

A. Skimmer

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

KEVIN JOY, et al.,

Plaintiffs,

v.

Civil Action No. 08-C-204

RICHMOND AMERICAN HOMES OF
WEST VIRGINIA, INC., et al.,

Defendants.

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JAN 14 2011

JEFFERSON COUNTY
CIRCUIT COURT
AC

CHARLES BAUER, et al.,

Plaintiffs,

vs.

Civil Action No. 08-C-431

RICHMOND AMERICAN HOMES OF
WEST VIRGINIA, INC., et al.

Defendants.

MICHAEL SALIBA, et al.,

Plaintiffs,

v.

Civil Action No. 08-C-447

RICHMOND AMERICAN HOMES OF
WEST VIRGINIA, INC., et al.,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR SANCTIONS, MOTION TO STRIKE THE ANSWERS OF DEFENDANTS, RICHMOND AMERICAN HOMES OF WEST VIRGINIA, INC., AND MOTION FOR DEFAULT JUDGMENT

The parties in this case came before the Court, on the 30th day of October, 2009, to be heard regarding Plaintiffs' Motion for Sanctions, Motion to Strike the Answers of the Defendants, Richmond American Homes of West Virginia, Inc. and MDC, Inc., and for Default

Judgment in the above-captioned cases.

Appearing on behalf of the *Joy, Bauer, and Saliba* Plaintiffs were Christopher Regan of Bordas & Bordas, PLLC and Andrew Skinner and Laura Davis of Skinner Law Firm. Appearing on behalf of the Defendants Richmond American Homes of West Virginia, Inc. and M.D.C. Holdings, Inc. were Niall A. Paul and James A. Walls of Spillman, Thomas & Battle, PLLC and Michael D. Jones of Kirkland & Ellis, LLP. Appearing on behalf of Defendant Breeden Mechanical were Robert M. Trumble and Suzanne M. Williams-McAuliffe of McNeer, Highland, McMunn & Varner, LC. Appearing on behalf of Defendant JSC Concrete Construction, Inc. was Michael M. Stevens of Martin & Seibert, LC. Appearing on behalf of Defendant North Star Foundations was Tracey Rohrbaugh of Bowles, Rice McDavid, Graff & Love, LLP. Appearing on behalf of DIW Enterprises dba Specialized Engineering was Kenneth Stallard of Thompson O'Donnell, LLP. Appearing on behalf of Modern Enterprises, Inc. was Debra Scudiere of Kay, Casto & Chaney, PLLC.

WHEREUPON, the Court indicated that it would hear from the Plaintiffs and the Court received evidence proffered by the Plaintiffs and argument of counsel in favor of the Motions, as recorded in the stenographic transcript.

WHEREUPON, the Court recessed for the luncheon meal.

WHEREUPON, the Court heard from Defendants, Richmond American Homes, Inc. and MDC Holdings, Inc. (hereinafter, "Defendants" "the Defendants") who presented evidence and argument of counsel against the Motions, as recorded in the stenographic transcript.

WHEREUPON, the Court heard argument in the nature of rebuttal from the Plaintiffs and sur-rebuttal from the Defendants and a final rebuttal from the Plaintiffs.

From time to time during the hearing, the Court entertained objections by the parties and

ruled upon the same as the transcript indicates.

WHEREUPON, the Court took a recess to consider the Motions.

WHEREUPON, the Court reconvened, GRANTED the Plaintiffs' Motions and subsequently issued certain Findings of Fact and Conclusions of Law, as reflected in its orders entered on November 4, 2009, and November 18, 2009, ("the sanctions orders") imposing default judgment against Richmond American Homes, Inc., and MDC, Inc. as a sanction for their litigation misconduct and striking the Answers they had previously filed.

THEREAFTER, Defendants Richmond American Homes, Inc., and MDC, Inc., sought a writ of prohibition, seeking to overturn this Court's orders of November 4, 2009, and November 18, 2009, on various grounds including, but not limited to:

- 1) That this Court had "exceeded its legitimate powers" in imposing the default judgment;¹
- 2) That this Court had "substantially abused its discretion;"²
- 3) That this Court had punished the Defendants for conduct that was legitimate;
- 4) That this Court's Orders could not withstand the testimony of Professor Bowman;³
- 5) That this Court had denied the Defendants due process;⁴
- 6) That this Court was otherwise mismanaging the case.⁵

On June 16, 2010, the Supreme Court of Appeals of West Virginia issued its opinion in this matter, granting a writ of prohibition, as moulded. The Supreme Court of Appeals' opinion did not embrace the grounds for relief advanced by Defendants, but rather vacated the sanctions

¹ See e.g. Defendants' Memorandum in Support of Verified Petition for Writ of Prohibition at 1, 3.

² Id.

³ Id. at 2.

⁴ Id. at 2 ("the instant Petition seeks to reestablish due process in this case").

⁵ Id. at 1-2 ("there is no case management order, no trial plan in place").

orders with instructions to replace them with a more detailed and specific order that addresses a new syllabus point on the inherent power of a trial court to sanction litigants. State ex rel. Richmond American Homes et al. v. Sanders, 697 S.E.2d 139, (W. Va. 2010), syllabus point 7, (hereinafter: Richmond). The Supreme Court of Appeals held as follows:

For the foregoing reasons we grant Petitioners' requested relief to the extent that we vacate the circuit court's November 4 and November 19, 2009, orders regarding and imposing sanctions. The circuit court is authorized to proceed in imposing sanctions if, as established by the terms of the sanction order, the action taken is based on specific factual findings of serious misconduct in light of the standards articulated in syllabus points one and two of Bartles v. Hinkle and, to the extent applicable, the new law set forth in this opinion.

