

11-1512

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IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST-VIRGINIA

DAVID EARLEY, TIMOTHY WELLS and)
TIFFANI D. TALBERT, Administratrix of)
the Estate of GERALD W. TALBERT)

Plaintiffs,)

v)

STRUCTURAL GROUP, INC., et al.)

Defendants.)

Civil Action No.: 06-C-153M

**ORDER GRANTING MOTIONS FOR SANCTIONS FILED BY
DEFENDANTS ERSHIGS, INC., PULLMAN POWER, LLC AND
STRUCTURAL GROUP, INC. AGAINST
DEFENDANTS OHIO POWER COMPANY AND
AMERICAN ELECTRIC POWER SERVICE CORPORATION**

On the 20th day of April 2011, came Defendants, Pullman Power, LLC and Structural Group, Inc. ("Pullman Power Defendants"), by and through their counsel, George M. Stewart and Sharon Z. Hall, and the law firm of Zimmer Kunz PLLC, and Thomas P. Mannion, and the law firm of Mannion & Gray Co., L.P.A., and came Defendant, Ershigs, Inc. ("Ershigs"), by and through counsel, Joseph J. Bosick, and the law firm of Pietragallo, Gordon, Alfano, Bosick & Raspanti, LLP, and Tiffany R. Durst, and the law firm of Pullia, Fowler, Flanagan, Brown & Poe, PLLC, pursuant to Rules 26 and 37 of the West Virginia Rules of Civil Procedure, and moved this Honorable Court for the entry of an Order granting the aforesaid Defendants' Motions for Sanctions against Co-Defendants, Ohio Power Company and American Electric Power Service Corporation (collectively, "AEP"). Having given

mature consideration to said Motions, and the oral argument at the pre-trial evidentiary hearing. And during arguments in chambers prior to jury selection relative to the same, the Court hereby finds the Motions well taken and GRANTS said Motions and ORDERS sanctions against Defendants Ohio Power Company and American Electric Service Corporation. In so ORDERING, the Court hereby renders the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This case arises as the result of a fire which occurred on March 4, 2006, that began inside a smoke stack at the Mitchell Power Plant, owned and/or operated by Ohio Power Company and located in Cresap, West Virginia.
2. On January 5, 2007, this Court established a Case Management Schedule governing the litigation of this case.
3. The Scheduling Conference Order was subsequently modified on June 25, 2010, by way of the Court's Pre-Trial Conference Order.
4. The Pre-Trial Conference Order included dates and deadlines by which the parties were to produce relevant documents, materials and evidence regarding the issues in the case.
5. Specifically, the Court established a discovery deadline of January 14, 2011.
6. On March 9, 2011, counsel for Ohio Power Company and American Electric Service Corporation "became aware that electronically stored information existed in this case." *See Defendants, Ohio Power Company and American Electric Service Corporation's Opposition to the Various Motions for Sanctions Filed Against Defendants, filed April 20, 2011, at p. 2.* Counsel "for these

Defendants" admitted that on March 9, 2011, "further learned that this information may not have been reviewed and produced in response to the various discovery requests directed to these Defendants. Upon learning of this issue counsel immediately contacted prior counsel for these Defendants, Edward A. Smallwood, who confirmed that the electronic information had not been reviewed." *Id.*

7. On March 10, 2011, approximately five weeks before trial, AEP's counsel advised counsel for the Pullman Power Defendants that AEP's counsel had discovered an additional 750,000 to 1,500,000 pages of electronic information that were in possession of AEP (and/or AEP's prior counsel Edward A. Smallwood) and that were potentially responsive to discovery requests. Counsel for Ershigs was also subsequently advised of the discovery of this electronic information that had not previously been produced. *Id.*

8. Counsel for AEP admitted that it took a "team" of professionals to review the electronic data and to identify potentially discoverable documents with the use of search terms. The "team" also de-duplicated the electronic information to remove exact copies of the same documents. The documents identified by this "team" were placed into a "review platform." Each document in the review platform was then reviewed by "attorneys [for AEP] to determine whether the documents were responsive to the discovery propounded to these Defendants." *Id.*

9. It took the AEP Defendants 41 days, from March 9, 2011 until April 19, 2011, utilizing a "team" and then multiple counsel, to complete its review of the documents and determine which documents were discoverable. *Id.*

10. AEP's counsel informed counsel for the Pullman Power Defendants that prior counsel for AEP, Edward Smallwood, Esq., of Swartz Campbell LLC, was in possession of these documents, which were stored on a hard-drive, but that he had not reviewed them for purposes of

discovery. AEP's current counsel represented to the Court that the documents in question were in the possession of AEP and/or their prior counsel for several years prior to disclosure.

