



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1512

**ON APPEAL FROM AN ORDER OF THE CIRCUIT COURT OF
MARSHALL COUNTY (Civil Action No. 06-C-153H)**

**OHIO POWER COMPANY and
AMERICAN ELECTRIC POWER
SERVICE CORPORATION,**

Petitioners,

v.

DOCKET NUMBER: 11-1512

**PULLMAN POWER LLC, STRUCTURAL
GROUP, INC., and ERSHIGS, INC.,**

Respondents.

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

(1) Whether the Circuit Court abused its discretion in dismissing Petitioners Ohio Power Company's and American Electric Power Service Corporation's cross-claims against Respondents Pullman Power LLC, Structural Group, Inc., and Ershigs, Inc. under W. Va. R. Civ. P. 37(b)(2)(C) as a sanction for Petitioners' late supplementation of its discovery responses?

SUGGESTED ANSWER: Yes.

STATEMENT OF THE CASE

The Petitioner, Ohio Power Company (“OPCo”), owns and operates the Mitchell Power Station located in Moundsville, West Virginia. **Petitioners’ Answer, Affirmative Defenses, and Cross-Claims to Plaintiffs’ Revised Amended Complaint II, ¶ 5, SCT 90.**¹ The Petitioner, American Electric Power Service Corporation (“AEPSC”), is an affiliated entity of OPCo which was responsible for certain engineering decisions associated with the plant. *Id.* at ¶ 6, SCT 90.

On or about August 5, 2004, AEPSC, as agent for OPCo, entered into a contract with Respondent, Pullman Power LLC² (“Pullman”), for Pullman to fabricate and line a new flue gas desulfurization chimney stack at the plant. *Id.* at ¶¶ 5-6, SCT 107. Thereafter, Pullman then in turn subcontracted out the fabrication of the fiberglass reinforced plastic (“FRP”) liners associated with the chimney stack project to Respondent, Ershigs, Inc. (“Ershigs”). **Ershigs’ Answer, Affirmative Defenses, and Cross-Claims to Plaintiffs’ Complaint, p. 3, ¶ 15, SCT 57.**

The Non-Participants, and plaintiffs below, David Earley, Timothy Wells, and Gerald W. Talbert, deceased, were employees of Pullman working on the chimney stack project. On March 4, 2006, a fire broke out in the stack which injured Earley and Wells and killed Talbert. **9/30/11 Cir. Ct. Order, ¶ 1, SCT 654.** Subsequently, on June 30, 2006, Earley, Wells, and Tiffani D. Talbert, Executrix of the Estate of Gerald Talbert (collectively, “Plaintiffs”), brought suit against OPCo, AEPSC, Pullman, and Ershigs in the Circuit Court of Marshall County. **Cir. Ct. Docket Sheet, Docket No. 1, SCT 1.**

In response to the Complaint, OPCo and AEPSC (collectively, “Petitioners”) denied liability, and cross-claimed against Pullman and Ershigs (collectively, “Respondents”), alleging

¹ Petitioners will refer to those relevant portions in the Appendix by Bates number, such as “SCT 57,” etc.

² Structural Group, Inc. is a related entity of Pullman Power LLC. Petitioners will therefore collectively refer to Pullman Power LLC and Structural Group, Inc. as “Pullman.”

that it was their negligence in the performance of the contract work which caused the fire. **Petitioners' Answer, Affirmative Defenses, and Cross-Claims to Plaintiffs' Complaint, pp. 15-16, ¶¶ 1-3, SCT000032-33; Petitioners' Cross-Claims against Pullman, ¶¶ 1-11, SCT 76-79.** Notably, the contract between AEPSC and Pullman contained an express indemnification provision. *Id.* at ¶ 8, SCT 78. Respondents likewise cross-claimed against Petitioners, claiming that the fire was in fact Petitioners' fault or that Petitioners were otherwise solely responsible. **Pullman's Answer and Affirmative Defenses and Crossclaim to Revised Amended Complaint II, Cir. Ct. Docket Sheet, Docket No. 205, SCT 5³; Ershigs' Answer, Affirmative Defenses, and Cross-Claims to Plaintiffs' Complaint, p. 13, ¶¶ 96-98, SCT 67-68.**

On January 5, 2007, the Circuit Court entered a Case Management Schedule setting forth the various deadlines governing the case. **9/30/11 Cir. Ct. Order, ¶ 2, SCT 654.** This Schedule was subsequently modified by the Court's June 25, 2010 Pre-Trial Conference Order. This Order included, among other things, discovery cutoff dates, and provided that all discovery must be completed by January 14, 2011. The Order also set a trial date of April 19, 2011. *Id.* at ¶¶ 3-5, SCT 654.

Petitioners, through their prior counsel, Edward A. Smallwood, Esquire of Swartz Campbell LLC, attempted to comply with the Court's discovery order and produced answers to discovery which included the production of thousands of documents and many employees for deposition which resulted in thousands of pages of testimony which Petitioners in good faith believed were fully responsive to Respondents' requests. However, on March 9, 2011, following the expiration of the discovery deadline, current counsel for Petitioners, who had taken over the handling of this matter from Attorney Smallwood, discovered, and immediately revealed to the other parties, that certain electronically stored information potentially relevant to the case existed which had been in Attorney Smallwood's possession for several years, and which current counsel discovered that Smallwood had neither reviewed nor

³ Pullman's cross-claim was against AEPSC only.

