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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Docket No.: 14-0661

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

MTR GAMING GROUP, INC.,
Defendant below,

Petitioners,

vs.

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

EDSON R. ARNEAULT, Plaintiff below,

Respondent.

RESPONSE TO PETITION FOR APPEAL

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Table of Contents

I. CROSS-ASSIGNMENTS OF ERROR.....1

II. STATEMENT OF THE CASE.....1

III. SUMMARY OF ARGUMENT.....5

IV. STATEMENT REGARDING ARGUMENT AND DECISION.....6

V. ARGUMENT.....6

A. Argument in Opposition to Appellant's Assignment of Error.....6

1. Civil Contempt supports the assessment of attorneys' fees in addition to the $500 per diem fine imposed by the Circuit Court..... 6-10

2. In re Frieda Q is controlling law and supports the assessment of attorneys' fees in addition to the $500 per diem assessment imposed by the Circuit Court because the $500 per day assessment was remedial, not punitive.....10-12

3. The Circuit Court correctly awarded Mr. Arneault attorneys' fees based upon MTR'S bad faith in failing to voluntarily dismiss the offending claims in the Contract Case when MTR could have re-filed them in the Circuit Court of Hancock County, West Virginia.....12-17

B. Argument in Support of Cross-Assignments of Error.....17

1. The Circuit Court Erred by Refusing to Allow Mr. Arneault to Recover Fees Incurred by his Pennsylvania Counsel Defending Against the Counts Brought in the Western District of Pennsylvania in Violation of the Circuit Court's Order.....17-19

VI. CONCLUSION.....19

Table of Authorities

Cases

American Federation of State, County and Mun. Employees v. Civil Service Commission of West Virginia, 181 W.Va. 8, 380 S.E.2d 43 (1989).....9

Folk v. Wallace Business Forms, Inc., 394 F.2d 240 (Court of Appeals, 4th Circuit - 1968).....9

In re Frieda Q., 230 W.Va. 652, 742 S.E.2d 68 (2013).....10, 11, 17, 18

In re General Motors Corp., 110 F.3d 1003 (Court of Appeals, 4th Circuit - 1997).....9

In re General Motors Corp., 61 F.3d 256 (Court of Appeals, 4th Circuit - 1995).....9

In re Sorrell, 346 B.R. 417 (Bankruptcy Court, N.D.W.Va. - 2006).....9

Lane v. Prima Marketing LLC, 2008 WL 793642 (S.D.W.Va. - Unreported - 2008).....9

Office of Lawyer Disciplinary Counsel v. Cunningham, 200 W.Va. 339, 489 S.E.2d 496 (1997).....7

Omega World Travel, Inc. v. Omega Travel and Shipping, 110 F.3d 1003 (Court of Appeals, 4th Circuit - Unpublished - 1990).....9

State ex rel. Richmond American Homes of West Virginia, 226 W.Va. 103, 697 S.E.2d 139 (2010).....7

State ex rel. Robinson v. Michael, 166 W.Va. 660, 276 S.E.2d 812 (1981).....7, 18

United Mine Workers of America v. Faerber, 179 W.Va. 73, 365 S.E.2d 353 (1986).....12

Statutes/Rules

Federal Rule of Civil Procedure 41.....13

West Virginia Rule of Civil Procedure 18.....6

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0661

MTR GAMING GROUP, INC.,

Petitioner,

v.

EDSON R. ARNEAULT,

Respondent.

RESPONDENT'S BRIEF WITH CROSS-ASSIGNMENT OF ERROR

On appeal from the Circuit Court of Hancock County, West Virginia
(Case No. 09-C-175R)

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I. CROSS-ASSIGNMENT OF ERROR

1. The Circuit Court erred by declining to award Edson Arneault his full attorneys' fees incurred as a result of the contempt finding against Defendant MTR.

II. STATEMENT OF THE CASE

The genesis of this contempt finding was a lawsuit filed on October 8, 2009, by Mr. Arneault in the Hancock County Circuit Court arising from MTR Gaming Group, Inc.'s ("MTR") violation of a deferred compensation agreement between MTR and Arneault. The agreement was entered into after Arneault ceased serving as 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 settled Mr. Arneault's claims, and, on or about February 19, 2010, the parties entered into a *Settlement Agreement and Release* which was thereafter incorporated *in toto* into the final Order of the Hancock County Circuit Court entered March 1, 2010, effectively dismissing the action. *Findings of Fact & Conclusions of Law* (FF&CL), Appx. at 44, ¶¶1 & 2. Section 4.4 of the *Settlement Agreement and Release* contained a forum selection clause which states:

> "Any dispute 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." [Emphasis Supplied]

FF&CL, Appx. At 44, ¶ 1.

