

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

**BILLY J. WATSON and
NOLA WATSON,**

Plaintiffs (Appellees),

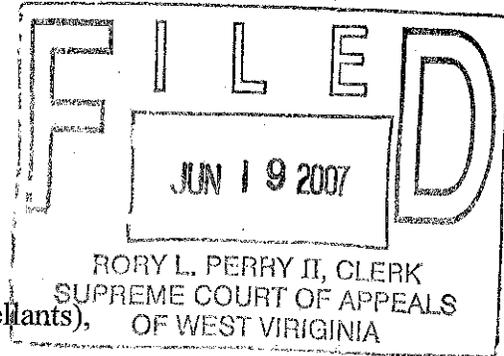
v.,

**CASE NO. 33338
LOGAN COUNTY
CASE NO. 93-C-73-P**

**SUNSET ADDITION PROPERTY OWNERS
ASSOCIATION, INC., a West Virginia corporation,
KEVIN and CONDA BATES,
ELMO and DELMA ELLIS,
EARL and EMILY CLAYCOMB,
HOBERT and RITA MACK,
GEORGE and JUDY BONELLI,
LARRY and SUE BEVINS,
ANDY and YVONNE SOS,
JAMES and KAY NISBET, and
A. D. SCAGGS III,**

Defendants and Third-party Plaintiffs (Appellants),

v.,



**ORA LEE WATSON and MARIE WATSON, and
DARRELL WATSON and PAULINE WATSON,**

Third-party Defendants

APPELLANTS' BRIEF

The Appellants wish to supplement their previously-filed "Petition for Appeal" in this matter with this brief. There will be no attempt to restate matters set forth therein.

The Appellants wish to appeal the Order entered by Special Judge John S. Hrko on July 13, 2006.

TYPE OF PROCEEDING

This is the appeal of a civil order requiring the Appellants to install a sewage-treatment plant to service their nine (9) homes and holding them in contempt for not having done so previously. The homes are located in the unincorporated community of McConnell in Logan County, West Virginia.

The Appellants **MUST** have some guidance and respectfully request it from this Court.

The Appellants are in a "Catch 22" situation. They **cannot** comply with the Court's Order without being in direct violation of rulings issued by the West Virginia Department of Health and Human Resources by which it has refused to issue the required permit for the construction.

In other words, **before** any such sewage-treatment plant can be installed, a permit must be obtained from the DHHR. In spite of knowing that the DHHR has refused and continues to refuse to issue such permit, thereby prohibiting the installation of this plant, the Court issued the Order from which this appeal is taken.

The Appellants are in a "no-win" situation. If they attempt to install the plant as directed by the Court's Order, they will be doing so in direct violation of the DHHR, which refuses to issue the proper permit. On the other hand, if they fail to install the treatment plant because they cannot obtain the proper permit, they will be in direct violation of the Court's Order requiring installation!

STATEMENT OF FACTS

Please review the "Statement of Facts" section in the undersigned's Petition for Appeal to get an idea of how the parties got to where they are in this action at this time.

Special Judge Hrko was the most recent of numerous judges who have been assigned to this case since 1993. He acknowledged on the record that he had **not read** the majority of the file. This, unfortunately, prohibited him from having a full understanding of what the Appellants have faced throughout this proceeding, including the Appellees' direct violation of earlier Orders, including intentional damage to the pipeline in question, and their attempts to block enforcement of the May 10, 1994, written Settlement Agreement. In part, the parties had agreed to the installation of the plant in that document, and for years the Appellants had to go to Court on several occasions to try to force each step to be completed by the Appellees. *See Items Nos. 7 (which begins on page 44 of the record), 8, 9, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 30, and 31 in the Index to Record. Item No. 24 includes a copy of the May 10, 1994, Agreement as EXHIBIT A.*

This, of course, was done at great expense to the Appellants and greatly delayed the installation of the plant.

During all of this time, the Appellants had contracted with a builder of such plants and had one built costing them many thousands of dollars.

Specifically, the Appellees, by that Agreement, were to convey a portion of their land to the Appellant Association for use in placement of the plant. The location was determined by the Appellees and professionals employed by the Appellants.