produced. **9/30/11 Cir. Ct. Order, ¶ 6, SCT 654-655; Petitioners' Opposition to Respondents' Motions for Sanctions, SCT 509.** On March 10, 2011, current counsel for Petitioners informed Respondents that the number of electronically stored documents, some of which could arguably be responsive to discovery, ranged from 750,000 to 1,500,000 documents. **9/30/11 Cir. Ct. Order, ¶ 7, SCT 655; Petitioners' Opposition to Respondents' Motions for Sanctions, SCT 509.**

Thereafter, from March 10, 2011 until April 19, 2011, current counsel for Petitioners reviewed, at significant cost, the documents to determine which documents were discoverable. **Petitioners' Opposition to Respondents' Motions for Sanctions, SCT 509-513.** On April 13, 2011, which was less than a week before trial, Petitioners produced 107,540 pages of documents to Respondents that were potentially responsive to their requests. **9/30/11 Cir. Ct. Order, ¶ 13, SCT 656.** On April 14, 2011, Petitioners produced another 180,115 pages of potentially responsive documents to Respondents. ***Id.* at ¶ 14, SCT 656.**

Prior to trial, the Non-Participants herein and plaintiffs below, Earley, Wells, and the Estate of Talbert, settled with all defendants. Petitioners then intended to go forward to trial against Respondents solely on the competing cross-claims. However, on April 18, 2011, the day before trial was set to begin, Pullman filed a Motion for Sanctions pursuant to Rule 37(b)(2) against Petitioners or, in the Alternative, a Motion for Continuance. **Cir. Ct. Docket Sheet, Docket No. 773, SCT 16.**⁴ On April 19, 2011, Ershigs then filed a similar motion. ***Id.* at Docket No. 783.**

⁴ Initially, on or about April 14, 2011, Respondents had moved for sanctions on the basis of the late supplementation of discovery responses, but only sought an adverse jury instruction as relief. **4/14/11 Hearing Transcript, pp. 49-63, SCT 715-729; Pullman's Motion for Sanctions and Memorandum in Support, SCT 487-507.** Later, however, on or about April 18 and 19, Respondents amended their requested relief to instead seek the more severe sanction of dismissal of the cross-claims. **4/19/11 Hearing Transcript, pp. 19-33, SCT 982-985.** Ershigs' motion for sanctions filed thereafter memorialized this request for the harsher sanction of dismissal. **Ershigs' Motion for Sanctions, SCT 518-533.**

Respondents' motions asked that the Court strike Petitioners' answers and affirmative defenses to their cross-claims as well as strike Petitioners' cross-claims against them. **Pullman's Motion for Sanctions and Memo in Support, SCT 487-507; Ershigs Motion for Sanctions, SCT 518-533.** Alternatively, Respondents' motions asked the Court to grant a continuance of the trial on the cross-claims so they could fully review the recently produced documents. *Id.*

In response, Petitioners contended that their prior counsel's failure to produce the documents was an inadvertent mistake, and was not done willfully or in bad faith, and therefore did not warrant the extreme sanction of striking their defenses and cross-claims. **Petitioners' Opposition to Respondents' Motions for Sanctions, SCT 511-514.** Further, Petitioners argued that they were not in violation of any direct court order, and had not committed any other serious discovery violations in the case. *Id.* Petitioners also emphasized that there was no showing that the documents produced late were especially significant or crucial to Respondents' claims or defenses, or that their late disclosure prejudiced Respondents' claims or defenses. *Id.* at **SCT 513-514.** Finally, Petitioners explained that in cases where dismissal is sought as a sanction, an evidentiary hearing must be conducted. *Id.* at **SCT 512, 514.**

On April 19, 2011, the day trial was supposed to begin, the Circuit Court heard oral argument on Respondents' motions for sanctions. **4/19/11 Hearing Transcript, SCT 987-986.** Thereafter, the Circuit Court, without conducting an evidentiary hearing, determined that Petitioners acted willfully and in bad faith pursuant to Rule 37(b)(2)(C), and accordingly struck their answers and affirmative defenses to Respondents' cross-claims, and also struck Petitioners' cross-claims against Respondents, thereby bringing the litigation to a close. **9/30/11 Cir. Ct. Order, ¶¶ 12-30, SCT 660-663.** On September 30, 2011, the Court's Order in this respect was entered. **Cir. Ct. Docket Sheet, Docket No. 835, SCT 17.** On October 31, 2011, Petitioners then filed this appeal.

SUMMARY OF ARGUMENT

The Circuit Court's imposition of the extreme sanction of dismissal under W. Va. R. Civ. P. 37(b)(2)(C) was an abuse of discretion under the facts of this case. Petitioners were not in violation of any direct court order.⁵ Petitioners had not engaged in a pattern of wrongdoing throughout the litigation. There was no showing that the documents which were produced late were especially significant or crucial to Respondents' claims or defenses against Petitioners. Sanctions must be proportionate to the discovery violation, and a case should not be dismissed for failing to produce documents when those documents have no essential bearing on the merits of the case.

Further, there was no showing of willfulness or bad faith on the part of Petitioners. Petitioners were entitled to an evidentiary hearing on the issue of bad faith, and the Circuit Court improperly refused their request for such a hearing.

Taking all of the above facts together and viewing the record as a whole, it is clear that the discovery violation committed by Petitioners did not warrant the harsh sanction of dismissal. This was not a case involving a callous or flagrant disregard of the Circuit Court's authority or the discovery rules. Rather, it was a case involving an isolated and unintentional discovery violation. There was no showing that this discovery violation prejudiced Respondents' claims or defenses.