Since the *Settlement Agreement and Release* was incorporated *in toto* into the

Hancock County Circuit Court's Order of March 1, 2010, the agreement was enforceable as an order of the court. *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"). Mr. Arneault and his co-plaintiff subsequently filed an Amended Complaint in the Pennsylvania *Civil Rights Case* which set forth the same causes of action as the original Complaint, but added an additional co-plaintiff, set forth additional factual details regarding the underlying claims, and corrected some minor typographical errors.

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"). MTR's complaint in the *Contract Case* included 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

Appx. at 84.

Of these six (6) counts, three (3) directly alleged breach of contract claims arising

from the *Settlement Agreement and Release.*

On or about November 10, 2011, Mr. Arneault filed a *Petition for A Rule to Show Cause* in the Circuit Court of Hancock County, West Virginia arising from 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. Docket, Appx. at 401. On or about November 29, 2011, MTR filed its response to said *Petition for A Rule to Show Cause* offering several excuses in an attempt to justify its clear breach of the forum selection clause of the Settlement Agreement and Release. *Id.*

On January 25, 2012, Judge Arthur M. Recht entered *Findings of Fact and Conclusions of Law* on Mr. Arneault's Petition seeking a contempt order against MTR following a full evidentiary hearing.[1] In that order, Judge Recht found that:

> (a) the Settlement Agreement and Release reached by the parties in the instant case provided that "[a]ny 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," (FF&CL, Appx. at 44 ¶1);
>
> (b) the Settlement Agreement and Release was incorporated in toto into an Order of this Honorable Court dated March 3, 2010, (FF&CL, Appx. at 44 & 47, ¶¶2 & 10);
>
> (c) Counts II, IV, and V of the "Contract Case" filed in the United States District Court for the Western District of Pennsylvania by the Defendants arose out of the Settlement Agreement and Release, were brought in the improper forum based upon the forum selection clause contained therein, and violated this Honorable Court's March 3, 2010 Order, (FF&CL, Appx. at 47-48, ¶¶11, 13, 14);
>
> (d) the counts of the "Civil Rights Case" filed against Defendant MTR by Mr. Arneault in the United States District Court for the Western District of Pennsylvania did ***not*** arise out of the Settlement Agreement and Release and, therefore, did not

[1] Judge Recht's Findings of Facts and Conclusions of Law were entered in the Civil Order Book on April 4, 2012. However, Judge Recht expressly stated that the Order was being entered *nunc pro tunc* as of January 25, 2012.

violate this Honorable Court's March 3, 2010 Order, (FF&CL, Appx. at 48, ¶16); and

(e) Mr. Arneault did not waive the forum selection clause of the Settlement Agreement and Release, (FF&CL, Appx. at 48, ¶17).

On May 29, 2012, MTR sought a writ of prohibition with this Court. However, this Court found that Judge Recht's Order of January 25, 2012, imposing contempt "did not contain any instance of clear error" and therefore denied MTR's request for a writ of prohibition. *State ex rel. MTR Gaming Group, Inc. v. Recht*, No. 12-0734, 2013 W.Va. LEXIS 727, *16 (June 18, 2013).

Thereafter, Mr. Arneault filed *a Petition for Entry of Decretal Judgment and for Award of Attorney's Fees*. Appx. at 50. MTR filed a Response (Appx. at 177), and Mr. Arneault filed a Reply (Appx. at 346). After a December 6, 2013, hearing on the matter (Appx. at 357), Judge David J. Sims entered a decretal judgment including an award of attorneys' fees against MTR. Appx. at 388.

Judge Sims found that MTR "acted in bad faith, vexatiously, wantonly or for oppressive reasons in filing its complaint in the Pennsylvania District Court, in refusing to dismiss its claims in the District Court, and in filing the writ of prohibition in the Supreme Court [of Appeals]." Appx. at 394. Judge Sims based his opinion, in part, on the fact that "MTR has never fully explained the reasons for filing its complaint in the Pennsylvania District Court" and the fact that "[i]t is unclear to this Court what interest was served in MTR's filing in the District Court." *Id.* Judge Sims further found that "MTR has failed to establish how the (U.S.) District Court (for Pennsylvania) was the more lawful, appropriate or convenient forum in which to file its complaint." *Id.*

Judge Sims also noted that after entry of the Circuit Court Order "MTR chose to

disregard its lawful Order by knowingly refusing to dismiss the case in the District Court and proceed in the proper forum of the Circuit Court of Hancock County." *Id.* As Judge Sims noted:

> "MTR could have easily complied with this Court's Order without prejudice to any of its legal claims. Instead, MTR chose to continue with the District Claim and filed the writ of prohibition without adequately justifying the District Court as the appropriate forum. MTR proceeded at its own risk."

