

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

DEBRA BISHOP, as Executor of the Estate of Dallas
Runyon, and DAVID E. RUNYON,

Plaintiffs,

vs.

Civil Action No.: 17-C-108
Presiding: Judge Akers
Resolution: Judge Wilkes

CITIZENS TELECOMMUNICATIONS
COMPANY OF WEST VIRGINIA,
FRONTIER WEST VIRGINIA, INC., and
APPALACHIAN POWER COMPANY,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART
FRONTIER'S MOTION FOR SANCTIONS

This matter came before the Court this 3rd day of January 2024, upon Frontier's Motion for Sanctions Based on Plaintiffs' Concealment of Documents in Their Possession, Custody, Or Control. The parties, by counsel, have fully briefed the issues necessary. The Court heard oral argument at a hearing held on a prior day. So, upon the full consideration of the issues, the record, the oral argument of the parties, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This civil action surrounds Plaintiffs' property in Mingo County, West Virginia, which is encumbered by an easement involving telecommunication poles involving Defendant Frontier. *See* Compl. Plaintiffs have sought the relocation of facilities in order to develop natural resources on said property. Relevant to the instant motion,

Plaintiffs' claims include claims for trespass, alleging Frontier's alleged trespass has been a, or the primary, reason Plaintiffs have not been able to develop their property. *See* Def's Mot., p.1.

2. In October 2021, Plaintiffs were served with discovery by Frontier that asked them to identify documents in their possession relating to the timbering and coal allegations in the Complaint. *See* Def's Mot., p.4. Plaintiffs lodged a boilerplate ambiguity objection and referred Frontier to its Response to Request for Production 14. *Id.*; *see also* Def's Mot., Ex. C. The Response to Request for Production 14 included one letter to Norfolk Southern regarding needing to cross the railroad track with heavy equipment. *See* Def's Mot., p.4-5; *see also* Def's Mot., Ex. E.
3. On a prior day, counsel for Frontier, after obtaining the discovery subject to this motion from the railroad (explained in more detail later in this Order), requested supplementation from counsel for Plaintiffs. *See* Def's Mot., p. 6; *see also* Def's Mot., Ex. G. Frontier avers no such supplementation occurred. *See* Def's Mot., p. 6.
4. Instead, Frontier served a subpoena on Norfolk Southern and asked that it produce any communications and documents related to Mr. Runyon and produce a witness for a Rule 30(b)(7) deposition. *See* Def's Mot., p. 7. On June 13, 2023, Norfolk Southern produced the eighty-nine pages of emails that are the subject of this motion. *See* Def's Mot., p. 7; *see also* Def's Mot., Ex. H.
5. On June 23, 2023, Defendant Frontier filed the instant Frontier's Motion for Sanctions Based on Plaintiffs' Concealment of Documents in Their Possession, Custody or Control, arguing Plaintiffs lodged their trespass theory while failing to produce communications between Norfolk Southern railway and itself, or Plaintiffs'

counsel, that Frontier allege show David Runyon and his lawyers believed it was the railroad, and not Frontier, that stood in the way of Plaintiffs' development plans. *See* Def's Mot., p. 1-2. Frontier moved the Court for sanctions based on Plaintiffs' failure to disclose these documents. *Id.* at 2.

6. The motion was fully briefed, and oral argument was heard by the undersigned.

7. The Court now finds the instant Motion is ripe for adjudication.

CONCLUSIONS OF LAW

Defendant Frontier moves to sanction Plaintiffs and their counsel. Defendant avers that counsel for Plaintiffs, Nathan Brown, communicated with the railroad in the subject communications, and Counsel for Plaintiffs, Ryan Donovan, who joined the case after Mr. Brown, failed to produce those communication when it was requested. Defendant asks for the following sanctions: a requested jury instruction, consideration of the documents in the lost profits motion for summary judgment, and other sanctions for Plaintiffs' counsel which the Court finds appropriate. Additionally, Frontier asks for reasonable expenses incurred in locating the communications that were withheld from discovery and bringing this motion.

First, Frontier asks that this Court to instruct the jury that Plaintiffs' willful failure to produce the subject documents is evidence that they knew their causation claim was meritless. *See* Def's Mot., p. 2. Frontier attached a proposed instruction as Exhibit A to the motion. Next, Frontier also asks that this Court consider the new railroad documents when the Court rules upon Frontier's pending motion for summary judgment on lost profits. *See* Def's Mot., p. 2. Finally, Frontier asks that this Court sanction Plaintiffs and their counsel, Nathan Brown, who communicated with the railroad, for not producing the responsive documents. *See* Def's Mot., p. 3.

