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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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' REPLY BRIEF

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STATEMENT OF THE CASE

In this appeal, Petitioners argued through their Brief that the Circuit Court abused its discretion in dismissing their cross-claims against Respondents under Rule 37(b) without first conducting an evidentiary hearing to determine whether Petitioners' prior counsel Edward Smallwood's failure to timely produce the documents was the result of bad faith, willfulness or gross negligence, or rather was just an inadvertent mistake on his part. Further, Petitioners argued that dismissal was a disproportionate sanction because they were not in violation of any direct court order, had not engaged in a pattern of wrongdoing throughout the case, and that the documents they produced late had no impact on the merits of the case.

In their Brief, Respondents make several arguments in support of their claim that the Circuit Court acted properly in dismissing Petitioners' cross-claims, all of which are without merit. Petitioners therefore now submit this Reply Brief to respond to some of those arguments.

ARGUMENT

"The striking of pleadings...against a party as sanctions under *W.Va.R.Civ.P.* 37(b) for that party's failure to obey an order of a circuit court to provide or permit discovery may be imposed by the court where it has been established through an evidentiary hearing...that the failure to comply has been due to willfulness, bad faith or fault of the disobedient party" or the intentional acts or gross negligence of that party's counsel. Syl. pts. 2 and 4, *Bell v. Inland Mut. Ins. Co.*, 175 W.Va. 165, 332 S.E.2d 127 (1985).

Determinations as to bad faith, willfulness, and gross negligence are factual inquiries for the fact-finder. They raise inherently fact-intensive questions focusing on the actor's state of mind as well as the surrounding circumstances of his actions. *State ex rel. Erie Ins. Property & Cas. Co. v. Mazzone,* 218 W.Va. 593, 598, 625 S.E.2d 355, 360 (2005)("Bad faith is a state of

mind which must be established by circumstantial evidence."); Syl. pt. 4, *McClung v. Marion County Com'n*, 178 W.Va. 444, 446, 360 S.E.2d 221, 223 (1987)(whether defendant in retaliatory discharge case acted willfully was "a function peculiarly within the province of the fact finder"); *Doulamis v. Alpine Lake Property Owners Ass'n, Inc.*, 184 W.Va. 107, 399 S.E.2d 689 (1990)(fact question whether plaintiff's discovery violation was the result of her lawyer's intentional acts or gross negligence).

Since allegations of bad faith, willfulness, and gross negligence raise issues of fact, not issues of law, an evidentiary hearing is necessary before striking pleadings under Rule 37(b) because a circuit court cannot make factual findings based on memoranda and oral argument of counsel. "An assertion by a lawyer..., orally or in legal memorandums, is not evidence." *Rebuild America, Inc. v. Davis*, --- S.E.2d ----, No. 11–0592, 2012 WL 694749 n. 15 (W. Va. March 1, 2012). Without an evidentiary hearing, the circuit court has no evidence before it to determine a party's state of mind, and thus no way of determining whether the party committed a discovery violation intentionally or accidentally, which is essential in fashioning the appropriate degree of sanction.

Because state of mind is critical to 37(b) sanctions, and because state of mind can only be established through evidence and not legal argument, a circuit court abuses its discretion when it denies a litigant an evidentiary hearing to develop a record in response to a Rule 37(b) motion for sanctions. *Bell v. Inland Mut. Ins. Co.*, 175 W.Va. 165, 175, 332 S.E.2d 127, 137 (1985)(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").

A circuit court thus needs to hold an evidentiary hearing because it is only through the taking of testimony and other evidence that it can discern state of mind. Further, in addition to being essential to the circuit court, an evidentiary hearing is also essential to a reviewing court 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). There is no way for a reviewing court to determine if the circuit court abused its discretion in imposing sanctions if there is no record of the required state-of-mind evidence the circuit court relied upon in making its decision.

The arguments made in Respondents' Brief provide a perfect example of how without an evidentiary hearing the Supreme Court in unable to undertake a meaningful review the Circuit Court's sanctions decision. With no evidentiary record, Respondents have nothing to rely on other than their own speculation. Petitioners will address each of Respondents' arguments in turn.

