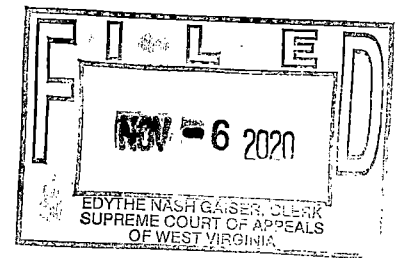


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IN THE

Supreme Court of Appeals of West Virginia

DOCKET No. 20-0870

WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION,

Defendant Below, Petitioner,

v.

EMILY BECK, AND

R. STEVEN REDDING, JUDGE, CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA,

Respondents.

**On Petition for Writ of Prohibition From
The Circuit Court of Berkeley County, West Virginia**

JOINDER IN PETITION FOR WRIT OF PROHIBITION ON BEHALF OF THE CABELL COUNTY BOARD OF EDUCATION

COUNSEL FOR INTERVENOR:

CABELL COUNTY SCHOOLS

**Sherrone D. Hornbuckle (W. Va. Bar No. 11883)
2850 5th Avenue
Huntington, West Virginia 25702
(304) 528-5007
Sherrone.hornbuckle@k12.wv.us**

The Cabell County Board of Education does hereby join in the Petition for Writ of Prohibition filed by the West Virginia Secondary School Activities Commission (SSAC) and respectfully request that the Court enter an Order prohibiting enforcement of the Circuit Court of Berkeley County's Temporary Restraining Order entered on November 5, 2020. In support, the Cabell County Board of Education states as follows:

I. Background Facts

Cabell County Board of Education will not restate all of the facts as stated by the SSAC but instead will try to augment where their interests require. This action stems from the request of a student at Martinsburg High School in Berkeley County, West Virginia to obtain a temporary restraining order prohibiting the West Virginia Secondary School Activities Commission from holding the AAA West Virginia State Soccer Tournament Semi-Finals and Finals on November 6-7, 2020 ("Tournament"). On November 5, 2020, the Circuit Court of Berkeley County granted the requested Temporary Restraining Order.

The teams scheduled to participate in the Semi-Finals are as follows:

Girls AAA:

George Washington High School (Kanawha County)

Jefferson High School (Jefferson County)

Parkersburg South High School (Wood County)

Wheeling Park High School (Ohio County)

Boys AAA:

Cabell-Midland High School (Cabell County)

George Washington High School (Kanawha County)

Jefferson High School (Jefferson County)

University High School (Monongalia County)

The above-named high school teams are scheduled to play the Semi-Final round game of the Tournament on November 6, 2020, in Beckley, West Virginia. However, to be clear, the Order entered by the Circuit Court in this case addresses the fact that Martinsburg High School was prohibited by the SSAC from participation in both the Sectional and Regional Rounds of the State Soccer Tournament.

The Sectional Rounds of the Tournament were held October 19-24, 2020 – some 9-14 days **before** the Plaintiff filed her case in Circuit Court. The Regional Tournaments were held on October 27, 2020 – six days **before** the Plaintiff filed her case.

The Plaintiff requests and the Circuit Court's Order in this case, though, seeks to halt the State Tournament to allow Martinsburg High School to participate. In other words, the request is not just that the four games to be played on November 6, 2020, be postponed until it can be determined whether Martinsburg High School can participate. In short, the request seeks to reset the entire State Soccer Tournament back at the Sectional Round, seemingly replay all of the Sectional Round games, replay all of the Regional Round games, and then hold the State Semi-Finals and Finals. The Circuit Court does not even address this fact in its Order. Moreover, Cabell Midland High School boys' soccer team was already travelling to Beckley for those games when the Order issued by the Circuit Court of Berkeley County was entered, a fact that the Circuit Court also failed to address.

II. Argument

The Circuit Court's Temporary Restraining Order failed to sufficiently deliberate what it was being asked to do and the impact of its decision; a Temporary Restraining Order should not have been granted. The issuance of a preliminary injunction "calls for the exercise of sound judicial discretion in view of all of the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ." *Hart v. National Collegiate Athletic Association*, 209 W. Va. 543, 547, 550 S.E.2d 79, 83 (2001), citing *State ex rel. Donley v. Baker*, Syl. pt. 4, 112 W. Va. 263, 164 S.E.2d 154 (1932). As this Court explained in *Hart*, the balance of hardship test requires the Court to consider "in flexible interplay" the following four factors to determine whether an injunction is appropriate: "(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *Hart*, 209 W. Va. at 547-48, 550 S.E.2d at 83-84 citing *Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990).