Id. at 150.

The Supreme Court of Appeals thus expressly authorized the entry of default judgment pursuant to this Court's inherent power "if, as established by the terms of the sanction order, the action taken is based on specific factual findings of serious misconduct in light of the standards articulated in syllabus points one and two of Bartles v. Hinkle and, to the extent applicable, the new law set forth in this opinion." Id. Accordingly, the core contention of the Defendants, that this Court was without power to sanction them with a default judgment,⁶ was expressly rejected by the Supreme Court's unanimous opinion.⁷ The Supreme Court of Appeals clearly found that "the inherent power of courts to sanction misconduct includes the authority to enter default judgment orders in appropriate circumstances." Richmond at 147

The Supreme Court of Appeals noted that the November 18, 2009, Sanctions Order imposed default judgment in all three cases, but that the Defendants sought a writ of prohibition

⁶ See id. at 3 (characterizing the sanctions orders as "this egregious abuse of power").

⁷ In a concurring opinion that did discuss the merits of the underlying sanctions determination, Chief Justice Davis wrote that: "[t]he record in this case clearly establishes that Richmond American implemented two tactical decisions to undermine the plaintiffs' attorney-client relationship" and that Defendants' egregious conduct in this case warranted the sanction imposed by the trial judge. Richmond at 152 (concurring opinion of Davis, C.J.).

only in the Joy case. As stated in footnote 4 of Richmond:

According to the headings on the orders, the November 4, 2009, order before us was entered solely in Civil Action No. 08-C-204, the Joy case, whereas the November 18, 2009, order was entered for all three cases. The petition for writ of prohibition before us was filed naming only the Joy plaintiffs

Id. Thus the default judgments in Bauer and Saliba remain in effect. Nevertheless, this Court hereby exercises its own discretion to replace the prior Bauer and Saliba Orders with this Order, to make the proceedings in those cases consistent with the law of Richmond, and to promote judicial economy.

The Supreme Court of Appeals further found that in the absence of a predicate order to produce certain discovery or an order from the discovery commissioner, the sanctions orders of this Court should not rely on the discovery misconduct identified in the prior Orders of this Court. Richmond at 146. Accordingly, this Court does not rely on that conduct in entering this Order.

WHEREFORE, this Court now makes the following findings of fact and conclusions of law regarding this matter, in the light of the Supreme Court of Appeals' decision:

FINDINGS OF FACT

1. The Plaintiffs herein are a group of Jefferson County, West Virginia homeowners and their families.
2. The homes in which the Plaintiffs live, or have previously lived, were constructed and/or sold by Defendants Richmond American Homes, Inc. and MDC, Inc.
3. According to Plaintiffs' Complaints, they learned after moving into their homes that the radon removal systems in their homes were defective, absent, or fake.
4. Plaintiffs filed suit against Defendants Richmond American Homes, Inc. and MDC, Inc., among others, and assert a variety of tort and contract claims regarding the failure to install

radon protection systems in their homes, the installation of defective radon protection systems in their homes and the installation of fake radon protection systems in their homes.

5. The Richmond American Defendants have denied liability and disputed Plaintiffs' damages. The parties have been actively litigating the case since its inception, including exchanges of motions, written discovery, and depositions.

**FACTS RELATING TO DEFENDANTS'
DIRECT COMMUNICATION WITH PLAINTIFFS**

6. During April 2009, Defendants' counsel forwarded to Plaintiffs' counsel a letter from Patrick Annessa, President of Richmond American Homes of West Virginia, Inc., addressed to Plaintiffs, and asked for permission to send this letter directly to Plaintiffs.

7. Plaintiffs' counsel expressly denied permission.

8. Plaintiffs' counsel told Defendants' counsel that the letter misstated facts pertinent to the case, was prepared by counsel, and failed to specify the terms of a vague offer of partial settlement to the Plaintiffs. See Exhibit B to sanctions motion.

9. Defendants, on or about April 16, 2009, again sought permission through counsel for Plaintiffs to contact the Plaintiffs directly regarding partial 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 Defendants or Defendants' counsel and the Plaintiffs.

10. Language for such an agreement was exchanged and discussed among counsel, though no agreement was reached. Richmond at 144-45.

11. Eventually, counsel for Defendants sent an email tabling discussion of the direct communication with Plaintiffs and moving on to other areas of discussion.

12. In June 2009, the CEO of Richmond American Homes, Inc., Patrick Annessa, sent a

letter (“the Annessa letter”) to many of the Plaintiffs in the Joy, Bauer and Saliba cases. See Exhibit C to sanctions motion; Sanctions Hearing Tr. at 29, lines 20-23.

13. The letter contained large blocks of text identical to the letter draft that had been previously sent by Defendants’ counsel to Plaintiffs’ counsel. Sanctions Hearing Tr. at 145, lines 7-12.

14. The letter was sent directly to Plaintiffs’ homes and was sent over the repeated written objections of Plaintiffs’ counsel. Sanctions Hearing Tr. at 27, lines 16-20.

15. Defendants sent letters to at least 11 of the 16 Plaintiffs families in the Joy litigation. At least 18 more letters were sent to the Plaintiffs in the Bauer and Saliba cases.

