IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1995 Term

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Nos. 22484 & 22485

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JACQUELINE BENNETT COX,
Plaintiff Below, Appellee

v.

STATE OF WEST VIRGINIA,
Defendant Below,

DEPARTMENT OF NATURAL RESOURCES,
Appellant

Appeal from the Circuit Court of Tucker County
Honorable Andrew N. Frye, Judge
Civil Action No. 92-C-110

AFFIRMED

Submitted: May 16, 1995
Filed: June 15, 1995

John W. Cooper, Esq.
Lori M. Hood, Esq.
Cooper & Preston
Parsons, West Virginia
Attorney for the Appellee

Darrell V. McGraw, Jr., Esq.
Attorney General
Stephen R. Van Camp, Esq.
Deputy Attorney General
Charleston, West Virginia
Attorneys for the Appellant

The Opinion of the COURT was delivered PER CURIAM.
JUSTICE BROTHERTON and JUSTICE RECHT did not participate.
RETIRED JUSTICE MILLER and JUDGE FOX sitting by temporary assignment.
JUSTICE CLECKLEY and JUSTICE WORKMAN concur, and reserve the right to file concurring opinions.

SYLLABUS BY THE COURT

1. "'A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963). Syllabus Point 1, Andrick v. Town of Buckhannon, 187 W. Va. 706, 421 S.E.2d 247 (1992)." Syllabus Point 1, Williams v. Precision Coil, Inc., ___ W. Va. ___, ___ S.E.2d ___ (No. 22493, March 24, 1995), rehearing denied, May 11, 1995.

2. "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus Point 2, Williams v. Precision Coil, Inc., ___ W. Va. ___, ___ S.E.2d ___ (No. 22493, March 24, 1995), rehearing denied, May 11, 1995.

3. "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party,

(2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Syllabus Point 3, Williams v. Precision Coil, Inc., ___ W. Va. ___, ___ S.E.2d ___ (No. 22493, March 24, 1995), rehearing denied, May 11, 1995.

4. "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." Syllabus Point 1, Bell v. Inland Mut. Ins. Co., 175 W. Va. 165, 332 S.E.2d 127, cert. denied, 474 U.S. 936, 106 S.Ct. 299, 88 L.Ed.2d 277 (1985).

5. "Where a party's counsel intentionally or with gross negligence fails to obey an order of a circuit court to provide or permit discovery, the full range of sanctions under W.Va.R.Civ.P. 37(b) is available to the court and the party represented by that counsel must bear the consequences of counsel's actions." Syllabus Point 4, Bell v. Inland Mut. Ins. Co., 175 W. Va. 165, 332 S.E.2d 127, cert. denied, 474 U.S. 936, 106 S.Ct. 299, 88 L.Ed.2d 277 (1985).

Per Curiam:

The Division of Natural Resources of the State of West Virginia appeals an order of the Circuit Court of Tucker County granting Jacqueline Bennett Cox summary judgment and also sanctioning the State by striking the State's pleadings, which resulted in judgment on the pleadings. Ms. Cox sued the State to quiet title to an 105.21 acre tract located in Canaan Valley State Park. After the State failed to respond to Ms. Cox's summary judgment motion, requests for admission and discovery requests, the circuit court awarded Ms. Cox summary judgment and sanctioned the State by striking its pleadings. On appeal, the State argues that no evidence supports the finding that it willfully failed to respond to discovery requests, that the circuit court failed to hold an evidentiary hearing on discovery requests and that the State will suffer prejudice if required to use eminent domain to acquire the disputed tract. Because the record shows no error, we affirm the circuit court's decision.

