

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

VALLIE HUFFMAN,

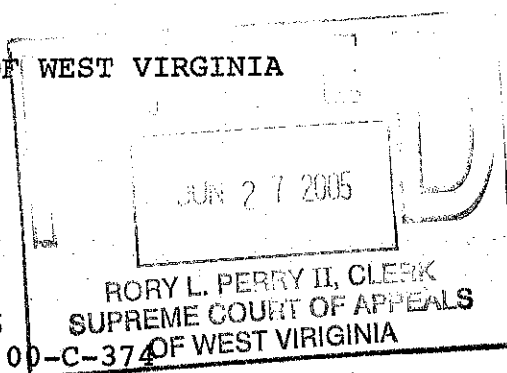
Plaintiff/Appellant

v.

No. 32706

Case No. 00-C-374

Kanawha County, West Virginia



ROBERT CRINER,

Defendant/Appellee

BRIEF OF THE APPELLANT

CLINTON W. SMITH

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West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996)

Riffe v. Armstrong, 477 S.E.2d 535 (1996)

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Howerton v. Tri-State Salvage, Inc., 210 W.Va. 233, 557 S.E.2d 287 (2001)

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In re Aaron Thomas M., Delta Dawn M., and Luke Brian M., 212
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Durham v. Florida East Coast Ry. Co., 385 F.2d 366, 368 (5th
Cir.1967)

West Virginia Rules of Civil Procedure, Rule 56

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Plaintiff/Appellant

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Kanawha County, West Virginia

ROBERT CRINER,

Defendant/Appellee

BRIEF OF THE APPELLANT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS:

Your Appellant respectfully represents unto your Honors that she is aggrieved by an Order entered by the Circuit Court of Kanawha County, West Virginia, on August 17, 2004, dismissing this action.

I.

KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

This appeal arises from a complaint filed February 18, 2000, alleging that the Appellee, Robert Criner, burnt the Appellant's house in the early morning hours of May 24, 1999. On the 4th day of March, 2003, the trial court substituted Vallie's Inc., a closely held corporation owned by Vallie Huffman, as the plaintiff. The Circuit Clerk of Kanawha County issued a notice on the 25th day of March, 2004, that the case would be dismissed pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure. The notice was styled Vallie Huffman v. Robert Criner. The Appellant timely filed a motion to not dismiss the case on April 6, 2004. The

Appellee filed a response the Appellant's motion on April 13, 2004. The Appellee's response was styled Vallie Huffman v. Robert Criner. Notwithstanding the filing of the Appellant's motion and without hearing, the trial court entered an order dismissing the case pursuant to Rule 41(b) on April 15, 2004. The Appellant replied to the Appellee's filing on June 11, 2004. Again without hearing and this time without notice, the trial court issued an order on August 17, 2004, stating that the case should not have been dismissed pursuant to Rule 41(b) but should have been dismissed pursuant to the Court's order of March 4, 2003, and therefore, the trial court dismissed the case. This order was also styled Vallie Huffman v. Robert Criner. At no time did the Appellee complain about the style of the pleadings or the standing of Vallie Huffman. Since the order which is appealed herein is styled Vallie Huffman v. Robert Criner, this style is used in these pleadings.

II.

STATEMENT OF FACTS OF THE CASE

In the early part of 1999, Robert Criner was dating the tenant of rental property owned by Vallie Huffman located in Clendenin, Kanawha County, West Virginia. By May, 1999, Criner's girlfriend had broken up with him and was trying to get him to stay away from her. On May 23, 1999, Criner was heard threatening his girlfriend, her family and to burn down their house. In the early morning hours of May 24, 1999, Criner was seen on the Appellant's property. Shortly

thereafter, the house burnt to the ground. Thankfully, Criner's former girlfriend and family had already fled the house and suffered no physical harm.

After this case was filed, the Appellant filed discovery. The Appellee responded to virtually all requests and interrogatories by asserting his right to remain silent pursuant to the West Virginia and United States Constitutions. In response, the Appellant filed a motion for summary judgment because, due to the adverse inferences arising from Criner's exercise of his right to remain silent, there were no material issues of fact to be tried. The trial court denied the motion.

