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IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

NORMA ACORD,
West Virginia Residents,
Plaintiffs and Class Representatives,

v.

Civil Action No. 04-C-151-0

COLANE COMPANY, a West Virginia corporation,
individually and as a successor-in-interest to Cole & Crane
Real Estate Trust; COAL & CRANE REAL ESTATE
TRUST, a West Virginia trust; LOGAN COUNTY
BOARD OF EDUCATION, a West Virginia public body;
WEST VIRGINIA COAL & COKE COMPANY, a West
Virginia corporation, OMAR MINING COMPANY, a
West Virginia corporation, individually and as successor-
in-interest to West Virginia Coal & Coke Company; A.T.
MASSEY COAL COMPANY, a West Virginia corporation,
Individually and as a successor-in-interest to West Virginia
Coal & Coke Company; MASSEY ENERGY COMPANY, a
Virginia corporation, individually and as a successor-in-interest
to West Virginia Coal & Coke Company; RICHARD FRY, a West
Virginia resident, individually,

Defendants.

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KAYLA T. STEVENS
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LOGAN COUNTY

ORDER

Pending before the Court is Plaintiff's Omnibus Motion to Alter or Amend Orders Granting the Motion to Dismiss of Cole & Crane Real Estate Trust and Motions for Summary Judgment of Colane Corporation, Omar Mining Corporation and Massey Energy Company and A.T. Massey Coal Company, Inc. Also pending before the Court is Defendants Massey Energy Company, A.T. Massey Coal Company, Inc., and Omar Mining Company's Motion to Strike, which was previously joined in, and adopted by, Defendants Colane Corporation and Cole & Crane Real Estate Trust.

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Based on the supporting and opposing memoranda of law, the arguments of counsel and the pertinent legal authorities, the Court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. On July 16, 2009, the Court entered Orders granting Defendant Omar Mining Company's Motion for Summary Judgment, Defendants Massey Energy Company and A.T. Massey Coal Company, Inc.'s Motion for Summary Judgment, Defendant Colane Corporation's Motion for Summary Judgment and Defendant Cole & Crane Real Estate Trust's Motion to Dismiss.

2. On July 27, 2009, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, the Court entered its Final Judgment Order in Favor of Defendants Colane Corporation, Cole & Crane Real Estate Trust, Omar Mining Company, A.T. Massey Coal Company and Massey Energy Company.

3. The plaintiff, pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, then filed Plaintiff's Omnibus Motion to Alter or Amend Orders Granting the Motion to Dismiss of Cole & Crane Real Estate Trust and Motions for Summary Judgment of Colane Corporation, Omar Mining Corporation and Massey Energy Company and A.T. Massey Coal Company, Inc.

4. On September 2, 2009, Defendants Massey Energy Company, A.T. Massey Coal Company, Inc., and Omar Mining Company filed their Motion to Strike, which was joined in, and adopted by, Defendant Colane Corporation and Cole & Crane Real Estate Trust.

5. On September 14, 2009, the Court held oral argument with respect to the Motion to Strike.

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6. On February 18, 2010, the Court held oral argument with respect to the Omnibus Motion to Alter or Amend.

II. CONCLUSIONS OF LAW

1. "Rule 59(e) of the West Virginia Rules of Civil Procedure provides the procedure for a party who seeks to change or revise a judgment entered as a result of motion to dismiss or a motion for summary judgment." Syl. Pt. 4, *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995).

2. The law is clear that the purpose of a Rule 59(e) motion is to argue that a court's decision in granting summary judgment was erroneous based upon the record it had before it at that time. A Rule 59(e) motion is not a proper vehicle to raise new arguments or to submit new evidence that could have been presented prior to summary judgment.

3. In *Browning v. Halle*, 219 W.Va. 89, 632 S.E.2d 29 (2005) (per curiam), the circuit court granted summary judgment in favor of the defendants. Thereafter, the plaintiffs filed a Rule 59(e) motion accompanied by additional exhibits which were never made part of the record at the summary judgment stage. The circuit court struck the plaintiffs' additional exhibits. On appeal, the Supreme Court of Appeals agreed:

After carefully reviewing the Appellants' motion to reconsider, we first find that Appellants based many of their arguments on the evidence they improperly sought to introduce after the grant of summary judgment and which this Court will not consider.