The Circuit Court was required to try other, lesser steps first—holding an evidentiary hearing, granting a continuance (which Respondents alternatively requested and Petitioners did not object to)—before employing the drastic measure of dismissal.

⁵ It is expected that Respondents will counter that Petitioners were, in fact, in violation of a court order; namely, the Court's Scheduling Order, which provided that all discovery responses were to be served on or before January 14, 2011. This argument misses the mark. The unintentional failure to comply with scheduling order deadlines is of a much different character than the willful refusal to obey a direct court order. *See* Argument section below at FNs 4 and 5.

The policy of the law is that cases be decided on their merits, and the Circuit Court improperly deprived Petitioners of this right. The Circuit Court's order dismissing Petitioners cross-claims under W. Va. R. Civ. P. 37(b)(2)(C) must therefore be reversed and the matter between Petitioners and Respondents remanded for a full trial on the merits. Alternatively, the Circuit Court's order must be reversed and remanded for an evidentiary hearing on whether Petitioners' discovery violation was committed in bad faith.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners respectfully submit that oral argument is necessary under Rule 18(a) of the Rules of Appellate Procedure because the decisional process would be significantly aided by oral argument.

Petitioners further submit that this appeal be set aside for oral argument pursuant to Rules 19(a)(1) and (2) of the Rules of Appellate Procedure. Rule 19(a)(1) applies to appeals contending that the Circuit Court failed to apply settled law, and Rule 19(a)(2) involves appeals claiming the Circuit Court abused its discretion. This appeal falls under both categories.

While the Circuit Court enjoys broad discretion in fashioning sanctions for discovery violations, that discretion is not without limit; indeed, the Circuit Court is only empowered to impose *appropriate* sanctions. And it is well-settled law that dismissal is only an appropriate sanction for a discovery violation when the litigant is in violation of a direct court order, has engaged in a pattern of wrongdoing, and has acted in bad faith as proven through an evidentiary hearing. Further, dismissal is not an appropriate sanction if the discovery violation does not significantly impact the merits of the case or prejudice the other party.

In this case, these settled elements were not met, and the Circuit Court therefore abused its discretion in dismissing Petitioners' cross-claims.

STANDARD OF REVIEW

“The imposition of sanctions by a circuit court under *W.Va.R.Civ.P.* 37(b) 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.” Syl. pt. 1, *Bell v. Inland Mut. Ins. Co.*, 175 W.Va. 165, 168, 332 S.E.2d 127, 129 (1985).

ARGUMENT

The Circuit Court Abused its Discretion in Imposing the Extreme Sanction of Dismissal

This appeal concerns the Circuit Court’s application of Rule 37 of the West Virginia Rules of Civil Procedure. Rule 37 “permit[s] the use of sanctions against a party who refuses to comply with the discovery rules[.]” Syl. pt. 1, *Shreve v. Warren Assoc., Inc.*, 177 W.Va. 600, 355 S.E.2d 389 (1987). The purpose of the rule permitting sanctions is to “ensure that those parties who are subject to discovery requests promptly and adequately respond.” *State ex rel. McDowell County Sheriff’s Dept. v. Stephens*, 192 W.Va. 341, 343, 452 S.E.2d 432, 434 (1994).

Rule 37 gives judges various types of sanctions to choose from, W. Va. R. Civ. P. 37(b)(2)(A)-(E), and they enjoy “broad discretion” in determining which sanction is appropriate in a given case. *Mills v. Davis*, 211 W.Va. 569, 573, 567 S.E.2d 285, 289 (2002). “However, the judge’s discretion [to impose sanctions] is not without limit.” *Mills*, 211 W.Va. at 573, 567 S.E.2d at 289. Indeed, a circuit court cannot impose *any* sanction; rather, it may only impose “an *appropriate* sanction.” *Id* at 575, 567 S.E.2d at 291 (emphasis in original). A court that imposes a sanction that is *not* appropriate abuses its discretion, and is therefore subject to reversal. Syl. pt. 1, *Bell*, 175 W.Va. at 168, 332 S.E.2d at 129.

Of the myriad sanctions for discovery violations available to judges under Rule 37, the “harshest” is the striking of pleadings pursuant to subsection (b)(2)(C). *Bell*, 175 W.Va. at 171, 332 S.E.2d at 132. It is under this subsection that the Circuit Court entered its sanctions order in this case. 9/30/11 Cir. Ct. Order, ¶¶ 23, 7, 8-11, SCT 657-66. Rule 37(b)(2)(C) provides, in pertinent part:

(b) Failure to Comply With Order.

* * * * *

(2) *Sanctions by Court in Which Action is Pending.* If a party...fails to obey an order to provide or permit discovery...the court in which the action is pending may make such orders in regard to the failure as are just, and among others are the following:

* * * * *

(C) 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[.]

W. Va. R. Civ. P. 37(b)(2)(C).

As a general matter, courts are loathe to dismiss claims under Rule 37(b)(2)(C), given the “policy of the law favoring the disposition of cases on their merits.” *Bell*, 175 W.Va. at 172, 332 S.E.2d at 134 (internal quotations and citations omitted). This being the case, the striking of pleadings as a sanction under Rule 37 is a “drastic” measure, *Cattrell Cos. v. Carlton, Inc.*, 217 W.Va. 1, 14, 614 S.E.2d 1, 14 (2005), only to be used “sparingly.” *Bell*, 175 W.Va. at 172, 332 S.E.2d at 134. “[D]ismissal of an action is an extreme sanction, reserved for flagrant cases of bad faith and callous disregard for the circuit court’s authority.” *Mills*, 211 W.Va. at 575, 567 S.E.2d at 291 (internal citations omitted).