I

On December 16, 1992, Ms. Cox filed suit to quiet title to a 105.21 acre tract of land located in Canaan Valley State Park, Tucker County, West Virginia (hereinafter the tract). In her

[1]The State does not address the merits of the circuit court's grant of summary judgment.

complaint, Ms. Cox alleges that she has title to the tract because she and her predecessors in interest, under color of title, possessed the tract openly, notoriously and continuously for more than 60 years. Ms. Cox maintains that the Division's placing markings and signs and maintaining trails on her tract constitutes an ongoing trespass. Ms. Cox also alleges that the Division's development of the park had caused her tract to become surrounded by park land. Attached to Ms. Cox's complaint is a March 16, 1964 letter from the Department of Natural Resources to John A. Bennett, Ms. Cox's father and predecessor in interest, acknowledging that the tract was subject to competing claims and offering to pay one-half of the market price, as agreed to by the parties, for a quitclaim deed.

The State filed a timely answer denying the allegations and claiming title to the tract through the will of Sarah Maude Kaemmerling, which the State alleges is superior to Ms. Cox's title.

On April 21, 1993, Ms. Cox served the State with a set of Interrogatories and Requests for Production of Documents. According to Ms. Cox, after the State failed to respond, her lawyer contacted Russell M. Hunter, the Assistant Attorney General representing the State, who said that the State would respond during the week of June 21, 1993. On June 23, 1993, the circuit court scheduled a jury trial for August 30, 1993.

Because the State failed to response to Ms. Cox's discovery requests, on August 10, 1993, Ms. Cox filed motions to compel discovery and to continue the jury trial. After a hearing on August 20, 1993, which was not attended by the State's lawyer, on August 26, 1993, the circuit court ordered the State to comply with Ms. Cox's discovery requests on or before August 31, 1993 or "its Answer and other pleadings will be stricken and Plaintiff will be granted summary judgment and Plaintiff's prayers for relief in the Counts of the Complaint will be granted." The circuit court also rescheduled the jury trial for December 16, 1993.

On August 31, 1993, the State answered at least some of the interrogatories and produced at least some of the documents.

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[2]According to Ms. Cox's brief, counsel for the State failed to notify either the Court or Ms. Cox's lawyer that the State would not appear at the August 20, 1993 hearing. Judge Frye and Ms. Cox's lawyer were present in open court and after waiting 45 minutes, Judge Frye instructed Ms. Cox's lawyer to telephone counsel for the State. When contacted, Mr. Hunter said he would not appear and did not oppose the granting of either motion.

[3]Ms. Cox maintains that the State's August 31, 1993 responses were either incomplete or missing. Ms. Cox noted that no answer was provided to one interrogatory and that the State failed to provide its title abstracts, files, reports or complete copies of maps and plats.

The State maintains that the omitted material was insignificant and because Ms. Cox already knew of the Division's 1964 letter, she suffered no prejudice.

In support of its Motion to Reconsider filed on February 7, 1994, the State submitted as exhibits over one hundred pages of documents which Ms. Cox alleges should have been disclosed in discovery.

One of the documents that the State failed to produce was the Division's March 16, 1964 letter that had been attached to Ms. Cox's complaint.

By letter dated September 3, 1993, Ms. Cox's lawyer requested the State to provide entire copies of the plats for comparison. No answer was received. On September 24, 1993, Ms. Cox served the State with 55 Requests for Admission, to which the State made no response.

On October 28, 1993, Ms. Cox filed a motion for summary judgment based on the State's answer, facts admitted, tax maps and County Assessor's records. Ms. Cox also filed a motion for sanctions alleging that the State failed to comply with discovery requests. Both motions were noticed for a hearing on November 12, 1993. The State did not respond to either motion, did not request a continuance, and did not file any evidentiary rebuttal. During the November 12, 1993 hearing, the Tucker County Assessor testified that according to official tax maps, the disputed tract "is outside the [State Park] boundary. . . ." Mr. Hunter, the State's lawyer, said he had a copy of the State's title report, which was available at the hearing, and he agreed that partial maps had been supplied. The State argued that the existence of a material issue of fact concerning adverse possession precluded summary judgment, but failed to present any

counter affidavit(s) or any additional document(s) or to retract explicitly any of its admissions.