Appx. at 394-95.

In fashioning a remedy, Judge Sims considered the "actual injury or harm that [Mr. Arneault] has incurred," and awarded attorneys' fees based upon (a) a contingency fee agreement with Attorney Daniel Guida; (b) a contingency fee agreement with Attorney Robert Fitzsimmons; and (c) a bill submitted by the Mizner Law Firm (representing Mr. Arneault in the Pennsylvania District Court) at an hourly rate. Appx. at 395-96. However, despite the fact that Mr. Mizner's bill contained only entries that either (a) evidenced work performed directly on the contempt case or (b) evidenced work performed relating to the offending claims dismissed from the Contract Case pending in the Western District of Pennsylvania, the court only awarded fees for the time billed on the contempt case.

This appeal followed.

III. SUMMARY OF ARGUMENT

The assessment of attorneys' fee, in addition to the $500 per diem assessment imposed by the Circuit Court, was not an improper punitive fine. The $500 per diem assessment was intended to encourage MTR into complying with the Circuit Court's Order and the attorneys' fees were remedial in that they were ordered to compensate Mr. Arneault for the actual fees he incurred as a result of MTR's contempt. Further, the award of attorneys' fees was appropriate because MTR

acted in bad faith in refusing to purge itself of its contempt by dismissing the contemptuous counts in the Western District of Pennsylvania and refiling them in the Circuit Court of Hancock County per the straight-forward forum selection clause in the *Settlement Agreement and Release*.

However, the Circuit Court erred in failing to award Mr. Arneault the full attorneys' fees he incurred defending against the counts brought in the Western District of Pennsylvania which were in violation of the Circuit Court's Order. These fees constitute "actual injury or harm" to Mr. Arneault "resulting from" MTR's refusal to obey a lawful and clear order of the Circuit Court.

IV. STATEMENT REGARDING ARGUMENT AND DECISION

Pursuant to *West Virginia Rules of Appellate Procedure, Rule 18*, oral argument is unnecessary in this matter because MTR's appeal is without merit (Rule 18(a)(2)); the dispositive issues have already been authoritatively decided and there is clear authority both that Mr. Arneault is entitled to recover attorneys' fees and that the amount of those fees should include all fees he incurred as a result of MTR's conduct (Rule 18(a)(3)); and the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decision process would not be significantly aided by oral argument (Rule 18(a)(4)).

V. ARGUMENT

A. Argument in Opposition to Appellant's Assignment of Error

1. Civil Contempt supports the assessment of attorneys' fees in addition to the $500 per diem fine imposed by the Circuit Court

It is well-established that courts have the inherent power to sanction misconduct of parties, witnesses, and attorneys who appear in matters before them. To this end:

> "In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and

> determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case. Syl. Pt. 2, *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827 (1996)."

Syl. Pt. 6, *State ex rel. Richmond American Homes of West Virginia*, 226 W.Va. 103, 697 S.E.2d 139 (2010).

Of course, there exists two forms of contempt, civil contempt and criminal contempt, and whether a contempt is civil or criminal "depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction is appropriate." *Office of Lawyer Disciplinary Counsel v. Cunningham*, 200 W.Va. 339, 341, 489 S.E.2d 496, 498 (1997)(citing Syl. Pt. 1, *State ex. rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981)).

As this Court has stated:

> "[C]ontempt is civil where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order...The appropriate sanction in a civil contempt is an order...that...specifies a reasonable manner in which the contempt may be purged...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."

State ex. rel Robinson v. Michael, *supra*. at 670.[2]

Judge Recht followed the above law in his ruling holding MTR in contempt of court. As previously noted, in his *FF&CL* entered on January 25, 2012, Judge Arthur M. Recht found, in

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[2] See also, *Gompers v. Bucks Stove and Range*, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911); *State ex re. Floyd v. Watson*, 254 S.E.2d 697 (W.Va. 1979).

part, that:

> "Counts II, IV, and V of the "Contract Case" filed in the United States District Court for the Western District of Pennsylvania by the Defendants arose out of the Settlement Agreement and Release, were brought in the improper forum based upon the forum selection clause contained therein, and violated this Honorable Court's March 3, 2010 Order."

