IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 19-0743

NORTHSTAR ENERGY CORPORATION,

Defendant Below, Petitioner

(On Appeal From Harrison)
(County Circuit Court)
(Business Court Division)
(Civil Action No. 15-C-405-3)
(Honorable Paul T. Farrell)

RILEY NATURAL GAS COMPANY,

Plaintiff Below, Respondent

PETITIONER'S BRIEF

Stephen L. Thompson, Esquire
W. Va. State Bar No. 3751
Barth & Thompson
Post Office Box 129
Charleston, WV 25321
E-mail: sthompson@barth-thompson.com
Telephone: (304) 342-7111
Facsimile: (304) 342-6215

COUNSEL FOR PETITIONER

Dated: November 22, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

I. ASSIGNMENTS OF ERROR

A. The Circuit Court deprived the Petitioner of its Due Process and Equal Protection guarantees in requiring the Petitioner to post an appeal bond in the amount of the judgment of $5,538,351.37 within fifty days of the entry of said Order as a condition of the appeal in Case Number 19-0535 being allowed to be heard and decided, and further providing that if the Petitioner did not post the bond within such period the pending appeal would be dismissed from the docket of the Supreme Court of Appeals.

B. The Circuit Judge abused its discretion in requiring the Petitioner to post an appeal bond in the amount of the judgment of $5,538,351.37 within fifty days of the entry of the said Order as a condition of the appeal in Case Number 19-0535 being allowed to be heard and decided, and further providing that if the Petitioner did not post the bond within such period the pending appeal would be dismissed from the docket of the Supreme Court of Appeals, where the Petitioner has not sought a "stay" of the enforcement of the judgment order to prevent any collection activity by the judgment creditor (the Respondent) during the pendency of the appeal.

C. The Circuit Court exceeded its jurisdiction and erred in requiring the Petitioner to post an appeal bond in a pending appeal as a condition of allowing its appeal in Case Number 19-0535 being allowed to be heard and decided, and further providing that if the Petitioner did not post the bond within such period the

pending appeal would be dismissed from the docket of the Supreme Court of Appeals, where the Petitioner has not sought a "stay" of the enforcement of the judgment order to prevent any collection activity by the judgment creditor (Respondent) during the pendency of the appeal.

II. STATEMENT OF THE CASE

A. THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

Respondent Riley Natural Gas Company (hereinafter "Respondent") filed a *Complaint* and an *Amended Complaint* seeking declaratory and monetary relief from Petitioner Northstar Energy Corporation (hereinafter "Petitioner"), claiming that Petitioner breached the gas purchase and sale Agreement between them by failing to pay Respondent for transportation charges on Dominion Transmission Inc.'s Appalachia Gateway Project Facilities natural gas pipeline and for other damages related to the gas purchased by the Respondent. App. 15-24; 53-72.

In its *Counterclaim* and *Amended Counterclaim* the Petitioner sought a declaration that the Delivery Point for the natural gas which Petitioner produced, sold and delivered to Respondent, with the result that the Petitioner was not subject to transportation charges which were alleged to be due and owing. The Petitioner asserted also that the Respondent wrongfully withheld from the proceeds of the gas delivered and sold the amount of those transportation charges; that Petitioner was entitled to recover a money judgment against Respondent for the transportation charges which had been deducted from the proceeds of the gas it delivered and sold, and that it was entitled to terminate the Agreement. App. 39-45; 82-89.

Both parties filed *Motions* and *Memorandums* for Summary Judgment and on April 16, 2019, Judge Paul T. Farrell, the Presiding Judge for this action pending in the Circuit Court of Harrison County, West Virginia, Business Court Division, made his ruling in favor of the

Respondent. Thereafter, on May 10, 2019, at the request of the parties in order to allow for an immediate appeal of his decision, the Circuit Judge entered his "*Amended Order Granting Plaintiff Riley's Motion for Summary Judgement and Denying Defendant's Motion for Summary Judgment on Findings of Fact and Conclusions of Law*" (the "*Final Order*"), App. 98-115, denying the Petitioner any relief.