By order dated November 19, 1993, the circuit court granted Ms. Cox's motion for summary judgment and motion for sanctions by striking all of the State's pleadings and awarding Ms. Cox judgment on the pleadings. Ms. Cox was also awarded an easement because the disputed tract was landlocked by virtue of the State's previous land acquisitions.

On February 7, 1994, the State, now represented by Shirley A. Skaggs, Senior Assistant Attorney General, filed a motion to reconsider. Attached to the motion were several additional documents and plats that had been requested in discovery; however, no title report or abstract was attached. At the March 18, 1994 hearing, the State argued that its title is superior to Ms. Cox's

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[4]The State gave conflicting accounts on why the material was not produced earlier. During the November 18, 1993 hearing, Mr. Hunter, the State's lawyer at the time, said, "I copied and furnished what file was provided me by the agency. . . there has been no intentional pigeonholing of any documents by counsel or anybody else. . . ." During the March 18, 1994 hearing, the State, now represented by Ms. Scaggs, said, "[A] lot of that information was prepared and given to the attorney and never made its way to Mr. Cooper [Ms. Cox's lawyer]." However, Ms. Scaggs also said that the agency "prepared a first set of copies of information that was requested and that information was never picked up from his office and never forwarded to Mr. Cooper."

[5]According to the transcript, the State scheduled a hearing for about two weeks earlier. When the State failed to appear, the circuit court said he "personally called your [the State's lawyer's]

title and that summary judgment was premature and not a proper sanction for failure to respond to discovery requests. The State also said that the "State's responses to the admissions and amended admissions are being prepared and will be submitted to the court for its review in the near future." Ms. Cox argued that the State's motion to reconsider was untimely because Rule 59(e) [1978] of the W.Va.R.Civ.P. requires the motion to be filed within 10 days and no ground for a Rule 60(b) motion was asserted. Ms. Cox also asserts that the attachment of documents, exhibits and an affidavit was solely to augment the record for appeal.

After the hearing, by order dated May 9, 1994, the circuit court denied the State's motion to reconsider. The State then appealed to this Court.

II

The circuit court awarded Ms. Cox judgment on two separate grounds: (1) summary judgment; and (2) a sanction, imposed on the State for failure to comply with a discovery order, striking the State's pleadings and then awarding Ms. Cox judgment on the

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office and the secretary said well she called in sick today, she is not going to be here, so nobody called me to tell me you had called in sick."

[6]The record on appeal contained no response from the State to Ms. Cox's requests for admission.

pleadings. Although the State contends that summary judgment was contingent on the sanction award, the circuit court granted Ms. Cox summary judgment independently of the sanction award. We first consider whether the award of summary judgment was proper.

"A circuit court's entry of summary judgment is reviewed de novo." Syl. pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). In accord Williams v. Precision Coil, Inc., ___ W. Va. ___, ___, ___ S.E.2d ___, ___ (Slip op. at 4) (No. 22493 March 24, 1995), rehearing denied, May 11, 1995. Our traditional standard for granting summary judgment is stated in Syl. pt. 3, Aetna Casualty & Surety Co. v. Federal Ins. Co. of N.Y., 148 W. Va. 160, 133 S.E.2d 770 (1963):

> A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.

[7]Although the circuit court does not articulate the bases for judgment, we interpret this action to be a Judgment on the Pleadings under Rule 12(c) [1994] of the W.Va.R.Civ.P.

[8]The November 18, 1993 order of the circuit court first addressed Ms. Cox's motion for sanctions and then her motion for summary judgment. Although the State argues that during the November 12, 1983 hearing, the circuit court's grant of summary judgment resulted from the circuit court's imposition of sanctions, the court's written order indicated that judgment was awarded on both bases. Indeed, in its May 9, 1994 order denying the State's motion to reconsider, the circuit court said that its November 18, 1993 order "granted simultaneous judgments in favor of the Plaintiff on two separate grounds and bases:. . . " (1) sanctions and (2) summary judgment.

