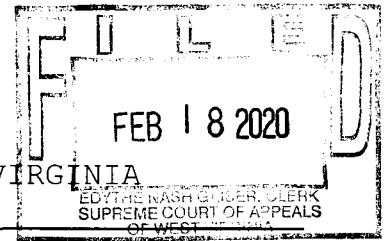


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NO. 19-1037



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

ROBERT NELSON RECTOR,
resident of Harrison County,
West Virginia,

Plaintiff,

v.

CIVIL ACTION NO. 17-C-344-3
James A. Matish, Judge

KIMBERLY KAY ROSS, formerly
known as KIMBERLY KAY RECTOR,
JACLYN BELCASTRO, as power of
attorney for Kimberly Kay Ross,
THOMAS G. DYER, and,
THE HONORABLE LORI B. JACKSON,

Defendants.

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE JAMES A. MATISH, JUDGE

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

GREGORY H. SCHILLACE WWSB #5597

Counsel for Appellant

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NO. 19-1037

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CHARLESTON

ROBERT NELSON RECTOR,
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CIVIL ACTION NO. 17-C-344-3
James A. Matish, Judge

KIMBERLY KAY ROSS, formerly
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JACLYN BELCASTRO, as power of
attorney for Kimberly Kay Ross,
THOMAS G. DYER, and,
THE HONORABLE LORI B. JACKSON,

Defendants.

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE JAMES A. MATISH, JUDGE

BRIEF OF THE APPELLANT, ROBERT NELSON RECTOR

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

**I. Statement of the Kind of Proceeding
and Nature of the Ruling Below**

The above-styled civil action was filed in the Circuit Court of Harrison County, West Virginia on November 3, 2017. Appendix Volume 1 at 00001. The complaint sought declaratory relief and interplead funds with respect to the defendants, Kimberly Kay Ross, Jaclyn Belcastro and Thomas G. Dyer. Appendix Volume 1 at 00005.

The complaint sought to enforce a settlement agreement between the appellant and the defendant, Kimberly Kay Ross. Appendix Volume 1 at 00007 and 00009. The complaint further sought damages from the defendant, Kimberly Kay Ross and her power of attorney, defendant, Jaclyn Belcastro. Appendix Volume 1 at 00012.

With respect to the appellee, The Honorable Lori B. Jackson, the complaint sought the issuance of a writ of prohibition pursuant to West Virginia Code §53-1-1 to prohibit the Family Court of Harrison County, West Virginia from conducting any further proceedings in the action styled: Robert Nelson Rector v. Kimberly Kay Recto [Ross], Civil Action No. 15-D-497-5, Family Court of Harrison County, West Virginia. (Hereinafter, divorce action.) The Family Court was without jurisdiction to conduct any proceedings in the divorce action after May 1, 2017. Appendix Volume 1 at 00139.

The complaint was amended pursuant to order entered on November 28, 2017. Appendix Volume 1 at 00037. The amended complaint was filed on November 29, 2017. Appendix Volume 1 at 00042.

The amended complaint reflected the recognition by the appellee that the family court denied the motion of the defendant, Kimberly Kay Rector (Ross) to enforce the settlement agreement between the appellant and Kimberly Kay Rector (Ross). Appendix Volume 1 at 00051. The appellee determined the family court had no

jurisdiction to enforce the settlement agreement. Appendix Volume 1 at 00051.

A hearing was held on December 11, 2017, however, an order was not entered with respect to that hearing. Appendix Volume 3 at 00548. On February 26, 2018 the appellee filed a motion to dismiss the amended complaint and a memorandum of law in support of the motion. Appendix Volume 1 at 00091.

On March 20, 2018 an order was entered scheduling a hearing on March 30, 2018. Appendix Volume 3 at page 00548. A response of the appellant to the motion to dismiss of the appellee was filed on March 29, 2018. Appendix Volume 1 at 00136.

At the March 30, 2018 hearing the circuit court imposed a \$5,000.00 sanction upon counsel for the appellant regarding cases other than this action for which no notice was provided. Appendix Volume 2 at 00540. The circuit court characterized the \$5,000.00 penalty as a sanction and required it to be paid to the Clerk of the Circuit Court. Appendix Volume 3 at 00544.