As required by the *Final Order*, the parties conferred and agreed upon the amount of damages which the Respondent was entitled to recover of and from the Petitioner based upon the Circuit Court's findings and conclusions. The Circuit Court then issued its *Order* granting a money judgment in favor of the Respondent and against the Petitioner in the amount of Five Million, Five Hundred Thirty-Eight Thousand Three Hundred Fifty-One Dollars and Thirty Seven Cents ($5,538,351.37). App. 116-17.

Thereafter the Respondent filed its *Motion To Require Defendant to Post an Appeal Bond.* The Petitioner filed its *Response* opposing the Motion, and noted that it had not sought any "stay" of the enforcement of the judgment.

The Circuit Court issued the *Order Granting Plaintiff's Motion To Require Defendant to Post an Appeal Bond* (the "*Bond Order*") on July 16, 2019 which is the subject of this appeal requiring the Petitioner to post an appeal bond in the amount of the judgment of $5,538,351.37 within fifty days of the entry of said *Bond Order* as a condition of the appeal in Case Number 19-0535 to continue, and further providing that if the Petitioner did not post the bond within such period the pending appeal would be dismissed from the docket of the Supreme Court of Appeals. App. 1-5.

B. STATEMENT OF THE RELEVANT FACTS

On May 10, 2019, the Court granted the Respondent's *Motion for Summary Judgment*

with the entry of an *Order* (the "*Final Order*") that the same

> constitutes a final judgment as the same is defined in Rule 54(b) of the West Virginia Rules of Civil Procedure regarding decrees from which an appeal may lie, as the decision and Order of the Court completely disposes of at least one substantive claim. Province v. Province, 196 W.Va. 473, 473 S.E.2d 894 (1996). There is no just reason for delay and the Court directs the entry of judgment as set forth herein.

and that dismissed the Petitioner's *Counterclaim* "with prejudice." *See*, *Final Order*, pg. 17, App. 114.

On June 7, 2019, Petitioner filed its *Notice of Appeal* with the Clerk of this Court of the May 10, 2019 *Final Order*.

After the filing of the *Notice of Appeal,* on June 19, 2019 the Respondent filed its *Motion to Require Defendant to Post an Appeal Bond* (the "*Motion*") to which the Petitioner filed a *Response*. App. 118-26. The Circuit Court dispensed with oral arguments and entered its *Order Granting Plaintiff's Motion To Require Defendant to Post an Appeal Bond* (the "*Bond Order*") on July 16, 2019. App. 1-5. It is this *Bond Order* which is the subject of the instant appeal.

Respondent cited as basis for its *Motion* the provisions of Rule 62 (a) of the West Virginia Rules of Civil Procedure, which governs an automatic stay and (b) which governs a discretionary stay. The Circuit Judge found that

> there are no pending motions to alter or amend a judgment made pursuant to Rule 59(e), motions for relief from judgment or order made pursuant to Rule 60, or motions for amendment to the findings or for additional finds made pursuant to Rule 52(b).

See, *Bond Order*, pg. 3, App. 3.

Further, the Circuit Judge found certain portions of the Respondent's *Motion*, including the portion regarding the "Plaintiff's discussion of the issue of a stay" to be "confusing," and that "Plaintiff's seeking of a stay pursuant [*sic*] Rule 62(a) and (b)" to be "misplaced." App 3.

Although the Petitioner had not sought a "stay" of the enforcement of the judgment order to prevent any collection activity by the judgment creditor (Respondent) during the pendency of the appeal, the Circuit Judge construed the Respondent's request as

> a motion of Plaintiff, pursuant to W.Va. R. Civ. P. 62(i), for a stay of proceedings to enforce or execute on the judgment in this action until a final adjudication of Defendant's proposed appeal to the West Virginia Supreme Court, See, W.Va. R. Civ. P. 62(i) (Defendant may request a stay to permit an appeal to the Supreme Court of Appeals of West Virginia conditioned on the posting of an appeal bond . . .).

See, *Bond Order*, pg. 4, App. 4.

As a result, the Court required the Petitioner to post an appeal bond in the full amount of the judgment of $5,538,351.37 as a condition of its appeal being considered by this Court. App. 4. The entry of the *Bond Order* by the Circuit Judge resulted in the filing of this appeal to insure Petitioner's right to appeal in Case No. 19-0535 pending before this Court was heard and considered.