FF&CL, Appx. at 47-48, ¶¶11, 13, 14.

Taking into account the arguments and evidence before him, Judge Recht believed the appropriate sanction against MTR was a $500 per diem fine until such time MTR dismissed the offending counts in the Western District of Pennsylvania and refiled them in the Hancock County Circuit Court, while reserving any ruling on the issue of attorneys' fees, presumably to see if MTR would simply dismiss the offending counts in the Western District of Pennsylvania immediately. Appx. at 20 and 36.

Clearly, the $500 *per diem* contempt sanction against MTR was civil in nature and it was imposed to induce MTR into compliance with the March 3, 2010, Order which incorporated the *Settlement Agreement and Release* in toto, including the forum selection clause. As Judge Recht said, "MTR will be fined $500 a day to either dismiss those counts, or refile them down here..." Tr. of 1/25/2012 Show Cause Hearing, Appx. at 20.

Although MTR still continues to argue against the imposition of the $500 *per diem* sanction (which has been approved by this Court previously), referring to it as "significant arbitrary" and a "punitive award in and of itself" MTR's Brief at 10, MTR's present argument is that attorneys' fees awarded to Mr. Arneault in addition to the *per diem* sanction are unduly punitive and impermissible.

However, as recognized by the Fourth Circuit United States Court of Appeals:

> "No one seriously questions the right of the Court to award civil contempt damages which have long been recognized...So also as to the right to include attorneys' fees as an element of the award."

Folk v. Wallace Business Forms, Inc., 394 F.2d 240, 244 (1968)(internal citations omitted). Further, it is also well recognized that an award of attorneys' fees is within the discretion of the trial court. *In re Sorrell*, 346 B.R. 417 (U.S. Bankruptcy Court, N.D.W.Va., 2006); *In re General Motors Corp*, 110 F.3d 1003 (U.S. Court of Appeals 4th Circuit, 1997), *In re General Motors Corp.*, 61, F.3d 256 (U.S. Court of Appeals 4th Circuit, 1995); *Lane v. Prima Marketing LLC*, 2008 WL 793642 (S.D.W.Va. 2008); *American Federation of State, County and Mun. Employees v. Civil Service Commission of West Virginia*, 181 W.Va. 8 (1989); *Omega World Travel, Inc. v. Omega Travel and Shipping*, 905 F.2d 1530, *4 (U.S. Court of Appeals 4th Circuit, 1990, *Unpublished*)("[A] court may assess attorneys' fees as part of the fine to be levied on the contemnor for the 'willful disobedience of a court order...that a contemnor's refusal to comply with a court order must rise to the level of obstinancy, obduracy or recalcitrance to satisfy the 'willful disobedience standard...")(internal cites omitted).

Here, MTR continued over a period of eight (8) months to ignore the March 3, 2010, Order and the finding of contempt by Judge Recht by continuing to assert its claims in the Western District of Pennsylvania rather than purge itself of the contempt. Indeed, MTR never voluntarily purged itself of the contempt. Rather, MTR was ultimately involuntarily brought into compliance with the March 3, 2010, Order only after Judge McLaughlin of the U.S. District Court for the Western District of Pennsylvania ordered dismissal of the offending counts in the Pennsylvania *Contract Case* on September 27, 2012. *MTR Gaming Group, Inc. v. Arneault*, 899 F.Supp.2d 367, 390 (W.D.Pa. 2012).

In any event, in awarding attorneys' fees against MTR as a result of its actions (or inactions), Judge Sims found that MTR "acted in bad faith, vexatiously, wantonly or for oppressive reasons in filing its complaint in the District Court, in refusing to dismiss its claims in the District Court, and in filing the writ of prohibition in the Supreme Court [of Appeals]," (Appx. at 394) that "MTR...never fully explained the reasons for filing its complaint in the District Court" (*Id.*) and that "[i]t is unclear to this Court what interest was served in MTR's filing of the complaint in the Pennsylvania District Court." (*Id.*). Based on these findings, Judge Sims believed that granting Mr. Arneault and award (or sanction) of attorneys' fees was warranted under the circumstances.

In sum, given the purpose of the contempt sanction imposed by Judge Recht and recognizing that fashioning contempt sanctions, including but not limited to awarding attorneys' fees, is largely within the discretion of the Circuit Court, especially given MTR's willful disobedience in this matter, MTR's arguments should be rejected.

