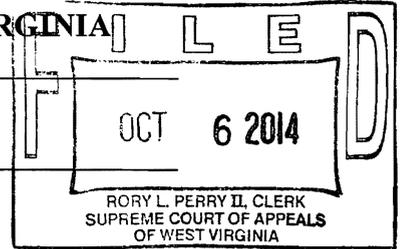


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0661



MTR GAMING GROUP, INC.,

Petitioner,

v.

EDSON R. ARNEAULT,

Respondent.

PETITIONER'S BRIEF IN SUPPORT

On Appeal from the Circuit Court of Hancock County
(Case No. 09-C-175R)

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TO: THE HONORABLE CHIEF JUSTICE
THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS

AND NOW comes Petitioner, MTR Gaming, Inc.¹ (hereinafter “MTR”), by and through counsel, Robert J. D’Anniballe, Jr., Esq. of the law firm Pietragallo Gordon Alfano Bosick & Raspanti, LLP, and hereby requests that this Honorable Court reverse the decision of the Honorable Judge David J. Sims (hereinafter “Judge Sims”) of the Circuit Court of Hancock County (hereinafter “Circuit Court”) awarding attorney fees to Edson R. Arneault (hereinafter “Arneault” or “Respondent”).

I. Assignment of Error

1. The Circuit Court erred in awarding Respondent attorney fees when a *per diem* penalty had already been imposed upon Petitioner.

II. Statement of the Case

A. Parties

Respondent Edson R. Arneault is an adult individual who currently resides in New Smyrna Beach, Florida. Appendix p. 139. Arneault, a certified public accountant among other things, entered the casino and racetrack industry in 1992 when he was asked to provide accounting expertise in the sale of a racetrack called Mountaineer Park located in New Cumberland, West Virginia. Appendix p. 139. Arneault was a significant shareholder and Chief Executive Officer of MTR from 1995 through October 2008. Appendix p. 140. Arneault remained CEO until October 2008 having informed the MTR Board of Directors in April, 2008

¹ MTR Gaming Group, Inc. merged with Eldorado Resorts, Inc., effective September 19, 2014. For the purposes of this proceeding, the entity will continue to be referred to as MTR Gaming Group, Inc. or MTR. The information contained herein regarding MTR will be based upon its existence at the time of the proceedings at issue in this appeal.

that he did not intend to continue as CEO when his current term of employment expired. Appendix p. 140.

Petitioner, MTR, is a corporation organized under the laws of Delaware and has a principal place of business in Wexford, Pennsylvania and a business address of Route 2 South, Chester, West Virginia 26034. MTR owns and operates gaming businesses, including Presque Isle Downs & Casino (hereinafter "PIDI"), Mountaineer Casino, Race Track and Resort in Chester, West Virginia, and Scioto Downs in Columbus, Ohio.

B. Facts and Proceedings Below

On or about February 19, 2010, the parties settled previous claims at issue in this case and entered into a "Settlement Agreement and Release" containing the following forum selection clause:

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.

Appendix p. 44, ¶ 1. On March 1, 2010, this "Settlement Agreement and Release" was incorporated *in toto* into an Order of Circuit Court settling this matter. Appendix p. 44, ¶ 1. Thereafter, on September 26, 2011, MTR filed a case in the United States District Court for the Western District of Pennsylvania captioned *MTR Gaming Group, Inc. v. Edson R. Arneault* (Case No.: 1:11-cv-00208) (the "Contract Case") which included claims arising from the "Settlement Agreement and Release," an alleged violation of the Circuit Court's Order dated March 1, 2010. Appendix pp. 45, 47-48 ¶¶4, 11-14. Prior to MTR filing the above stated action, on April 15, 2011, Arneault and other plaintiffs, clearly also in direct violation of the Circuit Court's March 1, 2010 Order, filed suit in the United States District Court for the Western District of Pennsylvania (hereinafter the "District Court") against, among other Defendants, MTR. *Arneault v. O'Toole*,

W.D.Pa. No. 1:11-cv-00095 (hereinafter the "Civil Rights Case"). Appendix p. 236. In his Pennsylvania suit, Arneault also incorporated the Settlement Agreement in his complaint as an attachment and otherwise placed the contract directly at issue. Thus, MTR did not file the Contract Case as an act of bad faith, but instead, reasonably believed that Arneault had waived his right to enforce the forum selection clause, and filed its action in the same forum selected by Arneault. While the Circuit Court found that MTR was incorrect in its belief that Arneault waived the forum selection clause, MTR's incorrect belief does not equate to bad faith. Indeed, Respondent acknowledged the reasonableness of MTR's belief when Arneault himself agreed that his Pennsylvania action sued under the Settlement Agreement, and this was illustrated by Arneault's subsequent withdrawal of one of his claims in the PA action.

