

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

**Todd M. Jack,
Plaintiff Below, Petitioner**

vs.) No. 11-0637 (Berkeley County 09-C-392)

**Navy Federal Credit Union,
Defendant Below, Respondent**

FILED

June 8, 2012

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

MEMORANDUM DECISION

Petitioner Todd M. Jack appeals the circuit court's amended order granting summary judgment to Respondent Navy Federal Credit Union (hereinafter "the Credit Union") and awarding the Credit Union its attorney's fees and court costs as a sanction for petitioner's litigation misconduct. Petitioner argues that the circuit court acted improperly in granting summary judgment and awarding attorney's fees and costs. The instant appeal was timely filed by the pro se petitioner with the entire record being designated on appeal. The Court has carefully reviewed the record, written arguments contained in the petition, and the response thereto, and the case is mature for consideration.

Pursuant to Revised Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present either a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

The Credit Union repossessed petitioner's Toyota Tacoma pick-up truck. He filed suit against the Credit Union, alleging that the repossession was unlawful. The circuit court granted summary judgment to the Credit Union in an amended order entered on March 3, 2011,¹ which contained the following pertinent conclusions of law:

¹ The circuit court's original order granting summary judgment and awarding attorney's fees and costs was entered on November 22, 2010, before the Revised Rules of Appellate Procedure became effective.

6. The Plaintiff failed to make full and timely payments under the terms of **Promissory Note, Security Agreement and Disclosure.**

7. The Plaintiff was provided proper notice of the default and failed to cure in regard to back payments.

8. The Defendant, as the noteholder for the 2005 Toyota Tacoma which was titled in the name of the Plaintiff, had the right and took all proper procedures to repossess said vehicle.

* * *

10. The Defendant properly and lawfully notified the Plaintiff that he was in arrears in payments on his loan. By letter dated January 13, 2009, the Plaintiff was properly advised that he was in default on the loan in the amount of \$1,077.36 for payments due going back to October 27, 2008. By letters dated January 23, 2009, and February 19, 2009, the Plaintiff was properly advised that, although small partial payments had been received and credited to his account, the Plaintiff had not complied with the prior request for payment of the total amount past due. Also, in those two letters, the Plaintiff was specifically provided with proper notification as to repossession. The Plaintiff did not catch up his past due payments, and the vehicle in question was repossessed on April 19, 2009. By letter dated July 7, 2009, the Plaintiff was specifically advised that he had the right to redeem the vehicle by the forwarding of \$9,097.32, plus repossession costs.

11. The Plaintiff failed to redeem the vehicle.

Accordingly, the circuit court found that petitioner was entitled to neither compensatory damages nor punitive damages.

The circuit court also granted a motion for sanctions the Credit Union had previously filed by awarding it its attorney's fees and court costs in defending itself against petitioner's suit, in the amount of \$4,324. The circuit court determined that petitioner "has exhibited a pattern of litigation misconduct." The circuit court found that petitioner's misconduct included the following: (1) his failure to appear at his previously-agreed deposition without providing notice to counsel for the Credit Union; (2) his failure to appear for the pretrial conference; and (3) his failure to file a pretrial memorandum that was required under the July 21, 2009, scheduling order. The circuit court specifically found the following:

6. In the **Plaintiff's Response to Order Granting Default (Civil Case)** and in his verbal statements to the Court, the Plaintiff made a number of misrepresentations which the Court finds to be false, including the allegation that he was the victim of a "mugging and attempted murder," the allegation that he went "to the hospital for treatment," and his allegation that he mailed certain documents on certain dates.

7. The Plaintiff, as he admitted verbally to the Court, filed two different versions of the same document; one sent to the Court and one sent to counsel for the Defendant. The Plaintiff's **Petition for a 20-Day Delay in the Preliminary Hearing** bears on its face a handwritten, back-dated date of May 1, 2010, but was not in fact mailed to counsel for the Defendant until May 21, 2010.

8. The Plaintiff's actions and representations to the Court could correctly be viewed as a substantive fraud on the Court. At the very least, the Plaintiff's actions were knowing and severe misrepresentations. Sanctions can be imposed as an exercise of the inherent power of the court. The West Virginia Supreme Court of Appeals has recognized that "there exists a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision in the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct." [] Syl. Pt. 5[, *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 226 W.Va. 103, 697 S.E.2d 139 (2010)] (quoting Syl. Pt. 1, *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827 (1996)).

9. In determining 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. 6, *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 226 W.Va. 103, 697 S.E.2d 139 (2010)] (quoting Syl. Pt. 2, *Bartles*, 196 W.Va. 381, 472 S.E.2d 827 (1996)). In the present case, the Plaintiff made willful misrepresentations to the Court, including allegations by the Plaintiff that he had been "mugged" and that he was the victim of an attempted murder by an agent of the Berkeley County Magistrate. The Plaintiff, in spite of both his written submissions and his verbal representations to the Court, had

not, in fact, been “mugged” on April 26, 2010. Instead, he was being arrested.

10. As a *pro se* plaintiff, it is the Plaintiff’s duty, since he has chosen to prosecute his case without the benefit and guidance of a qualified attorney at law, to abide by this Court’s **Scheduling Order**. He cannot lay that responsibility at the feet of the Defendant against whom he files a suit. Nothing that the Defendant did prevented [sic] the Plaintiff from prosecuting his own case. To rule otherwise would unfairly prejudice the rights of a Defendant who has abided by all the relevant rules as well as by the requirements set by the Court.

11. It is further the Plaintiff’s duty to not act in a vexatious, wanton, and oppressive manner. The Plaintiff violated that duty by representing to the Court that his failure to abide by the **Scheduling Order** was as a result of a mugging and attempted murder. The Plaintiff further had a duty to the Court to not back-date a submission to the Defendant. That is a wrong that should not be countenanced by the Court.

On appeal, petitioner argues that the circuit court had no grounds on which to grant the Credit Union summary judgment or to award the Credit Union its attorney’s fees and court costs. The Credit Union argues that it was entitled to judgment on petitioner’s claim that it repossessed his Toyota Tacoma pick-up truck unlawfully, as well as entitled to an award of attorney’s fees and costs, as a matter of law.

“Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). After careful consideration, this Court concludes that the circuit court did not err in granting the Credit Union summary judgment on petitioner’s cause of action.

“An attorney’s fee awarded as a sanction that explicitly is authorized by Rule 37(b) of the West Virginia Rules of Civil Procedure rests in the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal except in cases of abuse.” Syl. Pt. 4, *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827 (1996). The circuit court’s pertinent findings of fact support the award of attorney’s fees and court costs as a means of sanctioning petitioner for his misconduct. This Court concludes that the circuit court did not abuse its discretion in awarding the Credit Union its attorney’s fees and court costs in the amount of \$4,324.

For the foregoing reasons, we find no error in the decision of the circuit court and the summary judgment, and the award of attorney's fees and court costs, granted to Respondent Navy Federal Credit Union, is affirmed.

Affirmed.

ISSUED: June 8, 2012

CONCURRED IN BY:

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

DISSENTED IN BY:

Chief Justice Menis E. Ketchum