
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NO. 08-C-204

STATE OF WEST VIRGINIA, *ex rel.* RICHMOND AMERICAN HOMES OF WEST VIRGINIA, INC., and M.D.C. HOLDINGS, INC.

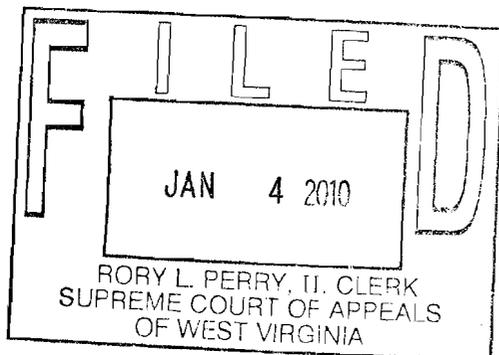
Petitioners

v.

HONORABLE DAVID H. SANDERS, JUDGE
OF THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA, BREEDEN MECHANICAL, INC., DIW
GROUP, INC. d/b/a SPECIALIZED ENGINEERING INC., NORTH STAR
FOUNDATIONS INC., MODERN ENTERPRISES INC., J.S.C. CONCRETE
CONSTRUCTION, INC., LOUDEN VALLEY CONCRETE, INC., and KEVIN JOY, et al.

Respondents.

PLAINTIFFS' OPPOSITION TO PETITION FOR A WRIT OF PROHIBITION



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PLAINTIFFS' OPPOSITION TO PETITION FOR A WRIT OF PROHIBITION

The Circuit Court's Order granting default judgment as a sanction for Richmond American Homes/M.D.C.'s litigation misconduct should not be overturned because Richmond engaged in egregious litigation abuses throughout the case and the sanctions imposed were entirely warranted. The Petition fails to set forth the extensive record of misconduct on which Judge Sanders was compelled to act, presenting a selective picture of the record in violation of this Court's admonition to writ petitioners last year in State ex rel. Nationwide v. Marks.¹

Richmond American Homes, Inc and M.D.C. Inc. (hereinafter: "Richmond") committed a series of indefensible acts of litigation misconduct summarized as follows:

- 1) **Directly contacting the Plaintiffs over the objection of their counsel and making false representations to the Plaintiffs in an attempt to elicit a partial settlement agreement. Richmond's defense to this egregious action consisted almost exclusively of soliciting an exculpatory, conclusory opinion from Professor Forest Bowman, in violation of State v. Jackson. Furthermore, upon cross-examination, it turned out that Professor Bowman had not been advised of the relevant facts and that had he been so informed, his opinion would have been different.**
- 2) **Seeking to undermine the Plaintiffs' attorney by offering him employment with the Defendants. At a mediation, Richmond's in house counsel attempted to lure Andrew Skinner off his clients' case with an offer of employment defending Richmond in radon cases – the very kind of case on which he represented Plaintiffs against Richmond. Richmond made no substantive defense to this allegation.**
- 3) **Abusing the discovery process with refusal to obey court orders, frivolous objections, and complete failures to respond to Plaintiffs' legitimate discovery. Richmond refused a court order to meet and confer, M.D.C. refused to answer discovery at all, including requests for admission, for over fifteen months and Richmond interposed over 500 objections, including privilege objections, although it could not substantiate more than a handful of them and failed to provide any privilege logs.**

¹ Plaintiffs below have filed a transcript of the sanctions hearing with this Court.

These actions were shown to have materially prejudiced the Plaintiffs. Richmond directly attacked the attorney-client relationship between the Plaintiffs and their counsel. Richmond itself contended that the Plaintiffs' trial date would have to be sacrificed in light of the litigation delays it had created with its misconduct. The obstruction in many cases delayed the repair of the radon systems, increasing unduly the Plaintiffs' exposure and distress. Richmond's discovery abuse was so comprehensive that the Plaintiffs could not have been expected to prepare their case properly for trial in the two years allotted because of Richmond's serial obstructions of the process. Moreover, Richmond's sabotage of the Plaintiffs' attorney-client relationship struck at the adversary process itself and was therefore different from "run of the mill" litigation abuse that can be remedied with awards of costs or fees.

The Circuit Court therefore acted properly in awarding the sanction of default and setting trial on damages only against Richmond. The sanction selected remedied the specific abuses that occurred by protecting the Plaintiffs' trial date, eliminating the advantages of delay and obfuscation sought by Richmond through its discovery abuses and most importantly protected the integrity of the process by making it clear that Richmond's efforts to buy off the Plaintiffs' attorney or to directly intimidate and mislead the Plaintiffs, outside the presence of their counsel, would not be tolerated. As in the most analogous case of Kocher v. Oxford Life, wherein a CEO sought directly to contact a plaintiff for the purpose of misleading him regarding settlement discussions, the extensive misconduct of Richmond in this case "fully supports" the trial Court's entry of default. Therefore, the Plaintiffs below respectfully request that the Petition be REFUSED.

I. Factual Background

Richmond American Homes, Inc., and its parent, M.D.C. Holdings, Inc., have built a number of homes in the Eastern Panhandle. Large tracts of the Eastern Panhandle are in what the EPA refers to as “Zone 1” for radon. The geology of the Eastern Panhandle creates very high risks of radon contamination, as rated by the EPA. Although Congress passed the Indoor Radon Abatement Act over twenty years ago, radon’s dangers remain very real and the gas remains the second-leading cause of lung cancer in the United States, after smoking, responsible for over 20,000 early deaths each year.