I. The Circuit Court was required to hold an evidentiary hearing, and oral argument of counsel cannot be "deemed" to constitute an evidentiary hearing

First, Respondents contend that the Circuit Court did, in fact, conduct evidentiary hearings. **Respondents' Brief, p. 16**. This is not accurate. There were *oral arguments* on the motions for sanctions, not evidentiary hearings. **4/14/11 Hearing Transcript, pp. 49-65, SCT 715-731; 4/19/11 Hearing Transcript, pp. 19-33, SCT 982-985; 4/20/11 Hearing Transcript, pp. 7-12, SCT 997-1002.**

While Respondents attempt to argue that the Circuit Court properly "deemed" the oral argument to constitute an evidentiary hearing, this argument has no support in either law or common sense. An oral argument is not an evidentiary hearing, and cannot be substituted for

one. An evidentiary hearing is, by definition, distinct from an oral argument; indeed, an evidentiary hearing is "a hearing *at which evidence is presented, as opposed to a hearing at which only legal argument is presented.*" *Black's Law Dictionary* 725 (7th ed.1999)(emphasis supplied). An evidentiary hearing thus involves the taking of testimony by witnesses and other evidence, whereas an oral argument only involves legal argument by counsel.

In this case, it is undisputed that there was no evidence presented at the April 14, 19, and 20 hearings.[1] ***Id.*** They were therefore oral arguments, not the required evidentiary hearings. While Respondents contend that counsel's statements during the oral argument constituted the necessary evidence[2], "[e]very trial judge knows, as every trial lawyer knows, and every appellate court judge should know, that the statements of counsel in an argument *are not evidence...*" *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 532, 694 S.E.2d 815, 865 n. 56 (2010)(citations omitted)(emphasis supplied). The record therefore shows that the required evidentiary hearing was not held, that the Circuit Court therefore had no evidence before it to decide whether prior counsel acted intentionally or accidentally in not producing the documents, and that the Circuit Court's attempt to satisfy the evidentiary requirement by "deeming" the oral argument to be an evidentiary hearing was insufficient.

Second, Respondents alternatively argue that pursuant to *Cox v. State*, 194 W.Va. 210, 460 S.E.2d 25 (1995)(per curiam), an evidentiary hearing is not always required before sanctions

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[1] In addition to the motion for sanctions, these hearings also dealt with numerous other pre-trial motions and other legal issues pertinent to the upcoming trial. Notably, at no point during the proceedings was any party ever advised that these hearings were anything other than oral argument, or that witnesses and other evidence could or should be brought to the hearings and presented.

[2] Respondents claim that rather than have an evidentiary hearing, Petitioners chose to "rel[y] upon the oral argument of their counsel at the April 14, 2011 and April 19, 2011 hearings, as well as the[ir] opposing brief" in contesting the sanctions motion. **Petitioners' Brief, p. 33.** This is simply not true. Petitioners did not choose to stand solely on the statements of counsel and their brief. They wanted an evidentiary hearing. In their Brief as well as at oral argument, Petitioners specifically requested 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.** Rather than provide them with the required evidentiary hearing, however, the Circuit Court improperly "deemed" their oral argument to constitute an evidentiary hearing.

may be imposed. **Respondents' Brief, pp. 30-34**. Respondents have misread *Cox*; it does not stand for this proposition, and it does not support their argument that sanctions in this case were appropriate. Indeed, *Cox* expressly states that "[t]he circuit court is *required* to hold an evidentiary hearing..." prior to imposing sanctions. 194 W.Va. at 217, 460 S.E.2d at 32 (emphasis supplied). And unlike in this case, that requirement was met in *Cox* because an evidentiary hearing was in fact held. *Id.* at 213.

In *Cox*, the plaintiff filed a motion for summary judgment and a motion for sanctions against defendant and a hearing was scheduled on both motions. *Id.* At the hearing, plaintiff introduced evidence, including testimony. *Id.* ("During the...hearing, the Tucker County Assessor *testified* that...")(emphasis supplied). The defendant had an opportunity to file a brief in opposition to the motions and introduce its own rebuttal evidence, but did not do so. *Id.*

Cox is therefore distinguishable from this case. In *Cox*, an evidentiary hearing was held and the defendant chose not to introduce evidence against plaintiff's motions. Here, on the other hand, Petitioners were never given an opportunity to introduce evidence at an evidentiary hearing. Despite Petitioners' requests for an evidentiary hearing in both their Brief and at oral argument, the Circuit Court refused to schedule an evidentiary hearing, instead choosing to *ex post facto* convert the oral argument of Petitioners' counsel into an evidentiary hearing without giving Petitioners' prior notice of its intent to do so.[3] Respondents' reliance on *Cox* is therefore misplaced; *Cox* adheres to settled law that an evidentiary hearing is required, and it is undisputed that no evidentiary hearing was held in this case.

[3] Obviously, had Petitioners' known beforehand that the Circuit Court would treat oral argument as an evidentiary hearing they would have subpoenaed witnesses, and marshaled other relevant evidence to present during oral argument.