In addition to the ruling the circuit court denied the motion of the appellee to dismiss the amended complaint. Appendix Volume 1 at 00151. On April 9, 2018 the appellant filed a motion to alter/amend the ruling made during the March 30, 2018 hearing. Appendix Volume 1 at 00147.

An order with respect to the March 30, 2018 hearing was not entered until June 5, 2018. Appendix Volume 3 at 00548. The

circuit court did not address the April 9, 2018 motion to alter/amend the March 30, 2018 rulings until August 13, 2019. Appendix Volume 3 at 00548.

By order entered June 25, 2018 the circuit court held a scheduling conference on July 13, 2018. Appendix Volume 1 at 00157. The appellant filed a motion for judgment on the pleadings or in the alternative motion for summary judgment with respect to the appellee on July 3, 2018. Appendix Volume 1 at 00159.

Despite the denial of the motion to dismiss of the appellee, no answer was filed on behalf of the appellee within the ten (10) days required by Rule 12(a)(3)(A) of the West Virginia Rules of Civil Procedure. Appendix Volume 3 at 00548. The pretrial and scheduling order was entered on July 16, 2018 with respect to the scheduling hearing held on July 13, 2018. Appendix Volume 1 at 00182.

On July 16, 2018 a response of the appellee was filed to the motion for judgment on the pleadings of the appellant. Appendix Volume 2 at 00193. The appellee served an answer to the amended complaint on July 16, 2018. Appendix Volume 2 at 00226.

On May 10, 2019, a motion for summary judgment was filed by the appellee. Appendix Volume 2 at 00318. A response of the appellant to the motion for summary judgment of the appellee was filed on May 28, 2019. Appendix Volume 2 at 00361.

A reply of the appellee in support of the motion for summary judgment was filed on June 12, 2019. Appendix Volume 3 at 00391. A mediation was conducted with respect to the entirety of the causes of action asserted in the amended complaint on June 18, 2019. Appendix Volume 3 at 00443.

During the June 18, 2019 mediation all matters in this action were resolved with the exception of the writ of prohibition regarding the appellee. Appendix Volume 3 at 00446. A hearing was held on June 27, 2019 which was scheduled as a final pretrial hearing. Appendix Volume 3 at 00450.

A motion to alter/amend the ruling announced during the June 27, 2019 hearing was filed on June 28, 2019. Appendix Volume 3 at 00450. An order regarding the June 27, 2019 final pretrial hearing was not entered until August 13, 2019. Appendix Volume 3 at 00467.

By order entered October 16, 2019 the circuit court dismissed the amended complaint against the appellee based upon the objection of counsel for the plaintiff to pay the final sanction for which the circuit court had no jurisdiction to impose. Appendix Volume 3 at 00486. On November 18, 2019 the appellant filed the Notice of Appeal. Appendix Volume 3 at 00548.

On January 27, 2020, the circuit court denied the motion for attorney fees of the appellee. Appendix Volume 3 at 0491. Although the appellant has no objection to the denial of the motion for attorney fees, the circuit court was without jurisdiction to

enter any orders after the filing of the Notice of Appeal. Fenton v. Miller, 182 W.Va. 731, 391 S.E.2d 744 (1990); State v. Doom, 237 W.Va. 754, 791 S.E.2d 384 (2016); State ex rel. Silver v. Wilkes, 213 W.Va. 692, 584 S.E.2d 548 (2001).

II. Statement of Facts

1. On December 21, 2016 the Family Court of Harrison County the appellee, The Honorable Lori B. Jackson, presiding, entered a Divorce Decree with respect to the domestic relations action styled: Robert Nelson Rector v. Kimberly Kay Rector, Civil Action No. 15-D-497-5. This Divorce Decree represented the final order in the underlying domestic relations action. Appendix Volume 2 at 00361.

2. The final Decree of Divorce was appealed to the Circuit Court of Harrison County, West Virginia on January 23, 2017. Appendix Volume 2 at 00363.