A passive radon removal system is a requirement of modern building codes in high radon areas like Jefferson County and consists of various components. These components include a gas permeable layer, plastic sheeting on top of the gas permeable layer, caulking and seals at potential radon entry points, vent piping designed to transport radon gas from the gas-permeable layer through the roof where it can be safely exhausted. A fan that assists the venting can be added to create an “active” system. Dozens of Richmond-built homes in West Virginia have been found to have no radon removal system, defective radon systems, or, in a number of homes, radon systems that were actually fake. That is, the home was intentionally built to look as though it had a radon removal system, but because the pipes led nowhere, did not.²

The Plaintiffs in Joy v. Richmond et al., Bauer v. Richmond et al. and Saliba v. Richmond et al., banded together to seek redress against Richmond and certain of its subcontractors for exposing their families to this deadly gas. Modern lifestyle changes,

² Richmond gives an early clue as to who they are by stating on page 1 of their Memorandum in Support that the subject radon removal systems are “allegedly” installed to control levels of radon gas. Id. (emphasis supplied).

including the increasing prevalence of finished basements – often finished as playrooms for children – made the discovery of these non-functional or even fake radon systems a devastating experience for the families involved. Exposure to radon substantially increases the risk of lung cancer. While dangerously elevated radon used to be considered four picocuries per liter of air, according to the EPA, recent studies by the World Health Organization recently slashed that figure to just 2.7 picocuries per liter. Many of the Plaintiffs’ homes show levels more than double the old limit and many times as high as the new limit.

The first Complaint filed was in Joy v. Richmond. Discovery was served with the complaint on Richmond and M.D.C. Holdings in May of 2008. The two Richmond Defendants took different tacks in obstructing the discovery process. Richmond’s strategy was simply to blanket the first set of discovery with objections, over 500 objections in all, to a total of approximately forty-five interrogatories and requests for production. See Richmond’s Answers to Plaintiffs’ First Set of Discovery Requests (Plaintiffs’ Appendix, exhibit A) (making 344 “general objections” and 169 specific objections to basic requests for insurance policies, names of witnesses, etc . . .); see also Sanctions Hearing Tr. at 40.³ Although dozens upon dozens of privilege objections were lodged, no logs were provided. Id. at 46-47. Other objections were patently non-sensical and when answers were given, they were deliberately obstructive (such as providing useless employee “numbers,” instead of names of witnesses). Richmond also ignored

³ In fact, Richmond has objected to virtually every single request, no matter what it was for. Many privilege objections appear not to be in good faith, inasmuch as Richmond contends that no responsive documents have been identified, while at the same time contending that all responsive documents are privileged.

its obligations to supplement its responses throughout well over a year of litigation, in violation of Rule 26(e).⁴

M.D.C. took the approach of simply ignoring the Plaintiffs' discovery for well over a year. See Transcript of Sanctions Hearing at 52, 129. M.D.C. claimed at one point that since it had filed a motion to dismiss, it had no obligation to answer discovery, then later that it had filed a motion to refer the case to arbitration, and that such a motion likewise left it immune to discovery. On March 12th, 2009, the Court ordered Richmond to meet and confer on its objections, but Richmond ignored the order and declined to meet and confer. Id. at 40-41.

In January of 2009, a mediation was held at which an in-house attorney for Richmond, Jana Eisinger suggested to Andrew Skinner, attorney for the Plaintiffs, that he might find good employment defending radon cases for Richmond and M.D.C. Holdings. The offer was supposedly a plum offer to "oversee" Richmond's radon cases nationally. See November 4th, 2009, Order at ¶ 20-22; Skinner affidavit – exhibit E to Plaintiffs' Motion for Default Judgment,

⁴ In addition to Plaintiffs' first set of discovery, Plaintiffs served specific discovery on the issue of the Annessa letters to clarify the basic facts for the hearing. Even the most basic questions were met with eleven general objections and further specific objections. Furthermore, Richmond could not give straight answers – when asked if Plaintiffs had objected to the direct contact by Richmond with its clients, Richmond refuses to admit that occurred (see Response to Request for Admission 4, Richmond Answers to Plaintiffs' Fourth Set of Discovery Responses (Plaintiffs' Appendix, Exhibit B)), but compare the Petition, where Richmond extensively complains about just that. Memorandum in Support of Petition at, for example, 7-8. While it should be undisputed that counsel was negotiating back and forth on the terms of a settlement of the property issues, Richmond denied that, too. Compare Richmond's Answers to Requests for Admission 7 and 8 (Plaintiffs' Appendix, Exhibit B, denying that an agreement was being negotiated) with the Memorandum in Support of Petition at 7-8 (describing the negotiations). See also, exhibits 8-11 from Petitioner's Appendix, also setting forth the negotiations Richmond short-circuited by going straight to Plaintiffs; Sanctions Hearing Tr. at 144 (Court finding the offer had become the subject of negotiations). To make sure it's clear that Richmond will duck anything, see Answer to Request for Admission 17, wherein the Fortune 1000 company refuses to admit it is a sophisticated corporation with a substantial in-house legal department. Plaintiffs' Appendix, Exhibit B.

Petitioner's Appendix Exhibit 15). This astonishing and brazen effort to undermine the attorney-client relationship between Mr. Skinner and his clients was just a taste of what was to come.

In April of 2009, counsel for Richmond, Spillman, Thomas & Battle entered into a series of discussions and email exchanges about effecting a partial settlement of the Plaintiffs' property damage claims. Sanctions Order at ¶¶ 2-6; Hearing Order at ¶ 1.a.⁵ Richmond proposed that contractors might be paid by Richmond to repair the radon systems in some of the Plaintiffs homes if Plaintiffs would agree to accept that as a satisfaction of that part of their claims and if certain other conditions were met. Plaintiffs' counsel sought better conditions for the Plaintiffs including, critically, licensed work done properly.⁶

In April of 2009, the Richmond Defendants, through their counsel, Spillman, Thomas & Battle, PLLC, sought permission to directly contact Plaintiffs about partial settlement. A proposal from the Richmond Defendants was presented to Plaintiffs' counsel that would have allowed Richmond directly to contact the Plaintiffs. See emailed discussion on direct contact (Plaintiffs' appendix, exhibit C). Plaintiffs, through counsel, expressly rejected the proposal because it allowed such contact. Sanctions Order at ¶ 6.

⁵ The hearing on the Motion for Sanctions yielded both a "Hearing Order," a minute order requested by the Court at the end of the hearing, noting the appearances and the action at the hearing and a "Sanctions Order," an Order actually resolving the Motion. Orders granting a motion are submitted, per circuit practice, with the motion itself. Determined to find fault with everything, Richmond characterizes the existence of both orders as "odd," and "inexplicable" (Memorandum in Support at 4), though it knows exactly where the orders came from and why two exist – furthermore, Richmond knows the only reason the "Hearing Order" was entered after the "Sanctions Order" was administrative – Plaintiffs' counsel circulated the Hearing Order to Richmond per the Rules and received no response, delaying its submission to the court for entry.

