



IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

**IN RE: MINGO COUNTY
COAL SLURRY LITIGATION**

CIVIL ACTION NO. 10-C-5000

THIS DOCUMENT APPLIES TO ALL CASES

**ORDER REGARDING DEFENDANTS' MOTION FOR PRODUCTION
OF CORRESPONDENCE AND ADDITIONAL INFORMATION FROM
PLAINTIFFS' COUNSEL RELATING TO BREACH OF CONFIDENTIALITY
PROVISION CONTAINED IN SETTLEMENT AGREEMENT**

Having considered "Defendants' Motion for Production of Correspondence and Additional Information from Plaintiffs' Counsel Relating to Breach of Confidentiality Provision Contained in Settlement Agreement" (TID# 39193349 filed on August 10, 2011), and Plaintiffs' Response in Opposition (TID# 39335153 filed on August 17, 2011); having heard oral argument on the motion; and having conferred with one another to ensure uniformity of their decisions, as contemplated by West Virginia Trial Court Rule 26.07(a), the Presiding Judges issue the following unanimous ruling.

Procedural History

On May 27, 2010, the Panel Chair, with the advice and consent of the Panel, assigned Judge James P. Mazzone, Judge John A. Hutchison, and Judge Jay M. Hoke as Presiding Judges in the Mingo County Coal Slurry Litigation. The Presiding Judges were assigned to handle the discovery and trial aspects of the litigation. The Panel also assigned Judge Derek C. Swope and Judge Alan D. Moats to serve as Resolution Judges. The Resolution Judges were assigned to handle the mediation aspect of the litigation.

After the initial status conference and hearing on August 20, 2010, the Presiding Judges worked separately and independently from the Resolution Judges. Consequently, the Presiding Judges have not seen the subject Settlement Agreement reached as a result

of the mediation conducted by the Resolution Judges on July 25-27, 2011. Although the Notice of Settlement Hearing (TID# 39035998 filed on August 2, 2011) requires Counsel for Plaintiffs to submit a copy of any settlement agreement that is the subject of the hearings to Lead Presiding Judge James P. Mazzone by no later than September 15, 2011, the parties do not dispute that they each voluntarily agreed that the terms of the settlement agreement were to be kept confidential. See Defendants' Motion, p. 1: "Following the lengthy mediation, a settlement was reached, the terms of which were expressly confidential. This confidentiality agreement applied to plaintiffs and plaintiffs' counsel." See also Plaintiffs' Response, p. 2: "Plaintiffs were advised that the terms of the settlement were to remain confidential."

Confidentiality of Mediation Process and the Parties' Confidential Settlement Agreement

On August 31, 2010, Lead Resolution Judge Derek C. Swope entered an Order Governing Mediation and Mediation Statements (TID# 32968007). Paragraph 8 of said order discusses the confidentiality of mediation statements, mediation discussions, including any resolution or settlement:

CONFIDENTIALITY

8. The contents of the mediation statements and the mediation discussions, including any resolution or settlement shall remain confidential, shall not be used in the present litigation nor any other litigation (whether presently pending or filed in the future), and shall not be construed as nor constitute an admission. Breach of this provision shall subject the violator to sanctions.

Although mediation was conducted on November 15 and 16, 2010, it was ultimately unsuccessful. On December 29, 2010, Lead Resolution Judge Derek C. Swope and Resolution Judge Alan D. Moats ordered that Mediation of the Mingo County Coal

Slurry Litigation be reconvened in February 2011. (TID# 35103485). Again, the Resolution Judges discussed confidentiality of the mediation process in Paragraph 5 of their order:

5. Mediation discussions, including any resolution or settlement of the Mingo County Coal Slurry Litigation shall remain confidential, shall not be used in the present litigation nor any other litigation (whether presently pending or filed in the future), and shall not be construed as nor constitute an admission. Breach of this provision shall subject the violator to sanctions.

The second mediation was met with partial success when the parties agreed to settle Plaintiffs' medical monitoring claims.