3. Upon the filing of the appeal of the Divorce Decree to the circuit court, the family court no longer had jurisdiction with respect to the divorce action. Pure Oil Company v. O'Brien, 106 W.Va. 10, 144 S.E. 564 (1928) (once a jurisdiction of a proceeding has been taken by this court [Supreme Court], the circuit court is without jurisdiction to act further in the proceeding. That obviously is the law, so the circuit court's order dissolving the preliminary injunction was erroneous.)

4. Despite the absence of jurisdiction in the family court, the defendant, Kimberly Kay Ross, by her court appointed guardian ad litem, filed a petition to hold the appellant in contempt of the Decree of Divorce on February 24, 2017 and filed a supplemental petition for contempt on April 12, 2017. Appendix Volume 1 at 00052.

5. Despite the absence of jurisdiction, the appellee scheduled a hearing to be held on May 1, 2017 with respect to the petition for contempt and supplemental petition for contempt. Appendix Volume 1 at 00098.

6. The appellant and his counsel appeared on May 1, 2017 before the family court and objected to the any Family Court proceeding based upon the absence of family court jurisdiction. Appendix Volume 2 at 00364.

7. Despite the absence of any jurisdiction, the family court set a hearing for May 1, 2017 regarding the two (2) petitions for contempt filed after the January 23, 2017 appeal to the circuit court. Appendix Volume 2 at 00364.

8. During the May 1, 2017 hearing the appellant and his counsel reaffirmed the assertion that the appellee lacked jurisdiction to conduct any hearing with respect to the concluded divorced action then on appeal to the circuit court. Appendix Volume 2 at 00364.

9. The May 1, 2017 hearing before the family court did not conclude within the time frame allotted by the family court, therefore, the appellee, over the clear objections of the appellant and his counsel, continued the hearing to reconvene on May 2, 2017 at 7:00 a.m. Appendix Volume 3 at 00412.

10. On May 1, 2017, following the hearing in the family court, the Circuit Court of Harrison County entered an order staying all proceedings before the appellee. Appendix Volume 3 at 00410.

11. In accordance with the stay entered by the circuit court on May 1, 2017, the appellant and his counsel did not appear on May 2, 2017 at 7:00 a.m. for the hearing set by the appellee. Appendix Volume 3 at 00412.

12. In violation of the May 1, 2017 order staying all proceedings in the domestic relations actions styled: Robert Nelson Rector v. Kimberly Kay Rector, Civil Action No. 15-D-497-5 the appellee, without jurisdiction, entered an order on May 11, 2017 setting further proceedings in the divorce action for June 14, 2017. Appendix Volume 2 at 00365.

13. The entry of the May 11, 2017 order was in direct violation of the May 1, 2017 order of the circuit court staying all proceedings pending appeal. Appendix Volume 2 at 00365.

14. On May 30, 2017 the appellant filed a Motion to Enforce Stay and Request for Expedited Relief before the circuit court. Appendix Volume 2 at 0365.

15. On June 2, 2017 the circuit court entered an Order Granting Motion to Enforce Stay and Clarification of May 1, 2017 Order Granting Stay of the Petitioner Pending Appeal. Appendix Volume 3 at 00414.

16. The June 2, 2107 Order of the circuit court expressly states at paragraphs 24 as follows:

24. The Court expressly FINDS and ORDERS that the Family Court of Harrison County has no jurisdiction to entertain any petition for contempt against Gregory H. Schillace or the petitioner, Robert N. Rector.

Appendix Volume 3 at 00419.

17. The June 2, 2017 Order has not been modified, amended or vacated by the circuit court. Appendix Volume 2 at 00366.

18. The appellee in violation of the June 2, 2017 Order of the circuit court entered an order entitled Order Continuing Three Contempt Actions on June 12, 2017. Appendix Volume 2 at 00366.

19. The entry of the June 12, 2017 Order by the appellee was a violation of the June 2, 2017 Order of the circuit court. Appendix Volume 3 at 0414.

20. On or about August 24, 2017 the appellant and the defendant, Kimberly Kay Ross, entered into a Release and Settlement Agreement which resolved all matters between them including, but not limited to, the following civil and criminal proceedings:

- (1) Robert Nelson Rector v. Kimberly Kay Rector, Civil Action NO. 15-D-497-5, Family Court of Harrison County, West Virginia;

- (2) Robert Nelson Rector v. Kimberly Kay Rector, Civil Action No. 15-C-491-2, Circuit Court of Harrison County, West Virginia; and,
- (3) The criminal restitution judgement against Kimberly Kay Rector (Ross) in the criminal proceeding styled: State of West Virginia v. Kimberly Kay Rector, Case No. 15-F-80, Circuit Court of Taylor County, West Virginia.