While the case was pending, it was discovered that Ms. Huffman had filed for bankruptcy and that the property which was destroyed by Criner was the property of the bankruptcy estate. A six month stay was granted to seek to have the bankruptcy trustee reopen the bankruptcy case and hire counsel for the Appellant to pursue the estate's claim against Criner in March 2003. The Appellant was not permitted to prosecute the case in any way pending the resolution of this issue. The trustee was successful in reopening the case and hiring counsel to pursue the claim. Unfortunately, the order granting the request of trustee was not entered and counsel retained until after the trial court determined that the stay had expired. Notwithstanding the fact that the Appellant was prevented from prosecuting her case until after the bankruptcy court had reopened her

bankruptcy case and the effort to have the case reopened was solely in the hands of the trustee, the trial court dismissed the case for not prosecuting it when the stay expired.

III.

ASSIGNMENTS OF ERROR AND THE MANNER OF DECISION BELOW

A. The trial court erred in denying the Appellant's motion for summary judgment.

B. The trial court erred in dismissing this case from its docket.

IV.

POINTS OF ERROR AND AUTHORITIES

A. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT TO THE APPELLANT.

United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 44 S. Ct. 54, 68 L.Ed. 221 (1923)

Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976)

Gooch v. W.Va. Dept. of Public Safety, 465 S.E.2d 628 (1995)

West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996)

Riffe v. Armstrong, 477 S.E.2d 535 (1996)

State ex rel. Wright v. Stucky, 205 W.Va. 171, 517 S.E.2d 36 (1999)

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In re Daniel D. and Samantha D., 211 W.Va. 79, 562 S.E.2d 147 (2002)

In re Aaron Thomas M., Delta Dawn M., and Luke Brian M., 212 W.Va. 604, 575 S.E.2d 214, (2002)

West Virginia Rules of Civil Procedure, Rule 56

B. THE TRIAL COURT ERRED IN DISMISSING THIS CASE FROM
ITS DOCKET.

United States Constitution, Fourteenth Amendment

West Virginia Constitution, Article 3

Davis v. Sheppe, 187 W.Va. 194, 417 S.E.2d 113 (1992)

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

Dimon v. Mansy, 198 W.Va. 40, 479 S.E.2d 339 (1996)

Howerton v. Tri-State Salvage, Inc., 210 W.Va. 233, 557
S.E.2d 287 (2001)

Durham v. Florida East Coast Ry. Co., 385 F.2d 366, 368 (5th
Cir.1967)

V.
DISCUSSION OF LAW

A. THE TRIAL COURT ERRED IN DENYING
SUMMARY JUDGMENT TO THE PETITIONER

The Appellant moved for summary judgment in this matter pursuant to Rule 56 of the West Virginia Rules of Civil Procedure.

Rule 56 states that summary judgment is proper in those instances where pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Appellee, Robert Criner, was to be deposed on July 26, 2000. The Appellee failed to attend this deposition. Another deposition was scheduled.

The Appellee was deposed on August 4, 2000. In answer to each and every question asked of him, the Appellee stated:

"Upon the advice of my attorney, Jim Cagle, I invoke the privileges given to me by the West Virginia and the United States Constitution not to be compelled to be a witness against myself in any criminal case." **Deposition of Robert Criner, pages 3-6.**

The Appellee answered in this fashion to every question put forth by Appellant's counsel -- including the question "State your name." **Deposition of Robert Criner, page 3.**

The Appellee can, in fact, invoke his Constitutional privilege not to testify. The Appellant is aware that after the Appellee exercises that right, a Court will not compel

the Appellee to testify except in extraordinary circumstances. However, by exercising that right, the Appellee put himself at risk of adverse consequences in this civil action.

The Appellee was properly served with Interrogatories and Requests for Production on February 18, 2000. Plaintiff's Motion to Compel Discovery Answers was granted in May 2000. The Appellee did not respond to these Interrogatories or Requests for Production in any fashion until June 27, 2000. Out of fifteen (15) interrogatories posed, eleven (11) questions were answered by the following statement:

"The defendant invokes his right to be free from providing any information which might be used against him in prosecuting a criminal case." Defendant's Answers to Plaintiff's First Set of Interrogatories, pages 1-5.

Two other answers were non responsive, leaving only two interrogatories answered. The Request for Production has not been answered in any fashion.

The Appellee made a blanket objection to all discovery requests and questions put to him. This in spite of an Order to Compel Discovery issued by the trial Court. In *State ex rel. Wright v. Stucky*, 205 W.Va. 171, 517 S.E.2d 36, 205 W.Va. 171 (1999), this Court stated that this is not appropriate:

"We do, however, observe that not every question at a deposition -- or request for admission, or document request, or other discovery request -- will necessarily require a response that in

its entirety is potentially self-incriminating. It would seem therefore that the self-incrimination right, if it is asserted, should ordinarily be asserted in response to specific questions or other specific discovery requests -- as opposed to a blanket objection to a form of discovery -- unless such a procedure would be demonstrably futile. See Syllabus Point 2, **West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.**, 197 W.Va. 489, 475 S.E.2d 865 (1996).” **State ex rel. Wright v. Stucky**, 205 W.Va. 171, 517 S.E.2d 36 (1999).