Id. at 96, 632 S.E.2d at 36; see also Cleckley, et al., *Litigation Handbook on West Virginia Civil Procedure* 1179 (3d edition 2008) ("A motion under Rule 59(e) is not appropriate for presenting new issues or evidence that could have been previously litigated. . . Rule 59(e) is not a vehicle

for a party to undergo his/her own procedural failures or to advance argument that could and should have been presented to the trial court prior to judgment.").

4. Indeed, the Supreme Court of Appeals has repeatedly recognized that a party has an affirmative obligation "to make sure that evidence relevant to a judicial determination be placed in the record before the lower court" *Jackson v. Putnam County Bd. of Educ.*, 221 W.Va. 170, 177, 653 S.E.2d 632, 639 (2007) (per curiam) (internal quotations and citation omitted).

5. In *Jackson*, the circuit court granted summary judgment in favor of the defendant. On appeal, the plaintiff attempted to make a Policy Manual of the Putnam County Board of Education part of the record. However, although the Policy Manual was exchanged during the course of discovery, it was never filed pursuant to Rule 5 and, thus, never made part of the record before the circuit court. The Supreme Court of Appeals struck the submission of the Policy Manual. *Id.* at 176-77, 653 S.E.2d at 638-39; *see also Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 700, 474 S.E.2d 872, 880 (1996) ("Although our review of the record from a summary judgment proceeding is *de novo*, this Court for obvious reasons, will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion. To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling.").

6. In addition to the Supreme Court of Appeals, other courts across the country have been uniform in holding that in order to present additional evidence at the Rule 59(e) stage, the movant must make a showing as to why, despite the exercise of due diligence, the evidence was not available at the time of the original summary judgment motion. *See, e.g., Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992) ("When

supplementing a Rule 59(e) motion with additional evidence, the movant must show either that the evidence is newly discovered [and] if the evidence was available at the time of the decision being challenged, that counsel made a diligent yet unsuccessful effort to discover the evidence.”) (internal quotations and citations omitted); *In re Sun Healthcare Group, Inc.*, 214 F.R.D. 671, 674 (D.N.M. 2003) (“Plaintiffs have made no showing that the witnesses cited in or exhibits attached to their Rule 59(e) motion were not discoverable despite the due diligence of counsel prior to the Court's dismissal of the Complaint.”).

A. Defendants' Motion to Strike

7. On June 5, 2009, Defendant Omar Mining Company's Motion for Summary Judgment, Defendants Massey Energy Company and A.T. Massey Coal Company, Inc.'s Motion for Summary Judgment, Defendant Colane Corporation's Motion for Summary Judgment and Defendant Cole & Crane Real Estate Trust's Motion to Dismiss, all with supporting exhibits, were filed.

8. On June 15, 2009, the plaintiff filed Plaintiff's Response to Defendant, Omar Mining's, Motion for Summary Judgment and Plaintiff's Response to Defendants, A.T. Massey Coal Company and Massey Energy, Motion for Summary Judgment, the former of which consisted of only a single page that contained no citations to the record. On the same date, plaintiff also filed responses to Defendant Colane Corporation's Motion for Summary Judgment and Defendant Cole & Crane Real Estate Trust's Motion to Dismiss.

9. In addition to the exhibits the defendants submitted with their respective motion to dismiss and motions for summary judgment, the plaintiff also filed a document styled "Exhibits in Support of Plaintiffs' Response to Motion for Summary Judgment of Defendants,

Cole & Crane Real Estate Trust, Colane Company, Omar Mining, A.T. Massey and Massey Energy." This filing consisted of forty-four pages of exhibits.

10. In her Omnibus Motion to Alter or Amend, the plaintiff attached over four hundred pages of exhibits. The defendants moved to strike certain of these exhibits, contending that such exhibits were not made part of the record prior to summary judgment and, as a result, may not be considered with respect to the Omnibus Motion to Alter or Amend. The Court will review these exhibits in turn.

11. Exhibit 3 of the Omnibus Motion to Alter or Amend consists of several printouts of information sheets titled ToxFAQs published by the Agency for Toxic Substances and Disease Registry, a subdivision of the United States Department of Health and Human Services. It is undisputed that the material comprising Exhibit 3 of the Omnibus Motion to Alter or Amend was not filed and not made part of the record prior to judgment. This material, which again consists of government publications, was presumably available to the plaintiff and her counsel throughout this litigation and the plaintiff has made no showing otherwise. Accordingly, the Court **GRANTS** the Motion to Strike with respect to Exhibit 3 of the Omnibus Motion to Alter or Amend.