This Court has documented the use of injunctions to preserve the status quo pending resolution of the case. In *State v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932), the Court stated that "[t]he function of a preliminary injunction, whether it be prohibitory or mandatory, is to preserve the status quo, until upon final hearing the court may grant full relief." *Id.* at 263, 164 S.E. at 155. In that case, the heirs of an estate charged that the executor had improperly withheld government bonds belonging to the estate. *Id.* The executor refused to comply with

an order requiring him to give the bonds to the sheriff and was removed as the executor. *Id.*

The successor executor moved for an injunction requiring that the bonds be held by a receiver pending outcome of the case. *Id.*

The Court noted that mandatory injunctions are extraordinary remedies but distinguished the successor executor's request as a provisional remedy pending the final hearing. "[T]he act of the chancellor is a mere provisional remedy, the legitimate object of which is the preservation of the property in controversy until the final decision of the case on a full and final hearing on the merits or dismissal of the bill for want of jurisdiction or other sufficient cause." *Id.* at 263, 164 S.E. at 156. In such a case – where the object is simply to preserve property pending resolution of the case – "the injunction may ordinarily be allowed." *Id.* at 263, 164 S.E. at 156.

The Circuit Court's order in this case ignores completely this primary purpose of a preliminary injunction or temporary restraining order. A temporary restraining order or preliminary injunction might have been called for if Martinsburg High School were omitted from the Semi-Final Rounds of the Tournament based upon COVID testing results, but that is not the case. The Plaintiff here (and the Circuit Court's Order) seeks to use a temporary restraining order to restart an entire Tournament, in which multiple teams have participated, in which eight Sections determined the teams to play in four regions, and in which four regions determined the teams to play in two Semi-Final games. This temporary restraining order does not preserve the status quo – it seeks a do-over for the entire tournament. That do-over means that the teams who participated in Sectionals and Regionals now have to reschedule, travel to, and replay those games, incurring the additional time and costs that rescheduling such games would take. The Circuit Court did not even consider this possible outcome of its Order.

The Circuit Court placed emphasis on the impartiality to the Martinsburg High School athletes who will miss out on the chance to play in the Tournament, and of course, that is a regrettable outcome of the COVID-19 pandemic. But it failed to consider any other student-athletes participating in this Tournament. Setting aside for the moment that some of those teams were in Beckley preparing for the Semi-Final rounds when they learned of this outcome, the Court's order is far more reaching than it acknowledges. Assume the Sectional games are replayed and one of the above-mentioned teams loses in the Sectional games, not to Martinsburg, but another team in another Section – perhaps a team it has already played this season. The do-over certainly would not turn out fairly to that team's members.

Even further, the Circuit Court seems to address but makes no mention of the fact that the participating schools' home counties' testing rates are changing daily. Assume Cabell County's rates change such that when the Sectional Games are replayed, Cabell Midland High School may no longer participate. The do-over certainly would not turn out fairly to that team's members. The Circuit Court failed to address this possibility as well.

And finally, it is, of course, noteworthy that the Cabell Midland High School boys' soccer team had already traveled to Beckley and were awaiting their games when the Court issued its Order, an additional fact that the Circuit Court failed to consider or weigh. The burden on Cabell County counties to bring our team back, await a new schedule, travel to, and play new games is tremendous, and it far outweighs the irreparable harm the Circuit Court found.

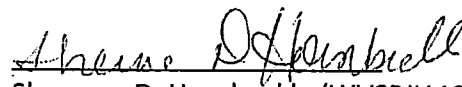
In short, the Plaintiff filed her case too late to seek a preliminary injunction. If she wanted to protest the SSAC's scheduling of Sectional or Regional Rounds of the State Tournament, she should have done so before October 19, 2020, when those games began. The Court should now

– two weeks later – find that those games should not have been played and use a temporary restraining order to reschedule them. The temporary restraining order does not preserve the status quo, it disrupts it. For that reason, and for those cited by the SSAC, the temporary restraining order should be set aside.

III. Conclusion

For the foregoing reasons, The Cabell County Board of Education joins in the SSAC's request and respectfully request that the Court enter an order prohibiting enforcement of the Circuit Court's temporary restraining order entered November 5, 2020.

**CABELL COUNTY BOARD OF EDUCATION,
By Counsel,**


Sherrone D. Hornbuckle (WVSB#11883)
2850 5th Avenue
Huntington, West Virginia 25702
(304) 528-5007
Sherrone.hornbuckle@k12.wv.us

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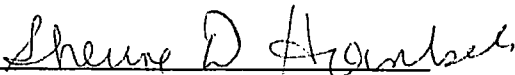
Defendant.

CERTIFICATE OF SERVICE

I, Sherrone Hornbuckle, counsel for the Intervening Party, does hereby certify that on this the 5th day of November, 2020, I served a true and correct copy of the foregoing upon the following by email and by depositing said copies in the United States Mail, postage prepaid, addressed as follows:

William R. Wooton
WOOTON & WOOTON
210 Main Street
Beckley, WV 25801

Barry Beck
Power Beck & Matzureff
308 W Burke St
Martinsburg, WV 25401


Sherone D. Hornbuckle (WVSB#11883)