

No. 31125
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

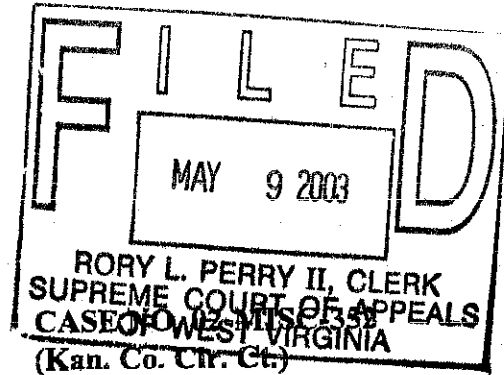
STATE OF WEST VIRGINIA ex rel.)
WEST VIRGINIA CITIZENS ACTION)
GROUP, an incorporated association of)
State citizens and taxpayers,)

Petitioner,)

v.)

WEST VIRGINIA ECONOMIC)
DEVELOPMENT GRANT COMMITTEE,)
CITY OF WHEELING, a municipal)
corporation, and CENTURY EQUITIES)
WHEELING VICTORIAN OUTLET MALL,)
INC., a private corporation,)

Respondents.)



MOTION OF PETITIONER TO AMEND PETITION FOR APPEAL

The petitioner hereby moves to amend its petition for appeal upon the following grounds:

1. It only came to the attention of counsel for the petitioner this week that its assignment of error "E.", Pet. App., p. 4, should have been directed to respondent "WVOC, L.P." instead of the "City of Wheeling" in regard to the Circuit Court's award of "costs."

2. This drafting processing error is significant because "costs" were awarded to WVOC, L.P., not to the City of Wheeling.

3. When petitioner filed its appeal on February 10, 2003, the Circuit Court Clerk under WVRCP 54 had not (and still has not) assessed and imposed any such costs. However, around the first of March counsel for petitioner received a copy of "WVOC Associates, L.P.'s Verification of Costs Incurred in Its Defense" and an accompanying "Memorandum" as filed in Circuit Court on

February 24, 2003. Such so-called "costs" are all in actuality attorney fees and related attorney expenses amounting to \$49,581.43. (See "Docket" of Circuit Court in present record).

4. The circuit judge erred in even awarding "costs" to the unprevailing WVOC, L.P., since petitioner in no way acted in bad faith or oppressively in regard to it so as to warrant reversal of the usual mode under WVRCP 54 and statutory and common law that costs are due to the prevailing party. (See accompanying Brief). Of course, WVOC, L.P., was the successful applicant forsolely the \$70 million grant at its retail mall project in Wheeling which was voided by the Circuit Court.

5. It would appear distinctly to serve overall economy and efficiency in this matter, as well as the policy to avoid needless serial and piecemeal litigation, for this issue conclusively to be resolved here and now by this Court.

WHEREFORE, petitioner respectfully requests that this Motion be granted, and that the accompanying Amendment to Petition For Appeal be resolved in the present proceeding so that petitioner does not owe the unprevailing WVOC, L.P., any "costs" in this matter; and so that any such so-called "costs," if any, may not be misconceived or misshaped into attorney fees and attorney expenses of \$49,581.43 or for any other amount for the unprevailing WVOC, L.P.

WEST VIRGINIA CITIZENS ACTION GROUP,
Petitioner

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CASE NO. 02-MISC-352
(Kan. Co. Cir. Ct.)

WEST VIRGINIA ECONOMIC)
DEVELOPMENT GRANT COMMITTEE,)
CITY OF WHEELING, a municipal)
corporation, and CENTURY EQUITIES)
WHEELING VICTORIAN OUTLET MALL,)
INC., a private corporation,)

Respondents.)

AMENDMENT TO PETITION FOR APPEAL

The petitioner hereby corrects and amends its initial Assignment of Error E as follows:

E. (Corrected) THE CIRCUIT JUDGE ERRED IN ORDERING PETITIONER TO PAY THE "COSTS" OF RESPONDENT WVOC ASSOCIATES, L.P., IN THE PROCEEDING IN CIRCUIT COURT

ARGUMENT

A. THERE IS NO BASIS FOR THE CIRCUIT JUDGE TO HAVE SHIFTED THE COSTS OF THE UNPREVAILING WVOC ASSOCIATES, L.P., TO PETITIONER

There is simply no basis for the reversal of the usual rule that the prevailing party is to be awarded costs. See WVRCP 54. Here, the \$70 million interest of the unprevailing WVOC, L.P., was tied to its retail mall project in Wheeling, which was voided by the circuit judge largely due to WVOC, L.P.'s actions in pressing for the illegally premature and discriminatory approval of the

project grant.