Appendix Volume 1 at 00017.

21. Following the execution of the Release and Settlement Agreement, issues arose with respect to the implementation of the agreement resulting in the filing of this action by the appellant and the filing of a Petition to Ratify and Enforce Release and Settlement Agreement in the domestic relations action styled: Robert Nelson Rector v. Kimberly Kay Rector, Civil Action NO. 15-D-497-5, Family Court of Harrison County, West Virginia, by the defendant, Kimberly Kay Ross. Appendix Volume 1 at 00003.

22. The Petition to Ratify and Enforce Release and Settlement Agreement of the defendant, Kimberly Kay Ross, was filed on or about September 21, 2017. Appendix Volume 1 at 00011.

23. On November 9, 2017 the appellant filed a Notice of Special Appearance and objected to any proceedings before the appellee regarding the interpretation and/or enforcement of the Release and Settlement Agreement, however, the appellee, over this objection, held a hearing with respect to the petition filed by the defendant, Kimberly Kay Rector. Appendix Volume 1 at 00051.

24. During the hearing held with respect to the Petition to Ratify and Enforce Release and Settlement Agreement before the family court, the appellee announced that it did not have subject matter jurisdiction over the Release and Settlement Agreement and dismissed the petition. Appendix Volume 1 at 00051.

25. An Order by the appellee dismissing the Petition of the defendant, Kimberly Kay Ross (Rector) to Ratify and Enforce Release and Settlement Agreement was entered on November 27, 2017. Appendix Volume 2 at 00367.

26. No appeal was filed with respect to the November 27, 2017 Order. Appendix Volume 2 at 00368.

27. On November 9, 2017, the appellee again in direct violation of the June 2, 2017 Order of the circuit court, entered an Order Issuing Rule to Show Cause and Setting Hearing with respect to the non-appearance by counsel for the petitioner at the May 2, 2017, 7:00 a.m. hearing. Appendix Volume 2 at 00367.

28. On November 9, 2017, the appellee, in direct violation of the June 2, 2017 Order of the circuit court, entered an Order Issuing Rule to Show Cause and Setting Hearing with respect to non-appearance of the appellant at the May 2, 2017 7:00 a.m. hearing. Appendix Volume 2 at 00368.

29. The entry of the two (2) November 9, 2017 Orders by the appellee was again in defiance of the June 2, 2017 Order of the circuit court. Appendix Volume 3 at 00414.

30. The June 2, 2017 Order is not limited to any period of appeal and unambiguously provides that the appellee was without jurisdiction to entertain any petition for contempt regarding the nonappearance of the appellant and/or his counsel at a hearing scheduled by the family court on March 2, 2017. Appendix Volume 3 at 00414.

31. During the March 30, 2018 the circuit court, with no notice to counsel for the appellant and based upon civil actions not noticed for hearing imposed a penalty upon counsel for the appellant. Appendix Volume 3 at 00540.

32. The \$5,000.00 penalty was directed to be paid to the Clerk of the Circuit Court. Appendix Volume 3 at 00544.

33. Counsel for the appellant filed a motion to alter/amend the imposition of the penalty on April 6, 2018. Appendix Volume 1 at 00147.

34. During the June 27, 2019 hearing set by the circuit court in the Pretrial and Scheduling Order, the circuit court, with no notice to counsel for the appellant and no action by the circuit court on the April 26, 2018 motion to alter/amend, imposed a penalty of \$50.00 per day until the \$5,000.00 sanction was paid, refusing to hear pending motions dispositive of the issue between the appellant and the appellee. Appendix Volume 3 at 00454.

35. A motion to alter/amend the ruling announced during the June 27, 2019 hearing was filed on June 27, 2019. Appendix Volume 3 at 00450.

36. On August 14, 2019 the circuit court granted a judgment in favor of the appellee as the \$5,000.00 sanction had yet to be paid. Appendix Volume 3 at 00486.