On or about November 10, 2011, Mr. Arneault filed a Petition for a Rule to Show Cause (the "Contempt Petition") seeking to have the Circuit Court hold MTR in contempt of its March 1, 2010 Order because the filing of the "Contract Case" violated the forum selection clause of the "Settlement Agreement and Release." Appendix p. 46, ¶ 5. On November 10, 2011, the Circuit Court, the Honorable Arthur J. Recht (previously the judge on this matter and hereinafter "Judge Recht") issued a Rule to Show Cause Order commanding that MTR appear to show cause why it should not be held in civil contempt of the Circuit Court, fined and/or imprisoned, if appropriate, for failure to obey the lawful Order of the Circuit Court dated March 1, 2010, and entered on March 3, 2010, for the matters alleged in Mr. Arneault's "Contempt Petition." Appendix p. 46, ¶ 7. Also on November 10, 2011, Mr. Arneault filed a Motion to Dismiss the "Contract Case" in the United States District Court for the Western District of Pennsylvania alleging, in part, that the forum for Counts II, IV, and V was improper in the Western District of Pennsylvania pursuant to the forum selection clause of the "Settlement Agreement and Release." Appendix p. 52, ¶ 6.

On January 25, 2012, the Circuit Court held a hearing on Mr. Arneault's "Contempt Petition." Appendix pp. 1-43. By a *nunc pro tunc* Order from Judge Recht dated April 4, 2012, but effective as of January 25, 2012, the Circuit Court, ruled on Mr. Arneault's "Contempt Petition," holding that "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 that Counts II, IV, and V of the Contract Case should be dismissed based upon the forum selection clause." Appendix p. 47, ¶ 11. Judge Recht was unmistakably persuaded that certain claims in the Civil Rights case, specifically the promissory estoppel count, also arose from the Settlement Agreement and should be dismissed:

But I am vexed by statements made by Mr. Arneault's attorney which, in essence, *do concede that there is certain portions [sic] that do grow out of the Settlement Agreement, and they should be dismissed.* (Appendix p.31).

In fact, had those claims remained, Judge Recht stated *there would be a contempt*:

Now, what is being withdrawn is the claim for unjust enrichment and promissory estoppel. Those are acknowledged to grow out of the Settlement Agreement, and that's what is being dismissed. *And if there was to be a contempt, that's what it would be, and there is no longer a reason for the contempt.* (Appendix p. 30.)

Taken together, these statements show that Judge Recht *acknowledged* that Arneault's claims for promissory estoppel and unjust enrichment arose out of the Settlement Agreement, and that until they were withdrawn *during the hearing*, Arneault was *likewise in contempt*. The transcript of the hearing shows that Judge Recht allowed a ten-minute recess so that Arneault's West Virginia counsel could contact his federal counsel in Pennsylvania and have him draft a dismissal of the offending counts in federal court and fax the same to Judge Recht to purge his contempt:

MR. GUIDA: Judge, if the Court would permit me a five or ten-minute recess, I will get ahold of Mr. Mizner and inquire of him.

THE COURT: Yeah, sure.

MR. GUIDA: Thank you.

THE COURT: We'll take a ten-minute recess.
(Brief recess is taken.)

THE COURT: All right.

MR. GUIDA: Your honor, I did contact Mr. Mizner, and he is literally in the process now of drafting a dismissal to that specific count. I think there was some other counts he was going to dismiss, but in any event, I got the fax number from Corey. Appendix p. 31.

Based on Arneault's representations that he withdrew the promissory estoppel claim, which indisputably arises from the Settlement Agreement, Judge Recht then declined to hold Arneault in contempt: "I'm not finding Arneault in contempt in light of this concession." Appendix p. 40. However, based on these statements it is clear that Arneault was in contempt of the March 1, 2010, Order from April 11, 2011, when he filed the Civil Rights Case which included claims arising from the Settlement Agreement, until January 25, 2012, when he withdrew the offending claims. Thus, it is clear that even if MTR was incorrect in its belief, it had, at the very least, a reasonable basis for believing that Arneault had waived the forum selection clause.