⁶ In the fall of 2008, Richmond, ostensibly in reaction to the discovery by the Plaintiffs of the defective systems, made an offer to non-represented homeowners to install active radon removal systems in their homes. Plaintiffs' counsel discovered that the contractor hired by Richmond was not licensed to do this type of work in West Virginia. Moreover, the contractor employed individuals without any license at all. Plaintiffs' counsel obviously wanted to obtain for his clients work done by a qualified contractor.

Defendants' counsel next forwarded to Plaintiffs counsel a letter from Patrick Annessa, the President of Richmond American Homes of West Virginia, Inc. addressed to Plaintiffs and asked again for permission to directly send this letter to Plaintiffs. See Letter dated 4/9/09 with e-mail enclosing the same (Plaintiffs' appendix, exhibit D). Permission was expressly denied by Plaintiffs' counsel to communicate directly with the Plaintiffs. Petitioner's Memorandum in Support at 7. Though it is not necessary to give reasons, Defendants' counsel were told that the letter made false statements, was obviously prepared by counsel and failed to specify a vague offer of partial settlement. See E-mail dated April 10, 2009 (Plaintiffs' appendix, exhibit E); see also Sanctions Order at ¶ 4, 9; Hearing Order at ¶ 1-3; Sanctions Hearing TS at 144.

Richmond persisted on or about April 16th, again seeking permission to contact the Plaintiffs directly regarding settlement. Permission was again denied, but counsel for Plaintiffs agreed to work on an appropriate partial settlement agreement between and among counsel without direct contact between Defendant or Defendants' counsel and the Plaintiffs. Sanctions Hearing Tr. at 144. Language was exchanged and discussed, though no agreement was reached before Richmond egregiously and deliberately went to the Plaintiffs behind counsels' backs.

In June of 2009, Richmond, having been repeatedly refused permission to directly contact the Plaintiffs, did so anyway. Richmond sent letters to at least 11 of the 16 Plaintiff families in the Joy litigation. The letter was "remarkably similar" to the one exchanged among counsel and had "blocks of the same language" Sanctions Hearing Tr. at 145. Many more letters were sent to the Plaintiffs in the Bauer and Saliba companion cases. The unauthorized communications made false statements about the ongoing litigation and proposed a partial settlement to the Plaintiffs. See Exhibit 3 in Petitioner's Appendix. The letter criticized the Plaintiffs' counsel. Hearing

Order at ¶ 1.d. The letter further invited return communication from the Plaintiffs in the form of acceptance or rejection of Richmond's terms. Id.

The letter went on to propose that further unrepresented contact would follow to set up and finalize the details of Richmond's partial settlement with the Plaintiffs. Hearing Order at ¶ 1.f. Finally, the letter suggested that if the Plaintiffs had any questions about the partial settlement proposal – they should call one of Richmond's own employees to talk it over. Id. As the circuit court found “a reasonable reading of the import of the letter is that it was sent with the intention to sow discord and distrust between counsel for the Plaintiffs and the Plaintiffs themselves and to substitute Richmond as their champion in that regard.” Hearing Order at ¶ 1.g (emphasis supplied); Hearing Tr. at 146-47.

Astonishingly, the letter from Patrick Annessa of Richmond directly attempted to undermine the relationship between Plaintiffs and Plaintiffs' counsel with statements such as “I am President of Richmond . . . I sent an offer letter to your attorney . . . This was an unconditional offer . . . it is my understanding your attorney chose not to send this letter to you therefore I am making the offer directly to you.” This statement was not only materially false in that the offer was conditional, but it was obviously intended to subvert the attorney-client relationship between Plaintiffs and their attorneys in blatant violation of well-established rules and Supreme Court of Appeals precedent.⁷ Id. The Circuit Court further found that the letter appeared “remarkably similar to a letter exchanged between counsel for the Plaintiffs and the Richmond Defendants, regarding the remediation of radon systems at the Plaintiffs' homes.” Hearing Order at ¶ 1.a.

⁷ Of course, Annessa and Richmond knew, and know, nothing about Plaintiffs' counsel's communications with his clients, nor should they.

Piling chutzpah on chutzpah, the letter purported to offer legal views to the Plaintiffs, including suggesting that if the Plaintiffs declined the offer, it would somehow become admissible in court. Id. Cf. W.Va.R.Evid. 408 (offers of settlement and compromise not admissible). The letter was clearly intended as a settlement proposal and indicated as much by stating that it was not a “full settlement.” Id.

Richmond is, of course, a large, sophisticated corporation with a substantial in-house legal department. It has had the services of six different law firms as outside counsel in this case alone. It is a repeat player in litigation of various kinds. Sanctions Order at ¶¶ 17-19. The Plaintiffs, by contrast, are, in the main, ordinary West Virginia families who are not sophisticated litigation players. Id. The Circuit Court found that the letter

constituted an end-run around the legal process in this case on the part of this sophisticated party Defendant, Richmond, reflecting an intention to fragment the Plaintiffs from one another and as such the Court finds the letter to have been impermissible and a violation of the rules applicable to this legal process.

Hearing Order at ¶ 2. In addition, the letter was arguably an invitation, in a multi-defendant case, for the Plaintiffs, without benefit of counsel, to conspire with Richmond to despoil evidence in the form of the radon systems existing in the Plaintiffs’ homes. Cf. Hannah v. Heeter, 213 W.Va. 704 (2003). Certainly when other defendants became aware of the letters, they insisted on participating and documenting the remediation efforts.

The Plaintiffs were forced to file Motions to Compel and requests for sanctions in regard to the discovery misconduct and the discovery issues were referred to a commissioner. A discovery commissioner hearing was set and was held. At the hearing, no legitimate basis for M.D.C.’s failure to answer any discovery was articulated. Moreover, virtually all of Richmond’s 500-plus objections were abandoned, and of those few that were not abandoned, virtually all were overruled.