37. Until June 27, 2019 the circuit court had taken no action on the motions to alter/amend the ruling regarding the sanction imposed. Appendix Volume 3 at 00467.

III. Summary of Argument

The Circuit Court of Harrison County improperly granted a judgment to the appellee as a sanction for the non-payment of a sanction which the circuit court abused its discretion in awarding. Further, the appellee had no jurisdiction to conduct any hearing or enter any orders in violation of stay imposed by the circuit court.

IV. Statement Regarding Oral Argument

Pursuant to Rule 18(a), the appellant, Robert Nelson Rector, believes that oral argument should be held in this case.

V. Points and Authorities

State Cases

Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996)

Crowe v. Corporation of Charles Town 62 W.Va. 91, 57 S.E. 330 (1907)

Fenton v. Miller, 182 W.Va. 731, 391 S.E.2d 744 (1990)

In re: Frieda Q., 230 W.Va. 652, 742 S.E.2d 68 (2013)

Kanawha Valley Radiologists, Inc. v. One Valley Bank, N.A., 210 W.Va. 223, 557 S.E.2d 277 (2001)

Lauderdale v. Neal, 212 W.Va. 184, 569 S.E.2d 431 (2002)

Murthy v. Karpacs-Brown, 237 W.Va. 490, 788 S.E.2d 18 (2016)

Noland v. Virginia Insurance Reciprocal, 224 W.Va. 372, 686 S.E.2d 23 (2009)

Powell v. Paine, 226 W.Va. 125, 697 S.E.2d 161 (2010)

Pure Oil Company v. O'Brien, 106 W.Va. 10, 144 S.E. 564 (1928)

State v. Doom, 237 W.Va. 754, 791 S.E.2d 384 (2016)

State ex rel. Askin v. Dostert, 170 W.Va. 562, 295 S.E.2d 271 (1982)

State ex rel. Bluestone Coal Corp v. Mazzone, 226 W.Va. 148, 697 S.E.2d 740 (2010)

State ex rel. Frazier Oxley, L.C. v. Cummings, 214 W.Va. 802, 591 S.E.2d 728 (2003)

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

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

State ex rel. Silver v. Wilkes, 213 W.Va. 692, 584 S.E.2d 548 (2001)

Vincent v. Preiser, 175 W.Va. 797, 338 S.E.2d 398 (1985)

Walker v. West Virginia Ethics Commission, 201 W.Va. 108, 492 S.E.2d 167 (1997)

Statutes and Regulations

West Virginia Code §51-2A-15(b)

West Virginia Code §53-1-1

West Virginia Code §61-5-26

Rules of Appellate Procedure

West Virginia Rules of Appellate Procedure Rule 5

West Virginia Rules of Appellate Procedure Rule 13

West Virginia Rules of Appellate Procedure Rule 18(a)

West Virginia Rules of Appellate Procedure Rule 28(a)

Rules of Civil Procedure

West Virginia Rules of Civil Procedure Rule 12(a)(3)(A)

VI. Discussion

A. Standard of Review

The standard of review applicable is if the circuit court abused its discretion regarding the imposition of sanctions. State ex rel. Richmond American Homes of West Virginia v. Sanders, 226 W.Va. 103, 697 S.E.2d 139 (2010).

With respect to the issue of the jurisdiction of the family court, the standard of review regarding the question of law is de novo. Walker v. West Virginia Ethics Commission, 201 W.Va. 108, 492 S.E.2d 167 (1997); Lauderdale v. Neal, 212 W.Va. 184, 569 S.E.2d 431 (2002).

B. The Circuit Court Abused its Discretion in Issuing the \$5,000.00 Penalty upon Counsel for the Appellant.

The circuit court abused its discretion imposing a monetary sanction which was not specifically fashioned to address the identified harm caused by the failure of counsel for the appellant to timely prepare an order regarding the December 11, 2017 hearing and the failure to appear for the February 28, 2018 hearing, the only notice of which would have been in the unprepared order. Richmond American Homes of West Virginia, Inc. v. Sanders, 228

W.Va. 103, 697 S.E.2d 139 (2010). The abuse of discretion is highlighted by the delay in the submission and entry of other orders in this action.