III. SUMMARY OF ARGUMENT

On June 7, 2019, Petitioner filed an appeal of the May 10, 2019 *Final Order* to the West Virginia Supreme Court of Appeals. Thereafter on June 19, 2019, Respondents filed a *Motion* to require the Petitioner to post an appeal bond in the full amount of the judgment of $5,538,351.37. The Circuit Court granted Respondent's *Motion* by its *Order* entered on July 16, 2019, in addition to a stay of proceedings pursuant to W. Va. R. Civ. P. 62(i). *See*, *Bond Order*, pg. 4, App. 4.

The Petitioner had not sought a "stay" of the enforcement of the judgment order to prevent any collection activity by the judgment creditor (Respondent) during the pendency of the appeal. The Circuit Judge however, construed the Respondents request for an appeal bond as a

request by the **Respondent**, not by the Petitioner, for a stay of proceedings pursuant to W. Va. R. Civ. P. 62(i), App. 4.

It does not make sense for the Respondent as a judgment creditor to seek a "stay" of the enforcement of the *Final Order*. This is an action that the judgment debtor would take to "stay" the enforcement of the judgment order to prevent any collection activity by the Respondent during the pendency of the appeal. The Petitioner herein did not seek a "stay" as it was not in a financial position to do so and therefore should be free from the mandate of the Circuit Judge forcing the Petitioner to seek relief it did not request. App. 125, ¶ 7.

The Petitioner believes that the Circuit Court exceeded its jurisdiction and did not have the authority to enter further Orders, specifically the *Bond Order*, after the filing of its *Notice of Appeal.*

The *Bond Order* entered by the Circuit Judge has the effect of depriving the Petitioner of any right to appeal if it is financially unable to post the required appeal bond, and of a right to have what it considered to be the errors of the trial court in granting of the *Final Order* which was entered against it be reviewed by this Court. Such action by the Circuit court deprives the Petitioner of Due Process and/or Equal Protection of the law by conditioning appeals of errors to those parties who have sufficient resources to satisfy unreasonable bonding demands.

The entry of the *Bond Order* is also an abuse of the discretion vested in the trial court, and constitutes error.

IV. STATEMENT REGARDING ORAL ARGUMENT

This matter should be set for argument pursuant to Rule 20 of the Rules of Appellate Procedure because of the importance of the Due Process and Equal Protection issues which are presented by this Appeal. The possible impact of the Circuit Court's decision to require a bond

in order for the Petitioner to pursue an appeal, if not reversed by this Court, would serve to punish those parties who lack the financial resources from pursuing justice in cases of merit.

V. ARGUMENT

A. STANDARD OF REVIEW

"When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. 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." Syl., *McCormick v. Allstate Ins. Co.*, 197 W.Va. 415, 475 S.E.2d 507 (1996). Syl. Pt. 1, *In re S.W.*, 236 W. Va. 309, 779 S.E.2d 577 (2015). Further, "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

B. ASSIGNMENTS OF ERROR

1. The terms of the *Bond Order* deprive the Petitioner of its right to appeal and deprive the Petitioner of Due Process and/or Equal Protection of the law.

"The underlying purpose of the due process of law clauses of the federal and state constitutions is to guarantee that the rights of persons may be dealt with in judicial proceedings only after due notice and a fair and reasonable opportunity for a hearing in accordance with procedure which has been ordained for the preservation of personal and property rights." *Walter Butler Bldg. v. Soto*, 142 W.Va. 616, 636, 97 S.E.2d 275, 287 (1957); *see also Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."); *Louk v. Haynes*, 157 W.Va. 482, 499, 233 S.E.2d 780, 791 (1976) ("Due process requires that the appearance of justice be satisfied.").

In *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct 780, 28 L.Ed.2d113 (1971), the Supreme Court of the United States held that access to the legal system in the United States is guaranteed when (1) the litigants' interests are fundamental; (2) resort to the courts is the sole path to relief, and (3) government control over the relief is exclusive. The Supreme Court of the United States held that "a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due." *Id.*, at 380.