A motion for sanctions seeking default judgment and the striking of Richmond's answers was filed in July of 2009. The circuit court, which resolves many types of motions on the pleadings, set the matter for evidentiary hearing on October 30th, 2009 in all three cases. See Order setting hearing dated October 13th, 2009.⁸ The hearing was set to commence in the morning and the Circuit Court reserved the entire day. See Tr. of Sanctions Hearing at 24. Testimony was taken, exhibits tendered and admitted and argument was made for a long day and the Court repeatedly advised arguing counsel that it would allow all the time either side requested to make their cases. Sanctions Hearing Tr. at e.g. 24, 45, 81, (the Court, to counsel for Richmond: "you're welcome to talk as long as you feel that you have something to say" "[The Court:] Again, I am really serious about having all the time in the world, go ahead"). Sanctions Hearing Tr. at 121; Hearing Order at 2. Argument was heard both on the merit of sanctions in the first instance and the proper nature and scope of the sanctions. Sanctions Hearing Tr. at e.g. 32, 40, 52-53, 147-48 Hearing Order at 2.

Since Richmond relies so extensively on the testimony of its retained expert, Professor Bowman, almost to the point of claiming that Professor Bowman is a trump that the Circuit Court had no choice but to follow, it is worth discussing his testimony. Specific discovery was served on the specific facts surrounding Richmond's unlawful communications with the Plaintiffs. Professor Bowman conceded Richmond did not provide it to him. Sanctions Hearing Tr. at 92-93. The specific discovery is exhibit B in Plaintiffs' appendix. Professor Bowman admitted:

Q. We can agree that the opinions that you give as an expert to the extent they are received by the Court are only as good as the accuracy of and completeness of the facts on which you rely?

⁸ The Order originally set the hearing for October 23rd, but it was moved to October 30th because of a scheduling conflict.

- A. Yes, I would agree.
- Q. Okay. Now, with regard to that factual predicate would it change your view, hypothetically speaking, if Richmond American in fact made false or inaccurate statements in the Annessa letter to the representative Plaintiffs?
- A. If they, yes.
- Q. That would change your opinion?
- A. Yes.
- Q. It would be wrong, wouldn't it?
- A. Yes.

Tr. of Sanctions hearing at 93-94. Of course, the Annessa letter was false (Sanctions Order at ¶¶ 9, 13, 14, 15) and the Circuit Court so found. Accordingly, Professor Bowman's testimony was ultimately for the Plaintiffs.⁹

Richmond simply underprepared Professor Bowman, by not giving him their own discovery answers on the letter and by feeding him an argumentatively prepared set of facts designed to be exculpatory. When Professor Bowman's opinions were held up to the actual facts, they no longer supported the conclusion Richmond had engineered for him to reach.¹⁰

Of course, the entire exercise of calling a witness on a legal issue, whether the communications to the Plaintiffs were lawful, is a violation of Jackson v. State Farm, which reserves such questions of law to the courts. No matter how esteemed, Professor Bowman is unelected, and it is to the elected judiciary of this State that legal determinations are committed.

As a general rule, an expert witness may not give his [or her] opinion on a question of domestic law [as opposed to foreign law] or on matters which involve questions of law, and an expert witness cannot instruct the court with respect to the applicable law of the case, or infringe on the judge's role to instruct the jury on the law. So an expert may not testify as to such

⁹ Richmond makes no attempt to show that any of Judge Sanders' findings of fact were clearly erroneous, as indeed, it could not.

¹⁰ Richmond also attempted to solicit opinions from Professor Bowman about Mr. Skinner's communications with his own clients. Such opinions were purely hypothetical, as there are no facts of record regarding such communications (as there should not be) and Richmond has no earthly idea what it is talking about when it purports to discuss Mr. Skinner's communications with his clients.

questions of law as the interpretation of a statute . . . or case law . . . or the meaning of terms in a statute . . . or the legality of conduct. 32 C.J.S. Evidence § 634, at 503-04 (1996) (footnotes omitted). See also John W. Strong, McCormick On Evidence, Vol. 1 § 12, p. 53 (1999) (stating that “[r]egardless of the rule concerning admissibility of opinion upon ultimate facts, at common law[,] courts do not allow opinion on a question of law, unless the issue concerns foreign law.” (Footnotes omitted.)).

Jackson v. State Farm, 215 W.Va. 634, 643 (2004). Ultimately, it is only the opinion of the Circuit Judge, and this Court, that matters as to whether Richmond’s conduct was lawful.¹¹ Professor Bowman’s testimony was anything but dispositive for Richmond.

At the conclusion of the hearing, the Court rejected Richmond’s arguments in defense of its conduct and indicated that Richmond’s actions in discovery, in offering Plaintiffs’ counsel a job and in directly contacting the Plaintiffs regarding settlement merited sanctions. The nature of the sanctions was taken under advisement. After due deliberation, the Sanctions Order was entered on November 4th, 2009, defaulting Richmond and limiting trial against Richmond to the amount of compensatory damages owed, and Plaintiffs’ right to punitive damages, if any.¹²

This Court might have the impression from reading Richmond’s Petition that only its direct communications to the represented Plaintiffs was at issue. Indeed, Richmond seeks to create just that impression by declining to mention its other sanctioned misconduct in the main text of its Petition or in the Memorandum in Support before page 25. This selective picture

¹¹ The Petition is therefore entirely out of order in taking Judge Sanders to task for failing to “rebut” Professor Bowman’s testimony. Petition at 2. The repeated invocations of Professor Bowman in the Memorandum in Support of the Petition take on a tone of desperation, as though Richmond believes it is syllabus point law that motions in West Virginia shall be resolved in accordance with the views of Professor Bowman, no matter how distorted by the retaining party’s selective provision of facts to the professor. The man is not a talisman.

