

IN THE SUPREME COURT OF WEST VIRGINIA

STATE ex rel. JOHN CARR,

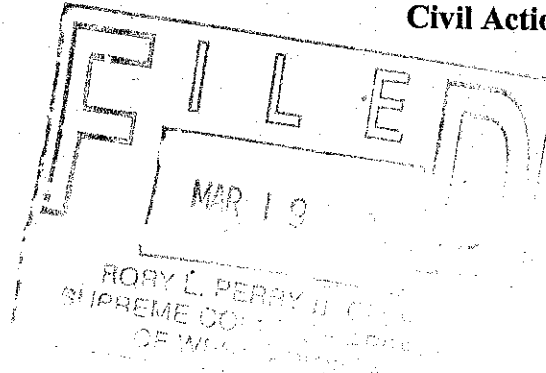
Petitioner,

v.

Civil Action No. 08-C-18

JUDGE ANDREW FRYE,
WEST VIRGINIA DEPARTMENT
OF EDUCATION and WEST
VIRGINIA DIVISION
OF JUVENILE SERVICES,

Respondents.



RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

Pursuant to this Court's request that Respondents file a response to the Petition for Writ of Prohibition, prior to the Court considering whether to issue a rule to show cause, Respondent West Virginia Department of Education ("WVDOE") provides the following in response to the Petition for Writ of Prohibition.

Relevant Facts Supporting Circuit Court's Order Imposing Sanctions

As set forth below, there is sufficient cause to award sanctions against the Petitioner when Petitioner unilaterally postponed the deposition without good cause, despite the fact that counsel for WVDOE had already traveled from Charleston to Tucker County for the deposition. The events surrounding Petitioner's counsel decision to unilaterally postpone the deposition of Nancy Oldaker justifies the Circuit Court's Order imposing sanctions against Petitioner in order to reimburse WVDOE for incurred attorneys' fees and expenses in traveling to Tucker County prior to Petitioner advising of the postponement.

Petitioner initially noticed the deposition of Nancy Oldaker for January 6, 2009 at 10:00 in Parsons, West Virginia. It is undisputed that Petitioner's counsel left a message for counsel for WVDJS counsel on the morning of January 5, 2009, requesting whether WVDJS wished to postpone the deposition of Nancy Oldaker on January 6, 2009, due to possible winter weather. Counsel for WVDJS responded to Petitioner's counsel advising that he wished to proceed with the deposition because it was January, that winter weather is expected this time of year and that it appeared that the weather was not going to be bad in the morning of January 6, 2009. Even though Petitioner was fully aware that counsel for WVDOE would be traveling several hours in order to attend the deposition, Petitioner's counsel did not bother to notify counsel for WVDOE on January 5, 2009, just as Petitioner had notified WVDJS. Without having any knowledge of Petitioner's intent to postpone the deposition, undersigned counsel traveled from Charleston to Tucker County for the deposition of Nancy Oldaker the next morning.

During the mid-afternoon on January 5, 2009, Petitioner faxed a "Notice of Postponement of Nancy Oldaker's deposition." *See Exhibit A.* After arriving in Tucker County, undersigned counsel was verbally notified that Petitioner had unilaterally postponed the deposition. Undersigned counsel proceeded to call Petitioner's counsel explaining that undersigned counsel was already in Tucker County, that weather for Tucker County was not expected to be bad until the evening of January 6, 2009, and that WVDOE would prefer that the deposition proceed. Petitioner's counsel responded that he had already made the decision to postpone the deposition. WVDOE advised that since counsel had already incurred the expense in traveling to Tucker County for the deposition, that WVDOE would seek attorneys' fees and expenses incurred in traveling to Tucker County. Had Petitioner's counsel advised WVDOE of his concerns regarding the weather in the morning,

WVDOE could have avoided incurring the expense in traveling to Tucker County. Only after WVDOE advised that it would seek attorneys' fees and expenses was WVDOE advised by Petitioner's counsel that his cousin had passed away on Sunday and that notice was given as soon as possible.