“Because dismissal is such a severe sanction, ending the litigation and leaving a party with an appeal as the only option,...it is inappropriate to make use of it unless other steps have first been tried.” *Id.* at 576, 567 S.E.2d at 292. Prior to striking pleadings, then, the circuit court must first attempt to impose “less[er] sanctions,” *Given v. Field*, 199 W.Va. 394, 397, 484 S.E.2d

647, 650 (1997), and “only after [these] other sanctions have failed to bring about compliance” should dismissal then be contemplated. *Doulamis v. Alpine Lake Property Owners Ass'n, Inc.*, 184 W.Va. 107, 112, 399 S.E.2d 689, 694 (1990). Dismissal is accordingly not the first option, but rather a “last resort.” *Mills*, 211 W.Va. at 575-576, 567 S.E.2d at 291-292.

To ensure that dismissal remains a last resort, it may not typically be imposed as a sanction unless the offending party is already in violation of a direct court order. Syl. pt. 3, *Mills*, 211 W.Va. at 570, 567 S.E.2d at 286; W. Va. R. Civ. P. 37(b)(2)(C)(“Failure to Comply With Order...”). The court must first issue a less severe order, and only if that order is not complied with may a dismissal sanction then be considered. In discovery matters, this means, for example, that failure to properly answer interrogatories and requests for production of documents must first result in a compel order, and only when that compel order is not complied with, would it be appropriate to consider sanctions, of which dismissal would be the most extreme.

“Generally,...to trigger the imposition of sanctions where a party refuses to comply with a discovery request, the other party must file a motion to have the court order discovery. If the discovery order is issued and not obeyed, then the party may seek sanctions under Rule 37(b)...”⁶ Syl. pt. 3, *Mills*, 211 W.Va. at 570, 567 S.E.2d at 286. *See also State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 226 W.Va. 103, 110, 697 S.E.2d 139, 146 (2010)(finding dismissal sanction inappropriate given that “there existed no order compelling discovery...”).

Significantly, “[i]n the absence of an order compelling discovery granted pursuant to a motion made by a party, it is an abuse of a circuit judge’s discretion to dismiss an action for a

⁶ “[T]he party seeking sanctions under Rule 37(b) has the burden of establishing noncompliance with the circuit court’s order to provide or permit discovery.” *Bell*, 175 W.Va. at 173, 332 S.E.2d at 134. If that burden is met, the other party may then rebut it “by showing that the inability to comply with the court’s order or special circumstances render the particular sanctions unjust.” *Id.*

single or isolated failure to comply with a discovery request.” Syl. pt. 5, *Mills*, 211 W.Va. at 571, 567 S.E.2d at 287.

Moreover, even in those instances where a party is in violation of a previous direct court order, the sanction of dismissal, while available, is still disfavored, and is not permissible unless certain other strenuous criteria are met.

To determine whether a discovery violation is of such a degree to warrant dismissal of a claim or pleading, the circuit court must not look just to the specific discovery violation, but to the “full record in the case...” *Id.* at 172, 332 S.E.2d at 134. “The entire record of the case must be considered by the circuit court in determining the appropriate sanction.” *Doulamis*, 184 W.Va. at 111, 399 S.E.2d at 693.

In addition to examining the whole record, the circuit court must also conduct an evidentiary hearing before it can dismiss a case on the basis of a discovery violation. Syl. pt. 2, *Bell*, 175 W.Va. at 168, 332 S.E.2d at 129. The court abuses its discretion when it denies a litigant an evidentiary hearing to develop a record in response to a motion for sanctions. *Bell*, 175 W.Va. at 175, 332 S.E.2d at 137 (finding that circuit court abused its discretion when it denied defendant’s request for “an evidentiary hearing to determine the propriety of the default judgment” and denied defendant an “opportunity to develop a record.”). This procedure is necessary because “[i]n the absence of an evidentiary hearing, [the Supreme] Court is unable to undertake a meaningful review of the [circuit] court’s factual findings on which it based its [sanctions] ruling.” *Karpacs-Brown v. Murthy*, 224 W.Va. 516, 526, 686 S.E.2d 746, 756 (2009).

The circuit court must take several factors into consideration when reviewing the full record, conducting an evidentiary hearing, and ultimately making its ruling on the motion for sanctions. To warrant dismissal, the court must find that the facts of record establish that the

discovery violation is “due to willfulness, bad faith or fault of the disobedient party and not the inability to comply and, further, that such sanctions are otherwise just.” Syl. pt. 2, *Bell*, 175 W.Va. at 168, 332 S.E.2d at 129. Where the discovery violation is not the result of the party’s conduct but rather that of its attorney, dismissal is only appropriate upon showing that counsel acted “intentionally or with gross negligence” in defying the court’s order. *Id.*, Syl. pt. 3.

Overall, there must be “good cause” for dismissal, *Mills*, 211 W.Va. at 574, 567 S.E.2d at 290, and in ascertaining whether such cause exists, “the court may consider the seriousness of the conduct, the impact the conduct had in the case 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.” Syl. pt. 6, *State ex rel. Richmond American Homes of West Virginia, Inc.*, 226 W.Va. at 106, 697 S.E.2d at 142 (internal citations and quotations omitted). Further, “the sanction must bear some reasonable relationship to the conduct at issue.” *Mills*, *Mills*, 211 W.Va. at 574, 567 S.E.2d at 290. In other words, the sanction must be proportionate to the discovery violation. Finally, other ancillary factors include “the public’s interest in the expeditious resolution of litigation, the court’s need to manage its docket,...[and] prejudice to the other side and to the operations of the court...” *Mills*, 211 W.Va. at 575, 567 S.E.2d at 291 (quoting *Bartles v. Hinkle*, 196 W.Va. 381, 389, 472 S.E.2d 827, 835 (1996)).