As a result, the Circuit Court held MTR in contempt of the March 1, 2010, Order of the Circuit Court since Counts II, IV, and V of the "Contract Case" were in violation of the March 1, 2010, Order of the Circuit Court. Appendix p. 48, ¶ 15. Also, the Circuit Court imposed a sanction against MTR of Five Hundred Dollars (\$500.00) per day "until such time as it (MTR) dismisses Counts II, IV, and V of Case No. 1:11-cv-00208, captioned *MTR Gaming Group, Inc., v. Edson R. Arneault* and filed in the United States District Court for the Western

District of Pennsylvania, the sum of which shall be paid upon further order of this Court." Appendix, pp. 48-49, ¶19. It is significant to note that, at this time, the Court took no evidence as to Respondent's actual injury or harm relating to the alleged contempt. Appendix, pp. 1-42. Arneault's "Contempt Petition" also sought attorneys' fees, and, during oral argument on the "Contempt Petition," the Circuit Court expressly reserved that issue to be addressed at a later date:

MR. GUIDA: Your Honor, one other matter. We also prayed, Judge, for attorney's fees, and if the Court could address that issue.

THE COURT: I will. I'll defer that.

Appendix p. 36.

On June 18, 2012, MTR petitioned this Court for a *writ of prohibition* to prevent the Circuit Court from enforcing its Order finding MTR in civil contempt of its March 1, 2010 Order. Appendix p. 132-171. On September 27, 2012, Sean J. McLaughlin, Judge of the United States District Court for the Western District of Pennsylvania, entered an Order on Mr. Arneault's Motion to Dismiss in which he agreed with the Circuit Court that Counts II, IV, and V of MTR's Complaint in the "Contract Case" arose from the "Settlement Agreement and Release" and violated its forum selection clause, and therefore dismissed those Counts without prejudice to reassert them in the Hancock County Circuit Court. Appendix p. 115.

On June 18, 2013, this Court issued a memorandum decision denying MTR's Petition for a Writ of Prohibition, holding that "the circuit court's contempt order does not contain any instance of clear error" and "the circuit court did not exceed its legitimate power by issuing the contempt order." Appendix p. 122, ¶ 4. This Court made no findings relative to propriety of the *per diem* sanction imposed in this matter or the issue of an award of attorneys' fees. Further, this Court in no way indicated that MTR's argument was frivolous or made in bad faith.

Thus, to date, the Circuit Court held MTR in contempt of its March 1, 2010, Order, and this Court affirmed the Circuit Court's ruling. Further, the District Court for the Western District of Pennsylvania concurred in the ruling by the Circuit Court and this Court. On March 28, 2012, the Western District of Pennsylvania issued an order dismissing the unjust enrichment claim filed by Arneault. Appendix pp. 312-313.

On April 27, 2012, Arneault re-filed his claim of unjust enrichment in the Court of Common Pleas of Erie County, Pennsylvania, not in Hancock County, West Virginia. Appendix, p. 325, ¶ 10. In an October 4, 2013, Report and Recommendations of Special Master of the United States District for the Western District of Pennsylvania, the Special Master recommended an award of counsel fees to all Defendants including MTR. Appendix pp. 323-345. The Special Master's Recommendation was based upon Arneault's claims and actions in the Civil Rights Case, which was venued in the Western District of Pennsylvania, which is the matter that first led MTR to believe that the forum selection clause had been waived. Appendix pp. 323-345.

III. Summary of Argument

In awarding Arneault attorney fees after a *per diem* sanction had already been imposed upon MTR, the Circuit Court erred in its interpretation of *In re Frieda Q.*, 230 W.Va. 652, 742 S.E. 2d 68 (2013). The Circuit Court improperly enforced a punitive sanction on MTR after a *per diem* penalty had already been imposed upon MTR without any nexus to alleged harm. The *per diem* sanction was imposed after MTR was found to be in contempt of court for filing litigation in a Pennsylvania federal court. As will be demonstrated below, MTR did not engage in bad faith in this matter, but instead, acted reasonably under the set of circumstances presented, and pursued legal rights and protections available to it within the judicial system. *Frieda*, makes

clear that a civil contempt sanction **cannot** be punitive in nature. *Id.* at 668, 84. The Circuit Court erred in permitting Arneault a recovery of both a very significant and arbitrary *per diem* penalty, within the first five pages of the transcript of the hearing (Appendix pp. 1-5) as well as an award for attorney fees. A *per diem* penalty coupled with attorney fees is a punitive measure, particularly because there was no finding as to actual injury or harm to Arneault. Therefore, a reversal of the Circuit Court's decision imposing attorney fees upon MTR is proper.

VI. Statement Regarding Oral Argument and Decision

Oral argument is necessary pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, as MTR submits that the decision process would be significantly aided by such argument. Oral Argument is appropriate under Rules 19(a)(1), 19(a)(2) and 19(a)(3) because the herein Petition involves: (1) assignments of error in the application of settled law (Rule 19(a)(1)); (2) an unsustainable exercise of discretion where the law governing that discretion is settled (Rule 19(a)(2)); and (3) this result of the underlying action is against the weight of the evidence (Rule 19(a)(3)).

