No. 22484 - Jacqueline Bennett Cox v. State of West Virginia and
No. 22485 Department of Natural Resources

Cleckley, J., concurring:

There is no question that the circuit court has authority to impose sanctions, including dismissal of an action, if a party fails to comply with a circuit court's order regarding discovery.[1] Smallwood v. Raleigh General Hospital, ___ W. Va. ___, ___ S.E.2d ___ (No. 22653 6/15/95). Reviewing the imposition of sanctions for an abuse of discretion,[2] I believe under these facts the sanction of dismissal was unwarranted. Rather, I believe a monetary sanction should have been imposed against the attorneys representing the State of West Virginia. I concur, however, because even independently

[1]The circuit court made two rulings that affected the ultimate outcome of this case. First, it granted the plaintiff's motion for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure. Presumably, this ruling was based on the lack of an adequate response by the defendants, the State of West Virginia and the Department of Natural Resources, to the motion for summary judgment. Second, as a sanction for the egregious misconduct of the attorneys representing the State during the discovery phase of the litigation, the circuit court entered an order striking the pleadings of the defendants as permitted under Rule 37(b)(2)(C). In my judgment, the striking of a party's pleadings is tantamount to a dismissal. This concurring opinion seeks to address the appropriateness of the sanction imposed by the circuit court.

[2]See Bell v. Inland Mutual Ins. Co., 175 W. Va. 165, 332 S.E.2d 127, appeal dismissed and cert. denied sub nom. Camden Fire Ins. Ass'n v. Justice, 474 U.S. 936, 106 S. Ct. 299, 88 L.Ed.2d 277 (1985); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S. Ct. 2447, 110 L.Ed.2d 359 (1990); Stevens v. Lawyers Mutual Liability Ins. Co.,

of the sanction imposed, the record in this case clearly demonstrates that the granting of summary judgment was proper under Rule 56 of the West Virginia Rules of Civil Procedure. Thus, "no harm, no foul."

"The legal system will endure only so long as members of society continue to believe that our courts endeavor to provide untainted, unbiased forums in which justice may be found and done. . . . Thus, it is beyond peradventure that . . . [circuit courts] have broad authority to preserve and protect their essential functions." Tennant v. Marion Health Care Foundation, Inc., ___ W. Va. ___, ___, ___ S.E.2d ___, ___ (No. 22642 6/15/95) (Slip op. at 14). To ensure that circuit courts have tools available to protect their truth-seeking process, Rules 11 and 37 of the West Virginia Rules of Civil Procedure allow circuit courts in many contexts to sanction parties who fail to meet minimum standards of conduct. Even in the absence of these rules, a circuit court has inherent power to manage and control trial proceedings.

Of course, "[b]ecause of their very potency, . . . [sanction] powers must be exercised with restraint and discretion.

---

789 F.2d 1056 (4th Cir. 1986).

A primary aspect of . . . [a circuit court's] discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." Chambers v. NASCO, Inc., 501 U.S. 32, 44-45, 111 S. Ct. 2123, 2132-33, 115 L.Ed.2d 27, 45 (1991). (Citation omitted; emphasis added). Thus, a circuit court must ensure that there is an adequate predicate for exercising its substantial authority under either the rules or its inherent powers and must also ensure that the sanction is tailored to address the harm identified. This is particularly true when the sanction is in the form of a dismissal. As we suggested in State ex rel Rusen v. Hill, ___ W. Va. ___, ___, 454 S.E.2d 427, 434-35 (1994), dismissal of an action is an extreme sanction, reserved for flagrant cases of bad faith and callous disregard for the circuit court's authority. See also Hillig v. Comm'r, 916 F.2d 171, 174-75 (4th Cir. 1990) (vacating dismissal of petition).

In exercising discretion under its powers, a circuit court must be guided by equitable considerations. First, the circuit

---

[3]We review the circuit court's imposition of sanctions under an abuse of discretion standard, see Chambers, 501 U.S. at 55, 111 S. Ct. at 2138, 115 L.Ed.2d at 52; Bell, 175 W. Va. at 175, 332 S.E.2d at 137, but it is clear that a circuit court necessarily abuses its discretion if it bases its ruling on an erroneous assessment of the evidence or an erroneous view of the law.

[4]In Hillig, 916 F.2d at 174, the Fourth Circuit Court of Appeals

court must consider the conduct at issue and explain why the conduct warrants sanction. Obviously, a pattern of wrongdoing may require a stiffer sanction than an isolated incident. A grave wrongdoing may compel a more severe sanction than might a minor infraction. Wrongdoing that actually prejudices the wrongdoer's opponent or hinders the administration of justice may demand a stronger response than wrongdoing that, through good fortune or diligence of the court or counsel, fails to achieve its untoward object. Furthermore, there may be mitigating factors that must be accounted for in shaping a circuit court's response.