Petitioner proceeded to send a letter to WVDOE (*See Exhibit B*) as well as a separate letter to Judge Frye regarding the postponement of the deposition of Nancy Oldaker. *See Exhibit C*. Not knowing that Judge Frye had already entered an Order on January 6, 2009, directing Petitioner to reimburse Nancy Oldaker a reasonable amount for her inconvenience and to pay counsel for WVDOE a reasonable attorney fee, if counsel appeared in Tucker County for the deposition (*See Exhibit D*), WVDOE responded on January 7, 2009, to Petitioner's letter to Judge Frye in order to clarify the sequence of events. *See Exhibit E*. WVDOE advised Judge Frye that it had decided not to file a Motion for Sanctions due to concerns of placing him in the position of determining whether a cousin's wife is a close enough relation to postpone a deposition or not and whether proper notice of the cancelation was given or not. WVDOE did not receive the Order until January 8, 2009.

On January 9, 2009, WVDOE requested Petitioner to reimburse WVDOE for incurred fees and expenses, totaling \$1,086.02 for traveling to Tucker County prior to Petitioner unilaterally postponing the deposition. *See Exhibit F*. Also, on January 9, 2009, Petitioner sent a letter to Judge Frye contesting the Order (*See Exhibit G*) and filed a Motion to Reconsider. *See Exhibit H*. Petitioner simply reiterated his arguments that there was good cause to postpone the deposition, that all parties received sufficient notice of postponement, and that the Court should not sanction the Petitioner when WVDOE decided not to seek sanctions.

On January 12, 2009, Petitioner demanded an affidavit from counsel for WVDOE as to

incurred mileage and hours. *See Exhibit I.* WVDOE provided an Affidavit as the amount incurred and explained that WVDOE was not willing to provide a detailed breakdown of hours, rates and mileage due to the confidential nature of defense counsel rates. *See Exhibit J.* On January 16, 2009, and in response to the Affidavit, Petitioner demanded that WVDOE assert a particular hourly rate; however, Petitioner did not allege that a particular rate was unreasonable. *See Exhibit K.*

On January 16, 2009, Petitioner provided supplemental evidence in support of his Motion to Reconsider by providing evidence that Petitioner provided notice to Nancy Oldaker that the deposition was postponed. *See Exhibit L.* On January 20, 2009, WVDOE responded to Petitioner's Motion to Reconsider asserting that the Court had the authority and discretion to impose sanctions against Petitioner. *See Exhibit M. (Exhibits not attached as they are previously contained herein.)*

On January 22, 2009, the Court denied Petitioner's Motion to Reconsider. *See Exhibit N.* With respect to the amount of attorneys' fees and expenses owed to WVDOE, the Court requested WVDOE to resubmit its request for reimbursement to Petitioner after reconsidering whether the amount was reasonable. The Court further directed that if the parties were unable to resolve the amount owed, that the Court would set a reasonable amount.

On January 26, 2009 and pursuant to the Court's Order, WVDOE re-evaluated the amount of fees and expenses and requested Petitioner to reimburse incurred fees and expenses in a reduced amount of \$939.02. Counsel had actually traveled from Charleston to Davis, but made a good faith effort in only requesting the Petitioner reimburse fees and expenses incurred in traveling from Charleston to Parsons since the deposition was to take place in Parsons, West Virginia. WVDOE. *See Exhibit O.* On January 29, 2009, Petitioner responded to WVDOE's request for reimbursement by requesting WVDOE to agree to an Agreed Order withdrawing the Court's Order. *See Exhibit P.*

On February 4, 2009, WVDOE replied that it does not have authority to withdraw any of the Court's orders and disagreeing with Petitioner's assertion that Judge Frye made erroneous findings of fact. *See Exhibit Q.*

On February 17, 2009, Petitioner advised Judge Frye that the issue of sanctions was resolved with Nancy Oldaker but that the dispute as to the amount owed to WVDOE could not be resolved since WVDOE refused to provide an hourly rate. *See Exhibit R.* On February 10, 2009, Petitioner advised the Court that the issue of Nancy Oldaker not being notified had been resolved. *See Exhibit S.* WVDOE responded on February 11, 2009, that the issue between the Petitioner and WVDOE had not been resolved. *See Exhibit T. (Exhibits not attached as they are previously contained herein.)* On February 26, 2009, the Court addressed the unresolved issue as the specific amount owed by Petitioner to WVDOE, and ruled that \$750.00 was a reasonable attorney fee. *See Exhibit U.* It is from this Order that the Petition for Writ of Prohibition was filed.