Counsel for the appellant was provided with no notice nor opportunity to respond to the matters unrelated to the above-styled civil action referenced by the circuit court during the March 30, 2018 hearing. Appendix Volume 3 at 00540. The circuit court had the obligation to afford a party with notice and the opportunity to be heard prior to awarding attorney's fees. Kanawha Valley Radiologists, Inc. v. One Valley Bank, N.A., 210 W.Va. 223, 557 S.E.2d 277 (2001).

Although the trial court is within its discretion to award attorney's fees as well as a civil penalty, to comply with the due process clause of the West Virginia Constitution such sanctions require a relationship between the sanctioned conduct and the matters in controversy. Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996). Further, the offending party must be given notice of all matters to be addressed and an opportunity to be heard with respect to those matters. Murthy v. Karpacs-Brown, 237 W.Va. 490, 788 S.E.2d 18 (2016).

West Virginia Code §61-5-26 which authorizes a circuit court and the judges punish contempt summarily applies in the following cases:

- (a) misbehavior in the present of the court, or so near thereto as to obstruct or interrupt the administration of justice;

- (b) violence or threats of violence to a judge or officer of the court, or to a juror, witness, or a party going to, attending or returning from the court, for or in respect of any act or proceeding had, or to be had, in such court;
- (c) misbehavior of an officer of the court, in its official capacity;
- (d) disobedience to resistance of any officer of the court, juror, witness, or any other person, to any lawful process, judgment, decree or order of said court.

This Court has determined that there are four (4) classifications of contempt in the context of determining the applicable due process requirement: direct-criminal, indirect-criminal, direct-civil, and indirect-civil. In re: Frieda Q., 230 W.Va. 652, 742 S.E.2d 68 (2013).

A direct contempt occurs in the actual physical presence of the court while an indirect contempt occurs entirely or partially outside of the actual physical presence of the court. A civil contempt is where the purpose to be served by imposing a sanction for the contempt is to compel compliance with a court order so is the benefit the party bringing the contempt action by enforcing, protecting or assuring the right of that part under the order. In re: Frieda Q., 230 W.Va. 652, 742 S.E.2d 68 (2013).

A contempt is criminal where the purpose to be served by imposing a sanction for the contempt is to punish for an affront to the dignity or authority of the court, to preserve order in the court or ensure respect for the court. State ex rel. Robinson v.

Michael, 166 W.Va. 660, 276 S.E.2d 812 (1981). Based upon these definitions the March 30, 2018 order that counsel for the plaintiff pay \$5,000.00 to the Clerk of the Circuit Court of Harrison County was a criminal contempt.

The transcript of the March 30, 2018 hearing with respect to the criminal penalty provides as follow:

There will be a \$5,000.00 lien, penalty, assessed against you. And the court is doing that here in this particular case. That needs to be payable to the Clerk by the end of next week.

Appendix volume 3 at 00540. The order entered on June 5, 2018 with respect to the March 30, 2018 hearing provides that:

IT IS FURTHER ORDERED that attorney Gregory H Schillace shall deposit the sum of five thousand dollars (\$5,000.00) with the Circuit Court of Harrison County by April 6, 2018.

Appendix volume 1 at 00151.

This Court held in State ex rel. Askin v. Dostert, 170 W.Va. 562, 295 S.E.2d 271 (1982), that a circuit court cannot order an attorney practicing before it to provide security for the good behavior of the attorney. Further, the circuit court refused to permit an attorney admitted to the West Virginia State Bar on October 22, 2004, Theresa Ann Post, to appear at hearings on behalf of clients of the Schillace Law Office.

In an contempt case where the trial court proceeds without a jury, the contumacious conduct giving rise to the contempt charged must fall squarely within the statutory provisions of West Virginia

Code §61-5-26. Further, whether a contempt is classified as 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 which is appropriate. Vincent v. Preiser, 175 W.Va. 797, 338 S.E.2d 398 (1985).

As the \$5,000.00 payment was to be made to the Clerk of the Circuit Court the contempt is criminal. However, West Virginia Code §61-5-26 limits any fine to a sum not exceeding fifty dollars (\$50.00).