¹² Seeking to build drama, Richmond claims that a trial of “unknown proportions” is set for April 2010. Memorandum in support of Petition at 1. But that’s not true and Richmond knows it and says so: “Judge Sanders limited the April 2010 trial of this case against the Richmond Defendants to the issues of compensatory and punitive damages.” Memorandum at 11. There is nothing “unknown” about the upcoming trial from Richmond’s point of view.

painted by Richmond runs afoul of this Court indication in State ex rel. Nationwide v. Marks, wherein this Court reminded litigants that “it is imperative that any party seeking [an extraordinary] writ be forthright in the allegations contained in its brief.” The Court in Marks was “troubled by Nationwide Mutual's failure to accurately reflect the circuit court's rulings in its petition for writ of prohibition to this Court.” 223 W.Va. 452, fn. 10 (2009) (emphasis supplied).¹³ Richmond has done the same. Based on the full presentation of the facts to the Circuit Court, as described above and as set forth in the transcript of the sanctions hearing, the Circuit Court's Orders appear wholly proper and the sanctions issued well-warranted, Plaintiff submits that the Writ prayed for should therefore be REFUSED.¹⁴

II. Argument

The decision of a Circuit Court to impose sanctions is reviewed only for abuse of discretion.

With regard to a review of the appropriateness of sanctions ordered by a trial court, the standard, as we recognized in Bartles v. Hinkle, 196 W.Va. 381, 472

¹³ The Petition itself references only Richmond's direct communication to the represented Plaintiffs and ignores the other two major bases for the default judgment. Even the Memorandum in Support fails to mention the other two-thirds of the Petitioner's misconduct outside its footnotes until its twenty-fifth page. As another example, the Petition claims on page 2 of the Memorandum, that “Respondent Judge Sanders' orders imposing sanctions . . . identify no rule, order, or other established legal or ethical norm that was allegedly violated by this conduct.” This is absurd. The orders are replete with citations to just those things, including a dozen or more reported cases and the relevant rules of civil procedure.

¹⁴ As to whether the Petition should be entertained and decided by this Court, Plaintiffs acknowledge the practically-minded authority of Parsons v. Consolidated Gas Supply Corp., 163 W.Va. 464 (1979), indicating that it is often wise to determine the validity of a default judgment on an interlocutory basis before trial. Parsons is of course not a sanctions case. There is, furthermore, tension between Parsons' rule of judicial economy and the countervailing considerations that extraordinary remedies should only be invoked where some error clearly appears. State ex rel. Nationwide Mut. Ins. Co. v. Marks, 223 W.Va. 452, Syl. Pt. 1 (2009). While the Circuit Court's Orders are proper in the view of the Plaintiffs, and no grounds for a rule to show cause, much less a writ, appear, the Plaintiffs take no position on whether it is wiser and more efficient to hear and dispose of Richmond's application with a written opinion, or to simply refuse the Petition outright.

S.E.2d 827 (1996), is abuse of discretion: “The question is not whether we would have imposed a more lenient penalty had we been the trial court, but whether the trial court abused its discretion in imposing the sanction.” Id. at 389-90, 472 S.E.2d at 835-36.

Suzuki v. Pritt, 204 W.Va. 388 (1998). Furthermore, with regard to litigants that, like M.D.C. simply fail to answer discovery, this Court has stated:

With respect to Rule 37(b), we have held that: [t]he 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.

Syl. pt. 1, Bell v. Inland Mut. Ins. Co., 175 W.Va. 165, 332 S.E.2d 127 (1985). Likewise, we now specifically hold that the imposition of sanctions by a circuit court under Rule 37(d) of the West Virginia Rules of Civil Procedure is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. See, e.g., Aziz v. Wright, 34 F.3d 587 (8th Cir.1994) (applying abuse of discretion standard in reviewing Rule 37(d) of the Federal Rules of Civil Procedure).

Cattrell Companies, Inc. v. Carlton, Inc., 217 W.Va. 1 (2005).

An extraordinary writ shall lie only in cases of abuse or where the circuit court acts in the absence of jurisdiction or exceeds its legitimate powers. “A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where a trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers.” W. Va. Code 53-1-1.”

Syl. Pt. 1, State ex rel. Shepard v. Holland, 219 W. Va. 310, 633 S.E.2d 255 (2006) (citing Syl. Pt. 2, State ex rel. Peacher v. Sencindiver, 160 W. Va. 314, 233 S.E.2d 425 (1977)).

A. A direct attempt to settle with a represented Plaintiff by a sophisticated corporation warrants the striking of the Answer and Judgment by Default under Kocher v. Oxford Life, 216 W.Va. 56, 602 S.E.2d 499 (2004).

In Kocher v. Oxford Life, a landmark case from Marshall County, the trial court struck the answers and defenses of Oxford Life upon learning that a representative of Oxford Life had

travelled to the home of a plaintiff to talk the case over, apologize and ask about settling the case.

This contact was made behind the backs of the Plaintiffs' lawyers.

The Circuit Court's ruling on that was strongly affirmed by this Court, which stated:

We observe that the compelling facts of the instant case and applicable law fully support the trial court's ruling imposing sanctions. It should be emphasized that this is not a case of one private litigant innocently seeking to talk directly with another litigant without either party's counsel being present. Rather, this is a case where a sophisticated corporation deliberately lied to a litigant for the purpose of contacting the litigant without his counsel's knowledge, and improperly sought to influence the litigant to settle the case.

Id. at fn. 3. This Court's express statement of support for the Circuit Court's decision in Kocher has several nuances.

First, Kocher was not a close call. The egregious attempt to contact Mr. Kocher about settlement and to mislead him were deemed "compelling facts" that "fully support[ed]" the decision to default Oxford Life.

Second, Oxford Life was a sophisticated company, like Richmond, trying to take advantage of an ordinary lay plaintiff by bypassing his attorney. Richmond has no defense to its egregious violation of the Plaintiffs' rights and the rules of integrity and fair play that govern litigation simply because it is not itself covered by the Rules of Professional Conduct. As the Circuit Court found, "[the letter's] statement was not only materially false . . . it was obviously intended to subvert the attorney-client relationship between Plaintiffs and their attorneys." Sanctions Order at ¶ 14.

This Court continued in Kocher:

The fact that Mr. Kocher's lawyer had specifically advised Oxford at a deposition not to discuss settlement with Mr. Kocher is merely cumulative; Oxford's conduct would have been "wrong" even if Mr. Kocher's lawyer had not had the occasion to make such a statement to Oxford. Oxford's misconduct was a deliberate effort to subvert and circumvent both the attorney-client relationship and the ordinary rules and procedures of litigation. This relationship and these rules and procedures

are central to the fair working of our legal system and to the public's confidence in the courts.