In this case, the parties engaged in extensive written discovery, including requests for production of documents. Petitioners, through their prior counsel, Edward A. Smallwood, Esquire of Swartz Campbell LLC, provided answers to the other parties’ discovery requests, including large amounts of documents. Pursuant to the Circuit Court’s Scheduling Order, on January 14, 2011, discovery closed. **9/30/11 Cir. Ct. Order, ¶ 5, SCT 654**. The Scheduling Order also set a trial date of April 19, 2011. **Cir. Ct. Docket Sheet, Docket No. 504, SCT 11**. On July 16, 2010 Brian R.

Swiger, Esquire and Jackson Kelly PLLC, substituted their appearance for Attorney Smallwood and Swartz Campbell LLC. **7/16/10 Notice of Appearance, SCT 178-181; 8/3/10 Motion and Order granting substitution of counsel, SCT 333-343.**

On March 9, 2011, following the expiration of the discovery deadline and approximately five (5) weeks before trial was set to begin, Petitioners' new counsel discovered that their prior counsel, Attorney Smallwood, had not reviewed or produced certain electronically stored information also potentially responsive to Respondents' discovery requests which had been in his possession for several years. **9/30/11 Cir. Ct. Order, ¶ 6, SCT 654-655; Petitioners' Opposition to Respondents' Motions for Sanctions, SCT 509.** The total number of electronic documents ranged from 750,000 to 1,500,000 additional pages of documents. **9/30/11 Cir. Ct. Order, ¶ 7, SCT 655; Petitioners' Opposition to Respondents' Motions for Sanctions, SCT 509.**

On March 10, 2011, Petitioners, through their new and current counsel, on their own initiative, disclosed the existence of these additional documents to Respondents. *Id.* Thereafter, from March 10, 2011 until April 19, 2011, current counsel for Petitioners engaged in a costly and exhaustive effort involving approximately fifty (50) lawyers to review the documents and determine which documents were discoverable. **Petitioners' Opposition to Respondents' Motions for Sanctions, SCT 509-511; 4/19/11 Transcript, pp. 23-25, SCT 983** On April 13, 2011, less than a week before trial, Petitioners supplemented their previously provided answers to Respondents' discovery requests with another 104,540 pages of documents. **9/30/11 Cir. Ct. Order, ¶ 13, SCT 656.** On April 14, 2011, Petitioners then supplemented again with another 180,115 pages of documents. *Id.* at ¶ 14, SCT 656.

Shortly before trial, the Non-Participants herein and Plaintiffs below, Earley, Wells, and the Estate of Talbert, settled their claims against all defendants. By virtue of these settlements, the supplemental documents therefore had no bearing on Plaintiffs' case or Respondents' defenses to

Plaintiffs' case. The only things the documents were potentially relevant to were Respondents' cross-claims against Petitioners and Respondents' defenses to Petitioners' cross-claims against it. Although Plaintiffs had settled and were no longer in the case, trial was still set to go forward on the competing cross-claims between Petitioners and Respondents on April 19, 2011.

However, on April 18, 2011, the day before trial was set to begin, Respondent Pullman filed a Motion for Sanctions pursuant to Rule 37 against Petitioners or in the Alternative, a Motion for Continuance. **Pullman's Motion for Sanctions and Memo in Support, SCT 487-507.** On April 19, 2011, Respondent Ershigs filed an identical motion. **Ershigs Motion for Sanctions, SCT 518-533.** The motions requested that Petitioners be subject to the harshest sanction available; namely, that Petitioners' pleadings against Respondents be stricken due to their late disclosure of supplemental discovery responses. *Id.* Alternatively, the motions asked that the trial date be pushed back to give Respondents additional time to review the supplemental responses. *Id.*

In response, Petitioners acknowledged that the supplemental documents were produced outside the discovery period and on the eve of trial, but argued that they were not in violation of any direct court order and that there was no evidence of any bad faith, and that a lesser sanction than dismissal was therefore more appropriate. **Petitioners' Opposition to Respondents' Motions for Sanctions, SCT 511-514.** Alternatively, Petitioners argued that the issue of bad faith could not be decided without first conducting an evidentiary hearing to inquire as to why the documents were not produced earlier. *Id.* at **SCT 512, 514.**

That same day, April 19, 2011, the Circuit Court heard oral argument on Respondents' motions for sanctions. **4/19/11 Hearing Transcript, pp. 19-33, SCT 982-985.** Thereafter, the Court, without conducting an evidentiary hearing, determined that Petitioners acted willfully and in bad faith pursuant to Rule 37(b)(2)(C), and accordingly struck their answers and affirmative defenses to Respondents'

cross-claims, and also struck Petitioners' cross-claims against Respondents, thereby bringing the litigation to a close. **4/20/11 Hearing Transcript, pp. 7-12, SCT 997-1002.** On September 30, 2011, the Circuit Court's Order in this respect was entered. **9/30/11 Cir. Ct. Order, SCT 653-664.** On October 31, 2011, Petitioners then filed this appeal.

For several reasons, the Circuit Court abused its discretion in striking Petitioners' pleadings against Respondents as a sanction for Petitioners' late supplement of its discovery responses.

