injunction proceedings.

Fourth, respondent's argument that a voluntary dismissal under R. Civ. P. 41 of a complaint for preliminary injunction is the same as dissolution of a preliminary injunction on its

⁸ Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997)(emphasis supplied).

merits, Respondent's Brief at 24 ("the circuit court's dismissal of the injunction request . . . on the merits"), has no legal support⁹ and, indeed, in Syllabus Point 1 of *Marguerite Coal*, this Court held, "In an action on an injunction bond, *counsel fees and expenses expended in resisting the issuing of a preliminary writ of injunction are not damages sustained from the issuance of the*

⁹ None of the cases relied upon by the Town below support forfeiture of the injunction bond or an award of sanctions in this matter. *Meyers v. Washington Heights Land Co.*, 107 W. Va. 632, 149 S.E. 819 (1929), did not involve forfeiture of a bond or imposition of sanctions, but the validity of an injunction in the absence of a bond. *Glen Jean, Lower Loup & D.R. Co. v. Kanawha, Glen Jean & E.R. Co.*, 47 W. Va. 725, 35 S.E. 978 (1900), did not involve forfeiture of a bond, but involved the enjoined party's remedy of malicious prosecution, which requires that the enjoined party prevailed on the substantive merits of the underlying action. In *State v. Marguerite Coal Co.*, 104 W. Va. 324, 140 S.E. 49 (1927), this Court specifically noted, "The injunction on a hearing was dissolved by the circuit court, which ruling was later affirmed by this court." In *State v. Freshwater*, 107 W. Va. 210, 148 S.E. 6, 7 (1929), the case also arose from judicial dissolution of an injunction: "The injunction was subsequently dissolved." In *State ex rel. Shatzer v. Freeport Coal Co.*, 144 W. Va. 178, 180, 107 S.E.2d 503, 505 (1959), the case arose from judicial dissolution, on the merits, of an injunction secured by a bond: "By the injunction, issued at the instance of the defendant Freeport Coal Company, which also claimed to be the owner of the coal, the relator was prevented from mining and removing the Bakerstown seam of coal from the foregoing tract of land during the period April 20, 1954 to April 10, 1956, when the injunction was dissolved and the claim of the defendant Freeport Coal Company to ownership of the coal was denied following a decision of this Court in the companion case of *Freeport Coal Company v. Valley Point Mining Company*, 141 W. Va. 397, 90 S.E.2d 296." Finally, the last case relied upon by the Town below, *State ex rel. Citizens' Nat. Bank v. Graham*, 68 W. Va. 1, 69 S.E. 301, 301 (1910), also arose out of a judicial dissolution of an injunction on the merits: "This plea made the point that the circuit court on dissolving the injunction decreed that the bank recover the amount of the two judgments with interest and costs of injunction and 10 per cent. damages as provided by statute from the date of the injunction to the date of dissolution, and that on execution the same had been paid." The Town has relied upon no case in which a party who in good faith filed and obtained a preliminary injunction later dissolved in favor of pursuing damages claims has been assessed with the attorney fees and costs of the enjoined party. Indeed, in *Ohio River Valley Environmental Coalition, Inc. v. Timmermeyer*, 363 F. Supp. 2d 849 (S.D. W. Va. 2005), where plaintiffs, as in this case, voluntarily dismissed their case after being awarded a preliminary injunction prior to an adjudication on the merits of their claims, as in this case, the court nevertheless awarded attorney fees to the plaintiffs because they had substantially prevailed on the merits at the preliminary injunction stage. Certainly, petitioners do not mean to suggest that they should be awarded their attorney fees because they initially prevailed at the preliminary injunction phase of these proceedings, but the *Timmermeyer* case underscores that it is an adjudication on the merits that dictates which party prevailed for purposes of fee and/or cost-shifting.

writ, and are therefore not in the condition of the bond, and *cannot be taken into account in determining the amount of damages that are caused by it.*” (emphasis supplied).

