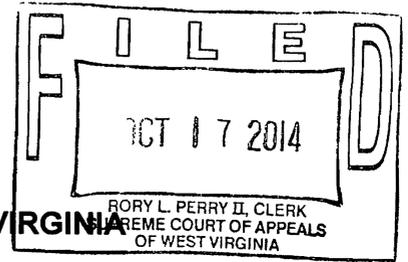


No. 14-0281



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0281

MARK E. DAVIS, Plaintiff below,

Petitioners,

v.

MIKE RUTHERFORD, et al., Defendants Below,

Respondents.

RESPONSE OF
REBUILD AMERICA, INC., and REO AMERICA, INC.

FLAHERTY SENSABAUGH BONASSO, PLLC
James W. Lane, Jr. (WV Bar No. 6483)
William J. Hanna (WV Bar No. 5518)
Flaherty Sensabaugh Bonasso PLLC
Post Office Box 3843
Charleston, WV 25338-3842
(304) 345-0200 (phone)
(304) 345-0260 (fax)
jlane@fsblaw.com
whanna@fsblaw.com

1. The Appeal Should be Dismissed for Petitioner's Failure to Perfect the Appeal.

Petitioner filed his Appendix Table of Contents on May 5, 2014, listing the documents that he would include as part of the record on appeal. These documents contain the procedural information upon which Rebuild would rely to defeat Petitioner's appeal. Petitioner has failed to file with this Court the documents set forth in his Appendix Table of Contents. Rule 7(c) and (e) of the West Virginia Rules of Appellate Procedure provide that it is the Petitioner's responsibility to prepare and file the appendix. Furthermore, Petitioner has not filed a brief. The appendix and Petitioner's brief were due September 2, 2014. The record on appeal and the legal basis for the appeal are lacking and inadequate. Pursuant to Rule 5(g) of the West Virginia Rules of Appellate Procedure, the Petitioner's failure to perfect an appeal "will result in the case being dismissed from the docket of the Court."

2. The Appeal Has No Merit.

Rule 37(b) of the West Virginia Rules of Civil Procedure provides that the court "shall require the party failing to obey the order [compelling discovery] . . . to pay the reasonable expenses, including attorney's fees . . . ". The West Virginia Supreme Court of Appeals has held that a circuit court is authorized to award attorney fees as a sanction for the failure to obey a discovery order. *Beto v. Stewart*, 2003, 582 S.E.2d 802, 213 W.Va. 355 (2003); *State ex rel. Dodrill v. Egnor*, 481 S.E.2d 504, 509; 198 W.Va. 409 (1996). The imposition of sanctions by a circuit court for the failure of a party to obey the court's order to provide or permit discovery is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion. *Karpacs-Brown v. Murthy*, 686 S.E.2d 746, 224 W.Va. 516 (2009); *Anderson v. Kunduru*, 600 S.E.2d 196, 199-200, 215 W.Va. 484 (2004); *Beto v. Stewart*,

582 S.E.2d 802, 213 W.Va. 355 (2003); *Bartles v. Hinkle*, (Syl.Pt. 2) 472 S.E.2d 827, 196 W.Va. 381 (1996); *Kiser v. Caudill*, 210 W.Va. 191, 557 S.E.2d 245, 251 (2001).

Based on the record as it exists, the Circuit Court was well within her authority to sanction Mr. Davis for refusing to attend his deposition as it had been scheduled on several occasions and for his failure to answer written discovery requests, all of which occurred after the Court entered an order compelling Mr. Davis to perform these acts. The record reflects that the Circuit Court ordered Mr. Davis, in person, at a hearing in April, 2013, to submit himself to deposition. Hearing Transcript, p. 13 . The record further reflects that after the Court entered the Order compelling Mr. Davis to attend his deposition, Rebuild on “three or four” occasions attempted to depose Mr. Davis. Hearing Transcript p. 14. The Circuit Court’s docket sheet, which Petitioner filed on September 2, 2014, reflects that after the Court’s order requiring the Davises to attend their deposition, two notices of deposition were filed on May 23, 2013, two amended notices of deposition were filed on June 6, 2013, and additional notices of deposition were filed on December 6, 2013. Mr. Davis did not attend his depositions, which frustrated Rebuild America’s ability to establish a record in this case. Hearing Transcript, p. 28. This also frustrated Rebuild America’s ability to file its own motion for summary judgment in this case.