11. Subsequent to advising the Pullman Power Defendants' counsel of the documents that were newly identified on March 10, 2011, counsel for AEP produced two documents, one of which was purportedly from the batch of 750,000 to 1,500,000 documents: (1) an additional "root cause report" dated May 1, 2006, and (2) an Exponent Fire Modeling Report from January 2005.

12. The Pullman Power Defendants were further advised by AEP's counsel on April 6, 2011, that a compact disc containing the first 26,000 documents (unknown number of pages) would be produced in the near future.

13. Less than one week before trial, on April 13, 2011, counsel for AEP produced 107,540 pages of documents to the Pullman Power Defendants and to Ershigs.

14. Just 5 days before trial, on April 14, 2011, counsel for AEP produced another 180,115 pages of documents to the Pullman Power Defendants and to Ershigs.

15. On April 14, 2011, again just 5 days before trial, counsel for the Pullman Power Defendants and counsel for Ershigs were further advised by AEP's counsel that two additional productions "of similar size and scope" would be produced.

16. On April 14, 2011, this Court held a final Pre-Trial Conference at which time the documents subject to the Motions for Sanctions were discussed.

17. On April 18, 2011, the Pullman Power Defendants filed a Motion for Sanctions Against Co-Defendant American Electric Power Company or, in the alternative, Motion for Leave to File Amended Cross-Claim Instantly, or in the alternative, Motion for Continuance.

18. As a result of the two Motions for Sanctions filed by the Pullman Power Defendants and Ershigs, the Court again heard argument on this issue on April 19, 2011, with respect

to the issues raised in the aforesaid Motions. During that hearing Counsel for AEP acknowledged that it had recently produced documents and was in the process of producing additional documents consistent with the findings of fact above. AEP also acknowledged that these documents were in the possession of AEP and/or their prior counsel, Edward A. Smallwood of Swartz Campbell LLC, for several years prior to disclosure to other parties.

19. Oral motions were made in open Court on April 20, 2011 by the attorneys for the Pullman Power Defendants and Ershigs requesting that all references to "American Electric Power Company" in their respective Motions for Sanctions be amended to read "American Electric Power Service Corporation." The Court granted the oral motions.

20. On April 20, 2011, Defendants American Electric Service Corporation and Ohio Power Company filed their Opposition to the Various Motions for Sanctions Filed Against the AEP Defendants, which is referenced above.

21. On April 20, 2011, counsel for AEP told the Court and other parties in this case that an additional "12,122 documents" would be "produced to counsel shortly." Counsel for AEP did not identify how many pages of information would be contained in the 12,122 documents. *Id.*

22. Counsel for AEP admitted that "the total electronic production of documents will contain approximately 32,233 documents." *Id.* This Court acknowledged that the additional discovery would be monument in nature.

23. This Court FINDS that AEP's production of hundreds of thousands of pages of documents less than one week before trial and the complete failure to produce another 12,122 documents (of an unknown number of pages) at all before trial constituted unjustified non-compliance with the West Virginia Rules of Civil Procedure regarding the production of

documents, was in contravention of the deadlines imposed by the 'Court's Pre-Trial Conference Order, and violated Rule 37(b)(2) of the West Virginia Rules of Civil Procedure.

24. The Pullman Power Defendants and Ershigs were unable to review the newly produced documents in any meaningful way prior to trial and thus their rights to properly defend their clients and prosecute their Cross-Claims were severely and unduly prejudiced by the late production.

25 The late production also unduly prejudiced the ability of the Pullman Power Defendants and Ershigs to depose witnesses on these newly produced documents, which further unfairly and unduly prejudiced those Defendants' rights to properly defend their clients and prosecute their Cross-Claims.

26. No just reason or excuse existed for the AEP Defendants' violation of the West Virginia Rules of Civil Procedure. No just reason or excuse existed for the AEP Defendants' violation of this Court's prior Pre-Trial Orders.