16. The Annessa letter⁸ began by representing to the Plaintiffs that Plaintiffs’ attorney had not communicated a settlement offer to them (“[i]t is my understanding that your attorney chose not to send this letter to you; therefore I am making the offer directly to you”). It went on to tell

⁸ The body of the Annessa letter read as follows:

My name is Patrick Annessa. I am President of Richmond American Homes of West Virginia. On April 3, 2009, I sent an offer letter to your attorney. This was an unconditional offer to install a radon reduction system in your home, free of charge. It is my understanding that your attorney chose not to send this letter to you; therefore I am making the offer directly to you. We are offering to hire a licensed subcontractor to unconditionally install a radon-reduction system or to reimburse you should you choose to have an independent company install such a system. This offer is intended to be admissible in court should this lawsuit progress. Our offer is not intended to be a full settlement of all your claims and you can continue to pursue your lawsuit if you chose [sic] to do so.

We have not been given the opportunity to fully inspect and/or repair your home, and by making this offer we do not admit any fault or liability in the construction of your home.

If you want to say “YES” to this offer and schedule an appointment, please mark the box “YES” and return this letter to Charlene Currin at 12220 Sunrise Valley Drive, Suite 400, Reston, Virginia 20191. Please provide your contact information and best times for us to reach you, in the space provided below. Once we receive your “YES” reply, we will then contact you to schedule your appointment.

Plaintiffs that the letter itself was an offer of partial settlement of their claims for remediation of their radon system (“[o]ur offer is not intended to be a full settlement of all your claims”). It also represented to Plaintiffs that the offer would be admitted into court if the lawsuit continued. (“[t]his offer is intended to be admissible in court should this lawsuit progress”). See Exhibit C to sanctions motion.

17. The letter further told the Plaintiffs that if they “want to say YES to this offer,” they can be in touch, not with their own lawyer, but rather with Charlee Currin of Reston, Virginia, an officer of Defendant Richmond American Homes, Inc. Id.

18. The letter indicated that Plaintiffs could simply schedule an appointment by contacting Defendants directly to install a radon reduction system in their homes. Id.

19. Finally, the letter claimed the offer was “unconditional” and suggested that if the Plaintiffs had any questions about the partial settlement proposal, they should call one of Defendant Richmond American Homes, Inc.’s own employees to talk it over and not their own attorneys. Id.

20. This Court believes, as stated by Chief Justice Davis in her concurring opinion in Richmond, the Annessa letter was “designed to interfere with, and sabotage, the attorney-client relationship between the plaintiffs and their counsel ” Richmond at 153 (concurring opinion of Davis, C.J.).

21. The statements in the Annessa letter were materially false in that the so-called offer was rife with conditions (Sanctions Hearing Tr. at 118, line 20- 119, line 19), and this Court agrees with Chief Justice Davis that the letter was intended to subvert the attorney-client relationship between Plaintiffs and their attorneys in violation of well-established rules and Supreme Court of Appeals’ precedent. Id.

22. As Chief Justice Davis stated, the letter “accuses plaintiffs’ counsel of deliberately failing to inform the plaintiffs of a purported partial settlement offer. This accusation implicitly suggests to the plaintiffs that they cannot trust their attorney, and that their attorney has elevated his interests above their interests.” Id. The letter purported to offer legal views to the Plaintiffs, including suggesting to the Plaintiffs that the offer would be admissible in court, presumably against the Plaintiffs, although this was not true. Cf. W.Va.R.Evid 408 (offers of settlement and compromise not admissible). See Exhibit C to sanctions motion; Sanctions Hearing Tr. at 31, lines 3-5.

23. The letter was clearly intended as a settlement proposal and indicated as much by stating that it was not a full settlement but only a partial one. See Exhibit C to sanctions motion; Sanctions Hearing Tr. at 116 line 10- 117 line 10.

24. Defendants are large, sophisticated corporations with substantial in-house legal departments including multiple attorneys on staff. They have also employed at least six different outside law firms in this case, including Jackson & Kelly; Spilman, Thomas & Battle; Steptoe & Johnson; Pullin, Fowler, Flanigan, Brown & Poe; Skadden, Arps, Slate Meagher & Flom of New York City; and Kirkland & Ellis of Washington D.C.

25. The Plaintiffs are, in the main, ordinary West Virginia families who are not sophisticated litigation players by any means. Sanctions Hearing Tr. at 28 line 15-20.

26. Defendants were on notice of the objectionable nature of the proposed direct communication, both because of Plaintiffs’ counsel’s repeated objections and the law discussed directly below and post at ¶¶ 44-47.

27. Rule 4.2 of the West Virginia Rules of Professional Conduct states

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer

in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The primary purpose of Rule 4.2 of the West Virginia Rules of Professional Conduct is to protect the attorney-client relationship by preventing one party's attorney from making an ex parte contact with another party. State ex rel. Charleston Area Medical Center v. Zakaib, 437 S E 2d 759 (W. Va. 1993)

28. The Annessa Letter contained some of the exact language from a letter drafted by Defendants' counsel and was signed by the President of Richmond Homes. "It is clear . . . that [the West Virginia Supreme Court of Appeals] does not approve of a party unilaterally contacting another party. This position recognizes the highly aggressive nature of civil litigation today, which makes unsophisticated plaintiffs extremely vulnerable to unscrupulously high pressure tactics by corporate defendants." Richmond at 151 (concurring opinion of Davis, C.J.); See Kocher, 216 W.Va. at 60.

29. The Court finds Defendants' blatant disregard for the Plaintiffs' counsel's request to not contact their clients directly so egregious that such conduct clearly establishes willfulness, bad faith and fault of the Defendants. Failure to sanction Defendants for such outrageous and offensive behavior would send the message to counsel for sophisticated corporations that they can easily circumvent Rule 4.2 of the West Virginia Rules of Professional Conduct by having a representative of a corporation communicate directly with the adverse party, even though counsel for the corporation has drafted the communication

FACTS RELATING TO DEFENDANTS' JOB OFFER TO PLAINTIFFS' COUNSEL

30. As set forth in the affidavit of Andrew Skinner, Esq., in-house counsel for the Richmond American Defendants attempted to enter into discussions regarding employing Plaintiffs' counsel, at or immediately prior to a mediation in the Joy case on or about January 26, 2009.

