

**IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION**

**HORIZON VENTURES OF WEST VIRGINIA,  
INC.,**

**Plaintiff,**

**v.**

**Civil Action No. 13-C-196  
Judge James H. Young, Jr.**

**AMERICAN BITUMINOUS POWER  
PARTNERS, L.P.,**

**Defendant.**

**ORDER GRANTING  
AMBIT'S MOTION TO STRIKE**

Came American Bituminous Power Partners, LP, by counsel, and moved this Court, pursuant to Rule 16(f) and Rule 37(b)(2)(B) of the West Virginia Rules of Civil Procedure, to strike Horizon Ventures of West Virginia, Inc.'s (Horizon's) designated rebuttal expert, Wilfred N. Derby, II, on the grounds that the disclosure was untimely,<sup>1</sup> outside the time frame imposed by any of this Court's Scheduling Orders, and, indeed, outside discovery<sup>2</sup> – within 12 days of trial. Additionally, AMBIT argued that Horizon's late designation was an attempt to delay the upcoming trial,<sup>3</sup> to re-litigate issues resolved at the November trial, and to usurp this Court's role on issues of law, as follows.

1. AMBIT argued that Rule 16(f) of the West Virginia Rules of Civil Procedure provides for sanctions against a party that fails to comply with a court's scheduling order. In pertinent part, Rule 16(f) states "[i]f a party or a party's attorney fails to obey a scheduling . . . order, . . . the judge, upon motion or the judge's own initiative, may make such orders with

<sup>1</sup> Horizon disclosed Mr. Derby on March 7, 2018, but Horizon's initial disclosure was on February 10, 2017, per Court's Dec. 5, 2016, Scheduling Order.

<sup>2</sup> See Scheduling Order (12/14/17), setting discovery cutoff as February 2, 2018.

<sup>3</sup> See Motion to Extend Deadlines and Reschedule Trial (2/13/18).

regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), and (D)." Under Rule 37(b)(2)(B), if a party fails to obey a court's scheduling order, the court may prohibit that party from introducing designated matters into evidence.

2. AMBIT further relied upon West Virginia Supreme Court of Appeals' decisions holding that untimely disclosure of an expert witness is serious conduct that may warrant the exclusion of the expert's testimony.<sup>4</sup> Furthermore, a trial court's decision to exclude testimony of a witness who was not timely disclosed will not be disturbed on appeal absent a clear abuse of discretion.<sup>5</sup> In further support of this proposition, AMBIT relied upon *Wolak v. Space*, a Second Circuit decision in which the plaintiff did not disclose any expert witnesses by the court-imposed deadline.<sup>6</sup> The *Wolak* court noted several factors that should be considered when determining whether to exclude the testimony of an untimely disclosed expert: (1) prejudice or surprise, (2) ability to cure, (3) disruption of trial efficiency, and (4) bad faith or willfulness.<sup>7</sup> Although the *Wolak* court noted that the prejudice could have been cured by a continuance, the court emphasized that a continuance would have come at the expense of trial efficiency.<sup>8</sup>

3. Based upon the Rules of Civil Procedure and these decisions, AMBIT argued that it was prejudiced by Horizon's untimely disclosure an expert witness. AMBIT noted that, while this matter has been pending for almost five years, even the most recent discovery deadline

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<sup>4</sup> *Kiser v. Caudill*, 210 W.Va. 191, 557 S.E.2d 245 (2001) (citing *Kincaid v. Southern West Virginia Clinic, Inc.*, 197 W.Va. 145, 475 S.E.2d 145 (1996); *Shaely v. Plinton*, 200 W.Va. 472, 490 S.E.2d 291 (1997); *Woolwine v. Raleigh General Hosp.*, 194 W.Va. 322, 460 S.E.2d 457 (1995)); see also *Pleasants v. Alliance Corporation*, 543 S.E.2d 320, 332 (W. Va. 2000).

<sup>5</sup> *Kiser* at Syllabus point 4; *Wolak v. Space*, 217 F.3d 157 (2d Cir. 2000) (citations omitted). In *Kiser*, the West Virginia Supreme Court of Appeals agreed that an appropriate sanction for untimely disclosure of an expert could be exclusion of that expert. However, in that case, the trial was delayed for two years after the disclosure, so the Supreme Court found the exclusion to be too harsh, inasmuch as the defendants had ample time to depose the expert in the intervening two years.