Finally, in Syllabus Point 3 of *Glen Jean, Lower Loup & D.R. Co. v. Kanawha, Glen Jean & E.R. Co.*, 47 W. Va. 725, 35 S.E. 978 (1900), this Court held, “Where no bond has been required, damages are not recoverable, unless the injunction was maliciously sued out, without probable cause.” Again, in this case, there has been a specific finding that petitioners did not act in bad faith in seeking a preliminary injunction. To the contrary, the record is clear that petitioners acted in good faith. And, indeed, rhetorical hyperbole and inaccurate statements of the record aside, respondent identifies no bad faith in this section of its brief, but merely argues that because “an injunction bond was required and posted” (even though none exists in the file), it not need to show any bad faith, but is entitled to “forfeiture” of the non-existent \$25,000 bond even though it lost every single substantive ruling, including the preliminary injunction which both the special commissioner and trial court has found was obtained in good faith.¹⁰

C. THE TRIAL COURT ERRED IN ENTERING A SANCTIONS ORDER WITHOUT AFFORDING PETITIONERS THE RIGHT TO ENGAGE IN DISCOVERY; THE RIGHT TO THE PRODUCTION OF A COPY OF ORIGINAL INVOICES AND PAYMENT RECORDS; THE RIGHT TO AN EVIDENTIARY HEARING, AND WITHOUT MAKING ANY OF THE REQUIRED FINDINGS UNDER *PITROLO*.

As petitioners repeatedly stressed to the special commissioner and Circuit Court, this Court has repeatedly reversed and remanded cases where attorney fees have been awarded

¹⁰ Rather than cross-assigning error regarding the finding below that petitioners did not act in bad faith in seeking the injunction, respondent argues that its rights were prejudiced. Respondent’s Brief at 30. The relative prejudice and ultimate responsibility will be adjudicated in the pending suits for receivership and breach of contract and, respectfully, should not have been the subject of a motion for sanctions by a party that did not substantively prevail on anything.

without the requisite findings and conclusions under *Pitrolo*.¹¹ Moreover, this Court has repeatedly set aside awards of attorney fees due to the failure of the trial court to comply with these due process requirements.¹² Recently, in *Corporation of Harpers Ferry v. Taylor*, 227 W. Va. 501, 711 S.E.2d 571 (2011), this Court reiterated a non-moving party's right to an evidentiary hearing on a request for award of attorney fees and after it became apparent that respondent was proffering questionable documents, petitioners repeatedly requested an evidentiary hearing in this case.

¹¹ See, e.g., *Paugh v. Linger*, 228 W. Va. 194, 201, 718 S.E.2d 793, 800 (2011) (“The issue is remanded to the circuit court with directions to remand to the family court for entry of an order making findings of fact which would allow a court to engage in meaningful review of the award of attorney's fees.”)(citing *Pitrolo*); *Croft v. TBR, Inc.*, 222 W. Va. 224, 230, 664 S.E.2d 109, 115 (2008) (“we remand for the circuit court to determine the issue of reasonable attorney fees and costs pursuant to the factors set out in Syllabus Point 4 of *Aetna Casualty & Surety Co. v. Pitrolo*); *Horkulic v. Galloway*, 222 W. Va. 450, 465, 665 S.E.2d 284, 299 (2008) (“the lower court shall ascertain the reasonable award by reference to syllabus point four of *Aetna Casualty & Surety Co. v. Pitrolo*”); *Heldreth v. Rahimian*, 219 W. Va. 462, 470-471, 637 S.E.2d 359, 368-369 (2006) (“On remand, the trial court is to determine an award by applying the factors set forth in *Bishop Coal* and *Pitrolo*”); *Statler v. Dodson*, 195 W. Va. 646, 648, 466 S.E.2d 497, 499 (1995) (“we remand this case for a determination of . . . whether the amount of legal fees requested by Mr. Scales is a ‘reasonable fee’ under . . . *Pitrolo*”); *Pitrolo*, 176 W. Va. at 195, 342 S.E.2d at 161 (1986)(reversing and remanding an award of attorney's fees finding that “The trial court's failure . . . to make any findings of fact or conclusions of law regarding the calculation of the attorney's fee award gives this Court nothing upon which to base our review.”).

¹² *State ex rel. Rees v. Hatcher*, 214 W. Va. 746, 749-50, 591 S.E.2d 304, 307-08 (2003) (“The record below shows that Judge Hatcher failed to provide the petitioner with an opportunity to respond to the assessment of sanctions); *Kanawha Valley Radiologists, Inc. v. One Valley Bank, N.A.*, 210 W. Va. 223, 229, 557 S.E.2d 277, 283 (2001) (“We have previously determined, on numerous occasions, that a circuit court has erred by failing to afford a party notice and the opportunity to be heard prior to awarding attorney's fees.”); *Czaja v. Czaja*, 208 W. Va. 62, 75-76, 537 S.E.2d 908, 921-22 (2000) (“In failing to accord Appellant's counsel an opportunity to respond to the lower court's basis for assessing fees and costs, the most basic of all protections inherent to our judicial system has been violated.”); *Daily Gazette Co. v. Canady*, 175 W. Va. 249, 251, 332 S.E.2d 262, 264 (1985) (“Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.”)(citation omitted).