Legal Argument and Analysis

Petitioner acknowledges that there are appropriate circumstances when a circuit court may sanction a party under Rule 37(d) when the party cancels a deposition. *Cattrell Companies, Inc. v. Carlton, Inc.*, 217 W.V. 1, 614 S.E.2d 1 Syl. Pt. 5 (2005). However, Petitioner fails to acknowledge that imposition of sanctions under Rule 37(d) of the West Virginia Rules of Civil Procedure is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Id.* at Syl. Pt 2. The only issue is whether the Circuit Court abused its discretion in awarding sanctions, not whether another circuit court would make a different decision based on the underlying facts.

Petitioner cites *Heldreth* for the proposition that reasonable attorneys' fees should be determined by multiplying the number of hours reasonably expended on the litigation times a

reasonable hourly rate; however, the issue in *Heldreth* was whether the attorneys' fees being sought by Plaintiff's attorney was reasonable, after the Plaintiff obtained a verdict under the human rights act. *Heldreth v. Rahimian*, 219 W.Va. 462, 637 S.E.2d 359 (2006). This holding is not specific to awarding sanctions against a party for canceling a deposition. Nonetheless, *Heldreth* reiterated that "the trial [court] ... is vested with a wide discretion in determining the amount of ... court costs and counsel fees; and the trial [court's] ... determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion." *Id.* at Syl. Pt 1 (citing Syl. Pt. 3, in part, *Bond v. Bond*, 144 W.Va. 478, 109 S.E.2d 16 (1959)).

Petitioner is essentially arguing that \$750 for travel to and from Charleston and Tucker County and back is unreasonable. This Petition for Writ of Prohibition must fail because there is no evidence that the Circuit Court abused its discretion in awarding WVDOE \$750 when Petitioner unilaterally postponed the deposition without good cause. In fact, Petitioner could have avoided this entire issue had Petitioner provided sufficient notice so that WVDOE could have avoided incurring these costs. Petitioner argues that Respondents were not prejudiced since the deposition was rescheduled at a later date; however, WVDOE was prejudiced when it incurred fees and expenses for traveling to and from Tucker County prior to being advised of Petitioner postponing the deposition.

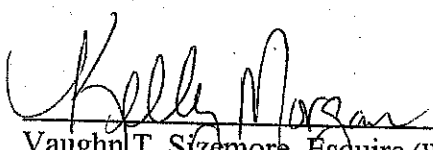
The Petitioner also argues underlying issues in the discovery in this case which are irrelevant to whether the trial court abused its discretion in awarding sanctions. For example, Petitioner argues that WVDOE filed a Motion for Protective Order to preclude Petitioner from taking a Rule 31 deposition and that Petitioner had to locate an address for Nancy Oldaker since Respondents did not provide her address. Further, Petitioner argues that the urine on the drug test was not Petitioner's

and that Nancy Oldaker is the person who tested Petitioner's urine. It must be noted that the trial court has ruled that Petitioner is not permitted to make the unsupported inference that Petitioner's urine was not on the drug test simply because his DNA was not found on the drug test without scientific evidence of such. Regardless, these issues are completely irrelevant to Petitioner unilaterally postponing Nancy Oldaker's deposition without good cause or whether sanctions are appropriate.

The trial court did not preclude Petitioner from taking the deposition of Nancy Oldaker at a later date. Instead, the trial court only awarded a reasonable amount to reimburse WVDOE for incurred fees and expenses. Sanctions for reimbursing incurred fees and expenses can hardly be deemed harsh, nor do the sanctions rise to the level to be considered an abuse of discretion. Without evidence of Judge Frye abusing his discretion, Petitioner's Writ of Prohibition must fail. Thus, this Court should not disturb the Circuit Court's Order, nor should this Court issue a rule to show cause. Instead, the Petition for Writ of Prohibition should be denied.

WHEREFORE, the WVDOE requests this Honorable Court deny the Petition for Writ of Prohibition and other relief as this Court deems just and proper.

**WEST VIRGINIA DEPARTMENT OF
EDUCATION**
By Counsel,



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JOHN CARR,

Plaintiff,

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Civil Action No. 08-C-18
Honorable Andrew Frye

WEST VIRGINIA DEPARTMENT
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DEPARTMENT OF JUVENILE
SERVICES and
STEPHANIE BOND,

Defendant.

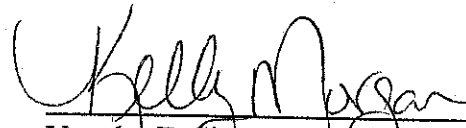
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Response in Opposition to Petition for Writ of Prohibition" was served upon the following parties by U.S.

Mail on this day, Wednesday, March 19, 2009.

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