

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION

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CATHY S. SASS, CLERK  
KANAWHA COUNTY CIRCUIT COURT

STATE OF WEST VIRGINIA, ex rel.  
PATRICK MORRISEY, ATTORNEY  
GENERAL, and THOMAS J. SMITH IN  
HIS OFFICIAL CAPACITY AS SECRETARY  
OF TRANSPORTATION AND COMMISSIONER  
OF HIGHWAYS, WEST VIRGINIA DEPARTMENT OF  
TRANSPORTATION,

Plaintiffs,

v.

Civil Action No. 17-C-41  
Presiding Judge : Hon. James H. Young  
Resolution Judge: Hon. Christopher Wilkes

CRH plc, et al.,

Defendants.

**SCHEDULING ORDER**

On June 28, 2018, counsel for the parties appeared before the Court for a scheduling conference.

The following schedule was established and is ORDERED by the Court in the above-styled civil action; and shall not be modified except by leave of Court.

**1. TRIAL DATE: Monday, September 16, 2019.**

Continuance motions must be heard prior to the pre-trial conference or they will not be considered. Trial is anticipated to last 1-2 weeks.

**2. PRE-TRIAL CONFERENCE DATE: Monday, July 15, 2019 at 9:00 a.m.** in the Courtroom of the undersigned in the Courthouse of Wayne County, West Virginia. Any objections to this location shall be made within 1 week of the date of entry of this Order.

At which time lead counsel must appear. All parties are ORDERED to exchange and deliver their respective **PRE-TRIAL CONFERENCE MEMORANDA** to the Judge's Chambers **NO LATER THAN TEN (10) BUSINESS DAYS BEFORE** the conference. **FAILURE TO COMPLY MAY RESULT IN CONTINUANCE OF TRIAL OR MONETARY SANCTIONS BEING IMPOSED.** Said memoranda are to contain at a minimum, the following:

1. Statement of the Case
2. Issues of Fact
3. Issues of Law
4. Proposed Stipulations
5. Schedule of Exhibits
6. List of Witnesses
7. Pending Motions
8. Motions *in Limine*
9. All Proposed Instructions of Law (Electronic as well as hard copy shall be provided to the Court.)
10. Proposed Voir Dire

Parties are to confer and provide a joint instruction charge to the Court.

### **SCHEDULE OF EXHIBITS**

The parties shall exchange a list of all proposed exhibits (including demonstrative) and shall make the exhibits available for viewing by counsel at least **5** work days prior to the pre-trial conference. By the time of the pre-trial conference counsel shall have stipulated as to which exhibits shall be admitted without objection and provide a list to the Court and Clerk. The parties shall mark all exhibits by use of standard exhibit stickers and provide a list to the Court and counsel.

### **VIDEO DEPOSITION TO BE USED AT TRIAL**

If a video deposition is to be used, all parties must be prepared to argue objections at the **pre-trial conference**. Thereafter, the proponent of the video deposition shall have the video edited to reflect the court's rulings.

### **JURY INSTRUCTIONS**

The parties are to exchange proposed jury instructions **ten business days prior to the Pre-Trial Conference**. The Court desires that all counsel read all parties proposed jury instructions **prior to the conference** and be prepared to discuss them at the conference. The Court will not be inclined to receive instructions after the pre-trial conference.

### **3. EXPERTS DISCLOSED:**

Plaintiff:        **January 31, 2019**  
Defendant:       **April 1, 2019**

- A. Any party desiring to use an expert witness must furnish opposing counsel with the specialty of such expert and copies of all reports submitted by such witness, or, if no

reports have been submitted, a summary of the substance of such experts contemplated testimony, on the date of Expert Disclosure per WVRCP 26(b)(4).

- B. The admissibility of expert testimony is subject to Rule 104(a) of the Rules of Evidence. Objection to the admissibility of expert testimony will be deemed waived if not objected to by a motion *in limine* filed at least **10 days** prior to the pre-trial and a hearing thereon set with the Court prior to first day of trial.
- C. Co-designation or co-reliance upon experts must also specifically be made in writing on date of Expert Disclosure.

4. **DISPOSITIVE MOTIONS:** Shall be filed no later than **June 17, 2019**. Responses will be due **June 27, 2019**. Rebuttal briefs will be due in advance of the pretrial as provided in the West Virginia Rules of Civil Procedure.

5. **FINAL WITNESS LIST EXCHANGED: July 1, 2019.**

This is to be a *bona fide* list of intended trial witnesses.

6. **FACT DISCOVERY COMPLETION DATE: December 31, 2018**  
**EXPERT DEPOSITION COMPLETION DATE: May 30, 2019**

All requests must be filed at least **35 days** in advance of this date so that all responses may be completed by this date. All trial depositions must be completed at least **5 days** before the pre-trial.

7. **ELECTRONICALLY STORED INFORMATION DISCOVERY: December 31, 2018**

All parties and counsel shall cooperate and work diligently to agree upon the methods and conduct for discovery of electronically stored information.

All counsel are required to be informed of and understand to a reasonable degree of their client's information management systems and electronically stored information processes including how information is stored and retrieved. An attorney's lack of knowledge will not be considered as an excuse by this Court in ruling upon a motion to compel or a motion for discovery sanctions.