12. Exhibits 4, 5, 6, and 17 of the Omnibus Motion to Alter or Amend consist of the entire deposition transcripts of the plaintiff's experts. Specifically, Exhibit 4 consists of the entire deposition transcript of the plaintiff's expert, Dr. Scott Simonton. Exhibit 5 consists of the entire deposition transcript of the plaintiff's expert, Dawn Seeburger. Exhibit 6 consists of the entire deposition transcript of the plaintiff's expert, Dr. Charles Werntz. Exhibit 17 consists of the entire deposition transcript of the plaintiff's expert, Dr. Shira Kramer.

13. With respect to Dr. Simonton, the defendants submitted certain portions of his deposition transcript into the record prior to judgment, specifically pages 85, 89, 115, 116, 125, 126, and 127. With respect to Ms. Seeburger, the defendants submitted certain portions of her deposition transcript into the record prior to judgment, specifically pages 83, 84, 121, 122, and 123.

14. The Court finds that Dr. Simonton, Ms. Seeburger, Dr. Wertz, and Dr. Kramer were undisputedly experts retained by and for the plaintiff. The plaintiff had retained most, if not all, of these experts for a period of years prior to judgment. These experts had all prepared reports for the plaintiff during the course of discovery. The plaintiff cannot claim that her own experts' opinions were somehow evidence unavailable to her prior to judgment. Had she chose to do so, the plaintiff could have obtained whatever affidavits from these individuals she felt necessary and submitted the same in response to the motions for summary judgment and motion to dismiss. Indeed, the plaintiff did so with Dr. Simonton, submitting an affidavit from him in response to the motions for summary judgment and motion to dismiss.

15. Moreover, the Court notes that the plaintiff's argument that her own experts' deposition transcripts were somehow not available to her is dispelled by the fact that the defendants obtained copies of said transcripts and were able to supplement the record with them. Accordingly, save for the aforementioned pages of Dr. Simonton and Ms. Seeburger's deposition transcripts which the defendants submitted into the record, the Court **GRANTS** the Motion to Strike with respect to Exhibits 4, 5, 6, and 17 of the Omnibus Motion to Alter or Amend.

16. Exhibits 7 and 9 of the Omnibus Motion to Alter or Amend consist of the entire deposition transcripts of Edgar Franklin and Ray Chafin, respectively. Messers Franklin and Chafin's depositions were taken in September 2004.

17. With respect to Mr. Franklin, the defendants submitted certain portions of his deposition transcript into the record prior to judgment, specifically pages 2-5, 14-17, and 74-81. With respect to Mr. Chafin, the defendants submitted certain portions of his deposition transcript into the record prior to judgment, specifically pages 2-5, 18-21, and 46-57. The plaintiff also submitted portions of Mr. Chafin's deposition transcript, specifically pages 5-8 and 21-32.

18. The plaintiff had the opportunity to submit whatever portions of Messrs. Franklin and Chafin's deposition into the record she felt necessary to respond to the motions for summary judgment and, in fact, did elect to do so with respect to portions of Mr. Chafin's deposition. The plaintiff may not use a Rule 59(e) motion to supplement the record with testimony for which she had the opportunity to do so prior to judgment, but chose not to do so. Accordingly, save for the aforementioned pages of Messrs. Franklin and Chafin's deposition transcripts which she submitted into the record prior to judgment, the Court **GRANTS** the Motion to Strike with respect to Exhibits 7 and 9 of the Omnibus Motion to Alter or Amend.

19. Exhibits 12, 13, 14, 15, and 16 of the Omnibus Motion to Alter or Amend consist of materials of the plaintiff's experts. Specifically, Exhibit 12 consists of the curriculum vitae of the plaintiff's expert, Dr. Scott Simonton. Exhibit 13 consists of a risk assessment spreadsheet prepared by Dr. Simonton. Exhibit 14 consists of a report by the plaintiff's expert, Dr. Shira Kramer, dated April 6, 2009. Exhibit 15 consists of a curriculum vitae of Dr. Kramer. Exhibit 16 consists of a report by the plaintiff's expert, Dawn Seeburger, dated May 17, 2005. It is undisputed that the material comprising Exhibits 12, 13, 14, 15, and 16 to the Omnibus Motion to Alter or Amend were not filed and made part of the record prior to judgment. The Court finds that this material and its sources were readily available to the plaintiff and her counsel prior to

judgment. Exhibits 12, 13, 14, 15, and 16 consist of information from the plaintiff's own expert witnesses, most of whom had been retained by the plaintiff for a period of years prior to judgment. Accordingly, the Court **GRANTS** the Motion to Strike with respect to Exhibits 12, 13, 14, 15, and 16 of the Omnibus Motion to Alter or Amend.