Here, the Petitioner has suffered a money judgment which it firmly believes to have been wrongly decided, and has appealed that decision to this Court.

Access to this Court, and reversal of the underlying judgment, is the Petitioner's sole means of relief, and the Circuit Court has taken steps to limit Petitioner's access to this Court by means of the *Bond Order*. Such actions violate the Petitioner's Due Process and Equal Protection guarantees under the Fourteenth Amendment to the United States Constitution.

The eminent Justice Haden of this Court reflected upon the history of "purchased justice" dating to the Magna Carta when concurring in *State ex rel. Reece v. Gies*, 156 W.Va. 729, 198 S.E.2d 211 (1973):

> Some men used to pay fines to have or obtain justice or right; others, to have their right or their proceedings or judgment speeded; others, for stopping or delaying of proceedings at law; *and others were obliged to pay great and excessive finds* (viz., a fourth part, a third part, or half of the debt sued for*) to obtain justice* and right, according to their several cases, *so that the king seemed to sell justice and right to some and to delay or deny it to others*. Against these mischiefs a remedy was provided by a clause in the great charters of liberties, made by King John and King Henry III. That clause in each of those charters runs in the same or consonant works, which are these: *Nulli venemus, nulli negabimus, aut differemus rectum aut justiciam*.' Mag. Char. Joh. 40; Char. Hen. III. 33.

Id., 156 W.Va. at 744, 198 S.E.2d at 219-220, *citing McHenry v. Humes*, 112 W.Va. 432, 436-37, 164 S.E. 501 (1932) (Emphasis Supplied by the Court).

In its *Motions* to consolidate and to expedite this Appeal, and the companion appeal in Case Number 19-0535 filed in this Court, the Petitioner has explained through the Affidavit of its President its inability to post the bond which the Circuit Court required in the *Bond Order* as a condition to this Court considering the issues raised on Appeal in Case Number 19-0535.

In *Rosier v. Rosier*, 162 W.Va. 902, 253 S.E.2d 553 (1979), this Court reviewed the role which financial inability plays in the appeal of domestic relations matters. In *Rosier* the appellant had failed to post an appeal bond as required as a result of her financial inability to post the same. It was asserted that the failure to post the required appeal bond precluded her from obtaining relief from this Court.

This Court found that the intent of the Legislature was "to open our legal proceedings to poor persons where inability to pay the fees and costs attendant upon such proceedings would otherwise exclude them," and this Court went on to decide the issue on appeal. *Id.*, 162 W.Va. at 904, 253 S.E.2d at 554.

The *Bond Order*, if allowed to stand and serve as a precedent for similar orders, effectively locks the doors of this Court to litigants in similar circumstances, whose resources do not allow them to sufficient capital to post appeal bonds in large amounts, notwithstanding that they may have valid grounds for relief from the very judgments which are limiting their rights to appeal.

This Court must reverse the *Bond Order* and allow the proceedings in Case Number 19-0535 between these parties to be argued to a conclusion.

2. The Circuit Court abused its discretion in requiring that the Petitioner post an Appeal Bond in Case Number 19-0535 as a condition of allowing the Appeal to continue, or to be subject to dismissal of the Appeal.

An abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and improper factors are assessed but the circuit court makes a serious mistake in weighing them when arriving at its decision. *Gentry v. Mangum*, 195 W.Va. 512, 520 n. 6, 466 S.E.2d 171, 179 n. 6 (1995).

This Court has said that it will reverse an order of the circuit court upon finding that the trial court abused its discretion. *Bartles v. Hinkle*, 196 W.Va. 381, 389-90, 472 S.E.2d 827, 835-36 (1996).

Generally, the test for abuse of discretion is whether the trial court acted without reference to any guiding rules and principles or whether the trial court acted arbitrarily and unreasonably. A bond is required by a judgment debtor to suspend execution the judgment during the appeal of the case, but the judgment debtor must also be protected in its ability to appeal by having only to post a bond which is "reasonable" in amount.