<sup>6</sup> *Wolak*, 217 F.3d at 159. The Second Circuit held that the exclusion was proper because the plaintiff showed no good cause for the delay, and the defendants would be prejudiced in that they "would have been hard pressed to depose [plaintiff's] expert and find one of their own." *Wolak*, 217 F.3d at 161.

<sup>7</sup> *Wolak*, 217 F.3d 157.

<sup>8</sup> *Id.*

pursuant to the Court's December 2017 Scheduling Order was February 2, 2018.<sup>9</sup> Whereas AMBIT filed supplemental opinions for its experts on January 23, 2018 (within the newly established discovery cutoff), AMBIT's experts have remained unchanged since February 10, 2017. Further, the "new opinions" identified for AMBIT's experts extend only to the invoices, which the Court notes were discussed at the November 2017 trial and which are the damages component of the sole remaining issue: acid mine drainage.

4. AMBIT conceded that it was theoretically possible, even given the schedules of counsel and preparations for trial, to get the deposition of this last-minute expert witness scheduled, taken and transcribed in order to fully elicit the opinions this witness intends to offer at trial in twelve days. However, if AMBIT then needed additional experts to rebut the opinions of this expert, as he is trained in the field of marine engineering and practices as a business consultant, which is outside the area at issue and may require additional (albeit, finally, unnecessary discovery), then, AMBIT argued, the trial date would be at risk and this matter delayed yet again.

5. AMBIT noted the limitations in the Lease Agreement relative to Horizon's unnoticed access to the Demised Premises, such that it would appear that Mr. Derby has no first-hand knowledge of the conditions of the property.<sup>10</sup> Additionally, Horizon has not shown good cause for its failure to disclose this expert witness within the time frame order established by this Court, citing only AMBIT's delay in providing it with a copy of the trial transcript (rather than any efforts Horizon expended in that process). The Court finds that Horizon demonstrated

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<sup>9</sup> Order (12/10/17), setting only discovery cutoff, dispositive motions deadlines, pretrial and trial. *See also* electronic mail exchange, where Court solicited input on deadlines leading into trial. While AMBIT engaged in that exchange, Horizon remained silent (never seeking an expert disclosure deadline or additional time for adducing same).

<sup>10</sup> *See* Lease Agreement at Section 1A, mandating 30 days' notice from Landlord prior to entry on or use of demised premises.

knowledge of its need for an expert on February 10, 2017,<sup>11</sup> participated in the November 2017 trial, received the Trial Order (12 20 17), and filed a motion relative to the rapidly approaching trial date,<sup>12</sup> all of which mitigates against excusable delay and allowing the untimely expert.

6. AMBIT also moved to strike Mr. Derby as an expert, arguing that he is not qualified to testify against AMBIT, specifically as designated. Rule 702 of the West Virginia Rules of Evidence is the paramount authority for determining if an expert is qualified to testify.<sup>13</sup> Rule 702 states as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness *qualified as an expert by knowledge, skill, experience, training or education*, may testify thereto in the form of an opinion or otherwise. (Emphasis added.)

AMBIT cited the limited scope of discovery over the past years, such that no discovery has been adduced on the specific nature of AMBIT's activities so as to allow Mr. Derby to opine to those activities as a cause of acid mine drainage. Whereas some of the scope of approved testimony goes to weight, nonetheless, the Court agrees that an uninformed "expert," as opposed to even an ill-informed expert cannot "assist the triers of fact to understand the evidence or to determine a fact in issue."<sup>14</sup> Whereas Mr. Derby alleged that he had worked on the site, AMBIT proffered that its search of its payroll, expense ledgers and consultant directory did not evidence Mr. Derby or his corporation.

7. To the extent that Horizon designated Mr. Derby to address issues resolved at the last litigation, such as "dumping waste ash on the Johanna [sic] Parcel,"<sup>15</sup> those issues will not be relitigated. Further, to the extent Mr. Derby proposes to construe the Lease Agreement's

<sup>11</sup> See Disclosure of Rule 26 Information (2 10 17).

<sup>12</sup> See Motion to Extend Deadlines and Reschedule Trial (2 13 18).

