

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**James Kailie,  
Plaintiff Below, Petitioner**

**vs.) No. 101284** (Berkeley County 10-C-AP-7)

**Harold Barlow and Metro Auto Sales, Inc.,  
Defendants Below, Respondents**

**FILED**

**November 10, 2011**  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

Petitioner James Kailie appeals the circuit court's order dismissing with prejudice his appeal of the magistrate court's dismissal of his civil action for a failure to appear. Petitioner seeks a remand of the case for trial on his claim for a refund of the \$1,200 in deposit payments he made on a 1983 Mercedes 380 SEL which was eventually sold to another customer. The instant appeal was timely filed by the pro se petitioner with the entire record being designated on appeal. Respondents Harold Barlow and Metro Auto Sales, Inc. (hereinafter collectively "Metro Auto Sales") were then directed to file a response which was subsequently filed on March 14, 2011.

The Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's order entered in this appeal on January 7, 2011. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. For the reasons expressed below, the circuit court is reversed and this case is remanded for further proceedings. In so holding, this Court finds that this case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner filed a civil action in the magistrate court alleging that he made deposit payments totaling \$1,200 on a 1983 Mercedes 380 SEL which was eventually sold to another customer. In its answer, Metro Auto Sales indicated that it had notified petitioner, both orally and in writing, that his deposit payments were non-refundable and that messages were subsequently left for him from January 6, 2009, through January 23, 2009, "remind[ing] customer that deposits were non-refundable and to please contact us immediately or deposits would be forfeited." Petitioner did not respond and, on April 3, 2009, Metro Auto Sales

considered that he had forfeited his deposits. The Mercedes was placed back on the lot and then sold that same day.

Petitioner alleges that he is a wounded Army veteran from the wars in Iraq and Afghanistan and that when he was readmitted to the hospital, “the car sales man sold the vehicle without contacting me what so ever.” He states that “I was readmitted to the Walter Reed Army Medical Center and all efforts I have done to relieve a reimbursement has been in vain.” According to Metro Auto Sales’ answer, when petitioner showed back up at the dealership on April 4, 2009, he was offered a 1988 Mercedes 300 “for the amount he had already paid.” Petitioner refused the offer.

The magistrate court dismissed petitioner’s civil action with prejudice when he failed to appear for a February 25, 2010, hearing on the matter. When he appealed to the circuit court, petitioner explained that “I was on my way to court on February 25, 2010, but bad weather on interstate caused many accidents.” The circuit court originally scheduled the bench trial for April 26, 2010; however, petitioner sought a continuance “because he was experiencing a delay in receiving records subpoenaed from Sprint.” The circuit court granted the motion and continued the bench trial from April 26, 2010, to May 24, 2010, at 11:00 a.m.

Petitioner failed to appear for the bench trial at 11:00 a.m. on May 24, 2010. By 11:30 a.m., “[he] had called to state he was in traffic in Frederick, Maryland.” The circuit court dismissed his appeal for failure to appear finding that “Plaintiff has failed to appear this date in a timely manner and had also failed to appear and did not appear in previous hearings in this case.” The circuit court explained the following: “Plaintiff subpoenaed numerous records from Sprint and did not appear Friday May 21, 2010 to review those records prior to the hearing.” The court concluded as follows:

It appears Plaintiff by his actions has not taken this matter seriously considering his failures to appear, and has abandoned his case. The Court desires to move this matter along and it has been pending since March 2010. Accordingly this matter is hereby Dismissed with Prejudice and placed amongst the causes ended and retired from the docket *for statistical purposes . . .* (emphasis added).

On appeal, petitioner argues that the circuit court erred in dismissing his appeal without allowing him the opportunity to have the case heard. Metro Auto Sales responds that dismissal of petitioner’s civil action was appropriate after there had been a total of three non-appearances by petitioner.

The applicable standard of review in this matter is abuse of discretion. *Caruso v. Pearce*, 223 W.Va. 544, 547, 678 S.E.2d 50, 53 (2009). This Court has recognized that “[b]ecause of the harshness of the sanction, a dismissal with prejudice should be considered appropriate only in flagrant cases.” *Dimon v. Mansy*, 198 W.Va. 40, 45, 479 S.E.2d 339, 344 (1996). “[V]arious interests must be weighed including the interest in judicial efficiency, the rights of plaintiffs to have their day in court, any prejudice that might be suffered by defendants, and the value of deciding cases on their merits.” *Caruso v. Pearce*, 223 W.Va. 544, 550, 678 S.E.2d 50, 56 (2009).

In the case-at-bar, petitioner argues that the circuit court’s dismissal of his appeal due to failure to appear was improper as he was delayed due to stopped traffic encountered on his journey to reach the courthouse. It appears from the record that petitioner lives outside of West Virginia and has to travel significant distances to appear for court. Although petitioner has previously missed court appearances, it appears that the factors set forth above, rather than abandonment of his appeal, are responsible. After fully reviewing the record, we conclude that the circuit court abused its discretion in dismissing petitioner’s appeal and, therefore, reverse to permit reinstatement of petitioner’s appeal and remand for further proceedings.

Reversed and Remanded.

**ISSUED:** November 10, 2011

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman  
Justice Robin Jean Davis  
Justice Brent D. Benjamin  
Justice Menis E. Ketchum  
Justice Thomas E. McHugh