On the trial side of the litigation, the Presiding Judges entered a Case Management and Scheduling Order on March 8, 2011, scheduling an all issues trial of seven randomly-selected cases beginning on August 1, 2011. (See TID# 36351540). Throughout the spring, the Presiding Judges ruled on a number of discovery and other motions, including motions to exclude expert witnesses. The Presiding Judges heard oral argument on dispositive motions and motions *in limine* on July 21 and 22, 2011.¹

On the resolution side of the litigation, the Resolution Judges entered an order scheduling a final mediation of the litigation on July 26 and 27, 2011. Just as they had in prior orders, the Resolution Judges addressed the confidentiality of the mediation process in their Second Order Reconvening Mediation filed on June 30, 2011 (TID# 38453691):

5. Mediation discussions, including any resolution or settlement of the Mingo County Coal Slurry Litigation shall remain confidential, shall not be used in the present litigation nor any other litigation (whether presently

¹ During the course of the hearing, the Presiding Judges issued a number of rulings from the bench, including rulings on July 22, 2011 regarding conduct of the parties in anticipation of the jury trial scheduled to begin on August 1, 2011. At the request of Plaintiffs' counsel, the rulings regarding conduct of the parties announced from the bench on July 22, 2011, were memorialized in a written Order that was e-filed on August 11, 2011 (TID# 39235574). Although some of the July 22 rulings no longer apply since there will be no jury trial, rulings regarding conduct of the parties in the courtroom continue to apply to any other proceedings before the Court.

pending or filed in the future), and shall not be construed as nor constitute an admission. Breach of this provision shall subject the violator to sanctions.

West Virginia Trial Court Rule 25.12 also addresses confidentiality of the mediation process:

Mediation shall be regarded as confidential settlement negotiations, subject to W.Va. R.Evid. 408. A mediator shall maintain and preserve the confidentiality of all mediation proceedings and records. Confidentiality as to opposing parties within a mediation shall be maintained in a manner agreed upon by the parties and mediator. For example, all information may be kept confidential unless disclosure is specifically authorized by a party, or, all information may be shared unless specifically prohibited by a party. A mediator may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute mediated.

Correspondingly, Rule 408 of the West Virginia Rules of Evidence states in relevant part as follows:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

As the result of the mediation in July 2011, the parties reached settlement. While there is no dispute that the terms of their settlement are confidential, the parties disagree regarding whether Plaintiffs breached the confidentiality provision of the settlement agreement. Defs. Mot., pp. 1-2. Also in dispute is whether Defendants violated the Court's orders regarding confidentiality of the mediation process by reciting what they claim to be statements made and positions taken by Plaintiffs' attorney, Kevin Thompson during the July 2011 mediation "in an open, publicly available pleading." Pltffs. Resp., pp. 1-2.

Defendants argue that someone in Plaintiffs' camp breached the parties' settlement agreement by providing Associated Press Reporter, Vicki Smith, with a copy of a letter from Plaintiffs' counsel to Plaintiffs containing confidential information related to the settlement. Defs. Mot., p. 2. Plaintiffs' counsel deny they or their staff breached the settlement agreement, arguing that such disclosure would also constitute a breach of the attorney-client privilege. Pltffs. Resp., p. 1. To the contrary, Plaintiffs' counsel assert they "undertook significant efforts to advise clients of the need to maintain in strictest confidence the terms of the proposed settlement." *Id.*, p. 4. Counsel for Plaintiffs state that they: (1) advised Plaintiffs that the terms of the settlement are confidential in both their client letter and in the telephone script used by paralegals to communicate with Plaintiffs about the settlement; (2) mailed the August 31, 2010 Order Governing Mediation and Mediation Statements to all Plaintiffs, which discussed the requirement of confidentiality; and (3) asked the Associated Press reporter, among other things, (a) not to publish the amount of the settlement because of the confidentiality agreement, (b) to identify the person who provided the confidential letter to the reporter, and (c) not to quote from the letter, once the reporter notified Plaintiffs' counsel that the reporter had come into possession of a copy of the attorney-client privileged communication at issue and was working on a story utilizing it. *Id.*, pp. 2-4.