This Court has also ruled that although a Defendant has the right under the West Virginia and the United States Constitutions not to be compelled to be a witness against himself in any criminal case, that same Defendant risks adverse consequences in civil proceedings:

“Additionally, we observe that in some circumstances, a party may permissibly be required to risk adverse consequences in civil proceedings, as a result of their silence based on the assertion of their right against compelled self-incrimination. See Syllabus Point 2, **West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.**, 197 W.Va. 489, 475 S.E.2d 865 (1996).” **State ex rel. Wright v. Stucky**, 205 W.Va. 171, 517 S.E.2d 36, 205 W.Va. 171 (1999).

The United States Supreme Court has gone even farther by stating that adverse inferences against a Defendant who exercises his criminal right against compelled self-incrimination in a civil case are proper:

Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), “the prevailing rule [is] that the Fifth

Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.'" Id. at 318, 96 S.Ct. at 1558 (quoting 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)); see 1 Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers §5-2(B)(1) (3rd ed. 1994). Moreover, "aside from the privilege against compelled self-incrimination, the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred by the Due Process Clause." 425 U.S. at 319, 96 S.Ct. at 1558. "'Silence is often evidence of the most persuasive character.'" Id. (quoting *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-154, 44 S. Ct. 54, 56, 68 L.Ed. 221 (1923)). *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996)(footnote omitted).

The Appellee, Robert Criner, has refused to testify in response to serious accusations made against him. Therefore as the United States Supreme Court stated in *Baxter*, supra, adverse inferences can be made against him in this civil action because of his refusal to testify in response to probative evidence offered against him. At the very least, his "silence in the face of accusation is a relevant fact". *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), as quoted in *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996). See also *In re Aaron Thomas M., Delta Dawn M., and Luke Brian M.*, 212 W.Va. 604, 575 S.E.2d 214,

(2002); *In re Daniel D. and Samantha D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002); *State ex rel. Myers v. Sanders*, 206 W.Va. 544, 526 S.E.2d 320 (1999).

During his deposition, the Appellee was asked whether he threatened to harm the occupants of Ms. Huffman's house, and to burn Ms. Huffman's house down.

"Q. Did you threaten to harm the occupants of that house and to burn it down?

A. Upon the advice of my attorney, Jim Cagle, I invoke the privileges given to me by the West Virginia and the United States Constitution not to be compelled to be a witness against myself in any criminal case." *Deposition of Robert Criner*, page 5.

In keeping with *Baxter*, supra, the Court may infer that the Appellee did threaten to harm the occupants of that house and to burn it down.

The Appellee was asked if he burned Ms. Huffman's house down:

"Q. On May 24th, did you burn a house belonging to Vallie Huffman?

A. Upon the advice of my attorney, Jim Cagle, I invoke the privileges given to me by the West Virginia and the United States Constitution not to be compelled to be a witness against myself in any criminal case." *Deposition of Robert Criner*, page 4.

As was stated in *Baxter*, supra, it would be proper for this Court to infer that the Appellee did, in fact, burn Ms. Huffman's house down based on the Appellee's refusal to answer the question put to him at his deposition.

Appellant's counsel asked the Appellee if he burned Ms. Huffman's house down intentionally, with malice:

"Q. Did you intentionally, maliciously, and outrageously burn Vallie Huffman's house?

A. Upon the advice of my attorney, Jim Cagle, I invoke the privileges given to me by the West Virginia and the United States Constitution not to be compelled to be a witness against myself in any criminal case." **Deposition of Robert Criner, page 4.**

The Court can properly infer that the Appellee did, in fact, burn Ms. Huffman's house down maliciously, outrageously and intentionally, based on the Appellee's refusal to properly answer the question.

The Appellant swore to all the elements of her case through her Affidavit. The Appellee offered no evidence to the contrary, and has not refuted any material fact that the Appellant offered as evidence. Thus, the Appellant proved all elements of her case.