In spite of the Agreement, the Appellees refused to sign such a deed, and this required further Court action instituted by the **Appellants** in an attempt to proceed with the Agreement. Ultimately, the Circuit Court, through a Special Judge assigned to the case prior to Judge Hrko, issued an Order requiring that the deed be signed by the Appellees. *See Index Items 23 and 24.*

At a later stage in the proceeding, the Appellees were required to sign a deed of easement across the portion of their remaining property for the installation of the lines from the plant to each individual home owned by the Appellants. They refused to do so, and this required additional hearings before the former Special Judge. Ultimately, a Special Commissioner had to be

appointed and required to sign the deed of easement for Appellee Billy J. Watson, who refused to sign in spite of being threatened with contempt and a jail sentence. *See Index Items 30 and 31.*

There were several occasions throughout this lawsuit when the Appellants were forced to go to Court seeing injunctions because Appellee Billy J. Watson had intentionally broken a line and on other occasions he had intentionally blocked the flow of water in a line. Each time this caused raw sewage to flow upon the surface. Upon each occasion the **Appellants** immediately reported the matter to the Logan County Health Department, sought the injunctions from the Court, and paid to have the line repaired.

The **Appellants** hired a contractor to install the plant. Unfortunately, after several delays and health problems, the contractor died.

The Appellants were unsuccessful in their attempts to locate other contractors who would install the plant. Quite frankly, many of them were unwilling to consider doing so because of their knowledge of the long, on-going lawsuit in which they did not want to be involved.

Then, after taking a complete 180-degree turn, the **Appellees** filed a motion in this case to **enforce** the Agreement and require the installation of the plant. At this point, **Judge Hrko was appointed.**

Hearings have been held in front of him, but no care has been taken by the Appellees (who were the original Plaintiffs in this action) or the Court to see to proper service upon parties. Many of the original nine (9) Defendants listed above have changed. Since the institution of this suit, several of them have sold their property to others, and these new owners are **not** party to this suit. Some of the original Defendants were **dismissed** by earlier Orders and yet continue to appear on the style of the case, and some other original Defendants have **died.**

Judge Hrko noted directly that, when he visited the property, there was raw sewage running on the surface. What he failed to acknowledge, however, was that it was caused by the **State of West Virginia** when it carelessly buried a portion of the line in question under rock when

performing a paving project in the area and, furthermore, that the Appellants, as always, expressed a willingness to repair the damage at their expense.

During this process, the **Appellants** obtained the two permits required to construct the plant. One is from Water Resources that would permit the discharge of the clean water from the plant after installation. The other is from the DHHR to construct the plant. Because of the passage of time because of the illness and ultimate death of the contractor, these permits expired.

Then the Appellees changed their position and filed their motion to force the installation pursuant to the Agreement, the Appellant Association contacted additional potential contractors to install the plant and learned that not only would additional modifications have to be made to the plant to update it to current regulations but also that the previously-issued permits for the installation would have to be renewed. It was **at this time** that the Appellant Association learned for the first time that the DHHR rules require a distance of 100 feet to be between a sewage-system plant sized less than 40,000 gallons per day and an occupied structure.

As pointed out in the Statement of Facts portion of the Petition for Appeal, page 6, Neighbors Ezra Adkins and Sherri Adkins at this point objected to the installation of the plant on the grounds that their home is within the 100-foot buffer zone.

The Appellants have gone through the various stages with the DHHR in an attempt to have the permit issued, but it has been continually denied. The matter is now pending on appeal in the Circuit Court of Kanawha County, West Virginia.

ASSIGNMENTS OF ERROR

1. The Court's Order places the undersigned in a position with which one cannot comply. The Court should not be permitted to force the undersigned to violate the law of this State by ordering the undersigned to install a sewage-treatment plant when the agency in charge of issuing the proper permits **has refused to do so** for such construction.

2. The undersigned should not be held in contempt when fulfillment of the Court's Order would require the undersigned to take action **in direct violation** of the law of the State of West Virginia.

3. The Order is not clear as to who are the parties in this action now affected by the decision.

4. The Order discriminates against the undersigned by requiring them to provide an act and perform services not required of the majority of the remaining homeowners in the same unincorporated town **including the Plaintiffs and the persons objecting to the issuance of the permit.**

AUTHORITIES AND RELIEF REQUESTED

The undersigned Appellants respectfully request guidance from this Court. The Order of Judge Hrko simply is improper and **cannot** be legally carried out for the following reasons:

1. Without a construction permit issued by the DHHR, the undersigned would be **in direct violation** of the law of the State of West Virginia if it attempts to install the plant as stated in Judge Hrko's Order. *64 C SR 47*

2. Who is to install the plant, and just who is affected by the Judge's Order? The Plaintiffs and the Court have ignored the fact that there have been numerous changes in ownership of the property in question, and some of the named parties are deceased. At the very least, the matter must be returned to the Circuit Court of Logan County, West Virginia, for direction on straightening out the procedural mess.