In accord Syl. pt. 1, Williams, supra; Syl. pt. 2, Painter, supra; Syl. pt. 1, Andrick v. Town of Buckhannon, 187 W. Va. 706, 421 S.E.2d 247 (1992).

Recently in Williams and Painter, we clarified the application of our long settled principles regarding summary judgment under Rule 56 [1978] of the W.Va.R.Civ.P. Subsection c of Rule 56 states, in pertinent part, that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In Williams, we said that at the summary judgment stage the circuit court's function "is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Williams, ___ W. Va. at ___, ___ S.E.2d at ___, Slip. op. at 8, quoting, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). See Syl. pt. 3, Painter, supra. We concluded that "we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. [Citations

omitted.]" Williams, ___ W. Va. at ___, ___ S.E.2d at ___, Slip op. at 8.

Syl. pt. 2, Williams, states:

> Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

See also Syl. pt. 4, Painter, supra.

Syl. pt. 3, Williams, states:

> If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

In this case, Ms. Cox supported her motion for summary judgment with the facts admitted by the State including the following:

(1) Ms. Cox and her predecessors in interest held title to the tract continuously since 1919 and paid real estate taxes on the tract since 1926.

(2) Although the State acquired title through eminent domain to other real estate owned by Ms. Cox's father, her predecessor in interest for this tract, the State failed to condemn or otherwise acquire the tract.

(3) Ms. Kammerling, who devised various real estate in Tucker County to the State and who, allegedly was State's predecessor in interest on the tract, had "never purchased or acquired title" to the tract; and,

(4) The State had never received a deed to the tract and according to State tax maps, the tract was outside Canaan Valley State Park and listed under the names of Ms. Cox and her predecessors in interest.

Given the admissions of the State, we agree with the circuit court that Ms. Cox make a properly supported motion for summary judgment. Once, Ms. Cox met her initial burden of production and persuasion, the burden of production shifted to the State, which did nothing. The State failed (1) to retract its admissions or otherwise attempt to rehabilitate the evidence; (2) produce additional evidence; or (3) submit an affidavit explaining why further discovery was necessary. See Syl. pt. 3, Williams, supra.

The State's allegation of superior title to the tract was contradicted by its own admissions. See Williams, ___ W. Va. at ___ n.12, ___ S.E.2d at ___ n.12, Slip op. at 11-12 n.12, noting

that "[a] conflict of evidence does not create a 'genuine issue of fact' if it unilaterally is induced." In this case, there is no conflict of evidence; rather a conflict between an allegation and admitted facts. We also note that the State did not request a continuance. See Williams, ___ W. Va. at ___, ___ S.E.2d at ___, Slip op. at 14, discussing the relief provided by Rule 56 (f) "when a party needs additional information or time to respond to a motion for summary judgment. [Footnote and citation omitted.]"

Rule 56 (e) [1978] states, in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

When these Rule 56 principles are applied to the case at bar, we find that the circuit court's award of summary judgment was proper.

II

Because we affirm the circuit court award of summary judgment, our discussion of the sanction applied in this case is limited. Rule 37(b) [1988] of the W.Va.R.Civ.P. is designed to ensure prompt and adequate responses to discovery requests. See

Syl. pt. 1, Shreve v. Warren Assoc., Inc., 177 W. Va. 600, 355 S.E.2d 389 (1987).

Rule 37(b) permits a circuit court to impose the following sanctions for failure to comply with an order compelling discovery:

> (2) Sanctions by Court in Which Action is Pending.-- If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to supplement as provided for under Rule 26(e), or if a party fails to obey an order entered under Rule 26(f), 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 follows:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (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;
>
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any

> orders except an order to submit to a physical or mental examination; . . .
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

A circuit court's decision to impose sanctions under Rule 37(b) for a party's failure to obey a court order to provide or to permit discovery is within the court's sound discretion. Syl. pt. 1, Bell, supra note 9, states:

> 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.