Again, rather than addressing these legal principles, respondent argues that this was not a sanctions order, even though it granted respondent's motion for sanctions, and that "Petitioners have no 'right' to discovery, and are not entitled to 'discovery', or an evidentiary hearing, or to compel discovery." Respondent's Brief at 32. Noticeably absent, however, from respondent's brief is any legal authority in support of the proposition that a party against whom a judgment is sought (again, there is no dispute that no injunction bond exists against which respondent can execute, but rather, unless this Court sets aside the "judgment," respondent will be able to enforce it like any other judgment), is not entitled to discovery or an evidentiary hearing prior to entry of a "judgment."

Throughout its brief, but mainly in support of its argument that petitioners were not entitled to discovery or an evidentiary hearing, respondent argues that because this case involved "forfeiture" of an "injunction bond," petitioners were not entitled to due process: "Typical discovery rules, and civil procedure rules do not apply in cases of extraordinary relief" Respondent's Brief at 32 n.18. Respondent could not be more wrong.

First, "Equity abhors a forfeiture." *Warner v. Haught, Inc.*, 174 W. Va. 722, 329 S.E.2d 88 (1985).

Second, because deprivation of a property interest is involved, forfeiture implicates the due process clause of the federal and state constitutions. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993)(forfeiture of real estate without hearing violative of due process); *State v. Forty Three Thousand Dollars And No Cents (\$43,000.00) In Cashier's Checks*, 214 W. Va. 650, 654, 591 S.E.2d 208, 212 (2003)("the permanent deprivation of property under the forfeiture act implicates concern for procedural due process").

Finally, W. Va. Code § 53-5-9 does not provide and has never been interpreted as providing that if a party post an injunction bond to secure a preliminary injunction, but later voluntarily dismisses it in favor of a suit for damages, the enjoined party is automatically entitled to “forfeiture” of bond as “costs” or “damages.”¹³

D. THE TRIAL COURT ERRED IN ENTERING A SANCTIONS ORDER BEFORE RESPONDENT HAD COMPLIED WITH THE TRIAL COURT'S OWN ORDER TO PROVIDE DOCUMENTATION REGARDING ITS ALLEGED ATTORNEY FEES AND COSTS, AND BEFORE THE PERIOD FOR PETITIONERS TO RESPOND TO THE SPECIAL COMMISSIONER'S PROPOSED SANCTIONS ORDER HAD EXPIRED. BECAUSE THE SANCTIONS ORDER WAS ENTERED UNDER THESE CIRCUMSTANCES, THIS COURT SHOULD REVERSE THE ORDER OF THE CIRCUIT COURT AND REMAND FOR FURTHER PROCEEDINGS.

One of the most perplexing aspects of this case is why the trial court entered its sanctions order on February 15, 2012, despite the fact that it had signed an order on February 1, 2012, directing respondent to submit its documentation by February 24, 2012, and affording petitioners until March 12, 2012, to respond to respondent's submission. App. 1735. Respondent's baffling arguments regarding how it was somehow proper to do so can be refuted by reference to a single document in the record. After the trial court entered this scheduling order, but before the parties had been advised the trial court entered the judgment order, respondent's counsel executed a

¹³ Indeed, this Court has held that the protection by those asking for a bond does not enlarge the liability of the obligors outside the language of the bond actually acquired and executed. *State ex rel. Shenandoah Val. Nat. Bank v. Hiatt*, 127 W. Va. 381, 32 S.E.2d 869 (1945). Moreover, it has held that liability on an injunction bond does not extend beyond the terms therein used, fairly construed, and absolute voids in such a bond cannot be filled by insertion or addition of things which according to law should have been put into it, or which it is merely supposed the parties intended to include. *Ballard v. Logan*, 68 W. Va. 655, 70 S.E. 558 (1911). Finally, this Court has held that attorney fees and expenses in resisting a preliminary injunction, which is what has been awarded in this case, cannot be the subject of a suit on the bond. Syl. pt. 1, *State v. Marguerite Coal Co.*, 104 W. Va. 324, 140 S.E. 49 (1927). Of course, this only makes sense as how can a party against whom a preliminary injunction was issued claim damages for fees and expenses undertaken prior to issuance of the preliminary injunction, particularly when it is ultimately adjudged that the preliminary injunction was obtained in good faith?