Third, Respondents argue that even if no evidentiary hearing was held, Petitioners "could have" and "should have" attempted to introduce evidence during oral argument.[4] **Respondents' Brief, pp. 32-33**. Specifically, Respondents state that *Cox* also stands for the proposition that a party has a duty to take "affirmative steps" to present "rebuttal evidence" at oral argument in response to a motion for sanctions, such as attaching a "sworn affidavit" to its brief in opposition. ***Id.*** Again, *Cox* does not support this proposition.

Cox states that "[t]he circuit court is required to hold an evidentiary hearing...to determine if 'the failure to comply has been due to willfulness, bad faith or fault of the disobedient party,' " and that once the party seeking sanctions has met this burden, the burden then shifts to the defendant to avoid the sanctions. *Id.* at 217.

This burden-shifting framework was satisfied in *Cox*. There, a hearing was held during which the plaintiff presented evidence in support of her motion for summary judgment[5] and motion for sanctions. *Id.* at 213. The defendant did not file a brief in opposition to either motion and did not introduce any rebuttal evidence at the hearing. *Id.* Based on these facts, the Supreme Court held that the defendant could not complain on appeal about the lack of an evidentiary hearing because it had an opportunity to offer evidence in the circuit court against the motions but did not do so.

These are not the facts of this case. Here, unlike *Cox*, Petitioners were never given an opportunity to introduce evidence. There was no evidentiary hearing, and while there was an oral argument, an oral argument is not a proper proceeding in which to introduce evidence.

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[4] Respondents aver that "the Circuit Court did not prevent Petitioners from presenting any rebuttal evidence to oppose any sanctions." **Respondents' Brief, p. 32**. Yes it did. The Circuit Court prevented Petitioners from presenting evidence when it denied Petitioners' request for an evidentiary hearing.

[5] Note also that the Court in *Cox* discusses a duty to submit an affidavit in response to a motion for *summary judgment*, not a motion for sanctions. *Cox*, 194 W.Va. at 216, 460 S.E.2d at 31. Further, because the Supreme Court affirmed the circuit court on the grounds that summary judgment was proper, its discussion of the lower court's sanctions ruling was "limited." *Id.*

While Respondents contend that Petitioners had a duty to introduce "rebuttal evidence" during oral argument, this necessarily begs the question, what evidence were they rebutting? Since there had been no evidentiary hearing, there was no evidence for Petitioners to rebut. Rather, there was only argument of Respondents' counsel, which is not evidence. Since Respondents only offered legal argument and no evidence of bad faith, willfulness, or gross negligence on behalf of Petitioners or their prior counsel, the burden never shifted, and Petitioners accordingly had no duty to attempt to introduce any evidence on their own.

II. Respondents' so-called "evidence" of bad faith, willfulness, and gross negligence is nothing more than speculation

Fourth, Respondents argue that even without an evidentiary hearing, there was other evidence sufficient to establish that Petitioners and their prior counsel acted "willfully," "in bad faith," and "with gross negligence." **Respondents' Brief, pp. 27, 33**. A review of Respondents' so-called "evidence," however, reveals that this argument is without foundation.

To begin, as to prior counsel Attorney Smallwood, Respondents argue that because he knew the documents existed and did not produce them, this alone shows willfulness and bad faith. ***Id.* at p. 27**. Respondents misunderstand their burden; the mere knowledge that the documents *exist* does not establish that Attorney Smallwood intentionally concealed them; in fact, it may have simply been that he overlooked them, or that he sincerely believed there was nothing relevant or discoverable in them. But because there was never an evidentiary hearing during which Attorney Smallwood testified, we have no idea why he did what he did (or did not do). Because we never heard Attorney Smallwood's side of the story, any conclusions drawn about his motivations or thought-processes are nothing more than pure speculation, which is too flimsy a ground upon which to base the extreme sanction of dismissal.

Next, as to Petitioners themselves, Respondents follow a similar line of argument; namely, they contend that Petitioners knew the documents existed and that because Attorney Smallwood never produced them, Petitioners therefore acted willfully and in bad faith. **Respondents' Brief, pp. 27, 33.** This argument is similarly misguided. Of course Petitioners knew the documents existed; they provided them to Attorney Smallwood in the first place; but they did not know Attorney Smallwood never reviewed them. And again, there is no record of what Petitioners knew or did not know, because no evidentiary hearing was ever held. Indeed, the weakness of Respondents' argument against Petitioners is apparent on the face of their Brief: Respondents aver that "AEP's in-house counsel" acted "willfully and with gross negligence," ***id***, but Respondents cannot even identify by name who this alleged wrongdoer is. This is exactly why an evidentiary hearing was needed, to flesh out who knew what and when. Without that, all that exists are blind accusations and supposition.

