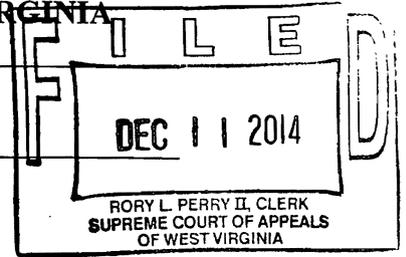


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0661



MTR GAMING GROUP, INC.,

Petitioner,

v.

EDSON R. ARNEAULT,

Respondent.

PETITIONER'S REPLY BRIEF IN RESPONSE TO
RESPONDENT'S BRIEF WITH CROSS-ASSIGNMENT OF ERROR

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 Group, 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 submits this Reply Brief in Response to Respondent’s Brief with Cross-Assignment of Error and requests this Honorable Court to 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. STATEMENT OF THE CASE

On or about February 19, 2010, the MTR and Arneault settled previous claims at issue in this case and entered into a "Settlement Agreement and Release" with a forum selection clause providing exclusive venue in the Circuit Court of Hancock County, West Virginia. Appendix p. 44, ¶ 1. On March 1, 2010, the Settlement Agreement and Release was incorporated *in toto* into an Order of Circuit Court settling this matter. Appendix p. 44, ¶ 1. On April 15, 2011, Arneault and other plaintiffs 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. Subsequent to Arneault’s filing of the Civil Rights Case, on September 26, 2011, MTR filed a case in the United States District Court for the Western District of

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.

Pennsylvania (the "Contract Case") which included claims arising from the Settlement Agreement and Release. Appendix pp. 45, 47-48 ¶¶4, 11-14. MTR did not file its Contract Case in bad faith; rather, it believed Arneault had waived the forum selection clause. In fact, Arneault eventually acknowledged that his Civil Rights Case involved claims under the Settlement Agreement, as demonstrated when Arneault withdrew a portion of his Civil Rights Case. Appendix, p. 31. This alone establishes that MTR had a reasonable belief, albeit ultimately held to be incorrect, that Arneault had waived the forum selection clause.

On or about November 10, 2011, 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 for failure to obey the Order of the Circuit Court dated March 1, 2010, and entered on March 3, 2010, for the matters alleged in Arneault's Contempt Petition. Appendix p. 46, ¶ 7.

On January 25, 2012, the Circuit Court held a hearing on Arneault's Contempt Petition. Appendix pp. 1-43. Here, the Circuit Court held MTR in contempt of its March 1, 2010 Order and found that Counts II, IV, and V of the Contract Case were in violation of the same. Appendix p. 48, ¶ 15. In this contempt finding, 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 the sum of which shall be paid upon further order of this Court." Appendix, pp. 48-49, ¶19. At this hearing, Arneault was provided a recess by the

Circuit Court in order to dismiss the counts of his Civil Rights Case in the Pennsylvania District Court, which were also in violation of the Circuit Court's March 1, 2010 order. Appendix, p. 31. With this, the Circuit Court did not find Arneault in contempt. Appendix, p. 40.

The issue of Respondent's request for attorney fees related to the Contempt Petition was not addressed at the January 25, 2012 hearing. Appendix p. 36. On December 6, 2013, Judge David Sims conducted a hearing on Arneault's Motion for Attorney Fees related to the Contempt Petition at issue. Appendix, p. 357. On June 3, 2014, Judge David Sims ordered MTR to pay \$54,087 in attorney fees. Appendix, p. 397. This award was in addition to the previous *per diem* penalty imposed by Judge Recht which was in the amount of \$133,802.

In his Brief, Respondent attempts to raise a cross-assignment of error that the Circuit Court erred in refusing to permit Arneault to recover additional attorney fees incurred by his Pennsylvania legal counsel, the Mizner Firm, in defending MTR's claim brought in the Western District of Pennsylvania. Arneault's Brief, pp. 17-19. The Circuit Court reviewed an invoice Arneault produced related to work performed by his Pennsylvania legal counsel and awarded Arneault \$4,687.80 attributed to the Mizner Firm for the work done in the Contempt Petition. Appendix, p. 396-97.

Respondent argues that the Circuit Court should have also awarded him the remaining fees of the \$23, 187.50 charged by the Mizner Firm for defending MTR's Contract Case brought in the Western District of Pennsylvania. Arneault's Brief, p. 18. However, this Court is not the proper venue for attorney fees related to claims brought in the Western District of Pennsylvania. Rather, any issues related to the Mizner Firm's fees for defending the Western District of Pennsylvania case should have been raised in that jurisdiction.