Accordingly, the \$5,000.00 fine ordered on March 30, 2018 and embodied in the June 5, 2018 order was either impermissible security for the good behavior of counsel, State ex rel. Askin v. Dostert, 170 W.Va. 562, 295 S.E.2d 271 (1982), or an impermissible criminal content fine pursuant to West Virginia Code §61-5-26 and In re: Freida Q., 230 W.Va. 652, 742 S.E.2d 68 (2013). In either instance, the circuit court abused its discretion and violated the right to due process of counsel for the appellant.

As the circuit court abused its discretion in assessing the \$5,000.00 penalty during the March 30, 2018 hearing, the \$50.00 per day penalty for the non-payment of the \$5,000.00 sanction was an abuse of discretion. Appendix Volume 3 at 00454. Particularly where there was no notice to counsel for the appellant that any issue regarding the payment of sanctions was to be addressed. Appendix Volume 1 at 00189. Murthy v. Karpacs-Brown, 237 W.Va. 490, 788 S.E.2d 18 (2016).

Additionally, the circuit court added insult to injury by granting a judgment to the appellee based upon the non-payment of a sanction which was the abuse of discretion to impose. Appendix Volume 3 at 00486. Based upon the clear due process violations the orders from the March 30, 2018; June 27, 2019; and, August 14, 2019 hearings must be vacated.

C. **The Appellee Had No Jurisdiction to Schedule the May 2, 2017 Hearing, Therefore, the Appellee Was Without Jurisdiction to Punish in Contemp for Non-appearance.**

This Court has addressed the jurisdictional issue between a circuit court and the Supreme Court in numerous decisions beginning at least in 1909 with the decision in Crowe v. Corporation of Charles Town 62 W.Va. 91, 57 S.E. 330 (1907) (when final judgment is rendered, and the court adjourns for the final term, it thereby loses jurisdiction of the person and of the subject unless such jurisdiction is in some way reserved by law). In Fenton v. Miller, 182 W.Va. 731, 391 S.E.2d 744 (1990), this Court held at once this Court 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 [Supreme Court].

In State v. Doom, 237 W.Va. 754, 791 S.E.2d 384 (2016), this Court held that when it grants a petition for appeal all proceedings in the circuit court relating to the case in which the petition for appeal has been granted are stayed pending a decision

by the Supreme Court in the case. As West Virginia Family Courts are inferior courts to both circuit courts and this Court as well as being subject to both the appellant and original jurisdiction of the circuit court, the filing of the appeal to the Circuit Court on January 23, 2017 deprived the appellee of any further jurisdiction in the underlying domestic relations case, voiding all actions taken by the family court. State ex rel. Silver v. Wilkes, 213 W.Va. 692, 584 S.E.2d 548 (2001).

Accordingly, the appellee was without jurisdiction to permit the filing of the Petition for Contempt on February 24, 2017; the Supplemental Petition on April 12, 2017; and Scheduling and Holding a Hearing on May 1, 2017. Additionally, the appellee had no jurisdiction to even schedule a hearing on May 2, 2017.

The June 2, 2017 Order of the circuit court was not modified, amended or vacated, therefore, the stay imposed by that order still applies to the appellee. The June 2, 2017 order was the result of the motion of the appellant to enforce the May 1, 2017 stay and request for expedited relief filed in Circuit Court on May 30, 2017 as a consequence as May 2, 2017 non-appearance entered an order on May 11, 2017 to show cause.

The appellee then entered a second order on May 2, 2017 rescheduling the hearing from May 2, 2017 to June 14, 2017. The two orders entered by the appellee on May 11, 2017 were in violation of the May 1, 2017 order granting stay and the June 2,

2017 order granting the motion to enforce stay and clarification of May 1, 2017 order granting stay.

Pursuant to the law of the case doctrine the June 2, 2017 order of the circuit court which states it expressly "**FINDS AND ORDERS**" that the appellee had no jurisdiction to entertain any petition for contempt against the appellant or his counsel is conclusive in any subsequent proceedings as that order was not appealed. Noland v. Virginia Insurance Reciprocal, 224 W.Va. 372, 686 S.E.2d 23 (2009).