First, this was not a case where Petitioners had been ordered by the Court to produce documents and failed to comply with that order.⁷ Indeed, at the time sanctions were sought, Petitioners were not in violation of any direct court order. Rather, this was a case where Petitioners, through prior counsel, timely answered Respondents' discovery requests, but then later learned through new counsel after the discovery cutoff had expired and close to trial that those previously provided answers were incomplete and needed to be supplemented in accordance with W. Va. R. Civ. P. 26(e).⁸ Upon discovering these additional documents, Petitioners then immediately disclosed their existence to Respondents, commenced an exhaustive review of them, at significant cost, and supplemented their answers with all potentially responsive documents as quickly as they could.

⁷ The sanction of dismissal is reserved for cases where the Court orders a party to take specific action and the party flagrantly ignores that order. That is not what happened in this case. There was a scheduling order which set forth various deadlines, including discovery deadlines. Petitioners timely served discovery responses in compliance with that deadline. Later, however, Petitioners found out that their initial responses were incomplete, and they accordingly supplemented those responses pursuant to W. Va. R. Civ. P. 26(e). At no point, however, did Petitioners consciously disregard a direct order from the Circuit Court to take a specific action.

⁸ Rule 26 provides, in pertinent part, that a "party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which...[t]he party knows that the response was incorrect when made." W. Va. R. Civ. P. 26(e)(2)(A). There is no specific time period prescribed in Rule 26 by when supplemental responses must be made; rather, the rule requires the party supplement "seasonably" once it learns of the prior incorrect response. Here, Petitioners learned of the additional documents on March 9, 2011 and informed all other parties of same one day later, on March 10, 2011. Their supplementation was therefore in compliance with Rule 26. They could not have supplemented any sooner, including before the January 11 discovery cut-off, because they only learned of the documents on March 9.

Given that Petitioners' late supplement of its discovery responses was not in violation of a direct court order, the harsh sanction of dismissal was therefore inappropriate. Syl. pt. 5, *Mills*, 211 W.Va. at 571, 567 S.E.2d at 287; *State ex rel. Richmond American Homes of West Virginia, Inc.*, 226 W.Va. at 110, 697 S.E.2d at 146. Petitioners' late supplement was "a single or isolated failure to comply with a discovery request," *Mills, supra*, and not a willful refusal to obey a direct court order. Since Petitioners' conduct did not violate any direct court order, a lesser sanction than dismissal—i.e. the Respondents' alternative request for a continuance—should have been imposed. The Circuit Court's order dismissing Petitioners' cross-claims must therefore be reversed and the case between Petitioners and Respondents remanded for trial.⁹

Second, a review of the full record, and Petitioners' conduct throughout the litigation, does not show any pattern of wrongdoing. Where the discovery violation is "an isolated occurrence," and not part of "a pattern of wrongdoing...with respect to discovery matters," dismissal is not a proper sanction. *Kiser v. Caudill*, 210 W.Va. 191, 197, 557 S.E.2d 245, 251 (2001). Below, the Circuit Court held that this requirement was met because Petitioners late supplement of its discovery responses was "not the first time [they had] run afoul of the discovery rules." 9/30/11 Cir. Ct. Order, ¶¶ 26-27, SCT 662-

⁹ It is expected that Respondents will rely on *Woolwine v. Raleigh General Hospital*, 194 W.Va. 322, 460 S.E.2d 457 (1995) to support their argument that failing to comply with a scheduling order is sufficient to merit dismissal. While *Woolwine* states in a footnote that a scheduling order "falls within the parameters of 'an order to provide or permit discovery' under Rule 37(b)(2)," *id.* at n. 7, that case is clearly inapposite. There, plaintiff's counsel's failure to comply with the scheduling order's expert disclosure deadline was only one of many reasons for dismissal. Not only did plaintiff's counsel not timely file the disclosure, the disclosure itself was insufficient, as it provided no information other than simply listing the doctor's name. *Id.* at 328. And plaintiff's counsel neglected to even attend the oral argument over whether the case would be dismissed based on the late disclosure. *Id.* In addition, even though he brought the case, plaintiff's counsel had made little effort to prosecute it, never serving any written discovery or noticing any depositions even though the case had been active for more than a year. *Id.* He had also engaged in similar dilatory conduct in other, prior cases. *Id.* Finally, on appeal, plaintiff's counsel never even filed a brief. *Id.* at 327. The Supreme Court ultimately held that while "[i]n almost any conceivable set of circumstances, a circuit court's failure to...consider less onerous sanctions before dismissing the case would amount to reversible error," the plaintiff's counsel's conduct, both in the Circuit Court below and on appeal, evidenced such an "egregious pattern of neglect" that he was the "exception to the rule." *Id.* at 328. The facts of *Woolwine* are thus much different than the facts of this case, and any reliance on *Woolwine* is therefore misplaced.

663. An examination of the record, however, shows that Petitioners' first so-called discovery violation was a routine matter, common in litigation, and was neither unusual nor egregious. In fact, sanctions were sought, but were not awarded.