Rule 26(e)(3) states that “[a] duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.” W. Va. R. Civ. P. 26. Further, it provides that “[i]f supplementation is not made as required by this Rule, the court, upon motion or upon its own initiative, may impose upon the person who failed to make the supplementation an appropriate sanction as provided for under Rule 37.” *Id.* Rule 37 provides that “if a party fails to supplement as provided for under Rule 26(e),...the court in which the action is pending may make such orders in regard to the failure as are just.” W. Va. R. Civ. P. 37; *see also* Syl. Pt. 3, in part, *Jenkins v. CSX Transp., Inc.*, 220 W. Va. 721, 649 S.E.2d 294 (2007)(“Rule 37 of the West Virginia Rules of Civil Procedure is designed to permit the use of sanctions against a party who refuses to comply with the discovery rules, i.e., Rules 26 through 36.”).

Further, the West Virginia Supreme Court of Appeals stated that the failure to supplement discovery requests is “a violation of both the letter and spirit of one of the most important discovery rules.” *McDougal v. McCammon*, 193 W. Va. 229, 237, 455 S.E.2d 788, 796 (1995).

In addition, this Court has the inherent authority to impose sanctions, including dismissal, pursuant to its powers to “do all things reasonably necessary for the administration of justice within the scope of its jurisdiction.” Syl. Pt. 3, *Shields v. Romine*, 122 W. Va. 639, 13 S.E.2d 16 (1940). Before imposing sanctions under the rules or pursuant to its inherent powers, the Court must first identify the alleged wrongful conduct and determine if a sanction is warranted. *See* Syl. Pt. 2, in part, *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996). In determining what constitutes an appropriate sanction, the Court may consider: “the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any

mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.” *Id.*

Here, counsel for Frontier requested a supplementation, and the subject communications were only disclosed after counsel for Frontier, Mr. Williams, contacted Attorney J.H. Mahaney, who represents the nonparty railroad. *See* Def’s Mot., p. 5. Frontier avers that after “protracted discussions, Mr. Mahaney finally received permission to disclose two sets of emails from 2017 between Mr. Runyon, his attorney, Nathan Brown, and Norfolk Southern”. *Id.* Frontier served a subpoena on Norfolk Southern and asked that it produce any communications and documents related to Mr. Runyon and produce a witness for a Rule 30(b)(7) deposition. After Plaintiffs filed a motion to quash this deposition, which was denied by this Court, Norfolk Southern produced eighty-nine pages of email between Mr. Runyon, Mr. Brown, and Norfolk Southern.

The Court hereby **FINDS** the requested discovery clearly should have been disclosed. The Court further **FINDS** this duty is glaringly obvious as Plaintiff’s Counsel Brown was the author of the communications in question. This Court also **FINDS** that in light of whom authored these communications, counsel should have been able to easily locate the requested information. Put another way, the Court agrees with Frontier that Plaintiffs cannot deny they knew the communications existed. Further, if they didn’t know, which is nearly impossible to believe, Plaintiff’s counsel should have known these communications existed. Perhaps most persuasive to the Court is the fact that Mr. Runyon, Plaintiff, was still emailing Norfolk Southern mere days before the request for supplementation came (in March of 2023).

The Court agrees with Frontier that Plaintiffs did not mention or produce their communications, which undermined Plaintiffs’ theory of the case, with Norfolk Southern. *See* Def’s Mot., p. 5. The Court has reviewed eighty-nine pages of emails attached to the instant

motion, and upon its consideration of the discovery, finds Plaintiffs' arguments in their defense to be wholly unconvincing. *See* Pls' Resp., p. 2.

Therefore, this Court, under its inherent authority and discretion pursuant to Rule 37 to make such **ORDERS** regarding the failure to supplement at issue and **FINDS** the following relief is appropriate at this time. First, the Court declines to instruct the jury that Plaintiffs' willful failure to produce the subject documents is evidence that they knew their causation claim was meritless. While the Court recognizes this is a logical assumption, it is not a certain indicator as to Plaintiffs' motives or lack thereof. Whether Plaintiffs had a specific motivation or simply was not diligent enough in their search, these communications were found and Defendant has had ample time to review the information. To instruct the jury as to a presumed motivation is more punitive, thus prejudicial, than instructive to the jury. Therefore, the motion is **DENIED** as to this request for relief.

Second, as these communications are relevant to Plaintiffs' claims, the Court will consider the new railroad documents when it rules upon any pending motions. The motion is **GRANTED** as to this request for relief. The Court notes that Frontier's motion for summary judgment which covered the lost profits claim was ruled upon shortly after the filing of the instant motion (*See* Ord., 6/28/23), and the Court concluded that any claim for lost profit damages is a factual dispute that can only be resolved by a jury, contemplating that if Plaintiffs were to prevail on their trespass claim, that would be taken into consideration. Therefore, the Court **FINDS** this evidence, subject to admissibility, may be presented at trial with the rest of Frontier's evidence when the jury is resolving the lost profits and trespass issues.