Additionally, upon the August 25, 2017 execution of the release and settlement agreement between the appellant and the defendant, Kimberly K. (Rector) Ross all issues in the litigation between the appellant and the defendant, Kimberly K. (Rector) Ross became moot. State ex rel. Bluestone Coal Corp v. Mazzone, 226 W.Va. 148, 697 S.E.2d 740 (2010). The primary parties to the litigation resolved their differences upon the execution of their Release and Settlement Agreement court action other than any proceeding before the Circuit Court to enforce the Release and Settlement agreement became mute.

Rule 13 of the West Virginia Rules of Appellate Procedure makes clear that an appeal from a final circuit court order refusing a petition for appeal from family court order or ruling on a family court appeal pursuant to West Virginia Code §51-2A-15(b) proceeds as any other civil appeal pursuant to Rule 5 of the West

Virginia Rules of Appellant Procedure. Once jurisdiction of a proceeding has been taken by the Supreme Court of Appeals, the lower court is without jurisdiction to act further in the proceeding. Fenton v. Miller, 182 W.Va. 731, 391 S.E.2d 744 (1990).

The exception is the continued ability of the circuit court which grants a stay, pursuant to Rule 28(a) of the West Virginia Rules of Appellate Procedure, to modify the stay during the pendency of the appeal. There was never any modification of the stay in this action.

This Court, upon appeal or original jurisdiction, has the ability to affirm the lower court, reverse the lower court, or remand for further proceedings in the lower court. A remand may be a general remand or a limited remand. Powell v. Paine, 226 W.Va. 125, 697 S.E.2d 161 (2010).

A general remand gives the lower court the authority to address all matters, as long as the actions of the Court are consistent with remand language. State ex rel. Frazier Oxley, L.C. v. Cummings, 214 W.Va. 802, 591 S.E.2d 728 (2003). A limited remand prohibits relitigation of some issues on remand or directs that only some expressly severed issues or causes may still be litigated.

A limited remand precludes the lower court from considering other issues or new matters effecting the cause. The mandate rule is not limited to matters decided expressly or implicitly on

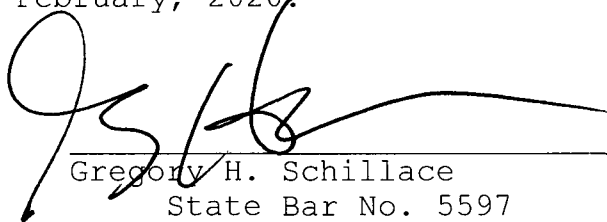
appeal, the mandate controls the framework that the lower court must use in effecting the remand. State ex rel. Frazier Oxley, L.C. v. Cummings, 214 W.Va. 802, 591 S.E.2d 728 (2003).

The appellee was without jurisdiction to enter any orders or conduct any proceedings once the notice of appeal to circuit court was filed. Further, the appellee was without jurisdiction to violate the stay imposed by the circuit court.

VII. Conclusion

Based upon the foregoing, the appellant, Robert Nelson Rector, respectfully requests the judgment in favor of the appellee be reversed and that any sanctions awarded against counsel for the appellant be vacated.

Dated this 17th day of February, 2020.



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NO. 19-1037

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

ROBERT NELSON RECTOR,
resident of Harrison County,
West Virginia,

Plaintiff,

v.

CIVIL ACTION NO. 17-C-344-3
James A. Matish, Judge

KIMBERLY KAY ROSS, formerly
known as KIMBERLY KAY RECTOR,
JACLYN BELCASTRO, as power of
attorney for Kimberly Kay Ross,
THOMAS G. DYER, and,
THE HONORABLE LORI B. JACKSON,

Defendants.

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE JAMES A. MATISH, JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2020, I served the foregoing **APPENDIX PURSUANT TO RULE 7(e) OF THE WEST VIRGINIA RULES OF APPELLATE PROCEDURE** and the **BRIEF OF THE APPELLANT, ROBERT NELSON RECTOR** upon all opposing counsel of record by depositing a true copy thereof in the United States mail, first-class postage prepaid, in an envelope addressed as follows:

Teresa J. Lyons, Esquire
Lyons Phillips Legal Group, PLLC
141 Walnut Street
Morgantown, West Virginia 26505