2. *In re. Frieda Q* is the controlling law and supports the assessment of attorneys' fees in addition to the $500 per diem assessment imposed by the Circuit Court because the $500 per day assessment was remedial, not punitive.

In support of its argument that the $500 per diem assessment was punitive, MTR relies on the case of *In re. Freida Q*, 742 S.E.2d 68 (W.Va. 2013). MTR's citation to this case is puzzling in light of the fact that this Court expressly re-affirmed the validity of per diem sanctions intended to bring a party into compliance with an Order of Court. Indeed, Syllabus Point 5 states:

> "A civil contempt sanction that sets monetary penalties retroactively before the hearing on contempt for failure to comply with a discovery order cannot be enforced. A monetary *per diem* penalty is permissible where it is set prospectively from the date of the contempt order as a means of ensuring compliance with the underlying discovery order."

Id., Syl. Pt. 5 (quoting Syl. Pt. 6, *State Farm Mut. Auto Ins. Co. v. Stephens*, 188 W.Va. 622, 425

S.E.2d 577 (1992))(internal quotations omitted).

In this case, Judge Recht's imposition of a $500.00 *per diem* sanction was a permissible prospective and remedial penalty rather than an improper retroactive and punitive penalty. Judge Recht imposed and announced the penalty at the *Show Cause Hearing* on Mr. Arneault's Petition after first finding MTR in contempt. Tr. of 1/25/2012 *Show Cause Hearing*, Appx. at 20. Judge Recht then explained that "MTR would be fined $500 a da yif it did not dismiss those counts, or refile them down here..." *Id.* Judge Recht was then explicit that the $500 *per diem* fine would begin that day. Tr. of 1/25/2012 *Show Cause Hearing*, Appx. at 41.

This is clearly and plainly a prospective *per diem* fine running from the date of the contempt finding and made to induce MTR to comply with the court's March 3, 2010, Order. Under *In re Frieda Q*, supra., cited by MTR itself, such a prospective per diem fine is permissible.

The remedial nature of the *per diem* fine is further evidenced by the fact that $500.00 *per diem* was apparently too small to coerce MTR into compliance with the March 3, 2010 order. Rather than dismiss the offending counts in the Western District Court of Pennsylvania and refile them in the Circuit Court of Hancock County, MTR elected to remain in contempt from January 25, 2012, until Judge McLaughlin of the U.S. District Court for the Western District of Pennsylvania ordered dismissal of the offending counts in the Contract Case on September 27, 2012. *MTR Gaming Group, Inc. v. Arneault*, 899 F.Supp.2d 367, 390 (W.D.Pa. 2012).

As noted herein, MTR came into compliance with Judge Recht's Order only after Judge McLaughlin dismissed the three (3) offending counts. Since MTR held its destiny in its own hands and could have purged itself of the contempt at any time without prejudice to any of its legal claims but blatantly and obstinately refused to do so, its claim that the "significant arbitrary award

of $500 a day indicates a punitive award in and of itself" (MTR's Brief at 10) should be rejected. If this were the case, MTR would have been compelled to purge itself of its contempt which it never did.

3. The Circuit Court correctly awarded Mr. Arneault attorneys' fees based upon MTR's bad faith in failing to voluntarily dismiss the offending claims in the Contract Case when MTR could have re-filed them in the Circuit Court of Hancock County, West Virginia

MTR attempts to argue that Mr. Arneault should not have been awarded attorneys' fees because MTR did not "commit bad faith simply by pursuing its legal rights and awaiting court determination." MTR's Brief at 10. However, given MTR's repeated refusals to purge itself of its contempt and the fact that the offending claims were resolved only when the District Court dismissed them for the same reasons that MTR was held in contempt, an award of attorneys' fees was appropriate.

In *United Mine Workers v. Faerber*, 179 W.Va. 73, 76 n.5, 365 S.E.2d 353, 356 n.5 (1986), this Court held that an award of "attorneys' fees and costs is an appropriate sanction in a civil contempt case." See also, Syl., *United Mine Workers v. Faerber*, 179 W.Va. 77, 365 S.E.2d 357 (1987)("Under a 'bad faith' exception, attorney's fees and costs may be awarded to the prevailing party and this extends to a civil contempt proceeding where attorney's fees are awarded.").