Skinner affidavit at ¶ 4-5.

31. On that day, an in-house lawyer for Defendants approached Mr. Skinner prior to the mediation and indicated that Defendants were concerned, not only with the Plaintiffs in Joy, but also with resolving or avoiding further claims that might be in Mr. Skinner's office, but not yet filed, or claims of persons who had not yet contacted Mr. Skinner, but would do so in the future.

Skinner affidavit at ¶ 6.

32. The job offered was to act as Richmond American Defendants' national counsel to "coordinate its nationwide radon litigation." Skinner affidavit at ¶ 7.

33. Mr. Skinner rejected the offer and responded that he could not represent Defendants. The offer was conveyed to him in a manner suggesting it was intended to create a conflict between him and his clients and to conflict him out of future radon cases. Id. at ¶ 8

34. The actions of Defendants in making this job offer appear to be entirely the acts of the Defendants themselves and its in-house counsel – evidence has not surfaced indicating any involvement in these actions by Defendants' outside counsel. Sanctions Hearing Tr. at 36, line 22 to 37, line 9

35. The Court notes that the job offer implicated not only the Joy Plaintiffs, but also the Bauer and Saliba Plaintiffs, whose cases were filed at that time, as it was specifically mentioned that one of Defendants' concerns was additional clients Andrew Skinner might represent. Skinner affidavit at ¶¶ 1-6.

36. The Court finds that the Defendants attempted to subvert Plaintiffs' counsel, and to subvert Plaintiffs' counsel's relationship with his clients by offering him employment working against the very sorts of people he now represents, in the same kind of cases. Richmond, at 153 (concurring opinion of Davis, C.J.).

37. When Mr. Skinner failed to take the bait, the Defendants attempted to convince Mr. Skinner's clients that he couldn't be trusted by sending the Annessa letter discussed above. As

Chief Justice Davis put it:

When Richmond American failed in its attempt to "buy-off" plaintiffs' counsel, it made a tactical decision to drive a wedge between the plaintiffs and their counsel. It did this initially by having defense counsel ask plaintiffs' counsel to allow defense counsel to have direct contact with the plaintiffs. When this effort failed, Richmond American took the deliberate and calculated step of going directly to the plaintiffs with a malicious letter that was designed to interfere with, and sabotage, the attorney-client relationship between the plaintiffs and their counsel.

Richmond, at 153 (concurring opinion of Davis, C J.).

CONCLUSIONS OF LAW

38. In deciding the instant motion, this Court is guided by syllabus point 2 of Bartles v. Hinkle, 196 W.Va. 381 (1996), which states:

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.

39. For purposes of the instant Motion, this Court identifies the "Annessa letter" and the "job offer" as the alleged wrongful conduct under consideration. Consideration of discovery misconduct is held in abeyance for the reasons set forth above.

40. This Court is directed to consider "the seriousness of the conduct, any mitigating circumstances and whether the conduct was an isolated occurrence or was a pattern of wrongdoing" in light of the new syllabus point 7, issued with the Richmond opinion.

41. This Court finds that in accordance with syllabus point 7 of Richmond, the actions of the Defendants herein involve "serious litigation misconduct" as specifically detailed below. Id.

42. This Court further finds, also in accordance with syllabus point 7 of Richmond, that the actions of the Defendants herein “adequately demonstrate and establish willfulness, bad faith or fault of the offending party,” also as specifically detailed below. Id.

**SPECIFIC ANALYSIS OF THE “SERIOUS LITIGATION MISCONDUCT” PRONG:
ANNESSA’S LETTER**

43. The Court finds that the Annessa letter was an improper end-run around plaintiffs’ counsel, by a sophisticated corporate litigant, to contact layperson-plaintiffs. The only prior case law in West Virginia dealing specifically with such an action came in Kocher v. Oxford Life, 216 W.Va. 56 (2004). While the commentary on the issue in that case was arguably dicta, it was very strongly stated in upholding Judge Karl’s decision to default a corporate litigant for going directly to a plaintiff without that plaintiff’s counsel’s consent.

44. Chief Justice Davis, in her concurring opinion in the instant case, described the Kocher Court’s thinking, and indicated the decision amounted to a finding of the Supreme Court of Appeals, writing as follows:

In Kocher, the defendant unilaterally contacted the plaintiff in an attempt to negotiate a settlement of the case. As a result of such contact, the trial court used its inherent authority to sanction the defendant by imposing a default judgment. After the issue of damages was tried, the defendant appealed. One of the issues raised by the defendant in the petition for appeal was that the trial court committed error in sanctioning the defendant with default judgment for contacting the plaintiff directly and without consulting plaintiff’s counsel. This Court reviewed the assignment of error and determined that it had no merit and that the trial court was correct in imposing the sanction. Consequently, this Court accepted the petition for appeal on only one issue: whether the trial court erred in giving a jury instruction on the issue of punitive damages.

Id. at 150 (Davis, C J, concurring, emphasis supplied). Thus, the Court again rejects the Defendants’ contention that there is nothing wrong with directly contacting plaintiffs over the objection of plaintiffs’ counsel with partial settlement proposals or other litigation-related communications.

