

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

**John Zsigray,
Petitioner Below, Petitioner**

vs) No. 11-0577 (Gilmer County10-CAP-30)

**Gilmer County Public Service District,
Respondent Below, Respondent**

FILED

May 29, 2012

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

MEMORANDUM DECISION

Petitioner John Zsigray, by counsel Richard Lindroth, appeals the Gilmer County Circuit Court's order dated December 8, 2010, affirming the magistrate court's order assessing jury costs to petitioner in the amount of \$617. Respondent Gilmer County Public Service District ("PSD") has filed its response, by counsel, Shelly DeMarino.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner initially filed a case in Gilmer County Magistrate Court against the PSD alleging that the PSD erred in its placement of a tap to service petitioner's property and seeking reimbursement of the money petitioner paid to the PSD for the installation of the tap. Although petitioner was named in the contract with the PSD, he was not actually a signor on the contract. Rather, his wife signed the contract with the PSD. The PSD states that while petitioner was not a party to the contract, he chose to continue as the plaintiff in the action. However, just before trial, petitioner moved to add his wife, who signed the contract, as a plaintiff. Petitioner failed to serve this motion on the PSD, and the PSD had no knowledge of this motion until it appeared for trial. At that time, the magistrate court denied the motion to add the wife as a plaintiff and dismissed the action because petitioner was not a party to the contract and therefore had no standing. The magistrate court also assessed court costs against petitioner in the amount of \$671.

Petitioner appealed the dismissal and the issue of the court costs to the circuit court. A hearing was held during which petitioner attempted to dismiss his counsel, which was denied. The circuit court denied petitioner's motion for a continuance, as it was not timely or properly filed. The

circuit court dismissed the matter and ordered petitioner to pay \$145 to the Clerk of Court, and upheld the magistrate court's order assessing jury fees to the petitioner in the amount of \$671.

"In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syllabus Point 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

Mey v. Pep Boys-Manny, Moe & Jack, 228 W.Va. 48, 52, 717 S.E.2d 235, 239 (2011).

On appeal, petitioner first argues that the magistrate erred in dismissing the lawsuit immediately prior to trial when there were no pretrial motions to dismiss made by either party. Petitioner also argues that his motion to add his wife as a plaintiff should have been granted, as it would not have prejudiced the PSD, would not have caused delay, and his motion was filed thirty days before the trial. Petitioner argues that dismissing his case was arbitrary and capricious.

Respondent PSD argues that the magistrate had no option other than to dismiss the case because petitioner was not the proper plaintiff. The PSD argues that the West Virginia Rules of Civil Procedure indicate that all actions must be prosecuted in the name of the real party in interest, who is, in this case, petitioner's wife. Petitioner's filing of the motion to add his wife as a plaintiff is an admission that he was not a proper party. Further, the motion was improperly filed and never served upon the PSD, as petitioner filed the motion pro se, though he was represented by counsel. The PSD notes that it should not be forced to incur additional litigation costs to defend motions and appeals filed by an individual who is not a proper party to the lawsuit and who had no standing.

This Court has stated as follows:

Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an "injury-in-fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Syl. Pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002). In the present case, petitioner had neither standing nor a legally protected interest. In his brief, petitioner states that he "can live with the arbitrary decision dismissing his case. He will simply file another one." The magistrate court form notes that the PSD moved for dismissal, and that the motion was granted. Moreover, petitioner's pro se motion to add his wife as a plaintiff was not filed in accordance with the West Virginia Rules of Civil Procedure for Magistrate Courts, as he did not

serve the motion on opposing counsel. Given the facts of this case, this Court finds no error in the circuit court's decision to affirm the magistrate court's dismissal of this action.

Petitioner next argues that the magistrate erred in arbitrarily assessing petitioner with jury costs, as the magistrate arbitrarily dismissed the case without any basis, and the petitioner did nothing to cause the dismissal. The PSD argues that the magistrate informed the parties that if the matter was not resolved prior to trial and a jury was brought forth, either party could be assessed with jury fees.

“[T]he trial [court] . . . is vested with a wide discretion in determining the amount of . . . court costs and counsel fees, and the trial [court's] . . . determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion.” Syl. Pt. 3, *Carper v. Watson*, 226 W.Va. 50, 697 S.E.2d 86 (2010) (internal citations omitted). Here, although petitioner was informed well before the trial date that the proper party had not been joined, he chose to continue without properly filing a motion to join his wife, who was the only person with standing. This Court finds that the magistrate court, which was the trial court in this matter, did not err in ordering petitioner to pay costs.

Finally, petitioner argues that the circuit court erred in deciding the appeal at a hearing that was noticed as only a status hearing. Petitioner asserts that his counsel was detained and could not appear, and thus he had to represent himself. Further, he argues that he was denied due process, and that the circuit judge was biased against him. Additionally, petitioner argues that the circuit court's order did not comply with Rule 52 of the West Virginia Rules of Civil Procedure. He also argues that imposing jury fees on him is tantamount to denying him access to the court system.

The PSD argues that the circuit court's order regarding the hearing makes no mention that the hearing had been set as a “status hearing” and only notes the date and time of the hearing. Further, the PSD indicates that petitioner continuously filed pro se motions, while he was represented by counsel, causing “complete and total confusion.” The PSD argues that all parties were notified of the hearing and there was no motion to continue filed prior to the hearing.

First, the hearing in circuit court was not noticed as a “status hearing.” The order setting the hearing merely states that a hearing would be held on a specific date and time and without indicating a particular type of hearing. Petitioner now argues that he was “forced” to represent himself, but the record shows that petitioner attempted to move for the dismissal of his attorney at the start of the hearing. Second, the fee imposed on petitioner by the circuit court's order is noted as “court costs” in the transcript of the circuit court's hearing and this Court finds no error in the assessment of this fee.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 29, 2012

CONCURRED IN BY:

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