MTR attempts to distinguish the *Faerber* case from the instant litigation on two grounds. First, MTR argues that *Faerber* is distinguishable because it "dealt with the safety and welfare of West Virginia mine workers." MTR's Brief at 11. However, this argument makes little sense. There is nothing in the *Faerber* opinion that indicates that this Court intended to restrict awards of attorneys' fees only to those cases where a party is held in contempt in a matter involving

"important health or safety consideration[s] or public welfare issue[s]." MTR's Brief at 11. Indeed, the fact that the rule was made one of the syllabus points of the case is strong evidence that it is one of general application.

MTR also argues that it "did not engage in dilatory delay in complying with the Circuit Court's Order." MTR's Brief at 11-12. However, this argument likewise has no merit. Judge Recht entered his ruling finding MTR in contempt effective as of January 25, 2012. Despite this, and the $500 per day remedial fine he imposed, MTR never purged itself of its contempt by dismissing the offending counts of the Western District of Pennsylvania action. The Federal Rules of Civil Procedure allowed MTR to dismiss the offending claims without prejudice as a matter of right, Fed. R. Civ. P. 41(a)(1)(A)(i) & (a)(1)(B), which would have allowed MTR to re-file the claims in the appropriate forum per the *Settlement Agreement and Release*: namely the Circuit Court of Hancock County, West Virginia. *FF&CL*, Appx. at 44.

Thus, while MTR claims that it did not "engage in dilatory delay" because it "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," (MTR's Brief at 11-12), it ignores the fact that MTR could have simply re-filed the claims in West Virginia state court at any time. It was not necessary for MTR to continue to bring its claims in the Western District of Pennsylvania to "rightfully pursue its economic and property interests"; rather, there was no reason MTR could not have pursued those same interests here in West Virginia as MTR voluntarily agreed in the *Settlement Agreement and Release* and the Circuit Court ordered.

Nevertheless, the offending counts remained pending in the United States District Court for the Western District of Pennsylvania until September 27, 2012, when the judge in that

matter dismissed them for the same reasons that Judge Recht found MTR in contempt:

> "[H]aving undertaken my own separate analysis, I find myself in agreement with Judge Recht on the two central points at issue here: (i) several of MTR's claims against Arneault [in the Contract Case] arise out of the Settlement Agreement and are therefore subject to the Agreement's forum selection clause, and (ii) Arneault has not waived his contractual right to enforce the forum selection clause by virtue of having previously prosecuted the Civil Rights Action."

MTR Gaming Group, 899 F. Supp. 2d at 382.

It is clear from MTR's conduct that, if Judge McLaughlin had not dismissed the offending claims at that time, MTR would have continued to pursue them. Even after Judge Recht's *Findings of Fact and Conclusions of Law* were entered in the Civil Order Book on April 4, 2012, MTR continued to vigorously oppose Mr. Arneault's attempts to have the offending counts dismissed in the United States District Court for the Western District of Pennsylvania, as evidenced from the following April 2012 excerpts from the docket for *MTR Gaming Group, Inc. v. Arneault*, W.D.Pa. No. 1:11-cv-00095:

04/13/2012	19	BRIEF in Opposition re 11 Motion to Dismiss *and Certificate of Service* filed by MTR GAMING GROUP, INC.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E) (Santarelli, Frederick) (Entered: 04/13/2012)
04/16/2012		Minute Entry for proceedings held before Judge Sean J. McLaughlin: Oral Argument held on 4/16/2012 re 11 MOTION to Dismiss filed by EDSON R. ARNEAULT. Motion is Under Advisement. Text-only entry; no PDF document will issue. This text-only entry constitutes the Court's order or notice on the matter. (Court Reporter: Ron Bench) (nk) (Entered: 04/19/2012)
04/18/2012	21	BRIEF in Opposition to 11 MOTION to Dismiss, *and in Reply to Arneault's April 15, 2012 Further Submission in Support of Motion to Dismiss and Certificate of Service* filed by MTR GAMING GROUP, INC.. (Attachments: # 1 Exhibit) (Santarelli, Frederick) (Entered: 04/18/2012)

Shortly thereafter, on or about May 29, 2012, MTR filed a *Petition for a Writ of Prohibition* to this Court claiming that Judge Recht's finding of contempt was an error of such magnitude that the trial court either had no jurisdiction or having such jurisdiction exceeded its legitimate powers as required for a writ of prohibition to issue. Syl. pt. 2, *State ex rel. Peacher v. Sencnidiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977). This Court found that MTR's petition presented "no substantial question of law," and that MTR had experienced "no prejudicial error in this case." *State of West Virginia ex rel. MTR Gaming Group, Inc.*, 2013 W. Va. LEXIS 727, *1.