45. The Court makes the following specific findings regarding the first prong of Richmond's syllabus point 7, the "serious litigation misconduct" prong:

a. The Defendants' decision to unilaterally make ex parte contacts with the Plaintiffs in this case, over the objections of Plaintiffs' counsel and without their knowledge, constituted "serious litigation misconduct "

b. The Defendants' action threatened the attorney-client relationships between the Skinner Firm and its clients in these cases by attempting to "drive a wedge" between the Plaintiffs and their counsel. Sanctions Hearing Tr. at 146 line 23- 147, line 9.

c. This Court agrees with Chief Justice Davis' concurring opinion that the Defendants herein "took the deliberate and calculated step of going directly to the plaintiffs with a malicious letter that was designed to interfere with, and sabotage, the attorney-client relationship between the plaintiffs and their counsel " Richmond, at 9 (concurring opinion of Davis, C J.).

d. This Court further finds, based on its review of the record, including the affidavit of Andrew Skinner, the emails exchanged by counsel regarding the Annessa letter, and the text of the letter itself, that the intent of the Annessa letter was to sow discord and distrust between the Plaintiffs and their attorneys. Sanctions Hearing Tr. at 144 line 8-147, line 9.

e. This court also agrees with Chief Justice Davis' concurring opinion that the Annessa letter: "accuses plaintiffs' counsel of deliberately failing to inform the plaintiffs of a purported partial settlement offer. This accusation implicitly suggests to the plaintiffs that they cannot trust their attorney, and that their attorney has elevated his interests above their interests." Richmond, at 153 (Davis, C J , concurring).

f. The Court finds, in addition, that the Annessa Letter contained an element of threat and intimidation, in threatening the Plaintiffs with admission of the letter in court, presumably against them, if they did not accept the offer. The letter, as Chief Justice Davis concluded also, was quite obviously designed “to place pressure on the plaintiffs to accept the partial settlement, or run the risk of having a jury be informed that they refused the offer.” Richmond, at 153 (Davis, C.J., concurring).

g. This Court agrees that

It is clear from the observations made in Kocher and the principles set out in the instant case that [the Supreme Court of Appeals] does not approve of a party unilaterally contacting another party. This position recognizes the highly aggressive nature of civil litigation today, which makes unsophisticated plaintiffs extremely vulnerable to unscrupulously high pressure tactics by corporate defendants.

Richmond, at 3 (Davis, C.J., concurring).

h. Furthermore, the letter was deliberately misleading in that it contained legally groundless threats to use the settlement proposal in court (such proposals are not admissible) and in that it made representations about the actions of Mr. Skinner of which Defendants had no knowledge. Sanctions Hearing Tr. at 146, line 23- 147, line 9.

46. The actions of the Defendants in seeking to intimidate the Plaintiffs, attempting to divide them from their chosen counsel by sabotaging the attorney-client relationship, and in doing so unlawfully and over the objection of Plaintiffs’ counsel constitutes serious litigation misconduct under Bartles and Richmond.

**ANALYSIS OF THE “WILLFULNESS, BAD FAITH OR FAULT” PRONG:
THE ANNESSA LETTER**

47. The Court makes the following specific findings regarding the second prong of syllabus point 7, the “willfulness, bad faith or fault” prong, in regard to the Annessa Letter:

48. There is simply no dispute herein as to the intentional nature of the Defendants’ actions

in sending the Annessa letter. The evidence establishes unequivocally that it was done intentionally and the Defendants do not deny that. Sanctions Hearing Tr. at 74 line 6-7

49. Furthermore, the Defendants have acknowledged that it was their intent to go around the Plaintiffs' attorneys to reach the Plaintiffs directly – although the Defendants deny that this was an invidious intent, they do not deny that it was in fact their intent.⁹

50. The Court finds that the letter was sent willfully, in a bad faith attempt to subvert the attorney-client relationship between Andrew Skinner and his clients. Several indicia of bad faith appear in the evidentiary record, and they are as follows:

- a. The Defendants were specifically told by Plaintiffs' counsel that there was an objection to any letters being sent directly to the Plaintiffs, but nevertheless sent the letters unilaterally, in the face of that objection, without seeking the guidance of the Court. Sanctions Hearing Tr. at 123 line 10- 124, line 7.
- b. The Defendants, as reflected in the email exchange between James Walls and Laura Davis, tabled their request to send the letter directly to the clients, just before Defendants went behind Plaintiffs' counsel's back and sent the letter directly to the Plaintiffs. Id
- c. The Defendants repeatedly suggested to this Court that the Annessa letter was, at worst, the innocent act of a "lay person,"¹⁰ and that the letter was "written by Mr. Annessa," but these suggestions were inaccurate, and there are at least two separate sources of proof of that:

1. First, since the Annessa Letter that went to the Plaintiffs was so similar to the

⁹ See e.g. Defendants Memorandum in Support of their Verified Petition at 7-8 (stating that Richmond felt obstructed by Plaintiff's counsel's involvement and desired to deal directly with Plaintiffs as a result).