The trail of omissions by the State's attorneys is long, callous, and egregious. The attorneys for the State of West Virginia repeatedly failed to respond to interrogatories and requests for production of records that were served on April 21, 1993. Even after the State agreed to respond by a certain date, the plaintiff found

---

suggested that lower courts should consider four factors before imposing dismissal of a case as a sanction:

> "(1) [W]hether the noncomplying party acted in bad faith; (2) the amount of prejudice the noncompliance caused the adversary[, which necessarily includes an inquiry into the materiality of the evidence he failed to produce]; (3) the need for deterring the particular type of noncompliance; and (4) the effectiveness of less drastic sanctions."

it necessary to file a motion to compel and to seek a trial continuance. On August 20, 1993, the date scheduled to hear plaintiff's motions, the State's attorney failed to appear and did not give the circuit court notice of his planned non-appearance, causing the court and counsel for the plaintiff to waste forty-five minutes. The State's attorney when contacted by telephone advised the circuit court for the first time that he had no objection to the motions.

The circuit court in its order dated August 26, 1993, found the State's failure to comply was without good cause and ordered the State to comply with the plaintiff's discovery requests on or before August 31, 1993, or "its [the State's] Answer and other pleadings will be stricken and Plaintiff will be granted summary judgment and Plaintiff's prayers for relief . . . will be granted." The jury trial was rescheduled for December 16, 1993.

The State made only a miserable and partial effort to comply with the circuit court's order, knowing it risked the sanction of dismissal. In fact, the State for questionable reasons failed to provide a March 16, 1964, letter that was attached to the plaintiff's complaint. On September 3, 1993, plaintiff's counsel made an informal written request to the State to provide for

comparison purposes the entire copies of the plats of the contested property. Receiving no response to this informal request, the plaintiff filed fifty-five requests for admissions pursuant to Rule 36 of the West Virginia Rules of Civil Procedure. The State, by not responding within thirty days, once again failed to comply with mandatory rules and, more importantly, failed to seek an extension of time or a protective order.

On October 28, 1993, the plaintiff filed a combined motion for summary judgment and a request for sanctions. The motion for summary judgment was based on the State's answer, facts omitted by the State's failure to comply with the time limits of Rule 36, and the tax maps and records from the County Assessor's office. Again, the State was derelict. It filed no response to either motion and did not make any effort to seek additional time to do so. As a result of the motions of the plaintiff, the circuit court scheduled a hearing for November 12, 1993.

At the scheduled hearing on November 12, 1993, the plaintiff, in addition to the documents listed in the preceding paragraph, presented the sworn testimony of the Tucker County Assessor who stated that according to the official tax maps, the disputed tract "'is outside of the State Park boundary.'" By order

dated November 19, 1993, the circuit court granted the plaintiff's motions for summary judgment and for sanctions striking all the State's pleadings and awarding summary judgment to the plaintiff. The plaintiff was also awarded an easement because the disputed property was landlocked. The State did not file a motion for reconsideration or to alter or amend the judgment within the ten days permitted by Rule 59(e) of the West Virginia Rules of Civil Procedure.

Nearly three months later, the State, being represented by another attorney, filed a motion for reconsideration. The motion

---

[5]Technically, our civil procedure rules do not provide for a motion to reconsider. Our cases, however, have given the moving party the benefit of the doubt and have treated the motion as a request for relief either under Rule 59(e) or Rule 60(b) depending on the time the motion is filed. See James M.B. v. Carolyn M., ___ W. Va. ___, 456 S.E.2d 16, 21 (1995). Because the State failed to act timely under Rule 59(e), its motion could only be considered under Rule 60(b). There is a significant disadvantage and tradeoff in proceeding under Rule 60(b). Rarely is relief granted under this rule because it provides a remedy
that is extraordinary and is only invoked upon a showing of exceptional circumstances. Because of the judiciary's adherence to the finality doctrine, relief under this provision is not to be liberally granted. Accordingly, the disposition of a Rule 60(b) motion is within the sound discretion of the circuit court and will not be overturned absent an abuse of that discretion. Browder v. Director, Ill. Dep't of Corrections, 434 U.S. 257, 263 n.7, 98 S. Ct. 556, 560 n.7, 54 L.Ed.2d 521, 530 n.7 (1978); N.C. v. W.R.C., 173 W. Va. 434, 317 S.E.2d 793 (1984); Intercity Realty Co. v. Gibson, 154 W. Va. 369, 175 S.E.2d 452 (1970). Certainly, there is no abuse of discretion in this case.

was supplemented by some additional documents and plats that had been requested during discovery. It is important to note that the documents did not contain a title report, an abstract, or any responses to plaintiff's requests for admissions. Now comes the coup d'etat. At a telephonic hearing scheduled on the State's motions, the State failed to appear or to notify the circuit court that it needed to reschedule the hearing it had requested. The circuit court, presumably concerned by the possibility of a miscommunication, telephoned the Attorney General's office only to be advised that the attorney earlier had called in sick and would not be available to argue its motion. No arrangements were made by anyone in the Attorney General's office to have substitute counsel available for this crucial hearing. On May 9, 1994, the circuit court entered an order denying the State's motion for reconsideration.