The standards of review require that the *Bond Order* and ultimate disposition be reviewed using an abuse-of-discretion standard while the underlying factual findings are reviewed under a clearly erroneous standard. *Public Citizen v. First Nat'l Bank*, 198 W.Va. 329, 480 S.E.2d 538, 1996 W.Va. LEXIS 213 (1996).

The Circuit Court abused its discretion by improperly determining that the **Petitioner** sought a stay of proceedings pursuant to West Virginia Rule of Civil Procedure 62(i) upon the **Motion** filed by the **Respondent** seeking to require the Petitioner to post an appeal bond, App. 3-4, and then requiring the posting of a bond for the full amount of the $5,538,351.37 judgment within fifty days of the entry of the said Order as a condition of the appeal in Case Number 19-

0535 to continue, and further providing that if the Petitioner did not post the bond within such period the pending appeal would be dismissed from the docket of the this Court.

While requiring the posting of some sort of bond would have been appropriate, for example, requiring a bond to assure payment of costs, the imposition of a bond where the Petitioner had previously advised the Court, and the Circuit Court acknowledged, that the Petitioner was no longer in business, App., 99, ¶ 2, results in the Petitioner's inability to obtain meaningful access to appellate review. This action by the Circuit Court constitutes an abuse of discretion in the rendering of its decision.

Rule 28(a) of the West Virginia Rules of Appellate Procedure provides for "stays" of circuit court orders pending appeal as follows:

> Any person desiring to present an appeal under Rule 5 may make an application for a stay of proceedings to the circuit court in which the judgment or order desired to be appealed was entered. Such application must be made by notice in writing to the opposite party at any time after the entry of the judgment or order to be appealed.

Significantly, the Petitioner, who filed the appeal and is the appropriate party to seek the stay, has not sought any stay of execution upon the judgment. The Respondent in its *Motion* did not request a stay of execution pursuant to West Virginia Rule of Civil Procedure 62(i). The imposition of the *Bond Order* was the act of a Circuit Judge who abused his discretion in the entry of the same.

This Court in *State ex rel. Shenandoah Valley Nat'l Bank v. Hiett*, 127 W.Va. 381, 32 S.E.2d 869, 1945 LEXIS 1 (1945), in a discussion regarding the entry and stays of executions upon judgments, makes it clear that the requirement of a bond may only be compelled where a stay of the effectiveness of the judgment is sought, or in the event of a "supersedeas," which is not a remedy invoked by the Petitioner.

The United States District Court for the Southern District of West Virginia took up the issue of fashioning relief to parties seeking stays in the matter of *United States v. O'Shea*, 2015 U.S. Dist. LEXIS 2015 (S.D.W.Va.) (April 21, 2015), with regard to an action reducing to judgment the unpaid tax assessments of the defendant taxpayers. Unlike the Petitioner's circumstance, the defendants requested that the District Court "stay" the execution of judgment pending appeal, pursuant to Rule 62(d) of the Federal Rules of Civil Procedure.[1] The United States argued that the defendants were not entitled to a stay pursuant to Rule 62(d) as they had not posted a bond. The defendants replied that traditional factors were not applicable and urged the Court to focus on the fact that the United States had secured liens against the defendants' properties, which made their obtaining a bond problematic if not impossible.

Although the Court found that the defendants were not entitled to a stay pursuant to Rule 62(d), it opined that the Court has discretion to grant a stay without a bond in appropriate cases, and in fact did grant defendant's motion for a stay without a bond. *See, e.g., Hoffmann v. O'Brien,* No. CIV. WDQ-06-3447, 2009 U.S. Dist. LEXIS 89694, 2009 WL 3216814, at *1 (D. Md. Sept. 29, 2009) (concluding that Rule 62(d) "leaves intact the district court's inherent discretion to stay judgments pending appeal when the appellant does not file a supersedeas bond").

The Court went on to discuss the factors which are generally considered with respect to a stay pending appeal in the federal courts. Those factors are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the

[1] Rule 62(d) provides: "If an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . The bond may be given upon or after filing the notice of appeal of after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond." Fed. R. Civ. P. 62(d)

other parties interested in the proceedings and (4) where the public interest lies." *Citing Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L. Ed. 2d 724 (1987).