The first discovery issue involved Plaintiffs' claim that Petitioners, through prior counsel, failed to properly answer portions of Plaintiffs' sixth and seventh sets of discovery requests. **Plaintiffs' Motion to Compel and Memorandum in Support, SCT 182-216.** Specifically, in September 2009, Plaintiffs served their sixth and seventh discovery requests upon Petitioners. **Plaintiffs' Memorandum in Support of Motion to Compel, pp. 2-4, SCT 192-194.** Plaintiffs thereafter gave Petitioners, through prior counsel, multiple extensions of time to respond to same. *Id.* On June 18, 2010, Petitioners, through Attorney Smallwood, served their answers and objections to Plaintiffs' sixth and seventh discovery requests. *Id.* Subsequently, Plaintiffs' counsel claimed that these answers were insufficient and, by letter, thereafter requested more specific answers. *Id.* Attorney Smallwood responded that Petitioners' previously provided answers to Plaintiffs' sixth and seventh set of discovery requests were sufficient, and that the additional information sought by Plaintiffs was either irrelevant or should be obtained from another party. **6/24/10 Correspondence of Attorney Smallwood, SCT 288-289.**

To resolve the issue, Plaintiffs then filed a motion to compel more specific answers, which also included a request for sanctions pursuant to W. Va. R. Civ. P. 37(a)(4)(A) seeking attorneys' fees and costs associated with preparation of the motion. **Plaintiffs' Motion to Compel, SCT 182-190.** After the motion was filed, current counsel substituted its appearance for Attorney Smallwood. Petitioners, by current counsel, then filed a response in opposition to Plaintiffs' motion, reiterating their argument that the discovery responses previously provided were adequate and that the additional information sought was not relevant and should be obtained from other parties. **Petitioners' Response in Opposition to Plaintiffs' Motion to Compel, SCT 344-351.**

The Circuit Court, after considering the arguments, agreed with Plaintiffs, granted the motion to compel, and ordered Petitioners to produce more specific answers. **11/2/10 Cir. Ct. Order, SCT 462-464.** The Court took under advisement, but never ruled upon, Plaintiffs' request for sanctions. *Id.* at SCT 463. Petitioners thereafter complied with the Court's order and produced more specific answers to Plaintiffs. **Cir. Ct. Docket Sheet, Docket No. 591, SCT 12.**

The record thus shows that Petitioners first alleged "violation" was in fact a routine discovery dispute involving Plaintiffs, not Respondents, and was one that did not entail any litigation misconduct by Petitioners or their prior or current counsel, as evidenced by the fact that the Circuit Court never imposed any sanctions stemming from the motion to compel proceedings. Petitioners' discovery dispute with Plaintiffs, then, cannot be fairly characterized as being part of a "pattern of wrongdoing." One prior instance does not make a "pattern," and Petitioners' failure to adequately answer Plaintiffs' discovery—thereby necessitating the filing of a motion to compel—did not rise to the level of "wrongdoing." There was no finding of bad faith, and no sanctions were imposed. Petitioners were just ordered to more fully answer Plaintiffs' discovery requests, which they did. If such common litigation conduct, without more, is sufficient to support a "pattern of wrongdoing," then nearly every litigant will find itself amenable to a dismissal sanction, an absurd result that could not have been intended. Because Petitioners did not engage in a pattern of wrongdoing, the Circuit Court abused its discretion in dismissing their claims against Respondents on the basis of a single discovery violation.

Third, the Circuit Court improperly focused on the number of documents not produced, rather than their import in the case, if any. The severity of the sanction must be pegged to the "impact" the discovery violation has on the case. Syl. pt. 6, *State ex rel. Richmond American Homes of West Virginia, Inc.*, 226 W.Va. at 106, 697 S.E.2d at 142. There must be a "relationship between the sanctioned party's misconduct and the matters in controversy," and "a court must ensure any sanction

imposed is fashioned to address the identified harm caused by the party's misconduct." *Id.* at Syl. pt. 5. In other words, sanctions must be tailored to the particular discovery violation, and a case should not be dismissed for failing to produce documents when those documents have no significant bearing on the merits of the case.

Here, the Circuit Court relied solely on the fact that large numbers of documents were produced late, but never closely examined how critical any of these documents were toward any of the claims between Petitioners and Respondents. There was no finding that any of the documents were crucial to Respondents' claims or defenses; rather, Respondents' sole contention was that there was not sufficient time between the time of disclosure and the date of trial to review all of the newly produced documents and determine whether any of them were crucial.¹⁰

Under such circumstances, the proper course was to continue the trial to give Respondents time to review the documents, not dismiss the case. If, after review, Respondents contended that the documents were critical, then the trial could have been set for a date sufficiently far in the future to give Respondents time to incorporate the documents into their defense or conduct any additional discovery relevant to those documents. If, however, Respondents' review confirmed what Petitioners contended—that the documents did not contain any especially pertinent new information, and that many of the documents were duplicates of documents previously provided by or otherwise previously in the possession of other parties—then trial could have been set for a date much closer. **Petitioners' Opposition to Respondents' Motions for Sanctions, SCT 513-514.**

¹⁰ Respondents admitted as much in their motions for sanctions. *See Pullman's Memorandum in Support of Motion for Sanctions, SCT 492* ("The documents which AEP serendipitously found on the eve of trial very likely contain information that is adverse to AEP. Given the physical impossibility to review these documents before trial..."); *Ershigs Motion for Sanctions, p. 4, ¶ 21, SCT 521* ("At this juncture, and on this record, it is difficult to evaluate the importance of the documents just now being produced...").

Petitioners' late disclosure only impacted the case in that it necessitated the trial date be moved so that Respondents could have time to review the documents. A discovery violation whose worst consequence is a continuance is not so egregious a violation as to warrant the extreme sanction of dismissal. This was not a case where Plaintiffs, who had been injured, would be made to wait even longer for their day in court. The Plaintiffs had already settled their claims against all defendants. Rather, this was a case among only defendants, and the brief continuance of the trial on their cross-claims would not have caused any of them prejudice, as evidenced by the fact that Respondents alternatively moved for a continuance.