The material facts are not in dispute and Appellant was entitled to a judgment in her favor:

- 1) Appellee's actions constituted trespass;
- 2) Appellee's actions were intended to cause or were made with reckless disregard of the probability of causing emotional distress to the Appellant;
- 3) Appellee's actions constituted malicious destruction of property;
- 4) Appellee's actions constituted intentional interference with property;
- 5) Appellee's actions were intended to cause or were made with reckless disregard of the probability of causing emotional distress to the Appellant.

The Appellee, Robert Criner, submitted no evidence to contradict the assertions made by the Appellant, Vallie Huffman. On the contrary, negative inferences can be made from Appellee's refusal to answer discovery. Appellee's silence in the face of accusation is also a relevant fact to be considered against him in determining his liability.

Therefore, there were no material facts in dispute and Appellant was entitled to a judgment in her favor. The Appellant did not appeal this decision as it would have been an interlocutory appeal and barred by the decisions of this Court. See *Gooch v. W.Va. Dept. of Public Safety*, 465 S.E.2d 628 (1995). However, as the order of August 17, 2004, resolved all the issues pending before the trial court, the Appellant now appeals this decision under the doctrine that when one appeals, the appeal encompasses all decisions made in the proceeding. *Riffe v. Armstrong*, 477 S.E.2d 535 (1996).

B. THE TRIAL COURT ERRED IN DISMISSING
THIS CASE FROM ITS DOCKET

As described above, the trial court had before it the issue of whether this case should be dismissed under Rule 41(b). The parties had submitted pleadings addressing the issue. The trial court eventually ruled on the known issue but then, without notice to the Appellant, ruled that there was another ground for dismissing the case.

By ruling that the case should be dismissed on grounds which the Appellant had no notice and no opportunity to

address, the trial court denied the Appellant her right to due process under the Fourteenth Amendment of the United States Constitution and Article 3 of the West Virginia Constitution.

In addition to denying the Appellant her due process, the trial court failed to abide by the principles announced in **Bartles v. Hinkle**, 196 W.Va. 381, 472 S.E.2d 827 (1996):

In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine 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. Syllabus 2, **Bartles v. Hinkle**, supra.

Dismissal is such a harsh sanction that this Court has stated "...dismissal with prejudice is appropriate only in 'flagrant' cases." **Howerton v. Tri-State Salvage, Inc.**, 210 W.Va. 233, 557 S.E.2d 287 at 290 (2001) citing **Dimon v. Mansy**, 198 W.Va. at 45, 479 S.E.2d at 344 (1996). As was stated in **Davis v. Sheppe**, 187 W.Va. 194, 417 S.E.2d 113 (1992), "Indeed, it has been observed that '[t]he decided cases, while noting that dismissal is a discretionary matter,

have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff.' **Durham v. Florida East Coast Ry. Co.**, 385 F.2d 366, 368 (5th Cir.1967)."

Dismissal in this case was particularly inappropriate because the case had been prepared to trial, only to be continued by the Circuit Court because the Judge felt that there was the appearance of impropriety due to a personal association he had with someone associated with one of the parties. This was not a case allowed to languish from the beginning. This case was vigorously contested from the beginning.

Therefore the trial court erred in dismissing this case from its docket and in failing to craft a sanction, if it believed a sanction was necessary, which punished the wrong doer and not the innocent litigant.

VI.

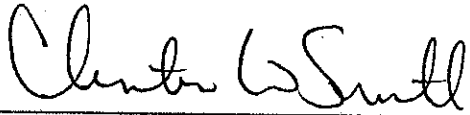
PRAYER FOR RELIEF

WHEREFORE, your Appellant pray that the judgment of the Circuit Court of Kanawha County, West Virginia, entered

August 17, 2004, be stayed and that such judgment should be reversed by this Honorable Court.

Respectfully Submitted

VALLIE HUFFMAN
By Counsel

A handwritten signature in cursive script, reading "Clinton W. Smith", is written over a horizontal line.

CLINTON W. SMITH

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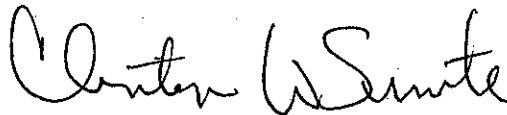
Defendant/Appellee

CERTIFICATE OF SERVICE

I, Clinton W. Smith, counsel for the Appellant, certify that a copy of the foregoing BRIEF OF THE APPELLANT was served upon:

James Cagle
1200 Boulevard Tower
1018 Kanawha Boulevard., East
Charleston, WV 25301

by placing the same in an envelope, properly addressed, with postage fully paid, and depositing the same in the United States Mail, this 27th day of June 2005.



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