Id. Richmond's unlawful communication went far beyond the "routine" litigation misconduct of delay, unresponsiveness to discovery, and sharp practice. It directly attacked the rules that "are central to the fair working of our legal system and to the public's confidence in the courts." Just as in Kocher, the denial of permission from Plaintiffs' counsel in this case to take this egregious action is merely cumulative of the inherent mendacity of going to the client behind his lawyer's back.

Moreover, the existence of Kocher, a case defended by a partner in the firm counseling Richmond at the time the letters were sent,¹⁵ puts to rout Richmond's repeated claims that there was "no notice" that its conduct was wrong. Not only does Kocher say it is wrong, Plaintiffs' counsel repeatedly objected to it. If Richmond did not know its conduct was wrong, it is only because it keeps its head planted deep in the sand, with its ears plugged for good measure. Richmond's entire due process argument, set forth at length, founders on the simple facts that both caselaw and the Plaintiffs' objections called its actions into serious question before they were undertaken. Not only have parties been defaulted before in West Virginia for similar conduct, the Plaintiffs specifically objected to the conduct and indicated it was unlawful. Did Richmond seek a ruling from the Court or clarification? Of course not – Richmond went ahead on its own, sowed the wind, and reaped the whirlwind.

B. A premeditated attempt to undermine the relationship between Plaintiffs and their counsel warrants the sanction of default as it cannot be remediated by lesser sanctions.

Fines or awards of fees would be an inadequate sanction, where, as here, the adversary system and the relationship between the Plaintiffs and their attorneys was attacked. While an

¹⁵ Tr. of Sanctions hearing at 59.

award of fees or penalties can remedy the run-of-the-mill discovery misconduct where a party's lawyer's time and effort is wasted, in this case, Richmond deliberately attempted to subvert the Plaintiffs' trust in their chosen attorney.¹⁶ An attack on the adversary process as a whole by making an end-run around a party's counsel is clearly an attack on the rightful decision in a case, as is an effort to subvert a party's attorney with an offer of conflicting employment.¹⁷ "Oxford's misconduct was a deliberate effort to subvert and circumvent both the attorney-client relationship and the ordinary rules and procedures of litigation." Kocher at fn. 4. Richmond's actions were of a similar nature and had a similar intent – to split the Plaintiffs from counsel and one other.

This Court recently held in Karpacs Brown v. Murthy that:

In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute 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. at syl. pt. 6. The Circuit Court in this case did just that. The Sanctions Order and the Hearing Order identify the patterns of misconduct in the areas of discovery, direct contact with the represented Plaintiffs and the attempt to subvert Plaintiffs' counsel with a job offer. The Circuit Court set forth its reasons orally and in writing. The Circuit Court considered the nature of the misconduct and the manner in which it struck at the heart of the system and the extensive nature

¹⁶ Of course, default is available for egregious discovery misconduct also. See e.g. Given v. Field, 199 W.Va. 394, 484 S.E.2d 647 (1997).

¹⁷ Richmond repeatedly invokes the "interferes with the rightful decision of the case" standard, but appears to take the standard to mean that unless the outcome of the case is actually changed, there can be no sanction. In other words, if the misconduct fails, it can't be punished. This is, frankly, absurd. It is the intention and potential to interfere with the rightful decision that is at issue.

Slosberg, 658 A.2d 658 (Me.1995) (judgment for punitive damages entered as discovery sanction).¹⁸

The relationship of Plaintiffs' counsel with the Plaintiffs was materially damaged by Defendants' actions. One Plaintiff was concerned he should not share the Annessa letter with his own lawyer. See Skinner affidavit at ¶ 10 (attached as exhibit E to Plaintiffs' Motion for Default Judgment, Exhibit 15 in Petitioner's Appendix). Several more have expressed concerns about the manner in which they are being represented and Plaintiffs' counsel has had to communicate with all his clients about the letter explaining its misrepresentations and detailing the true state of the facts regarding the partial settlement negotiations. Id. An unknown number of Plaintiffs unwittingly responded to Richmond's wrongful communicating to the prejudice of their cases. Most importantly, the relationship of trust has been harmed by Richmond's action, as it was intended to do. As the Circuit Court found "a reasonable reading of the import of the letter is that it was sent with the intention to sow discord and distrust between counsel for the Plaintiffs and the Plaintiffs themselves and to substitute Richmond as their champion in that regard." Hearing Order at ¶ 1.g (emphasis supplied); Hearing Tr. at 144-45.

In mass tort litigation, the numbers involved make representing Plaintiffs a demanding task for the most skilled and diligent attorneys. Richmond knows this and deliberately and purposely sought to undermine Plaintiffs' counsel's relationship with all of the clients not only in

¹⁸ A court examined just such an attempt by another sophisticated defendant in Loatman v. Summit Bank, 174 F.R.D. 592 (D.N.J.) and described just what Richmond was up to in this case:

Specifically, defendants' conduct . . . implied that plaintiff's attorneys could not be trusted to convey to plaintiff defendants' settlement offer, and further implied to plaintiff directly that plaintiff's interests may not be aligned with those of her attorneys. Defendant tried to induce plaintiff to question the motives of her attorneys and to question whether her attorneys were acting in plaintiff's best interests.

Id. at 601-02.

an attempt to influence partial settlements now, but to gain advantage in future negotiations. Defendants have “sown the seeds” of distrust they hope will ripen later into discord among the Plaintiffs and between them and their attorneys. Such illegitimate and deceitful conduct must receive strict and unyielding punishment, or else our entire system will be compromised.

The scope and breadth of Richmond’s misconduct cannot in the slightest degree be countenanced by the Court. This level of misconduct is of such a nature that only the sternest sanction of default can remedy it and send the message of Kocher again – sophisticated corporations who directly contact represented plaintiffs to mislead them and influence them to settle will receive a harsh penalty for such dishonest and deceptive conduct. Actions like Richmond’s are an attack on the integrity of our court system itself and cannot be tolerated. Where such actions are determined to be willful, extinction of the party’s claim is a proper sanction. Kimberly Industries, Inc. v. Lilly Explosives Co., Inc., 199 W.Va. 584, 486 S.E.2d 324 (1997) (plaintiff’s case extinguished for willful failure to act as ordered by Court).