V. Argument

A. Standard of Review

When reviewing the imposition of a civil contempt order, the standard of review is three-fold: (1) the contempt order is reviewed under an abuse of discretion standard; (2) the underlying factual findings are reviewed under a clearly erroneous standard; and (3) questions of law and statutory interpretations are subject to *de novo* review. *State ex rel. Zirkle v. Fox*, 203 W.Va. 668, 510 S.E. 2d 502 (1998) (citing Syl. Pt. 1, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996)).

B. In Re Freida Q is the Controlling Law As to This Issue and Prohibits Punitive Civil Contempt Awards

Under a review of controlling case law, Arneault’s Motion should have been denied as inconsistent with West Virginia law because the motion sought to impose a punitive sanction upon MTR. The law set forth by this Court in the recent decision of *In re Frieda Q* provides significant guidance as to the propriety of the sanction that was entered in this matter, 230 W.Va. 652, 742 S.E.2d 68. Specifically, in *Frieda* this Court reviewed the appropriateness of a contempt order *nunc pro tunc* imposing a prospective monetary sanction of \$50.00 *per diem*. This Court began its reasoning by noting that the threshold question was whether the contempt was civil or criminal in nature. *Id.* at 663, 79. This Court reaffirmed its prior holding that a *per diem* penalty is permissible as a civil contempt sanction in a case where the litigant has refused to obey an order of the court. *Id.* at 666, 82 (citing *State Farm Mut. Auto. Ins. Co. v. Stephens*, 425 S.E.2d 577, 587 (W.Va. 1992)). However, this Court went on to note that “civil contempt sanctions must be remedial, not punitive.” *Id.* at 664, 80.

In *Frieda*, this Court then noted that an alternative to a *per diem* sanction is a monetary civil contempt sanction for compensation or damages. *Id.* at 667, 83. This Court was clear however that “a monetary civil contempt sanction for compensation or damages must be based upon competent evidence of actual injury or harm to the aggrieved party resulting from the contemner’s refusal to follow an order of the circuit court. The sanction must be remedial, not punitive.” *Id.* at 668, 84. Finally, the court held that,

Where the ... record contains no evidence showing the actual harm, if any, resulting from [Respondent’s] contumacious conduct – and where the indisputable fact is that the amount of the sanction was based on a *per diem* fine, not on any injury to harm to the Respondents—the sanction imposed by the circuit court cannot stand. *Id.*

In the case at hand, it should be undisputed that the January 25, 2012 Findings of Fact and Conclusions of Law is a finding of civil contempt. According to the decision in *Frieda*, a sanction paid to the complaining party must be in an amount commensurate with the harm or actual damage to the complaining party. Similar to the facts in *Frieda*, the Circuit Court in the instant case did not perform an analysis, provide for discussion, or take evidence as to the actual harm or damage to Respondent. Appendix pp. 1-5. Rather, as in *Frieda*, there was a seemingly arbitrary fine imposed by the Circuit Court. Indeed, neither the January 25, 2012 Findings of Fact and Conclusions of Law nor the transcript of the hearing address any harm or damage to Arneault in any manner whatsoever. While prospective *per diem* penalties are permissible as a civil contempt sanction, the requirement that the same be remedial and not punitive still must be satisfied. Here, the significant arbitrary award of \$500 a day indicates a punitive award in and of itself. To layer on top of such an award an additional sanction of an award of attorneys' fees is undoubtedly an impermissible punitive penalty, and therefore, Respondent's motion should not have been granted.

C. *MTR Did Not Act In Bad Faith in Pursuing Its Legal Rights, and Faerber does not Permit a Punitive Sanction*

MTR did not commit bad faith simply by pursuing its legal rights and awaiting court determination. The only basis that Respondent has offered to establish bad faith is that MTR opposed Respondent's contempt petition, maintained its Contract Case until it was ruled upon, and, within its legal rights, sought review of the Circuit Court's decision. There is no question that "[b]ringing or defending an action to promote or protect one's economic or property interests does not *per se* constitute bad faith . . . within the meaning of the exceptional rule in equity authorizing an award to the prevailing litigant of his or her attorney's fees." *Yost v.*

Fuscaldo, 185 W.Va. 493, 408 S.E. 2d 72 (1991) (citing *Sally-Mike Properties v. Yokum*, 365 S.E.2d 246 (W.Va. 1986)).