I can sum up the dereliction in fast order. When ordered by the circuit court to respond to interrogatories in a certain timely manner, the State failed to comply. When the State did partially comply, the answers lacked diligence and, indeed, some of the answers because of omissions were, in fact, misleading. Considering the manner and form of the responses and the systematic delay, the conduct of the State constituted bad faith.

The information sought by the plaintiff was material to the prosecution of the action. The State was dilatory throughout the discovery process in providing the most basic information. Deterrence of the type of conduct engaged in by counsel for the State was plainly warranted.

The only question that merits further discussion is the availability of less drastic alternatives. In evaluating the conduct at issue, a circuit court must specifically consider the range of permissible sanctions and explain why less severe alternatives to the sanction imposed are inadequate or inappropriate. We have "indicated that dismissal, which is the harshest sanction under Rule 37, should be used sparingly, and only after other sanctions have failed to bring about compliance." Smallwood v. Raleigh General Hospital, ___ W. Va. at ___, ___ S.E.2d at ___. (Slip op. at 6). See also Doulamis v. Alpine Lake Property Owners Ass'n, Inc., 184 W. Va. 107, 399 S.E.2d 689 (1990); Chandos, Inc. v. Samson, 150 W. Va. 428, 146 S.E.2d 837 (1966). Although the circuit court need not "exhaust all other sanctioning mechanisms prior to resorting to its inherent power," Landon v. Hunt, 938 F.2d 450, 454 (3rd Cir. 1991), "the court must explain why it has chosen any particular sanction from the range of alternatives it has

identified." Republic of the Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 74 (3rd Cir. 1994). I believe the circuit court should have given serious consideration to imposing sanctions against the attorneys for the State. If an attorney rather than a client is at fault, the sanction should ordinarily target the culpable attorney. This is particularly appropriate when the client is the citizens of West Virginia.

In an ordinary civil case, I would advocate the remand of the case to the circuit court to reconsider its decision on sanctions, at least, to consider a monetary sanction against the attorneys involved. This case, however, is not ordinary. Discounting the sanction that was imposed, the granting of summary judgment was appropriate and complied with our recent decisions in Painter v. Peavy, ___ W. Va. ___, 451 S.E.2d 755 (1994); Williams v. Precision Coil, Inc., ___ W. Va. ___, ___ S.E.2d ___ (No. 22493, 3/24/95). Because the State failed to respond properly and timely

[6]While this factor is recognized as important, the extent of a party's personal responsibility is not always dispositive because a client cannot always avoid the consequences of the acts or omissions of counsel. Here, however, there is no evidence that the clients were the reason for, or even had knowledge of, the evasive, callous, and bad faith efforts that led to the imposition of the sanction. Under these circumstances, the circuit court must give reasons why the sanction should not directly be imposed against the culprit, the attorneys representing the defendants.

to the motion for summary judgment, the trial court was obligated under Rule 56(c) to grant the plaintiff's motion. Furthermore, I am at least suspicious that had the State answered the requests for admission in good faith, it would have conceded the issue. Under these circumstances, I believe the circuit court's failure to consider a less severe sanction or another form of sanction was harmless error at best. I, therefore, concur with the majority's conclusion.

I am authorized to state that Justice Workman joins me in this concurring opinion.

---

[7]The record of this case includes the fifty-five admissions that were never denied by the State. See the majority opinion for a discussion of these admissions.

[8]I cannot leave this case without another observation. It is simply astonishing that after two calls on separate days to the office of the State's attorney by the busy circuit judge that neither attorney made any effort to offer a satisfactory explanation for the two "no-shows." The legal business of the State of West Virginia is indeed serious and, it must be taken as serious by all those who seek to provide it with legal representation. Concededly, this is not an appropriate occasion to allocate individual blame but there is definitely "something wrong in Denmark" when the attorneys for the State of West Virginia cannot give its client, the citizens of West Virginia, the minimum level of representation that other attorneys at the private sector accord to their clients. This type of legal representation should be condemned at all levels and I feel obligated to say so.