Richmond’s repeated assertion that its conduct in sending a false and misleading communication over the objection of the Plaintiffs attorneys was “perfectly acceptable” “entirely lawful and appropriate,” and, best of all a “good deed”¹⁹ is as unavailing as its endless repetition that there is no authority for the proposition that a divisional president of a sophisticated Fortune 1000 company cannot, with assistance of his in-house legal department, make an end run around represented individuals and send them a letter saying they had better call up his company and schedule repairs or they will be testifying in Court about why they didn’t. Just because Richmond won’t admit that its conduct was atrocious does not give it a get-out-of-jail-free card.

¹⁹ Petitioner’s Memorandum in Support at 20: “a good deed.” Really.

Like Kocher, this case is not a close one because of the extent of the litigation misconduct and its indisputably intentional nature. Parties have been validly defaulted for far less in the way of misconduct. See e.g. General Conference Corp. of Seventh-Day Adventists v. McGill, Slip Copy, 2009 WL 1505710 (W.D.Tenn., 2009) (default granted for party's failure to mediate as ordered); see also Jean Marie Hansen, Attorney, P.C. v. Chachoua, 2006 WL 2664431, *1 (E.D.Mich. Sep. 15, 2006) (affirming district court's entry of default judgment against defendant based upon defendants' dilatory tactics, manipulation of the judicial system, and disobedience of court orders during litigation); U.S. v. Coon, 2002 WL 31002885, *2 (W.D.Mich. July 25, 2002) (recommending entry of default judgment as a result of defendants' failure to participate in pretrial court proceedings).

C. Richmond's attempt to hire Plaintiffs' counsel at a settlement conference in this case is a further assault on legitimate legal process and independently and collectively with Richmond's other misconduct, warrants the most severe sanctions.

As set forth in the attached affidavit of Andrew Skinner, Esq., in-house counsel for Richmond attempted to enter into discussions regarding employing Plaintiffs' counsel during a settlement conference on or about January 26, 2009. See Skinner affidavit at (attached as exhibit E to Plaintiffs' Motion for Default Judgment). The job would be to act as Richmond's national counsel to "oversee radon cases." Id. The offer was of course rejected. Id.

Richmond's deceit simply knows no bounds. It attempted to subvert Plaintiffs' counsel directly, by offering him employment working against the very sorts of people he now represents, in the same kind of case. When that failed, it went to plan B, attempting to convince Plaintiffs' counsel's clients that he couldn't be trusted. How strange that Mr. Annessa failed to mention to the Plaintiffs that Richmond's corporate counsel offered their lawyer a job in his "informative" letter about the partial settlement. Sanctions Order at ¶ 20-23.

Richmond never produced any counter-affidavit or evidence rebutting the facts underlying this part of the motion for sanctions. Even now, it simply offers its lawyer's claim that its in-house attorney, if she had bothered to file an affidavit, would have disagreed with the characterization of the events. Memorandum in Support at 26. Richmond's failure to make a factual record is fatal to its complaint about the Circuit Court's ruling. A full evidentiary hearing was scheduled with ample notice and the Court heard everything anyone put forth. Richmond is not entitled to "hang back" with evidence to save for a writ Petition (or even later, as there is no counter-evidence with the Petition either).²⁰

Undersigned counsel has worked with Richmond's outside counsel in the past and it would be shocking to find that the lawyers at Spillman, Thomas & Battle knew about Richmond's plan to send these letters over Plaintiffs' counsel's objection or the illicit job offer. Plaintiffs have made clear throughout that the actions complained of appears to be entirely the act of Richmond itself and its in-house counsel that have made it subject to the sanctions prayed for herein. Sanctions Hearing Tr. at 144. Those actions are simply inexcusable and indefensible.

D. Richmond has engaged in extensive discovery abuse, prejudicing the Plaintiffs' preparation for trial and further supporting the sanction of default judgment.

Plaintiffs propounded a set of interrogatories, request for production of documents, and request for admissions upon M.D.C. and Richmond with the Complaint on May 20, 2008.

²⁰ Richmond's claim that it "asked respondent Judge Sanders at the hearing to indicate whether he believed the issue merited the circuit court's consideration" is bizarre. The Plaintiffs filed a motion on the issue with supporting evidence and the court set a hearing on it. This is known as "notice and opportunity to be heard." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). A process whereby the responding party shows up at the hearing and laconically asks the judicial officer "Judge, why don't you tell us what parts of the motion you think we ought to bother with and we'll come back some other day and tell you what we think," followed by successive hearings on those items, would be extraordinarily cumbersome, not to mention contemptuous of the moving party's rights and the circuit court's time. As an aside, Richmond brought numerous attorneys to the Sanctions hearing, but not Eisinger.

Plaintiffs gave the Defendants two discovery extensions. In turn, Richmond gave the Plaintiffs intentionally vague and non-responsive answers and it failed to provide documents that were clearly required by the West Virginia Rules of Civil Procedure. M.D.C. filed no answers at all for over 15 months. Richmond provided answers blanketed with frivolous and unnecessary objections, over 500 in all, including numerous objections to such basic requests as those for insurance policies, names of witnesses with relevant knowledge and basic company policies.

Despite numerous efforts to receive supplemental discovery answers without Court intervention, the Plaintiffs were forced to file two motions to compel. Richmond did not supplement its discovery responses until the day before Plaintiffs' hearing on its motions to compel. At the March 12, 2009 hearing before Judge Sanders, Richmond, through counsel, promised the Court that Richmond would work with Plaintiffs to further narrow the discovery issues and, if all matters were not resolved, the parties would refer the matter to Discovery Commissioner, Oscar Bean.

Pursuant to the Court's ruling from the bench, the parties were required to confer regarding the discovery dispute on or before April 1, 2009. See Order from March 12, 2009 hearing (exhibit H in Plaintiffs' Motion for Default Judgment, exhibit 15 to Petitioners' Appendix). Pursuant to the Court's Order, on March 30, 2009, Plaintiffs forwarded correspondence to Richmond outlining the many areas requiring supplementation. See letter (exhibit I in Plaintiffs' Motion for Default Judgment, exhibit 15 in Petitioners' Appendix). Despite the Court's Order requiring the parties to confer, Richmond ignored Plaintiffs' correspondence.