CONCLUSIONS OF LAW

1. It is well-settled that "one of the purposes of the discovery process under our Rules of Civil Procedure is to eliminate surprise. Trial by ambush is not contemplated by the Rules of Civil Procedure." McDougal v. McCammon, 455 S.E.2d 788, 795 (W.Va, 1995).

2. Each party has a duty to disclose its evidence upon proper inquiry. Graham v. Wallace, 588 S.E.2d 167, 174 (W.Va. 2003).

3 The discovery rules are based on the belief that each party is more likely to get a fair hearing when it knows beforehand what evidence the other party will present at trial. *Id*

4. This allows for each party to respond to the other party's evidence, and it provides the jury with the best opportunity to hear and evaluate all of the relevant evidence, thus increasing the chances of a fair verdict. *Id.*

5. Rule 37 of the West Virginia Rules of Civil Procedure ("The Civil Rules") permits the use of sanctions against a party who refuses to comply with discovery rules. Shreve v. Warren Assocs., 355 S.E.2d 389, 393 (W.Va. 1987).

6. The imposition of sanctions for the failure of a party to obey a circuit court's discovery order is within the sound discretion of the Court and will not be disturbed upon appeal unless there has been an abuse of that discretion. Mills v. Davis, 567 S.E.2d 285, 289 (W.Va. 2002).

7. Possible sanctions available under Rule 37(b)(2) include:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; [or]

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order [compelling discovery] is obeyed, or dismissing the action or proceeding.

Hannah v. Heeter, 584 S.E.2d 560, 567-68 (W.Va. 2003).

8. This well-established principle was illustrated by the West Virginia Supreme Court of Appeals in Kimberly Indus. v. Lilly Explosives Co., wherein the Court stated that where a party fails to obey a discovery order, under Rule 37(6)(2), "the circuit court may, *inter alia*, enter an order "striking out pleadings or parts thereof, or staying further proceedings until the

order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." Kimberly Indus. v. Lilly Explosives Co., 486 S.E.2d 324, 327 (W.Va. 1997).

9. The sanctions of striking pleadings and rendering a default judgment under Rule 37(b) will be upheld when it is demonstrated that the failure to comply with the order is due to willfulness, bad faith, or fault. State ex rel. Richmond Am. Homes of W. Va. v. Sanders, 697 S.E.2d 139, 149 (W.Va. 2010 (citing Bell v. Inland Mut. Ins. Co., 332 S.E.2d 127 (W.Va. 1985))).

10. The party seeking sanctions under Rule 37(b) has the burden of establishing the disobedient party's noncompliance with the circuit court's order. Doulamis v. Alpine Lake Property Owners Ass'n, 399 S.E.2d 689, 684 (W.Va. 1990).

11. Once established, the burden is upon the disobedient party to avoid the sanctions sought under Rule 37(b) by showing that the inability to comply or special circumstances render the particular sanctions unjust. Doulamis, 399 S.E.2d at 694.

12. On April 20, 2011, this Court ruled that the statements of counsel made during the Pre-Trial conference on April 14, 2011, and the statements of counsel during the in chambers arguments on this issue on April 19, 2011, will be deemed to be an evidentiary hearing. Thus, this Court FINDS that AEP has failed to timely respond to discovery sent years ago and that its noncompliance with the Court's Pre-Trial Conference Order was willful and cannot be disputed.

13. The Court's Pre-Trial Conference Order stated:

(6) Discovery — all expert witness discovery shall be completed on or before January 14, 2011. All other discovery shall be supplemented by the same date.

14. This Court FINDS that AEP's late production was made months after the

discovery deadline. AEP's current counsels' oral representations affirm that the documents in question were in the possession of AEP and/or their counsel for several years prior to their disclosure. Thus, this Court FINDS and CONCLUDES that AEP has not offered a single compelling reason for its inability to comply with the Court's Order, or indicated any special circumstances suggesting that the requested sanctions would be unjust.

15. This Court further FINDS that AEP's late production was unduly prejudicial to the Pullman Power Defendants and Ershigs.

16. The Supreme Court of Appeals has provided the following guidance on the considerations that must be taken into account by a court when contemplating sanctions:

To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the ease and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.