Thus, three (3) different courts and seven (7) different judges have each undertaken an independent analysis of these issues and concluded that MTR has violated the forum selection clause of the *Settlement Agreement and Release* incorporated into the Circuit Court's Order of March 3, 2010 and that Mr. Arneault has not waived that contractual provision.

Despite the same, MTR's denial of its wrongdoing in continuing to litigate Counts II, IV, and V of its Complaint in the *Federal Case* is so complete that even as recently as its Response to Mr. Arneault's *Motion for Entry of Decretal Judgment and Award of Attorneys' Fees*, MTR has continued to attempt to re-litigate these decided issues by arguing, for instance:

> (a) that "on April 15, 2011, Arneault and other plaintiffs, clearly also in direct violation of this Court's March 1, [sic] 2010 Order, filed suit in the United States District Court for the Western District of Pennsylvania . . . against, among other Defendants, MTR," (MTR's Response, Appx. at 179);
>
> (b) that "Judge Recht was unmistakably persuaded that certain claims in the Civil Rights case . . . also arose from the Settlement Agreement and should be dismissed," (MTR's Response, Appx. at 180);
>
> (c) that "Judge Recht *acknowledged* that Plaintiff's claims for promissory estoppel and unjust enrichment arose out of the Settlement Agreement," (MTR's Response, Appx. at 181); and
>
> (d) that Mr. Arneault's "unjust enrichment claim raises factual disputes including the

scope of the West Virginia February 19, 2010 Settlement Agreement" and, therefore, Mr. Arneault has "assert[ed] claims in Pennsylvania that directly implicate and require application and interpretation of the Settlement Agreement by a Pennsylvania court," (MTR's Response, Appx. at 184).

Each of these arguments relate to MTR's contentions that have already been rejected by three (3) different courts. For reasons unknown, MTR stubbornly continues to assert them. Indeed, echoes of these same arguments can be found in MTR's brief in the matter at bar when MTR writes at length about how Mr. Arneault would have been held in contempt if he had not dismissed certain counts in the Western District of Pennsylvania.[3] MTR's Brief at 4-5.

In short, MTR has doggedly continued to pursue arguments that are plainly at odds with the Circuit Court's finding of contempt against Mr. Arneault and this Court's rejection of MTR's allegations of error in its *Petition for a Writ of Prohibition*. These ongoing, needless arguments have continued to cause Mr. Arneault to incur additional attorneys' fees, yet they provide no legitimate chance of success for MTR.

MTR's argument, therefore, that it has not acted in bad faith should be rejected. The facts recited herein reveal that MTR has vexatiously and needlessly fought the Circuit Court's finding that MTR was in contempt of court by improperly bringing certain claims in the Western District of Pennsylvania and refused to then purge itself of obvious contempt by dismissing its claims in the Western District of Pennsylvania and refiling them in the appropriate forum.

Accordingly, the attorneys' fees are not "undoubtedly an impermissible punitive

[3] Even if MTR were correct that Mr. Arneault was somehow in contempt of an Order of the Circuit Court of Hancock County, West Virginia--a position which Mr. Arneault expressly rejects--it does not follow that the court acted unfairly by imposing a coercive fine and awarding attorneys' fees against MTR. Indeed, if MTR's theory were correct, Mr. Arneault would have *purged* himself of any contempt when he withdrew the allegely offending claim from the Western District of Pennsylvania. MTR ignores the fact that, for *over eight (8) months* MTR had the *same opportunity* to withdraw its offending claims against Mr. Arneault, but refused to do so until the claims were dismissed at great expense and effort by Mr. Arneault.

penalty." The *In re Frieda Q.* case cited by MTR itself belies this argument. There, the *Frieda* Court explained that both prospective *per diem* fines as well as compensatory fines are permissible sanctions for civil contempt. *In re Frieda Q.*, 742 S.E.2d at 81.

The sanction at issue in *In re Frieda Q.* was rejected by this Court "because the sanction was neither a prospective per diem fine nor 'compensation or damages' for the party aggrieved. Rather, it was arbitrarily imposed and was punitive in nature." *Id.* at 83. However, the attorneys' fees sought by Mr. Arneault squarely fall within this category.

The *In re Frieda Q.* Court has set forth the test for determining whether an award of compensation or damages for civil contempt is appropriate, explaining 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." *Id.* at 84. This is precisely what Mr. Arneault has done by attaching copies of the bills for legal work performed by Mr. Arneault's counsel to his original Motion. The attorneys' fees listed on those bills are *directly* due to MTR's failure to bring its claims in the appropriate forum and its repeated refusals to remedy its error.