20. Exhibit 19 of the Omnibus Motion to Alter or Amend are portions of a deposition transcript from a November 2008 deposition taken of Barbara Smith. The deposition was taken in a proceeding in the Circuit Court of Mingo County, West Virginia styled *Whitt, et al. v. Rawl Sales & Processing, et al.*, Civil Action No. 07-C-113. The deposition was taken by the plaintiff's counsel in this case, Kevin Thompson. The relevance of this deposition is unclear. Nonetheless, this deposition transcript was clearly available to the plaintiff and her counsel had they chosen to make it of record in this case prior to judgment. Accordingly, the Court **GRANTS** the Motion to Strike with respect to Exhibit 19 of the Omnibus Motion to Alter or Amend.

21. Exhibit 20 of the Omnibus Motion to Alter or Amend consists of a mineral lease dated July 26, 1924 between the trustees of Cole & Crane Real Estate Trust and Hutchinson Island Creek Coal Corporation. The defendants subsequently informed the Court that the plaintiff did submit a copy of this lease into the record at the June 25, 2009 hearing on the pending dispositive motions. Accordingly, the Court **DENIES** the Motion to Strike with respect to the lease between the trustees of Cole & Crane Real Estate Trust and Hutchinson Island Creek Coal Corporation attached as Exhibit 20 to the Omnibus Motion to Alter or Amend.

22. Lastly, Exhibit 24 of the Omnibus Motion to Alter or Amend consists of a Rule 56(f) affidavit executed by the plaintiff's counsel, Mr. Thompson. It is undisputed that the Rule 56(f) affidavit was not filed in opposition to the motions for summary judgment. A review

of the affidavit itself reveals it was not notarized until July 27, 2009, after summary judgment had been granted and the same day the plaintiff's Omnibus Motion to Alter or Amend was filed.

23. The record is devoid of any indication from the plaintiff that additional discovery was necessary in order to enable her to respond to the pending motions for summary judgment. The plaintiff's counsel never executed a Rule 56(f) affidavit until after summary judgment had been granted and presented it for the first time as an exhibit to the Omnibus Motion to Alter or Amend. The plaintiff's counsel may not use a Rule 59(e) motion to claim for the first time that there was an inadequate opportunity to conduct discovery. *See Powderidge Unit Owners*, 196 W.Va. at 701, 474 S.E.2d at 881 ("The defendants also point out that even if there was any validity to plaintiff's argument that it had an insufficient opportunity to conduct discovery on the statute of limitations issue, there was a procedural mechanism under Rule 56(f) of the West Virginia Rules of Civil Procedure which it could have invoked to protect itself. The plaintiff, however, did not avail itself of this rule."). Accordingly, the Court **GRANTS** the Motion to Strike with respect to Exhibit 24 of the Omnibus Motion to Alter or Amend.

B. Plaintiff's Omnibus Motion to Alter or Amend

24. Having resolved the defendants' Motion to Strike, the Court will now address the Plaintiff's Omnibus Motion to Alter or Amend itself.

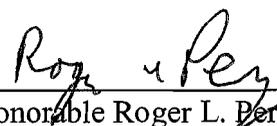
25. After careful review, the Court finds that the plaintiff has proffered no evidence or authorities to cause the Court to alter or otherwise amend its Orders granting summary judgment in favor of defendants Omar Mining Company, Massey Energy Company, A.T. Massey Coal Company, Inc., and Colane Corporation, or its Order granting defendant Cole & Crane Real Estate Trust's Motion to Dismiss. There was no genuine issue of material fact and judgment was properly granted in favor of these defendants.

CONCLUSION

Based on the foregoing findings and conclusions, the Court hereby **GRANTS** in part and **DENIES** in part Defendants Massey Energy Company, A.T. Massey Coal Company, Inc., and Omar Mining Company's Motion to Strike, which was previously joined in, and adopted by, Defendants Colane Corporation and Cole & Crane Real Estate Trust. The Court hereby **DENIES** the Plaintiff's Omnibus Motion to Alter or Amend as it pertains to defendants Omar Mining Company, Massey Energy Company, A.T. Massey Coal Company, Inc., Colane Corporation and Cole & Crane Real Estate Trust.

The objections and exceptions of any party aggrieved by this Order are preserved.

Entered this 31st day of March 2010.



Honorable Roger L. Perry

PRESENTED BY:

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