The Court noted that Rebuild had filed two motions addressing the fact that the Davises had not complied with discovery. AR 273. In addition, Mr. Davis filed pleadings with the Court but failed to attend hearings on those pleadings. Hearing Transcript, p. 4-6, 14. The Circuit Court determined that Mr. Davis was in flagrant disregard for the rules in failing to comply with repeated discovery requests and failure to attend hearings. Hearing Transcript, p. 14-15. The court found that Mr. Davis impeded efforts to depose him. *Id.*, p. 15-16.

Mr. Davis has provided no record or argument that would tend to refute the Circuit

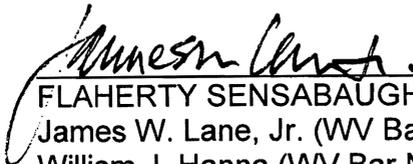
Court's findings. Certainly, he has proffered no evidence that shows or tends to show that the Circuit Court committed an abuse. *Beto v. Stewart*, (Syl.Pt. 2) 582 S.E.2d 802, 213 W.Va. 355 (2003).

CONCLUSION

WHEREFORE, for the reasons stated herein, Petitioner Rebuild America, Inc. and REO America, Inc., respectfully request that this Court dismiss this appeal.

**REBUILD AMERICA, INC. and
REO AMERICA, INC.**

By Counsel



FLAHERTY SENSABAUGH BONASSO, PLLC
James W. Lane, Jr. (WV Bar No. 6483)
William J. Hanna (WV Bar No. 5518)
Flaherty Sensabaugh Bonasso PLLC
Post Office Box 3843
Charleston, WV 25338-3842
(304) 345-0200 (phone)
(304) 345-0260 (fax)
jlane@fsblaw.com
whanna@fsblaw.com

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Docket No. 14-0281

MARK E. DAVIS,

Petitioner,

vs.

MIKE RUTHERFORD, et al.,

Defendants.

CERTIFICATE OF SERVICE

I, James W. Lane, Jr., do hereby certify that I served the foregoing **RESPONSE OF REBUILD AMERICA, INC. and REO AMERICA, INC.** upon Mark E. Davis and Tammy L. Davis, pro se, and counsel of record this 17th day of October, 2014, by depositing a true copy thereof in the United States mail, postage prepaid, as follows:

Mark E. Davis, *pro se*
51 Woodbridge Drive
Charleston, WV 25311

Tammy L. Davis, *pro se*
51 Woodbridge Drive
Charleston, WV 25311

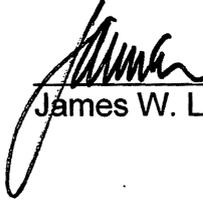
O. Gay Elmore, Jr., Esquire
Elmore Law Office
121 Summers Street
Charleston, WV 25301

Marc J. Slotnick, Esquire
Bailey & Wyant, PLLC
500 Virginia Street East, Suite 600
P.O. Box 3710
Charleston, WV 25337

Herschel H. Rose, III, Esquire
Rose Law Office
300 Summers Street, Suite 1440
P.O. Box 3502
Charleston, WV 25335

Philip B. Hereford, Esquire
Hereford & Riccardi, PLLC
405 Capitol Street, Suite 306
Charleston, WV 25301

Christopher S. Smith, Esq.
Hoyer, Hoyer & Smith, PLLC
22 Capitol Street
Charleston, WV 25301



James W. Lane, Jr. (WV Bar #6483)