In sum, applying *In re Frieda Q.*, the prospective *per diem* fine imposed by Judge Recht and attorneys' fees imposed by Judge Sims are both entirely proper remedies for MTR's contemptuous conduct. MTR's arguments to the contrary must, therefore, be rejected.

B. Argument in Support of Cross-Assignment of Error

1. **The Circuit Court Erred by Refusing to Allow Mr. Arneault to Recover Fees Incurred by his Pennsylvania Counsel Defending Against the Counts Brought in the Western District of Pennsylvania in Violation of the Circuit Court's Order**

In support of Mr. Arneault's *Petition for Entry of Decretal Judgment and Award of*

Attorneys' Fees, Mr. Arneault attached an invoice from the Mizner Law Firm in Erie, Pennsylvania detailing the work that firm performed for Mr. Arneault on these matters. Appx. at 172-75.

Importantly, all of the work on the invoice addressed either (a) attempts to dismiss the Complaint filed by MTR in the Western District of Pennsylvania containing the offending counts that led to the finding of contempt; or (b) work performed by the Mizner Law Firm in support of the proceedings here in West Virginia.

In its Order, the Circuit Court awarded fees only for that portion of the invoice which it found constituted "work[] on the contempt matter." (Appx. at 396). This amount was $4,687.50 of the total amount of $23,187.50 invoiced to Mr. Arneault. However, the failure of the Circuit Court to award the full amount sought by Mr. Arneault is erroneous as a matter of law.

In *In re Frieda Q*, this Court held that "a sanction for civil contempt may take the form of 'an order requiring the payment of a fine in the nature of compensation or damages to the party aggrieved by the failure of the contemnor to comply with the [underlying] order.'" *In re Frieda Q.*, 742 S.E.2d at 83 (quoting *State ex rel. Robinson v. Michael*, 166 W. Va. 660, 670, 276 S.E.2d 812, 818 (1981)). The compensation or damages "must be based upon competent evidence of ***actual injury or harm*** to the aggrieved party ***resulting from*** the contemnor's refusal to follow an order of the circuit court." Syl. Pt. 6, *In re Frieda Q.* (emphasis added).

The Circuit Court viewed the attorneys fees available to Mr. Arneault narrowly and being restricted to *only* those fees which Mr. Arneault incurred in the contempt proceedings. However, the law is clear that he can recover those fees which "result from" the contemnor's refusal to follow an order of the circuit court.

Here, MTR disobeyed a court order based upon a contract which MTR voluntarily

entered into--by refusing to voluntarily dismiss certain claims in the *Contract Case* and simply re-file them in the Hancock County Circuit Court. The result was an extensive series of briefs, motions, and arguments made by the Mizner Law Firm to obtain dismissal of those counts--a dismissal which, as discussed herein, was made for the very same reasons as the finding of contempt and in which the judge in the Western District of Pennsylvania *expressly agreed* with the Circuit Court's reasoning and findings.

It follows that, if MTR had never brought the offending claims in the Western District of Pennsylvania and, instead, had simply filed them in the Circuit Court of Hancock County, West Virginia as the *Settlement Agreement and Release* and resulting Order of the Circuit Court required, Mr. Arneault would never have incurred the $23,187.50 in attorneys fees which he is seeking to recover. These fees, therefore, "result from" MTR's contempt and, as such, are part of the attorneys' fees which Mr. Arneault is entitled to recover as compensation for MTR's contempt.

The Circuit Court, therefore, erred in denying Mr. Arneault the full amount of fees incurred for the work of the Mizner Law Firm which were detailed on its invoice.

VI. CONCLUSION

For the reasons set forth herein, the Circuit Court of Hancock County correctly imposed both a $500 per diem coercive sanction against MTR as well as awarding attorneys' fees incurred by Mr. Arneault as a result of the blatant, obstinate, and contemptuous conduct of MTR. However, the Circuit Court erred by declining to award full attorneys' fees to Mr. Arneault incurred in defending the *Contract Case* in Pennsylvania federal court which he would not have had to do but for MTR's continuous contemptuous conduct.

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By Counsel_____

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CERTIFICATE OF SERVICE

Service of the foregoing RESPONDENT'S BRIEF WITH CROSS-ASSIGNMENT OF ERROR was had by mailing a true copy thereof, by regular U.S. first class mail, postage prepaid, to the following:

Robert D'Anniballe, Esq.
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Dated this 14th day of November, 2014.

Daniel J. Guida, Esq.