<sup>13</sup> *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.2d 87 (1994).

<sup>14</sup> WVR. Evid. 702(a).

<sup>15</sup> Trial Order (12 20 17).

reclamation obligations of the parties (contractual analysis, which is a question of law for this Court), West Virginia law on contract construction is well settled. "The question as to whether a contract is ambiguous is a question of law to be determined by the Court."<sup>16</sup> West Virginia's Supreme Court has found that "[i]t is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them."<sup>17</sup> "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent."<sup>18</sup>

8. Beyond the legal reality that contractual issues belong to the Court, West Virginia law restricts experts from addressing the ultimate legal issues:

W. Va. R. Evid. 702 only allows an expert to give an opinion that will assist the trier of fact to understand the evidence or to determine a fact in issue. An expert is not allowed by Rule 702 to usurp the role of the judge to determine the law of the case, or to instruct the trier of fact as to the applicable law. It is a general rule of law that it is the duty of the jury to take the law from the court and to apply that law to the facts as it finds them from the evidence.<sup>19</sup>

The Court finds that Mr. Derby cannot address legal issues without placing himself in an impermissible role in the trial of this matter, which cannot and should not be done.

WHEREFORE, for all of the reasons set forth herein, the Court GRANTS AMBIT's Motion to Strike, precluding Horizon's alleged rebuttal expert from participating at the March 19, 2018, trial of this matter.

<sup>16</sup> Syl. pt. 4, *Dan's Carworld, LLC v. Serian*, 223 W. Va. 478, 677 S.E.2d 914 (2009), quoting Syl. pt. 1, *Berkeley County PSD v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968).

<sup>17</sup> Syl. pt. 5, *Dan's Carworld, LLC*, 223 W. Va. 478, 677 S.E.2d 914, quoting Syl. pt. 1, *Hayfield v. Health Mgmt. Assocs. Of W. Va., Inc.*, 223 W. Va. 259, 672 S.E.2d 395 (2008), quoting Syl. pt. 3, *Cottga Devel. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962).


<sup>18</sup> Syl. pt. 6, *Dan's Carworld, LLC*, 223 W. Va. 478, 677 S.E.2d 914, quoting *Bennett v. Dove*, 166 W. Va. 772, 277 S.E.2d 617 (1981), quoting Syl. pt. 1, *Cottga Devel. Co.*, 147 W. Va. 484, 128 S.E.2d 626.

<sup>19</sup> *France v. Southern Equipment*, 225 W. Va. 1, 14, 689 S.E.2d 1, 14 (2009).


The exceptions and objections of any aggrieved parties are noted and preserved.

Entered

April 24, 18

  
Honorable James H. Young, Jr., Judge  
Business Court Division - WV Courts

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***Horizon Ventures of West Virginia, Inc. vs. American Bituminous Power Partners, L.P.,  
Pleasant Valley Energy Company, American Hydro Power Partners, L.P., Business Court  
Case, Civil Action No. 13-C-196, Ohio County***

***Judge Mazzone – Janet***

***Helen – Circuit Clerk's office keeps trial calendars***

***Resolution Judge:***

***Honorable James A. Matish***

***Harrison County Courthouse***

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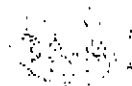
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TWENTY-FOURTH JUDICIAL CIRCUIT

WAYNE COUNTY, WEST VIRGINIA

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JAMES H. YOUNG, JR.

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April 24, 2018

Brenda L. Miller, Circuit Clerk  
Ohio County Courthouse  
1500 Chapline Street  
Wheeling, West Virginia 26003

RE: Horizon Ventures of West Virginia, Inc. vs. American Bituminous Power  
Partners, L.P., et al., Civil Action No. 13-C-196

Dear Ms. Miller:

Please find enclosed two original Orders in the above-referenced matter, along with a self-addressed envelope in order that **time-stamped copies can be returned to me. Also, please mail copies to the Business Court Division, all attorneys of record, and the Resolution Judge in this matter.** For your convenience, I have also enclosed a list of the attorneys of record.

If you need anything further, please contact me.

Sincerely,

A handwritten signature in cursive script, reading "Diana Fields", is written over a horizontal line.

Diana Fields  
Secretary

Enclosures