As agreed by the parties, the Presiding Judges conducted an *in camera* review of communications between Plaintiffs' counsel and Plaintiffs regarding the terms of the settlement reached by the parties on July 27, 2011. See proposed "Agreed Order to Provide *In Camera* For the Court's Review Production of Communications to Plaintiffs" filed on September 1, 2011 (TID# 39615374 filed on September 1, 2011). Specifically,

the Presiding Judges conducted an *in camera* review of the client letter and telephone script referenced on pages 2 and 3 of Plaintiffs' Response.

Having conducted their *in camera* review, and having reviewed the parties' briefs and oral argument on the motion, the Presiding Judges **FIND** there is nothing to suggest Plaintiffs' counsel precipitated the breach of the confidentiality provision of the settlement agreement. Indeed, Plaintiffs' counsel Bruce Stanley represented, as an officer of the Court, that neither Plaintiffs' counsel nor their staff disclosed the attorney-client letter obtained by the Associated Press reporter.

The Presiding Judges also **FIND** that, while Plaintiffs' counsel clearly and unequivocally advised their clients in both of their attorney-client communications that the terms of the settlement agreement are confidential, a breach of the confidentiality provision of the settlement agreement nonetheless occurred. This finding is supported by the August 9, 2011, report of Associated Press reporter Vicki Smith that, "[t]he settlement proposed last month is confidential, but the Associated Press obtained a copy of a letter sent to the more than 500 plaintiffs whose cases were to be tried in August" followed by a detailed description of the contents of the letter.

Disclosure of the attorney-client letter regarding the terms of the settlement also violates no less than three of the Court's Orders entered by Lead Resolution Judge, Derek C. Swope, regarding confidentiality of the mediation, each of which provide that **"[m]ediation discussions, including any resolution or settlement of the Mingo County Coal Slurry Litigation shall remain confidential."** Order Governing Mediation And Mediation Statements at Paragraph 8; Order Reconvening Mediation at Paragraph 5; and Second Order Reconvening Mediation at Paragraph 5. Breach of the

parties' settlement agreement and violation of the Courts' Orders is no less serious because there are a large number of Plaintiffs who are parties to the litigation. Each and every Plaintiff is obligated to uphold the agreed upon confidentiality, and all Plaintiffs received a copy of at least one of the Court's orders regarding confidentiality of the mediation. See Pltff. Resp., p. 3, Footnote 2: "Additionally, Plaintiffs' counsel mailed the 8/31/10 Order Governing Mediation and Mediation Statements . . . which included the requirement of confidentiality, to all Plaintiffs."

The Presiding Judges further **FIND** that Defendants have also violated the Court's Orders governing the confidentiality of mediation. In bringing to the Court's attention the breach of the confidentiality provision in the parties' settlement agreement, counsel for Defendants publicly filed a motion disclosing statements they assert were made by Attorney Kevin Thompson, and positions they assert were taken by Mr. Thompson during the July 2011 mediation. Significantly, Defendants' attorney, Dan Stickler, admitted during oral argument that Defendants disclosed communications that probably should have been filed under seal.

While the Court declines to impose sanctions upon the parties/counsel for the aforementioned breaches, the Court reminds the parties that if their ability to candidly discuss the strengths and weaknesses of their cases during mediation is compromised, it will have a chilling effect on the entire mediation process. Consistent with West Virginia Trial Court Rule 25.12, the Resolution Panel ordered mediation sessions to be conducted confidentially because extremely sensitive and/or personal information concerning all parties may frequently be discussed during mediation. Additionally, if the parties voluntarily agree to confidentiality as a term of their settlement agreement, as was the

case in this litigation, they must abide by that agreement, no matter how many Plaintiffs or Defendants are party to it.

The Court admonishes the parties that any future breaches under similar circumstances will be met with sanctions.

It is so **ORDERED**.

All exceptions and objections are noted and preserved for the record.

Entered this 15th day of September, 2011.

/s/ James P. Mazzone
Lead Presiding Judge
Mingo County Coal Slurry Litigation