Respondent relied upon *United Mine Workers v. Faerber*, 179 W.Va. 73, 365 S.E. 2d 353 (1986), to support his position that he is entitled to an award of attorney fees. As noted above, *Frieda* provides a detailed recitation of West Virginia law governing awards of sanctions in contempt matters. But, even considering the case at hand under the *Faerber* case, a request for an award of attorney's fees must be denied.

Faerber involved an order of court requiring all thin seam coal mines to have a "full roof bolting" support plan. Specifically, the court noted that the case "involved a safety issue of great importance. . . concern[ing] the health or safety of the citizens of West Virginia," *Id.* at 75, 355. After the Order was entered against Faerber, the Commissioner of the West Virginia Department of Energy, Faerber did not pursue legal remedies, but instead, held meetings complaining about the ruling. This Court in *Faerber*, as in *Frieda*, noted that an appropriate sanction in a civil contempt case is "an order requiring the payment of a fine in the nature of compensation or damages to the party aggrieved by the failure of the contemner to comply with the order." *Id.* at 76, 356. This Court went on to find that the United Mine Workers suffered no real detriment other than its inconvenience and costs and reasonable attorneys' fees. Thus, the court ordered compensatory damages in the amount of \$100 and reasonable attorneys' fees.

Thus, not only is the case at hand distinguishable from *Faerber*, but even under *Faerber*, the only case cited by Respondent to support his position, the damages requested by Respondent are not recoverable as the same would be impermissibly punitive. First, *Faerber* dealt with the safety and welfare of West Virginia mine workers. Clearly, there is no important health or safety consideration or public welfare issue involved in Respondent's case. Second, MTR did not

engage in dilatorily delay in complying with the Circuit Court's Order. Instead, MTR continued to rightfully pursue its economic and property interests in defending this action as well as pursuing its claims in the Western District of Pennsylvania, the forum initially selected by Respondent. Certainly, Judge Recht's comments as to Arneault's actions and admissions and that of his attorney in the Civil Rights Action should be dispositive as to MTR having, *at the very least*, a reasonable basis for its belief that Arneault had waived the forum selection clause, even if MTR was ultimately found to have been mistaken in its belief. Simply arriving at a different conclusion after considering the law does not amount to bad faith or a frivolous action. While MTR may not have been victorious in its pursuits in the Western District of Pennsylvania or previously before this Court, its beliefs and positions were reasonable and supported by good faith arguments under the application of existing law. *See Daily Gazette Co. v. Canady*, 179 W. Va. 249, 332 S.E. 2d 262 (1985). Simply put, that fact that MTR did not prevail in its arguments does not equate to bad faith. *See Yost*, 185 W.Va. at 500, 408 S.E.2d at 79.

Further, Respondent has now been permitted to recover under two different methods. Consistent with the facts in *Frieda*, Plaintiff sought a *per diem* award of damages in this case and, ultimately, collected \$133, 802. Appendix, p. 360. That was a choice Respondent made in his request to the Circuit Court. Arneault should not have also been granted recovery for compensation or damages because the sanction then certainly became punitive and even bordered on becoming a criminal sanction. *Faerber* is illustrative of this point. In *Faerber*, this Court considered the damages incurred and then awarded a sanction to compensate for the same. In *Faerber*, this Court did not make an award of a significant arbitrary *per diem* sanction and then look to the damages that had resulted from the contempt. In the case at hand, the Circuit Court made no findings nor took any evidence as to actual harm, but instead, chose a *per diem*

sanction. To then allow an award of attorneys' fees as an additional second sanction makes the \$500 per diem award entirely punitive. As stated above, West Virginia law explicitly prohibits punitive civil contempt sanctions. As such, for all of the above reasons, Respondent's Motion should have been denied.

VI. Conclusion

For the foregoing reasons, the Circuit Court erred in awarding Respondent attorney fees in addition to the already imposed *per diem* sanction.

WHEREFORE, the Petitioner respectfully requests that this Honorable Court reverse the decision of the Circuit Court granting attorney fees to Arneault and for any such other relief as this Honorable Court deems necessary, appropriate, and proper.

Respectfully Submitted,



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VII. Verification

I, Robert J. D'Anniballe, Jr., hereby declare, under penalty of perjury under the laws of the State of West Virginia, that I have read the above Brief, and I know it is true of my own knowledge, except to those things stated upon information and belief, and as to those I believe to be true.



Robert J. D'Anniballe, Jr., Esq.
Declarant

Respectfully Submitted,



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CERTIFICATE OF SERVICE AND
MEMORANDUM OF PERSONS TO BE SERVED

I do hereby certify that on this 3rd day of October, 2014, I served the foregoing *Petitioner's Brief in Support* by U.S. First Class mail to the parties at the addresses set forth below:

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