The Circuit Court below acted hastily in dismissing Petitioners' cross-claims based on the late supplement of its discovery responses without first ascertaining whether any of the documents produced actually mattered to the case. Further, there was no prejudice to Respondents in continuing the trial (in fact, Respondents' motion for sanctions requested a continuance as an alternative remedy). These things being true, it is clear that the Circuit Court abused its discretion in dismissing Petitioners' cross-claims in the first instance rather than as a matter of last resort. Its decision in this respect must therefore be reversed and the case remanded for trial on the cross-claims.

Fourth, and finally, in response to Respondents' motions for sanctions, Petitioners argued that dismissal was premature without first conducting an evidentiary hearing. **Petitioners' Opposition to Respondents' Motions for Sanctions, SCT 512, 514; 4/20/11 Hearing Transcript, pp. 7-8, 10-11, SCT 997-998, 1000-1001.** When dismissal is contemplated as a sanction, an evidentiary hearing must be held to develop a factual record. *Bell*, 175 W.Va. at 175, 332 S.E.2d at 137 (finding that circuit court abused its discretion when it denied Camden Fire's request for an evidentiary hearing in response to a motion for sanctions seeking entry of judgment by default). Since allegations of

willfulness and bad faith raise issues of fact, not issues of law, an evidentiary hearing is necessary because a court cannot make factual findings based on memoranda and legal arguments submitted by the parties.

Here, without hearing evidence on the circumstances surrounding prior counsel's failure to timely review and produce the supplemental responses, the Circuit Court had no basis for determining whether that failure was the result of bad faith or rather was due simply to mistake or oversight. Bad faith contemplates a state of mind—namely, the conscious doing of a wrong—and the only way state of mind can be ascertained is through an evidentiary hearing.

While the Circuit Court acknowledged that an evidentiary hearing was required, rather than holding one, it instead “deemed” the oral argument on the motions by counsel to constitute an evidentiary hearing. 9/30/11 Cir. Ct. Order, ¶ 12, SCT 660; 4/20/11 Transcript, pp. 10-11, SCT 1000-1001. This was error. An oral argument is not an evidentiary hearing, and cannot be substituted for one. An oral argument involves legal arguments by counsel, whereas an evidentiary hearing involves the taking of testimony by witnesses and other evidence. The only way to ascertain an individual's mental state is by examining him and making a credibility determination. A mental state cannot, however, be proven by legal argument.

Because bad faith is contingent on the resolution of factual issues, state of mind, and credibility, an evidentiary hearing was necessary, and the Circuit Court's refusal to grant Petitioners' request for a hearing was therefore an abuse of discretion. The court below should have let Petitioners develop a factual record before it ruled on Respondents' motions. The Circuit Court's sanctions order should therefore be reversed and the matter should be remanded to the trial court for an evidentiary hearing.

CONCLUSION

The extreme sanction of dismissal under W. Va. R. Civ. P. 37(b)(2)(C) is reserved for those cases where a litigant repeatedly violates discovery orders and rules to such a degree that it prejudices his opponent. This is not such a case. Petitioners were not in violation of any direct court order, and had conducted themselves appropriately throughout the litigation. Moreover, there was no showing that the supplemental discovery responses which they produced after the discovery cutoff date had a significant bearing on Respondents' claims or defenses. Since Petitioners' conduct was not egregious and its late discovery did not impact the merits of Respondents' cross-claims or defenses, dismissal was a disproportionate sanction to the discovery violation at issue. The Circuit Court had a lesser sanction than dismissal available to it—namely, a continuance giving Respondents time to review the newly produced documents. This continuance was requested by Respondents and consented to by Petitioners, and it, rather than dismissal, should have been granted. The claims between Petitioners and Respondents should be decided on their merits, not procedural grounds. The Circuit Court's order granting Respondents' Motion for Sanctions and dismissing Petitioners cross-claims must therefore be reversed and remanded for a trial on the merits.

Alternatively, dismissal is only appropriate as a sanction upon a showing of intentional misconduct or bad faith. These are factual issues which can only be established through an evidentiary hearing. The Circuit Court improperly refused Petitioners' request for an evidentiary hearing, and instead made a finding of bad faith based on legal arguments of counsel rather than a factual record. This was an abuse of discretion, and the Circuit Court's order granting Respondents' Motion for Sanctions and dismissing Petitioners cross-claims must therefore be reversed and remanded for an evidentiary hearing.

**OHIO POWER COMPANY and AMERICAN
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1512

**ON APPEAL FROM AN ORDER OF THE CIRCUIT COURT OF
MARSHALL COUNTY (Civil Action No. 06-C-153H)**

**OHIO POWER COMPANY and
AMERICAN ELECTRIC POWER
SERVICE CORPORATION,**

Petitioners,

v.

DOCKET NUMBER: 11-1512

**PULLMAN POWER LLC, STRUCTURAL
GROUP, INC., and ERSHIGS, INC.,**

Respondents.

CERTIFICATE OF SERVICE

I, Brian R. Swiger, counsel for Defendants Ohio Power Company and American Electric Power Service Corporation, do hereby certify that on this 31st day of January, 2012, I served PETITIONERS OHIO POWER COMPANY and AMERICAN ELECTRIC POWER SERVICE CORPORATION'S BRIEF upon all counsel and parties of record, via United States mail, postage prepaid, addressed as follows:

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