Third, the Court considers Frontier's request for sanctions against Plaintiffs and Mr. Brown, including reasonable expenses incurred in locating the communications that were

withheld from discovery and bringing this motion. The Court **FINDS** and **CONCLUDES** that the discovery that is the subject of this motion plainly should have been located and produced. That is particularly compounded by the irrefutable fact that Defense Counsel Williams corresponded with counsel for Plaintiffs *specifically* regarding these documents. To the extent that Plaintiffs represented they undertook efforts to find responsive documents but were not successful, the Court **FINDS** this unreasonable and unacceptable. The Court concludes Plaintiffs, and their counsel, could not have and did not work diligently to find these obviously discoverable communications authored by Plaintiffs' own counsel.

In considering the factors laid out for the Court's consideration in *Bartles v. Hinkle*, the Court considers that "the seriousness of the conduct" is met. The conduct, as described above, is of great gravity to the discovery process. The Court will not reiterate its preceding paragraph but emphasizes again the seriousness of counsel's duty to disclose relevant discovery and duty to supplement under the Rules of Civil Procedure.

Second, the Court considers the "impact the conduct had in the case". As an initial matter, the subpoena and deposition of Norfolk Southern, as well as the motion to quash and corresponding briefing and decision, could have been avoided if Plaintiffs had properly supplemented their production. This case, pending since 2017, should not have further obstacles to trial. Further, the Court is of the opinion that the subject discovery does impact the issue of causation for Plaintiffs and therefore, should have been produced. For this reason, the Court **FINDS** the Plaintiffs failed to disclose the evidence. Further, that evidence does undermine Plaintiffs' position and that Plaintiffs' counsel knew or should have known it existed. However, this discovery is now disclosed, and this Court finds that evidence may be used in trial.

Next, the Court considers “whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.” The Court has determined that this discovery should have been located with a diligent search. Despite this, after review of the record, the Court does not find any other allegations of other discovery abuses by Plaintiffs’ counsel. However, the Court warns that Plaintiffs’ seemingly cavalier approach to discovery and its double-down response to Defendant’s motion to compel, did not go unnoticed. Therefore, the Court **FINDS** any future actions such as this may result in the imposition of the full range of sanctions and further directs the parties to work diligently to locate relevant evidence and supplement responses when necessary.

With regard to whether the Court finds any “mitigating circumstances” present, the Court considers that this discovery was not subject to the typical motion to compel. *See* Pls’ Resp., p. 4. The Court is cognizant that the West Virginia Supreme Court of Appeals has held that, barring unusual circumstance, a party must seek and obtain an order compelling discovery prior to filing a motion for sanctions based on an alleged failure to comply with a discovery request. Syl. Pt. 3, *Mills v. Davis*, 211 W. Va. 569, 570, 567 S.E.2d 285, 286 (2002). Further, the Court notes that rule 34(b) provides that when a responding party objects to a request for production, the requesting party should “move for an order under Rule 37(a). W. Va. R. Civ. P. 34.

Finally, the Court considers “the administration of justice” in conjunction with its discretion under Rule 37 and inherent authority to impose sanctions and “do all things reasonably necessary for the administration of justice”. *See* Syl. Pt. 3, *Shield s v. Romine*, 122 W. Va. 639, 13 S.E.2d 16 (1940). The Court has found that in this case, administration of justice calls for the relief as set forth above. The Court advises Plaintiffs’ counsel that future similar conduct, noncompliance with court orders, or further abuse of the discovery rules will result in harsh

sanctions by the Court. Plaintiffs are hereby **GIVEN NOTICE** that failure to comply with this Order and other Orders of the Court may result in the full range of sanctions under Rule 37 of the West Virginia Rules of Civil Procedure, including the award of attorney's fees.

CONCLUSION

Accordingly, it is hereby **ADJUDGED** and **ORDERED** that Frontier's Motion for Sanctions Based on Plaintiffs' Concealment of Documents in Their Possession, Custody, Or Control is **GRANTED IN PART AND DENIED IN PART**. Additionally, it is hereby **ADJUDGED** and **ORDERED** that:

1. Any failure by Plaintiffs to comply with this Order may result in the full range of sanctions under Rule 37 of the West Virginia Rules of Civil Procedure; and
2. The parties shall proceed with this case pursuant to the West Virginia Rules of Civil Procedure, all other applicable law, and any scheduling orders entered by this Court.

The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record.

January 3, 2024



MARYCLAIRE AKERS, JUDGE
WEST VIRGINIA BUSINESS COURT
DIVISION