joint order entitled “AGREED ORDER STAYING TOWN’S MOTION FOR SANCTIONS” in which both sides agreed to stay “additional submissions by defendant, Town of Clay, and by plaintiff, Multiplex, Inc.” App. at 1767. If this scheduling order somehow did not exist, as respondent may be contending, or if it was superfluous, as respondent appears to be contending, and if this case really did not involving the imposition of “sanctions,” then why did respondent’s counsel sign an “AGREED ORDER STAYING TOWN’S MOTION FOR SANCTIONS” suspending respondent’s obligations under that scheduling order?

E. THE TRIAL COURT ERRED IN ORDERING THE FORFEITURE OF A \$25,000 INJUNCTION BOND THAT DOES NOT EXIST AND WAS NEVER POSTED BECAUSE THE TRIAL COURT PERMITTED PETITIONERS TO MAKE A CASH DEPOSIT OF \$2,500 TO SECURE THE PRELIMINARY INJUNCTION IN LIEU OF A BOND. BECAUSE THE TRIAL COURT HAS ORDERED THE FORFEITURE OF AN INJUNCTION BOND THAT DOES NOT EXIST, THIS COURT SHOULD REVERSE AND REMAND WITH DIRECTIONS THAT IF ANY PENALTY BE IMPOSED ON PETITIONERS, IT BE LIMITED TO THE \$2,500 CASH DEPOSITED BY PETITIONERS TO SECURE THE PRELIMINARY INJUNCTION.

As previously noted, this Court has held that:

1. Liability on an injunction bond does not extend beyond the terms therein used, fairly construed.
2. Absolute voids in such a bond cannot be filled by insertion or addition of things which, according to law, should have been put into it, or which it is merely supposed the parties intended to include.
3. The condition of a bond, given to put into effect an injunction against a judgment, requiring the judgment debtor only to perform and discharge the orders and decrees of the court in the injunction suit, respecting the judgment, does not make the obligors liable for the judgment unless nor until a decree therefor is rendered, nor for costs in the equity suit at all.

Syl. pts. 1, 2, and 3, *Ballard v. Logan*, 68 W. Va. 655, 70 S.E. 558 (1911). Here, respondent had the opportunity to place any bond in the appellate record, but did not do so because no bond was ever demanded by respondent and no bond was ever posted. Rather, the parties proceeded to

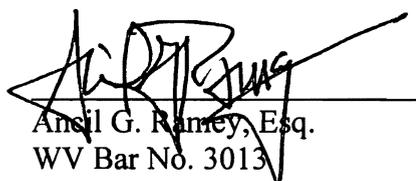
mediation and once that was unsuccessful, the parties proceeded to suing one another for breach of contract and the preliminary injunction, in force for only a few weeks, was voluntarily withdrawn. Certainly, if entitled to anything, it would only be the \$2,500 in cash actually deposited and which was apparently sufficient to respondent.

VI. CONCLUSION

The petitioners respectfully request that either this Court reverse the judgment of the Circuit Court of Clay County and remand for entry of judgment as a matter of law in their favor or, in the alternative, remand this case for further proceedings to either afford petitioners their rights of discovery and an evidentiary hearing or a reduction in petitioners' obligation to respond to the \$2,500 deposited to secure the preliminary injunction.

**MULTIPLEX, INC., a West Virginia
corporation; ART POFF; and PAMELA
POFF**

By Counsel

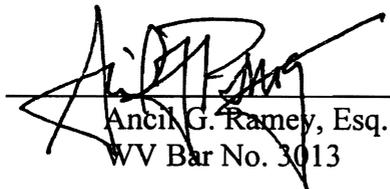


Ansil G. Ramsey, Esq.
WV Bar No. 3013
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington, WV 25722-2195
Telephone (304) 526-8133

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on August 22, 2012, I served the foregoing **“REPLY BRIEF OF THE PETITIONERS”** upon counsel of record, by electronic mail and by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Carl J. Roncaglione, Jr. Esq.
1018 Kanawha Blvd., East
Suite 401
Charleston, WV 25301
carlroncaglionejr@yahoo.com
Counsel for Town of Clay


Ancil G. Ramey, Esq.
WV Bar No. 3013

Exhibits on File in Supreme Court Clerk's Office