1. No "Bad Faith" or "Oppression"

Surely, given this huge pecuniary interest of WVOC, L.P., in this already approved grant, and its illegal actions in that regard, it was scarcely an exercise in "bad faith" or "oppression" for it to have been joined as a respondent. Sally-Mike Properties, Inc. v. Yokum, 365 S.E.2d 246 (W. Va. 1986); Midkoff v. Htgn. Nat. Bank, 511 S.E.2d 129 (W. Va. 1998); and Board of Review v. Gatson, 559 S.E.2d 899 (W. Va. 2001). WVOC, L.P., was a proper party here. See, e.g., Wetzel County Solid Waste Authority v. DNR, 401 S.E.2d 226 (W. Va. 1990); White v. Manchin, and Hall v. Manchin, 318 S.E.2d 470 (W. Va. 1984).

2. Can't Disclaim Interest, Then Claim Costs

Even considering this matter most favorably to WVOC, L.P., its best scenario would be that it was an "unnecessary" party with a huge stake in the case, as contradictory as those two propositions strike one. As clarified in 20 Am Jur 2d, "Costs", §28:

A person who has been brought in as a party to an action between others is entitled to recover his costs if no cause of action against him is established and he is not shown to have any interest in the subject matter of the litigation. (emphasis added)

Please note the conjunctive "and" here.

The above rule is pointedly explicated in Kederick v. Heintzleman, 141 F. Supp. 633, 635 (D.C. Ala. 1956):

A party who is unnecessarily made a party is entitled to his costs upon dismissal, but this is not true where the party makes a defense which is not necessary to protect his rights (citations omitted).

Certainly the defendant Riley cannot argue that he was not an interest party in the outcome of this lawsuit, nor can he now argue that it was necessary for him to

answer where no relief was asked against him personally.

For the reason that the plaintiff was the prevailing party in the cause of action, and because of the public interest of the case and the interest the defendant Riley had in the outcome of the case, in that he would have received emoluments and salary, and further, that defendant Riley answered where a defense was not necessary and he is not entitled to costs. Id.

Even under its best possible case, WVOC, L.P., cannot prevail on this issue of costs. The most fitting line of cases under West Virginia law would appear to be those cast in judicial estoppel. WVOC, L.P., simply may not in a legal proceeding inconsistently disclaim any interest and involvement in the case, and then claim costs for involvement in protecting that avowedly nonexistent interest. See, e.g., E.H. v. Matin, 428 S.E.2d 523 (W. Va. 1993).

3. Costs Aren't Attorney Fees and Attorney Fees Aren't Costs

Apart from the above considerations, it is clear that WVOC, L.P., is not entitled to \$49,581.43 in claimed attorney fees and related expenses, or any portion of that amount. As noted above, these claimed "attorney fees" and related "expenses" are just that. See "Verification," *supra*, and surely not court "costs." Any contrary view would overrule and wipe out 140 years of statutory and common law to the stark contrary.

It would as well, must portentously, radically contort WVRCP 54 in every case into an omnibus device for shifting attorney fees, even to the losing party. See Sally-Mike Properties, Inc., *supra*, and its progeny.

CONCLUSION

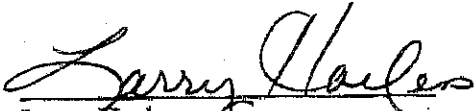
WHEREFORE, it is respectfully requested that the Order of January 21, 2003, in awarding "costs" to WVOC, L.P., be reversed, and/or that it be held that none of the \$49,581.43 in its claimed attorney fees and related expenses, whether tabbed "costs" or otherwise, are recoverable from

petitioner.

Respectfully submitted,

WEST VIRGINIA CITIZEN ACTION GROUP,
Petitioner

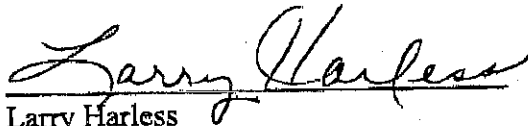
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CERTIFICATE OF SERVICE

The undersigned, counsel for petitioner, hereby certifies that he caused a copy of the foregoing Motion of Petitioner to Amend Petition For Appeal and Amendment to Petition for Appeal by facsimile and first-class mail upon Kathleen Schultz (Fax No. 304-558-2525), Joanna Tabit (Fax No. 304-353-8180) and Denise Klug (Fax No. 304-233-3656), this 9th day of May 2003.



Larry Harless
Counsel for Petitioner