Richmond American's refusal to confer forced Plaintiffs, through counsel, to contact Discovery Commissioner Oscar Bean to get a hearing. Richmond's refusal was a clear violation

of the Court's March 12, 2009 Order and entitles Plaintiffs to sanctions pursuant to W.Va.R.Civ.P. 37(b)(2). Only after Richmond learned that the matter would be referred to the Discovery Commissioner did it feel obliged to finally address the discovery issues. Richmond's "supplementation" did not take place until June 17, 2009- three (3) months after the Court Ordered the parties to confer.

Richmond American/M.D.C. also employs a number of information technology specialists, managers, technicians, and engineers and yet, no electronic discovery has been provided. Not a single e-mail has been produced. The Plaintiffs' first set of discovery was served over fourteen months before the Sanctions Hearing. There is simply no excuse for such obstruction. Moreover, Richmond's misconduct clearly represents a pattern through the entire case, further supporting the award of the severest sanctions. See Warner v. Wingfield 685 S.E.2d 250 (2009).

Richmond takes a classic tack on this discovery issues in its Petition. It claims, without any record support, that the Plaintiffs are guilty of discovery misconduct. But Richmond filed no motion for sanctions below and has not even sought, let alone obtained a finding from the circuit court that Plaintiffs did anything sanctionable. Memorandum in Support of Petition at 27. Richmond tortures a few quotations of conversation (not findings, just conversation) from an eight-hour discovery commissioner hearing to attempt to smear the Plaintiffs, in the desperate hopes that the mere appearance of impropriety will win it points with this Court. All this is intended to neatly sidestep its own, copiously-documented and fully litigated abuses, which it fails to justify in the slightest degree.

As described above, Plaintiffs served specific discovery on the issue of the Annessa letters to clarify the basic facts for the sanctions hearing. Even the most basic questions were

met with eleven general objections per request and further specific objections. Furthermore, Richmond could not give straight answers – when asked if Plaintiffs had objected to the direct contact by Richmond with its clients, Richmond refuses to admit that occurred (see Response to Request for Admission 4, Richmond Answers to Plaintiffs’ Fourth Set of Discovery Responses (Plaintiffs’ Appendix, Exhibit B)), but compare the Petition, where Richmond extensively complains about just that. Memorandum in Support of Petition at, for example, 7-8. While it should be undisputed that counsel was negotiating back and forth on the terms of a settlement of the property issues, Richmond denied that, too. Compare Richmond’s Answers to Requests for Admission 7 and 8 (Plaintiffs’ Appendix, Exhibit B, denying that an agreement was being negotiated) with the Memorandum in Support of Petition at 7-8 (describing the very negotiations). See also, exhibits 8-11 from Petitioner’s Appendix, also setting forth the negotiations Richmond short-circuited by going straight to Plaintiffs; Sanctions Hearing Tr. at 144 (Court finding the offer had become the subject of negotiations). To make sure it’s clear that Richmond will duck anything, see Answer to Request for Admission 17, wherein the Fortune 1000 company refuses to admit it is a sophisticated corporation with a substantial in-house legal department. Plaintiffs’ Appendix, Exhibit B.

Richmond clearly engaged in an extensive pattern of discovery misconduct in this case. Richmond apparently feels free to do as it wishes, when it wants, and manufactures reasons to justify its actions. Richmond’s obstructive discovery practices have caused incalculable inconvenience and expense to the Plaintiffs. Many months have been lost and little progress has been made towards the recovery of discoverable information, jeopardizing the trial. Richmond has made misrepresentations as to what discoverable information exists and these misrepresentations continue to this day.

For all of the reasons appearing at the Sanctions Hearing, and on the record, including:

- 1) the filing of frivolous objections;
- 2) the total failure of M.D.C. to answer discovery;
- 3) the failure to produce privilege logs as required by law;
- 4) the production of deliberately unhelpful and non-sensical answers;
- 5) the failure to meet and confer as ordered by the Court;
- 6) the failure to adequately and fairly meet the substance of legitimate requests; and
- 7) the needless wasting of hours of Court time and the Plaintiffs' counsel's time,

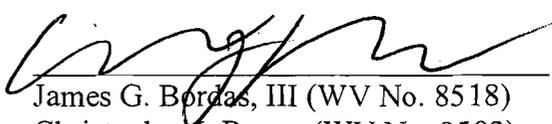
the Sanctions were well-warranted. As such, Defendants' discovery misconduct deserved the severest sanctions available pursuant to W.Va.R.Civ.P. 37(b)(2), including the striking of Defendants' defenses and the granting of default judgment on liability. The Circuit Court's Order was therefore altogether proper and should not be disturbed.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that the writ prayed for be REFUSED.

Respectfully Submitted,

KEVIN JOY, et al., Plaintiffs

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
RICHMOND AMERICAN HOMES
OF WEST VIRGINIA, INC., and
M.D.C. HOLDINGS, INC.,

Petitioners,

v.

Civil Action No. 08-C-204

HONORABLE DAVID H. SANDERS,
JUDGE OF THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA,
BREEDEN MECHANICAL, INC.,
DIW GROUP, INC., d/b/a SPECIALIZED
ENGINEERING, INC., NORTH STAR
FOUNDATIONS, INC., MODERN
ENTERPRISES, INC., J.S.C. CONCRETE
CONSTRUCTION, INC., LOUDEN VALLEY
CONCRETE, INC., and KEVIN JOY, et al.,

Respondents.

CERTIFICATE OF SERVICE

Service of the foregoing **PLAINTIFFS' OPPOSITION TO PETITION FOR A WRIT OF PROHIBITION, NOTICE OF FILING, MOTION TO EXCEED PAGE LIMIT, and APPENDIX OF EXHIBITS** was had upon the parties, by forwarding a true and correct copy thereof, by United States Mail, postage prepaid, to counsel of record, this 4th day of January, 2010, to the following:

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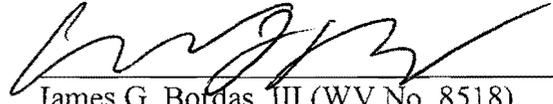
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