¹⁰ See e.g. Tr. of Sanctions Hearing at 74, line 4.

letters previously exchanged among counsel, that Defendants' claims that it was un-counseled do not appear to be possible and as this Court indicated at the hearing, certainly are not credible;¹¹

2. Second, Mr. Annessa admitted at deposition that the letters were sent with advice and assistance from Defendants' in-house legal department.¹² In light of this admission, the idea that the letters were authored or sent by a lay person, is simply not the fact in this case.

d. Accordingly, it is clear that the Defendants sent these letters in bad faith, intending to subvert the Plaintiffs' relationship with their counsel, and that the Defendants' later-proffered explanations amount to rationalizations of the action they had already taken.

e. The Defendants' interpretations of the letter, (that it was not threatening,¹³ that it was not a partial settlement proposal,¹⁴ and that it was not intended to subvert the attorney-client relationship¹⁵) are irreconcilable with the face of the letter itself and lack credibility.

f. Finally, the balance of evidence suggests that the letter was not actually intended to bring about any repairs to the Plaintiffs' homes, but rather to create a trial exhibit the

¹¹ As the Court noted at the sanctions hearing, it appears that the language utilized in the shorter version of the letter of the 15th of July is remarkably similar to the letter that was sent to the Plaintiffs. In fact, it appears to have blocks of some of the same language of the earlier one which the lawyers had in their possession and were speaking of. So, whether it comes out under his signature it is something that he did with the language was coaching or that it appears to be a short pithy but legally informed document that was sent out to all of the parties. Tr. of Sanctions Hearing at 145, lines 7-16.

¹² Annessa Deposition Tr. at 30-44.

¹³ Tr. of Sanctions Hearing at 98, line 21.

¹⁴ Tr. of Sanctions Hearing at 76, line 20- 77, line 7.

¹⁵ Tr. of Sanctions Hearing at 83, line 18- 84, line 16.

Defendants could use to portray the Plaintiffs and their lawyers as obstructionist. Sanctions Hearing Tr. at 36 lines 7-19. Multiple specific facts support the conclusion that Defendants were not actually trying to fix anything by sending their letters, but rather to gain litigation advantage unfairly:

1. Most of the letter recipients, if not all of them, were already involved in extensive multi-party litigation, including various sub-contractors. The Defendants could not seriously have intended to unilaterally schedule repair work on the object of the litigation without consulting the other parties, all of whom had a right to be present or to inspect the condition of the homes before and after. Cf. Hannah v. Heeter, 213 W Va 704 (2003). The basic notion of the letter, as Defendants would portray it – that the Plaintiffs need only make a call to Richmond and Richmond will come out and fix their home – therefore appears to be a very unlikely one. Sanctions Hearing Tr. at 34, line 23- 36, line 19.
2. Defendants’ counsel revealed at the hearing on the motion for sanctions that Defendants’ intention was to “slide the letter across the table” at depositions, using it to suggest to Plaintiffs that their lawyer was holding out on them and to later admit it into evidence before the jury:

[Mr. Paull, for RAH/MDC]: I would hope it gets into court, okay. It’s not dishonest to say he understood we tried to give you this offer to Plaintiffs’ counsel through Plaintiffs’ counsel. We did. The fact that Mr. Skinner is now upset that was revealed to his clients only sped up the revolution time[.] Plaintiffs were going to be deposed and that letter was going to be slid across the table, have you ever seen this letter, do you know about this letter, was this offer communicated to you That could happen, Your Honor, that was going to happen.

Sanctions hearing Tr. at 83, line 23- 84, line 8 (emphasis supplied).

3. Since the Plaintiffs, practically speaking, could not accept the offer without potentially damaging their case through what other litigants might call spoliation of evidence, the offer was much more likely made for the tactical purposes counsel for Defendants alluded to above. Sanctions Hearing Tr. at 36, lines 7-19.

g. Considering these facts, particularly the fact that the letter, taken at face value, is an invitation for the Plaintiffs, without their counsel, to work with Defendants to alter or destroy material evidence without notice to other parties, the Court finds that the letter had other purposes than its apparent one and was therefore sent in bad faith. Sanctions Hearing Tr. at 34, line 23 – 36, line 6.

51 Finally, as to the issue of fault, the Court has determined and emphasizes that sophisticated corporate defendants may not directly contact represented plaintiffs over the objections of their counsel and without court permission. Sanctions Hearing Tr. at 145 line 5-147, line 20.

52. As the concurring opinion in Richmond points out: “Rule 4.2 “is not intended to insulate from scrutiny situations where a party communicates with another . . . while the adverse party's counsel is . . . unaware of the contact.” In re Anonymous, 819 N.E.2d 376, 379, n.1 (Ind. 2004), cited in Richmond, at 150, (Davis, C.J. concurring).

53. Moreover, courts have found that initiating direct settlement talks over the objection of counsel to be tortious:

When a third person intentionally interferes with [the attorney-client] relationship for his own benefit, either by unlawful means or by lawful means where there is a lack of sufficient justification, by inducing a client to terminate the relationship with his attorney or otherwise act with the intent to deprive the attorney of his remuneration, a cause of action arises in tort for the damages resulting from that act.

State Farm Mut. Ins. Co. v. St. Joseph's Hosp., 489 P 2d 837, 841 (Ariz. 1971). See also, Richmond, at 151 (Davis, C.J., concurring) (collecting cases).

54. Accordingly, the prohibited nature of Defendants' actions clearly establishes fault in this matter for purposes of syllabus point 7 of Richmond.

55. The Court finds the conduct in sending the Annessa letter to dozens of represented Plaintiffs in Joy, Bauer and Saliba to be "serious" within the meaning of syllabus point 2 of Bartles and to constitute "serious litigation misconduct" within the meaning of syllabus point 7 of Richmond.

56. The Court further finds that the Defendants have failed to show evidence in mitigation of the misconduct, as contemplated by syllabus point 2 of Bartles, particularly in light of the bad faith reflected by its conduct as described infra in ¶¶ 6-37.

57. The Court finds that the Defendants' conduct in sending the Annessa letters was not isolated, in that it involved dozens of Plaintiffs and in that it followed the job offer discussed herein at ¶¶ 30-37.