4. While frustrated, the Court failed to understand and appreciate the efforts made by the Appellants to have the plant properly installed, as outlined above. Instead, the Court opined that the Appellants had done nothing to carry out the Agreement with the exception of an eleventh-hour appeal to him, which, with all due respect, is completely incorrect.

5. The Special Judge failed to recognize that the fact that sewage was running on the ground during his inspection was the direct result of the actions of the State of West Virginia and not any parties to this action.

6. Both the surviving Appellee in this case and Ezra and Sherri Adkins, who are the people objecting to the issuance of the construction permit, live in the area **but do not have any sewage treatment facilities either**. As is the case with 300 other families in McConnell, their sewage runs untreated to the Guyandotte River. Installation of this plant will **not in any way** change this situation.

Please review the cases of **Wischhusen v. American Medicinal Spirits Co.**, 163 Md 565, 163 A 685 (1933) and **Poledor v. Mayerfield**, 94 Ind. App. 601, 173 NE 292, 176 NE 32 (1930) cited on page 8 under the "Authorities and Relief Requested" section of the Petition for Appeal in this matter for Court discussions of what one is to do when prevented from carrying out certain activities because of the failure or refusal to issue proper permits or authorization.

It certainly is not proper to hold the undersigned in contempt or fine them for failure to carry out Judge Hrko's Order under these circumstances. See Syllabus Point 65 of **Kessell v. Leavitt**, 204 W.Va. 95, 511 S.E.2d 720 (1998).

The Court seemed to be quite exasperated with the situation, which is understandable. The Appellants have been fighting that same battle since these homes were built over 30 years ago. They have incurred incredible expense and yet still do not have proper sewage for their homes installed by the Plaintiff who built the homes, by the Government, or even as a result of their own attempts. Judge Hrko suggested that a Government grant or award be obtained for the installation of public sewage in that area with the assistance of Logan County's State delegation, including the Lieutenant Governor. Unfortunately, Judge Hrko did not seem to fully appreciate the magnitude of the sewage-disposal problem in Logan County.

These Appellants own only 9 of the more than 300 homes in this **one community alone** that pour untreated sewage directly into the Guyandotte River. This is not uncommon in Logan County. There are many large communities that send untreated sewage straight to the river.

Requiring 9 homeowners to do for themselves what neither the Government has attempted to do for them, their community, and many other communities and towns in Logan County seems patently unfair and, as a practical matter, would not even begin to make a ripple in the overall county problem.

With all due respect, issuing an Order directing the Appellants to install this plant, full well knowing that doing so would be in complete violation of State regulations and without the issuance of the required permits, is like issuing an Order outlawing cancer. How is it to be accomplished?

Doing so without guidance is a shameful abuse of discretion. The Court did not order the DHHR to issue the permit. The Court did not state that the plant should be installed if and when the permit is issued and direct the Appellants to proceed through that entire process. The Court did not direct that the parties return to it once the appellate process concerning that permit had been completed. The Court did not outline just who is covered by the Order. The Court did not take care to make certain that it had the proper parties before it. The Court gave no direction as to whether or not the undersigned could attempt to install the plant without the permit. Even if it were to do so, what contractor would take that job knowing that the undersigned cannot get the proper permits issued?

Where do we go from here?

Respectfully submitted this 19 day of June, 2007, by

SUNSET ADDITION PROPERTY OWNERS
ASSOCIATION, INC., a West Virginia corporation,
KEVIN and CONDA BATES,, ELMO and DELMA
ELLIS, EARL and EMILY CLAYCOMB, HOBERT
and RITA MACK, GEORGE and JUDY BONELLI,

LARRY and SUE BEVINS, ANDY and YVONNE
SOS, JAMES and KAY NISBET, and A. D.
SCAGGS III, as Defendants, Third-party Plaintiffs, and
Appellants

By 

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CERTIFICATE OF SERVICE

I, JOHN W. BENNETT, counsel for the Defendants, Third-party Plaintiffs, and Appellants, certify that, on the 19 day of June, 2007, I served the attached Appellants' Brief on the other parties in this action, appearing pro se, by mailing true copies thereof, by United States first-class mail, postage prepaid, to them at their home addresses shown below:

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Plaintiff and Appellee

ORA LEE WATSON AND MARIE WATSON
McConnell, WV 25646
Third-party Defendants

DARRELL WATSON AND PAULINE WATSON
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