Mills, 567 S.E.2d at 291.

17. Approximately five weeks before trial, AEP's counsel had discovered an additional 750,000 to 1,500,000 pages of electronic information that were in possession of AEP (and/or AEP's prior counsel Edward A. Smallwood) and that were potentially responsive to discovery requests served several years ago. Less than one week before trial, counsel for AEP began to produce the aforesaid electronic information to the Pullman Power Defendants and to Ershigs.

18. This Court FINDS and CONCLUDES that AEP's conduct warrants the sanctions requested in the instant Motions.

19. The Supreme Court of Appeals has explained the importance of thorough and undiminished discovery, stating, "the fairness and integrity of the fact-finding process is of great concern to this Court; and, when a party fails to acknowledge the existence of evidence that is

favorable or adverse to a requesting party, it impedes that process.” McDougal v. McCarrmon, 455 S.E.2d 788, 797 (W.Va. 1995).

20. This Court FINDS that AEP's conduct had not only impeded the fact-finding process, but subverted it altogether. Accordingly, this Court FINDS and CONCLUDES that AEP's serious violation of the West Virginia Rules of Civil Procedure will not stand without the severe repudiation of this Honorable Court.

21. This case has been in litigation since 2006, and that the parties conducted discovery and depositions of many fact and expert witnesses. Many of the depositions, and the testimony elicited therein, were based upon reference to documents disclosed throughout discovery.

22. This Court FINDS that AEP's failure to produce hundreds of thousands of pages of documents has rendered it impossible to develop a complete and accurate factual record.

23. The Court further FINDS that AEP's discovery violation presents a serious threat to the administration of justice and has severely impacted Pullman Power Defendants' and Ershigs defense against Plaintiffs' claims, as well as AEP's Cross-Claims.

24. This Court FINDS that AEP has impeded the free flow of information and documents in discovery so as to pervert any verdict or ruling on AEP's cross-claims against Pullman Power Defendants and Ershigs. No meaningful or equitable result can be had, given AEP's abuse of discovery.

25. Accordingly, this Court FINDS and CONCLUDES that AEP's discovery violation has impacted this case on every conceivable level.

26. AEP's most recent discovery violation is not the first time AEP has run afoul of the discovery rules.

27. This Court FINDS that on September 2, 2010, an Order was issued by this Court compelling AEP to respond to Plaintiffs' discovery requests. At that time, this Court took Plaintiffs' counsel's request for sanctions pursuant to Rule 37(a)(4) against AEP under advisement.

28. In light of the foregoing, this Court FINDS and CONCLUDES that Ohio Power Company and American Electric Power Service Corporation's Cross-Claims against Pullman Power Defendants and Ershigs should be dismissed, WITH PREJUDICE; and that Ohio Power Company and American Electric Power Service Corporation's Answers and Affirmative Defenses to Pullman Power Defendants' and Ershigs Cross-Claims should be stricken from the record.

29. Accordingly, this Court does GRANT the primary relief requested in Pullman Power Defendants and Ershigs' Motions for Sanctions in their entirety, and does hereby ORDER that Ohio Power Company and American Electric Power Service Corporation's Cross-Claims against Pullman Power Defendants and Ershigs are DISMISSED, as a matter of law, WITH PREJUDICE, and that Ohio Power Company and American Electric Power Service Corporation's Answers and Affirmative Defenses to Pullman Power Defendants and Ershigs' Cross-Claims are STRICKEN FROM THE RECORD.

30. It is further ORDERED that all objections and exceptions of American Electric Power Service Corporation and Ohio Power Company are hereby noted and preserved.

The Clerk is directed to send certified copies of this Order to all parties or counsel of record.

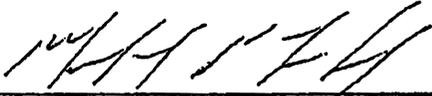
Entered this 30th day of September, 2011.



The Honorable David W. Hummel, Jr.

TCR 24.01

Prepared by:



Michael P. Leahey, Esq.
JACKSON KELLY, PLLC
P.O. Box 553
Charleston, WV 25322
*Counsel for American Electric Power Service Corporation
and Ohio Power Company*

Certified by me this 3rd day
of Oct, 2011.
Dennis Brown Deputy