II. ARGUMENT

A. The Circuit Court's Award of Attorney Fees to Respondent Subsequent to a Previously Imposed *Per Diem* Penalty is an Impermissible Punitive Civil Contempt Sanction

The Circuit Court has imposed two separate, cumulative sanctions for civil contempt upon MTR, creating a punitive measure prohibited by West Virginia law. As previously set forth in MTR's Brief in Support of its Petition for Appeal, this Court's decision in *In re Frieda Q* establishes that "civil contempt sanctions must be remedial, not punitive." 230 W.Va. 652, 664, 742 S.E.2d 68, 80 (2013) (internal citations omitted). Here, the Circuit Court imposed upon MTR a \$500 *per diem* penalty totaling \$133,802, and then subsequently imposed an additional penalty of attorney fees totaling \$54,087. Appendix, pp. 48, 397. To impose two separate penalties upon MTR related to a single action is to impose a punitive civil contempt sanction and is an error on behalf of the Circuit Court.

In his Response to Petition for Appeal, Arneault argues that that the \$500 *per diem* penalty was to encourage MTR to comply with the Circuit Court's order and that the additional attorney fees were intended to compensate Arneault for fees he incurred. Arneault's Brief, p. 5. However, because civil contempt sanctions must be remedial and not punitive, the \$500 *per diem* penalty imposed upon MTR was more than sufficient to compensate Respondent for his attorney fees. In fact, the *per diem* penalty goes far beyond compensating Arneault. Respondent then goes on to argue that the award of attorney fees was "appropriate" because MTR "acted in bad faith." Arneault's Brief, pp. 5-6. This additional argument set forth by Arneault contradicts the very principle set by this Court that a civil contempt sanction cannot be punitive.

On one hand, Arneault argues that the Circuit Court's award of attorney fees compensates him for fees incurred as a result of MTR's contempt, and then on another hand, Respondent

further argues that the attorney fees were appropriate because MTR acted in bad faith. This bad faith argument raised by Respondent indicates that Arneault views the award of attorney fees as an appropriate punishment for MTR's actions – a punitive measure. Arneault cannot have it both ways.

The \$500 *per diem* penalty imposed upon MTR by Judge Recht resulted in a \$133,802 payment to Arneault. Appendix, pp. 360. Thereafter, the Circuit Court awarded Arneault an additional \$54,087 in attorney fees. Appendix, p. 397. Arneault's attorneys were performing work related to this matter on a contingent fee basis and upon an oral agreement that each attorney would receive a minimum flat fee of \$10,000. Appendix, p. 369. Thus, the initial *per diem* award of \$133,802 more than compensated Arneault for any fees associated with this matter, and in fact, the award went far beyond that. Arneault argues that the *per diem* award was for the sole purpose of encouraging MTR to comply with the Circuit Court's Order and that additional attorney fees were necessary as a remedial measure. Arneault's Brief, p. 5. However, an additional award of attorney fees after the substantial *per diem* penalty clearly equates to a punitive civil contempt measure, which is impermissible under West Virginia law.

In *Frieda*, this Court quoted a "functional test" established by Justice McHugh, which stated that

The appropriate sanction in a civil contempt case is an order that incarcerates a contemner for an indefinite term and that also specifies a reasonable manner in which the contempt may be purged thereby securing the immediate release of the contemner, **or 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.** (emphasis added).

230 W.Va. at 79, 742 S.E.2d at 663. This Court further clarified that a *per diem* penalty can be a permissible civil contempt sanction. *Id.* at 82, 666. In the instant case, the Circuit Court determined that incarceration was not appropriate because MTR was a corporate entity and chose

instead to impose a *per diem* penalty upon MTR. Appendix, p. 5. Then, subsequent to this finding and related sanction, the Circuit Court imposed an additional penalty of attorney fees.

In *United Mine Workers v. Faerber*, this Court did grant attorney fees when evaluating the civil contempt fine to impose. 179 W.Va. 73, 365 S.E. 2d 353 (1986). Respondent argues that *Faerber* illustrates that the attorney fees requested by Arneault are appropriate. Arneault's Brief, p. 12. However, the *Faerber* Court did not award attorney fees on top of a substantial *per diem* penalty, as Arneault received here.

Arneault also continues to assert that MTR acted in bad faith in pursuing its Contract Case in the Pennsylvania District Court. Arneault's Brief, pp. 12-17. MTR reasserts its argument from its initial Brief that it did not act in bad faith in pursuing legal remedies it believed were available. MTR's Brief, pp. 10-12. MTR filed its Contracts Case in the Pennsylvania District Court after Arneault filed his Civil Rights Claim in the Pennsylvania District Court. MTR's filing was based upon its belief that Arneault, in filing claims arising out of the Settlement Agreement and Release in the Civil Rights Case, had waived the forum selection clause.