This framework provides an appropriate analysis within which this Court should work—and would have provided a framework for the Circuit Court below and all other Circuit Courts who must address such issues in the future. In considering these factors, the *Petitioner's Brief* opposing summary judgement strongly supported a finding that would have satisfied the first factor in its behalf. The underlying issue to be decided below, and on appeal here in Case Number 19-0535, was the "Delivery Point" under the parties' Agreement; as the Petitioner pointed out below, and as it has reiterated in this Court, the underlying documents support a finding that the Circuit Court failed to apply the plain reading of the Agreement to the facts.

The second factor of irreparable harm falls onto the side of the Petitioner, because the harm of failing to have a meritorious appeal heard and considered—and the underlying decision reversed, as Petitioner believes will be the result—will mean that the Petitioner will be out of business. Any harm to the Respondent from not being able to execute upon its judgment is merely a delay and is not permanent.

The third factor is closely related to the second factor. The Respondent would merely be delayed in enjoying the fruits of its judgment if the *Bond Order* was found to be erroneously issued. The assets of the Petitioner will still be available for execution and levy if the underlying Summary Judgment Order and Judgment Order are not reversed by this Court, only the time for obtaining satisfaction upon its money judgment will be delayed until the underlying issues in Case Number 19-0535 are decided.

Finally, the public interest in having not just the appearance of justice but actual justice rendered to all litigants is a paramount consideration, and again supports the issuance of a stay

even where litigants are financially unable to post a bond. No litigant should ever perceive that the Courthouse doors will be made to open conditioned upon its paying a hefty price for admission. In this, the public interest is paramount.

The *Bond Order* entered by the Circuit Judge has the effect of depriving the Petitioner of its right to have errors of the trial court which are included within the *Final Order* granting summary judgment against it be reviewed by this Court.

This Court must find that the entry of the *Bond Order* by the Circuit Court was an abuse of its discretion, reverse the terms of the *Bond Order,* and remand the same to the Circuit Court.

3. The Circuit Judge exceeded the jurisdiction of the Circuit Court in requiring Petitioner post an appeal bond in Case Number 19-0535 as a condition of allowing the appeal to continue, or to be subject to dismissal of the Appeal.

Jurisdiction deals with the power of the court and is the inherent power of a court to decide a case. *See,* Syl. Pt. 2, *Vanover v. Stonewall Cas. Co.*, 169 W.Va. 759, 289 S.E.2d 505 (1982).

The Petitioner believes that the terms of the *Bond Order* entered after the filing of its *Notice of Appeal* on June 7, 2019, exceeded the jurisdiction of the Circuit Court, is inconsistent with the right of an aggrieved party to appeal, and deprives this Court of the right to determine those cases which it will hear and adjudicate.

In *Highmark W.Va., Inc. v. Jamie*, 221 W.Va. 487, 655 S.E.2d 509, 207 W.Va. LEXIS 111 (2007), this Court found that dismissal of counterclaims "with prejudice" was consistent with the entry of a judgment pursuant to West Virginia Rule of Civil Procedure 54(b) in terms of facilitating an appeal because the dismissal with prejudice foreclosed the possibility of further amendment; otherwise, an appeal would not have been appropriate.

This Court has long held that an appeal has the effect of transferring the case that is appealed from the circuit court to this Court for **all** further proceedings until a decision is rendered on the appeal. In 1872, the matter of *Dunbar v. Dunbar*, 5 W.Va. 567, 1872 W.Va. LEXIS 69 (1872), came before the Court upon the petitioner husband seeking a writ of prohibition against the Sheriff, circuit court judge and his wife to prevent the circuit court from enforcing a custody decree pending the husband's appeal.

On review, this Court held that all proceedings on any judgment or decree appealed from had to absolutely cease until the questions arising under such appeal were determined by the court where the case, as to the order appealed from was properly pending. It was found that, when a party files and gives notice of an appeal in any case from a judgment, order or decree, the jurisdiction of the circuit court with respect to the judgment, order or decree appealed from, ceases until the outcome of the appeal is resolved. From that point forward it is not competent for the lower court to proceed in disregard of such appeal, to carry the judgment, order or decree into execution or to determine the legality of such appeal.