A party has an obligation to take reasonable and proportional steps to preserve discoverable information in the party's possession, custody, or control. The Court may issue sanctions for spoliation, the intentional or negligent destruction, or failure to preserve relevant electronically stored information. A party may move for an order to preserve electronically stored information upon a showing that the continuing existence and integrity of the information is threatened.

All requests made pursuant to Rule 34 of West Virginia Rules of Civil Procedure shall be construed to include information contained or stored in an electronic medium, regardless of format, unless otherwise stated.

Unless otherwise agreed upon, all production of electronically stored information shall be either in hard copy form or in the form of a compact disk (CD) utilizing a format best suited for viewing the information by the requesting party and reasonably accessible to the producing party. If the parties are unable to agree upon a format, the Court will rule upon the type of format to be used for a particular category or all discovery of electronically stored information.

If any party intends to utilize an electronic search of another party's electronically stored information or if any other issue regarding electronically stored information arises between the parties, then all counsel shall hold a conference. The requesting party shall give reasonable notice to all parties, and all counsel shall be present. The conference must be held at least 40 days prior to the completion of discovery, as set by the scheduling order in this matter.

At the conference, all counsel shall use their best efforts to reach an agreement as to the method of search, the scope of the search, the amount of searching, and the words, terms, or phrases to be used. All counsel shall utilize this conference to resolve all remaining electronic discovery issues such as the allocation of discovery costs for material not readily accessible, form of production, etc.

If during a search or otherwise, electronically stored information that contains privileged information or attorney work product is inadvertently released in whole or part, then

- a. If the information, document, or material, on its face, appears to be privileged or attorney work product, it shall be immediately returned,
- b. If notice of the inadvertent disclosure is given, it shall be returned as soon as practicable, and in no case later than 10 days.
- c. Upon returning the privileged or attorney work product material, any person to whom it has been disclosed, must destroy any copies, notes, or information derived from the material. The filing of a motion for protective order or to compel or other similarly related motion shall not affect this order.

**8. MOTIONS *IN LIMINE* MUST BE FILED AT LEAST 10 DAYS BEFORE PRE-TRIAL AND WILL BE RULED UPON AT THE PRE-TRIAL CONFERENCE.**

**9. MEDIATION/ALTERNATIVE DISPUTE RESOLUTION:** The Court finds that this is an appropriate case for mediation or alternative dispute resolution. Therefore, pursuant to Rule 25 of the West Virginia Trial Court Rules, this case is referred to mediation or other form of dispute resolution agreed to by the parties. By order of this Court, mediation or other form of dispute resolution shall be conducted by **the Honorable Christopher Wilkes as Resolution Judge** and shall be scheduled and concluded on or before **August 15, 2019** unless such deadline is otherwise

extended by the Presiding Judge for good cause shown. The Resolution Judge shall contact the parties for the purpose of scheduling mediation/alternative dispute resolution. All counsel shall provide their email address to the Business Court Division at [Business.Court@courtsww.gov](mailto:Business.Court@courtsww.gov) and the Resolution Judge via [Claire.Watson@courtsww.gov](mailto:Claire.Watson@courtsww.gov).

10. **SANCTIONS:** In accordance with WVRCP 16(f), the Court may impose the full spectrum of sanctions authorized by the WVRCP if a party or party's counsel fails to obey this order or other orders of this Court including exclusion of evidence and granting of default for failure to comply.

11. **UNLESS AUTHORIZED BY COURT ORDER, THE ABOVE DATES ARE FINAL.** No additional evidence developed as a result of deviations from the above schedule will be admissible at trial unless justice requires.

12. **OBJECTIONS** to the above schedule must be made to the undersigned Judge within 15 days of the date of this Order or will be deemed waived.

13. It will be the responsibility of plaintiff or their counsel to notify opposing counsel of the existence of this scheduling order; if and when such counsel appears of record.

14. The dates set out above do not relieve counsel or parties from timely compliance with discovery requests propounded pursuant to the West Virginia Rules of Civil Procedure.

The Clerk shall transmit certified copies to counsel of record; the Presiding Judge **James H Young, Jr.**, Wayne County Courthouse, P.O. Box 68, Wayne, West Virginia 25570, the Resolution Judge **Christopher Wilkes**; and the Business Court Division, 380 W. South Street, Suite 2100, Martinsburg, WV 25401.

ENTER: 7/31/18

*James H. Young, Jr.*  
Honorable James H. Young, Jr.

Date: 8/2/18  
Certified copies sent to:  
☒ counsel of record  
☒ parties  
☐ other (please indicate)  
By:  
☐ certified/1st class mail  
☐ fax  
☐ hand delivery  
☐ interdepartmental  
Other directives accomplished:  
*[Signature]*  
Deputy Circuit Clerk

*Judge Wilkes*  
*Young*  
*Bus Ct*  
*B.B*  
*DD*  
*JS*  
*RG*  
*MF*  
*DD*  
*ST*  
*CF*

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 2nd  
DAY OF July 2018  
*[Signature]* CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Prepared and Agreed by:



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***State of WV, ex rel. Patrick Morrissey, Attorney General, et al vs. Oldcastle, Inc., et al. and City of Charleston, et al. vs. West Virginia Paving, Inc., et al., Business Court Case, Civil Action No. 17-C-41, Kanawha County***

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