See State ex rel. Rusen v. Hill, ___ W. Va. ___, ___, 454 S.E.2d 427, 434 (1994), discussing standard of review for imposition of sanctions under Rule 16(d)(2) of the W.Va.R.Crim.P.; Vincent v. Preiser, 175 W. Va. 797, 804, 338 S.E.2d 398, 405 (1985).

[9]Rule 37 of the W.Va.R.Civ.P. is virtually identical to Rule 37 of the Federal Rules of Civil Procedure. See Bell v. Inland Mut. Ins. Co., 175 W. Va. 165, 332 S.E.2d 127, cert. denied, 474 U.S. 936, 106 S.Ct. 299, 88 L.Ed.2d 277 (1985).

Bell also recognized that because of the constitutional limitations and the purposes of Rule 37, "[a]s a general rule, the rendering of judgment by default as a sanction under Rule 37(b) should be used sparingly and only in extreme circumstances," in order to effectuate the "policy of the law favoring the disposition of cases on their merits. [Citations omitted.]" Bell, 175 W. Va. at 172, 332 S.E.2d at 134, quoting, Affanto v. Merrill Brothers, 547 F.2d 138, 140 (1st Cir. 1977). Davis v. Sheppe, 187 W. Va. 194, 417 S.E.2d 113 (1992); Hulmes by Vest v. Catterson, 182 W. Va. 439, 442, 388 S.E.2d 313 (1989) (per curiam).

The circuit court is required to hold an evidentiary hearing and consider the entire record in order to determine if the "the failure to comply has been 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." Syllabus Point 2, in part, Bell. Once the party seeking the sanction has met his burden of establishing noncompliance with the order compelling discovery, the burden shifts to "the disobedient party to avoid the sanctions sought under W.Va.R.Civ.P. 37(b) by showing that the inability to comply or special circumstances render the particular sanctions unjust." Syl. pt. 3, in part, Bell.

Bell also recognized that the actions of a party's counsel can justify the imposition of sanctions. Syl. pt. 4, Bell, supra note 9, states:

> Where a party's counsel intentionally or with gross negligence fails to obey an order of a circuit court to provide or permit discovery, the full range of sanctions under W.Va.R.Civ.P. 37(b) is available to the court and the party represented by that counsel must bear the consequences of counsel's actions.

In Doulamis v. Alpine Lake Property Owners Ass'n, Inc., 184 W. Va. 107, 112, 399 S.E.2d 689, 694 (1990)(per curiam), we noted that "W.Va.R.Civ.P. Rule 37 [1988] provides various sanctions and that dismissal, the harshest sanction, should be used sparingly and only after other sanctions have failed to bring about compliance."

In this case, the circuit court conducted a hearing on the motion for sanctions and Ms. Cox established that the State had not complied with the circuit court's order compelling discovery. Although the State argues that no evidentiary hearing was held, the record contains a transcript of the November 12, 1993 hearing during which the circuit court consider Ms. Cox's motion for sanctions and the State's reasons for not complying.

The State also argues that its failure to disclose a 1964 letter already in Ms. Cox's possession was not prejudicial to her case. Although we agree that the State's failure to disclose the 1964 letter was not prejudicial, we note that the State's failure

to disclose title reports and abstracts, the contents of which were not known to Ms. Cox, could have been prejudicial. Finally, we note that the State was given several opportunities, informal and formal, to comply before the sanction was imposed. Indeed the circuit court's order compelling discovery indicated that the failure to comply would be the imposition of this sanction.

The State maintains that its failure to comply with the discovery requests was not willful. Given the State's different explanations (see supra note 3) and failure to comply, we find that the circuit court did not abuse its discretion in imposing the sanction of striking the State's pleading.

For the above stated reasons, the decision of the circuit court of Tucker County is affirmed.

Affirmed.