58. Finally, the Court finds that the conduct seriously threatened the administration of justice as described in ¶¶ 6-37. The attorney-client relationship is of paramount importance in our system. By seeking to convince Mr. Skinner's clients that he could not be trusted, Defendants were taking an action that could fracture the Plaintiffs' efforts and destroy their case. Such an attack on the legitimate, fair, and orderly administration of justice warrants the severest sanctions.

**ANALYSIS OF THE SERIOUS LITIGATION MISCONDCUT PRONG:
THE JOB OFFER**

59. This Court likewise finds that the act of the Defendants in seeking to hire Andrew

Skinner constitutes “serious litigation misconduct,” within the meaning of Bartles, syllabus point 2 and Richmond, syllabus point 7.

60. The Court makes the following specific findings in regard to how the job offer constituted “serious litigation misconduct.”

- a. The action of the Defendants, in approaching Plaintiffs’ counsel about employment with their company at a mediation of his clients’ claims against the Defendants undermines the integrity of the judicial process. Richmond, at 152-53 (concurring opinion of Davis, C.J.).
- b. As sophisticated legal actors, the Defendants are well aware that Plaintiffs’ counsel appears at the mediation to represent his clients.
- c. By making a job offer to Plaintiffs’ counsel at the mediation, Defendants were attempting to undermine the “attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client” Learning Curve Int’l. Inc. v. Seyfarth Shaw, LLP, 911 N.E.2d 1073, 1080 (Ill. App. Ct. 2009).
- d. Furthermore,

[t]he client-lawyer relationship is structured to function within an adversarial legal system. In order to operate within this system, the relationship must do more than bind together a client and a lawyer. It must also work to repel attacks from legal adversaries. Those who are not privy to the relationship are often purposefully excluded because they are pursuing interests adverse to the client's interests.

MNC Credit Corp. v. Sickels, 497 S.E.2d 331, 334 (Va. 1998) (internal quotations and citation omitted, emphasis supplied).

- e. The offer, in substance, was an attempt to “buy off,” as Chief Justice Davis succinctly put it, the Plaintiffs’ attorney. Richmond, at 153 (Davis, C.J., concurring).

Such an action is utterly intolerable within the bounds of our adversary system of represented parties.

- f. The offer of a job made to a Plaintiffs' attorney at a mediation of dozens of his or her clients' claims is so egregious an attack on the integrity of our court system that in Chief Justice Davis' view, that conduct "alone was invidious enough to warrant imposition of default judgment against Richmond American." Richmond, at 153 (concurring opinion of Davis, C.J.). This Court agrees.
- g. The Court finds that it is the *nature* of the Defendants' action in *offering* a job and not whether the job was *accepted* that matters here. While Mr. Skinner correctly refused the offer, the nature of the offer itself was an attack on the fair administration of the case and an effort to create a conflict of interest for the Plaintiffs' attorney. In light of the sophistication of the Defendants and the fact that they used in-house counsel to make the offer, such conduct cannot be excused or mitigated.¹⁶

61. Examined in view of these specific findings, the Court can reach no other conclusion than that the job offer constituted serious litigation misconduct.

**ANALYSIS OF THE "WILLFULNESS, BAD FAITH OR FAULT" PRONG:
THE JOB OFFER**

62. The Court also examines the willfulness, bad faith, or fault involved in making the job offer to Andrew Skinner.

63. The Court finds that the job offer was willful because it is not the kind of action that

¹⁶ Under these circumstances, the dominant consideration is the nature of the action, and not its result. Had Defendants' effort to buy off opposing counsel succeeded, it is likely no court would ever know of it. Therefore, punishing such an act only when it succeeds would fail completely to deter such conduct.

could have been undertaken by mistake. It was made by an attorney in Defendants' in-house counsel's office and at the particularly provocative setting of a mediation in the radon case. The subtext that Mr. Skinner would be better off working for MDC, recently a Fortune 1000 company, than for the clients he brought to the mediation simply could not be missed. Skinner affidavit at ¶¶ 4-8.

64. The Court further finds that the job offer was made in bad faith because there simply is no "innocent" explanation for such an action.

65. While Mr. Skinner was present throughout the approximate six hours of the sanctions hearing in 2009, Defendants did not seek to cross-examine him or impeach his affidavit in any way. The Court notes that the Defendants, in the ten months that have passed since the filing of Plaintiffs' Motion, have never offered any evidence to either this Court or the Supreme Court of any innocent explanation for the job offer.

66. At the hearing on the Motion for Sanctions in October 2009, Defendants did claim they were prepared to submit an affidavit regarding those circumstances. Sanctions Hearing Tr. at 112, line 21- 113, line 4. The Court makes the following findings in respect to that claim:

- a. First, the hearing set by the Court on Plaintiffs' motion was the time for both parties to submit the relevant evidence. The Court did not refuse any evidence or argument that any party submitted on this issue. Sanctions Hearing Tr. at 81, lines 3-8.
- b. Defendants' indication that it would submit evidence on the job offer if the court was "interested" was not appropriate. It would be highly disruptive of court procedure and efficiency if, at a scheduled hearing, set for a full day of court time, a party could appear intentionally unprepared to address a fairly-noticed issue, and then, seek a later hearing if the Court shows "interest" in the issue. Therefore, the failure to come

forward with any evidence at the hearing set by the Court on a Motion raising the issue was a waiver of Defendants' right to present evidence on that subject later.

- c. However, had Defendants actually submitted evidence on the issue, the opportunity would have existed for it to be considered by this Court or the Supreme Court of Appeals, but that did not occur either
- d. The Defendants have never submitted any evidence on the job offer issue, not at the hearing, or after the hearing, or after the prior sanctions orders, or at any time during the extraordinary writ proceeding. Accordingly, Defendants have waived the right to present evidence on that issue.