Fifth, Respondents argue that Attorney Smallwood's knowledge of the existence of the documents can be imputed to current counsel because Attorney Michael Leahey was an associate at Swartz Campbell LLC during the time Attorney Smallwood was handling this case and Attorney Leahey came over as an associate to Jackson Kelly PLLC when this case, as well as numerous other AEP matters, were transferred from Swartz Campbell to Jackson Kelly. **Respondents' Brief, p. 24.**

This argument was not raised below, and is therefore waived. *Builders' Service and Supply Co. v. Dempsey*, 224 W.Va. 80, 84, 680 S.E.2d 95, 99 n. 9 (2009). More importantly, it is again complete speculation. Because no evidentiary hearing was conducted, Respondents have no facts to support their allegations and they are left with nothing but their own conjecture.

Respondents have no facts showing that Attorney Leahey worked on this case while at Swartz Campbell, much less that he had any knowledge regarding the specific documents at issue here.

III. Respondents' argument that the late produced documents are relevant to the claims and defenses in the case is nothing more than speculation

Sixth, Respondents argue that the missing documents were "relevant" to the litigation, and that they were therefore prejudiced by Petitioners' late supplementation. **Respondents' Brief, p. 30.** When considering a Rule 37(b) sanction, 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. In other words, 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 significant bearing on the merits of the case. Here, Respondents aver that it is "inconceivable" that the documents "do not contain new information relevant to the underlying litigation."[6] ***Id.* at p. 30.** But this is just more speculation. Respondents say the documents are relevant, but they cannot say how, much less point out a specific relevant document[7]; instead, they just make sweeping generalizations. If, as Petitioners contend, these documents were not significant, this weighs against dismissal and in favor of a less severe sanction. But because no evidentiary hearing was held and the Circuit Court prematurely decided the sanctions issue on an incomplete record, Petitioners never had an opportunity to make their case.

IV. Respondents' argument that Petitioners engaged in a pattern of litigation misconduct has no merit

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[6] Respondents further argue that the documents were relevant because they were "responsive to discovery." **Respondents' Brief, p. 29.** This has no merit. It is well-settled that what is discoverable is far broader than what is relevant. So the mere fact that documents were produced in discovery does not necessarily make them relevant to the claims and defenses at trial.

[7] Respondents suggest that the so-called missing Vanderniet documents might be somewhere in the electronic documents. Again, this is speculation. Further, Petitioners have repeatedly searched for the Vanderniet documents, and specifically searched for them in the electronic documents, and the missing Vanderniet documents were not found.

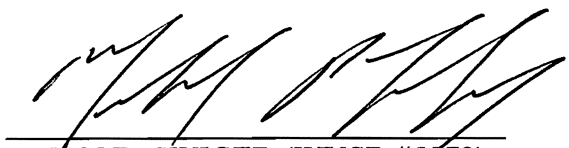
Seventh, and finally, Respondents argue that Petitioners engaged in a pattern of litigation misconduct which warranted the dismissal of their cross-claims. **Respondents' Brief, p. 26.** Another factor the Circuit Court must take into account when deciding the degree of sanction is whether the discovery violation was an "isolated occurrence" or part of 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. In their Brief, Respondents aver that this element was satisfied because Petitioners were subject to three (3) motions to compel during the course of the litigation. ***Id.*** Respondents offer no evidence that these motions to compel were anything other than routine discovery motions common in litigation. As such, they cannot be fairly characterized as evidencing a "pattern of wrongdoing."

CONCLUSION

An evidentiary hearing was necessary, because without one, there is nothing but speculation. Speculation cannot be the basis for the harsh sanction of dismissal. Nor can an appellate court effectively review a trial court's decision if there is no record of the evidence it relied on in making its decision. For these reasons, the Circuit Court's sanctions ruling in this case must be reversed and the matter remanded for a full evidentiary hearing.

OHIO POWER COMPANY and AMERICAN ELECTRIC POWER SERVICE CORPORATION

By Counsel



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Respondents.

CERTIFICATE OF SERVICE

I, Michael P. Leahey, counsel for Defendants Ohio Power Company and American Electric Power Service Corporation, do hereby certify that on this 5th day of April, 2012, I served PETITIONERS OHIO POWER COMPANY and AMERICAN ELECTRIC POWER SERVICE CORPORATION'S REPLY BRIEF upon all counsel and parties of record, via United States mail, postage prepaid, addressed as follows:

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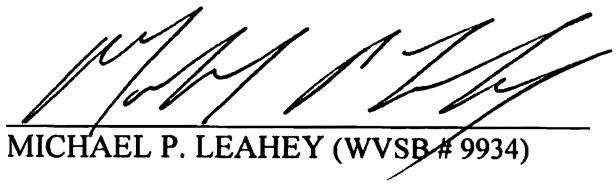

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