In *Crawford v. Fickey*, 41 W.Va. 544, 23 S.E. 662, 1895 W.Va. LEXIS 117 (1895), while an appeal was pending, a receiver in the real estate dispute obtained an order from the trial court, which relieved him of paying interest to the landowners. This Court reversed the judgment of the trial court and stated:

> In volume 2, p. 327 of that valuable recent work, Encyclopedia of Pleading and Practice, the rule, based on authorities from every quarter, is definitely state, that, "where an appeal has been perfected, the jurisdiction of the appellate court over the subject matter and the parties attaches, and the trial court has no power to render any further decision affecting the rights of the parties in the cause until it is remanded." It is removed to the appellate court. The lower court has lost jurisdiction.

Id., at 546.

A case which had facts very close to those of the instant case is *Pure Oil Co. v. O'Brien*, 106 W.Va. 10, 144 S.E. 564, 1928 W.Va. (1928). In a chancery action related to commercial paper a circuit court judge entered a second injunction in a case that was pending on appeal. This Court held that "[w]hen an appeal is perfected, the jurisdiction of the appellate court over the subject matter and the parties attaches, and the trial court has no power to render any further decision affecting the parties in the cause until remanded." *Id.*, 106 W.Va. at 12, 14 S.E. at 545, *quoting Dunbar, supra,* and *M'Laughlin v. Janney*, 47 Va. 609, 6 Gratt, 609; 2 Enc. Pl. & Prac. 327.

In *Fenton v. Miller*, 182 W.Va. 731, 391 S.E.2d 744, 1990 W.Va. LEXIS 39 (1990), the Appellant Department of Human Services challenged the judgment of the Circuit Court which entered a preliminary injunction against a husband with a pending appeal to enjoin the Department from collecting certain payments.

On appeal, this Court reversed the circuit court and found that, once the Supreme Court of Appeals takes jurisdiction of a matter pending before a circuit court, the circuit court is without jurisdiction to enter further orders in the matter except by specific leave of this Court. *Id.*, Syl. Pt. 3,

Lastly, *Hanson v. Board of Educ.* 198 W.Va. 6, 479 S.E.2d 305, 1996 W.Va. LEXIS 170 (1996), involved an appeal by the Defendant board of education of the Circuit Court's order requiring the board to comply with the terms of a settlement agreement. After litigation in the Circuit Court which resulted in a Settlement Agreement a dispute arose regarding the crediting of vacation and sick days. The employee filed a motion to compel enforcement in the Circuit Court, which the court granted.

On appeal, this Court reversed and held that the circuit court did not have jurisdiction over the subject matter of the dispute. *Id.*, 198 W.Va. at 7, 479 S.E.2d at 308. The syllabus of *Hanson* quoted the following syllabus points of this Court in *Hinkle, supra*:

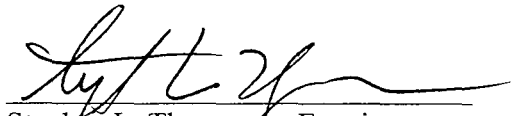
> Whenever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket. *Id.* Syl. Pt. 1,
>
> In the exercise of appellate jurisdiction, this Court will reverse a trial Court which exceeds its lawful jurisdiction. *Id.* Syl. Pt. 3.

Clearly the Circuit Court exceeded its jurisdiction when requiring the Petitioner to post an appeal bond in the full amount of the judgment rendered against it as a condition of this Court hearing and deciding the appeal in Case Number 19-0535. This Court should reverse the terms of the *Bond Order* and remand the same to the Circuit Court following the decision in Case Number 19-0535.

VI. CONCLUSION

This Court should reverse the terms of the *Bond Order* and remand the same to the Circuit Court following the decision in Case Number 19-0535.

NORTHSTAR ENERGY CORPORATION
By Counsel



Stephen L. Thompson, Esquire
W. Va. State Bar No. 3751
Barth & Thompson
Post Office Box 129
Charleston, WV 25321
Telephone: (304) 342-7111
Facsimile: (304) 342-6215
sthompson@barth-thompson.com

Counsel for the Petitioner