67. The Court finally finds there to be fault on the part of the Defendants in making the job offer. It was made by in-house counsel and was a clear attack on the Plaintiffs' attorney's ethics and his relationship with his clients. Richmond, at 153 (concurring opinion of Davis, C.J.)

68. The job offer was therefore made willfully, in bad faith, and with fault on the part of the Defendants within the meaning of syllabus point 7 of Richmond. The importance of the attorney-client relationship made Defendants' action an assault on our judicial system as a whole and the invidious nature of the Defendants' conduct warrants the sternest sanction of default judgment.

CONCLUSION

69 In the final analysis, the Defendants herein mounted multiple, major attacks on the attorney-client relationship between the Plaintiffs in Joy, Bauer, and Saliba cases and their attorney, Andrew Skinner. To condone the conduct of Richmond American "would deprecate and lessen the sanctity of the attorney-client [relationship]" United States v. Edwards, 39 F. Supp. 2d 716, 746 (M. D. La. 1999).

70. The Defendants' misconduct occurred in relation to all three cases as indicated in the prior order dated November 18, 2009, (captioned with and discussing all three cases) and as set forth above in ¶¶ 12-16 (finding that letters went to clients in all three cases) and ¶ 31 (finding that the job offer was made in specific contemplation of the Bauer and Saliba clients, whose cases had just been filed in the months before the job offer). Accordingly, this Sanctions Order is entered, as the November 18, 2009, Order was previously entered, in all three cases, Joy, Bauer and Saliba.

71. The Defendants' misconduct in either of its attacks on the attorney-client relationship in this case would be sufficiently egregious and threatening to the administration of justice to warrant the sanction of default.

72. The Supreme Court of Appeals' decision expressly authorized the imposition of default as being within this Court's discretion, if the findings on remand were as stated herein, concluding:

Imposition of sanctions of dismissal and default judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld upon review as a proper exercise of discretion when trial court findings adequately demonstrate and establish willfulness, bad faith or fault of the offending party.

Richmond, Syl. Pt. 7; furthermore, the concurring opinion stated that "the egregious conduct in this case warranted the sanction imposed by the trial judge[.]" Richmond, at 150 (Davis, C.J., concurring).

73. As reflected in all of the foregoing, this Court finds that the Defendants have engaged in serious litigation misconduct, under circumstances reflecting willfulness, bad faith and fault and therefore exercises its discretion and its inherent power under syllabus points 2 of Bartles and 7 of Richmond to SANCTION the Defendants by STRIKING their ANSWERS in this matter as

to the Plaintiffs and imposing JUDGMENT BY DEFAULT upon them on the claims asserted in Plaintiffs' Complaints, EXCLUSIVE of the Plaintiffs' claim for punitive damages, which shall be tried to a jury in accordance with Kocher v. Oxford Life, supra. Any cross-claims made by the Defendant Richmond in its Answer shall remain in effect and are not stricken.

74. A scheduling conference will be conducted in order to set a date for the inquest on damages to which the Plaintiffs may be entitled on _____, 2011, at _____, and to address any other scheduling issues.

FINDINGS OF DISCOVERY MISCONDUCT EXCLUDED FROM THIS ORDER

75. The Supreme Court of Appeals' opinion reflects the view that the record regarding Defendants' discovery misconduct is incomplete until the Discovery Commissioner's decision is entered. Richmond, at 149.

76. The Supreme Court of Appeals' opinion also reflects that default is not available under Rule 37, without a predicate violation of an order compelling discovery (as opposed to an order to meet and confer). Richmond, at 146.

77. Therefore, this Court has not relied, in this Order, on Defendants' alleged discovery misconduct in making its determination regarding sanctioning the Defendants.

78. The Supreme Court of Appeals did not address this Court's award of attorney's fees as a sanction in regard to Defendants' discovery misconduct.

79. Accordingly, this Court finds that the Plaintiffs' Motion for Sanctions in regard to the discovery misconduct of Defendants to be unripe and HOLDS THAT PORTION OF THE MOTION IN ABEYANCE, until the Discovery Commissioner has ruled.

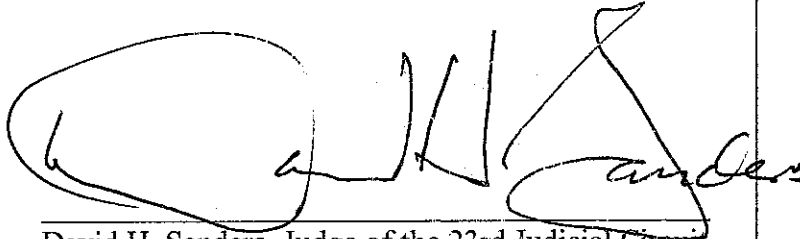
80. The Court further orders the Discovery Commissioner to rule within forty-five (45) days of the entry of this order to facilitate such further proceedings as may be required.

The Court notes any objections of the parties for the record.

The Clerk is directed to enter this Order and transmit copies of this Order to all *pro se* parties and counsel of record.

Entered: _____

1/14/11



David H. Sanders, Judge of the 23rd Judicial Circuit

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OB-C-431

OB-C-447

J. Campbell

R. Debski

A. Skinner

S. Potter

C. Hogen

J. Bordes

A. Amore

D. Scudiere

S. Wms. McAuliffe

T. Rohrbaugh

C. Steele

M. Stevens

K. Stallard

J. Walls

N. Paul

A. Emch

G. Perdo

1-18-11 *ex*

A TRUE COPY
ATTEST:

LAURA E. RATTENNI
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY B. Clark
DEPUTY CLERK