Though MTR's belief on this issue turned out to be incorrect, as the courts in this matter have held, that does not make its pursuit of these claims a bad faith action. In fact, only three counts of MTR's Contract Case were found to be in contempt of the Circuit Court's Order. Respondent suggests that MTR's continued pursuit of a variety of legal remedies related this contempt matter illustrates bad faith and undue delay. Arneault's Brief, pp. 12-17. However, these actions by MTR should demonstrate its firmly held belief that it was acting in accordance with the law. MTR pursued legal rights available to it, and though MTR's belief was incorrect, an erroneous conclusion does not demonstrate bad faith.

As discussed above, a civil contempt penalty was already imposed upon MTR in the form of a *per diem* penalty. While *Faerber* does permit attorney fees in a civil contempt case in order to compensate, Arneault has already been afforded such recovery through the *per diem* award. *Faerber* does not demonstrate that attorney fees should be awarded as a sanction for civil contempt on top of another substantial penalty for the same contempt.

Frieda makes clear that civil contempt sanctions serve dual purposes: enforcing compliance with a court order **and** compensating for losses caused by noncompliance with such an order. *Id.* at 84, 668 (quoting *N.L.R.B. v. Monfort, Inc.* 29 F.3d 525, 528 (10th Cir. 1994) (emphasis added). The *per diem* penalty thus more than served this purpose, and any additional penalty, such as the attorney fees awarded by the Circuit Court, becomes punitive and is an erroneous extension of the law. The Circuit Court erred in granting Respondent attorney fees.

B. The Circuit Court was Correct in not Addressing Attorney Fees Related to Claims in Pennsylvania

Respondent fails to make a valid argument that the Circuit Court erred in refusing to include additional legal fees charged by the Mizner Firm for defending a claim in federal court in Pennsylvania. Arneault is raising the issue of attorney fees for a Pennsylvania District Court case in an improper venue. The Circuit Court reviewed the invoices submitted by Respondent, and, in its June 3, 2014 Order, determined that \$4,687.50 of the fees submitted by the Mizner Firm could be attributed to the contempt matter at issue here. Appendix, pp. 396-97. Respondent attempts to have the remainder of the Mizner Firm's \$23,187.50 invoice also included in the award of attorney fees ordered by the Circuit Court. This argument must fail. Respondent also alleges that he is seeking payment of fees for the Mizer Firm's work on only the counts of MTR's Contracts Case that were found in contempt of the Circuit Court Order. Appendix, p. 18. However, the

record does not support this, as the legal bill produced does not break down fees on specific counts of the Contracts Case. Appendix, pp. 172-75.

Again, MTR reiterates that it filed its Contracts Case in the Pennsylvania District Court only after Arneault filed his Civil Rights Case in the same venue. Furthermore, only three counts of MTR's Contracts Case were found to be in contempt of the Circuit Court's Order. The Circuit Court made a finding that the remaining attorney fees in the Mizner Firm's bill are attributed to defending the remaining portion of the Pennsylvania District Court claims. Appendix, p. 396. As such, neither the Circuit Court nor this Court are not the proper venue in which to raise the issue of attorney fees incurred in defending a claim brought in Pennsylvania. In fact, the United States District Court for the Western District of Pennsylvania would have been the proper venue for Arneault to raise this issue.

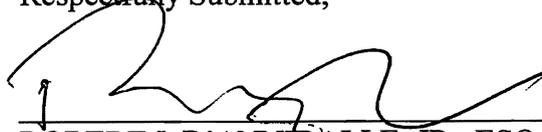
Arneault does not cite to any statute or law which would indicate that the issue of attorney fees in another jurisdiction should be reviewed and addressed by this Court or why it should have been addressed by the Circuit Court. Instead, Respondent points to *Frieda*, to illustrate a civil contempt award may compensate the aggrieved party. Arneault's Brief, p. 18. *Frieda* has been discussed by both parties at length and does not provide any reasoning for reviewing attorney fees incurred in the United States District Court for the Western District of Pennsylvania. As such, the Circuit Court did not err in refusing to allow Arneault to recover fees associated with defending the remaining portion of a case in the United States District Court for the Western District of Pennsylvania.

VI. Conclusion

For the foregoing reasons, the Circuit Court erred in awarding Respondent attorney fees in addition to the already imposed *per diem* sanction. However, the Circuit Court did not err in

failing to consider Respondent's attorney fees associated with defending a claim in United States District Court for the Western District of Pennsylvania. 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

I do hereby certify that on this 10th day of December, 2014, I served the foregoing *Petitioner's Reply Brief in Response to Respondent's Brief with Cross-Assignment of Error* by U.S. First Class mail to the parties at the addresses set forth below:

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