

IN THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA

JONATHAN WILSON, CHERI WILSON, and
STEVEN OWENS, JR., a minor, by his mother,
personal representative, and next friend, CHERI WILSON,
Plaintiffs,

v.

Case No. 07-C-77
Judge Andrew N. Frye, Jr.

RUSSELL BARKLEY and
CINDY BARKLEY,
Defendants.

and

JONATHAN WILSON, CHERI WILSON, and
STEVEN OWENS, JR., a minor, by his mother,
personal representative, and next friend, CHERI WILSON,
Plaintiffs,

v.

Case No. 08-C-67
Judge Andrew N. Frye, Jr.

MOUNTAINEER GAS COMPANY,
a West Virginia Corporation,
Defendant/Third-Party Plaintiff,

v.

RUSSELL BARKLEY and
CINDY BARKLEY,
Third-Party Defendants.

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CIRCUIT COURT OF
TUCKER CO. W.VA. JK

**ORDER DENYING DEFENDANT MOUNTAINEER GAS COMPANY'S MOTION FOR
RECONSIDERATION AND MOTION TO ADD ADDITIONAL EXPERT WITNESSES
AND GRANTING PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT**

On this 4th day of August 2010, this matter came on before the Court, the Honorable
Andrew N. Frye, Jr. presiding, upon the pending *Motion for Reconsideration and Motion to Add
Additional Expert Witnesses* filed by Defendant Mountaineer Gas and the Plaintiffs' *Motion for
Default Judgment*. The Plaintiffs were present by their counsel, Dorwin Wolfe, Geoffrey Brown,

and Jeremy McGraw. The Defendant Mountaineer Gas was present by its counsel Harry F. Bell, Jr., Pat A. Nichols, and Henry P. Sorett. Defendants Russell Barkley and Cindy Barkley were present in person and *pro se*.

Upon consideration of the arguments of counsel made this date and after thorough review of the pleadings, this Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

Findings of Fact and Procedural History

1. This civil action is the result of a gas explosion at a building owned by Defendants Barkley in Parsons, West Virginia on October 17, 2006. Plaintiffs, who were tenants of the Barkley Defendants in the second story of the building, suffered injuries as a result of the explosion. Defendant Mountaineer Gas Company provided the natural gas service to the Barkley building. The explosion was investigated by the West Virginia State Police and the West Virginia State Fire Marshal and was determined to be an accidental explosion caused by a buildup of natural gas inside the residence. The investigators obtained items of evidence from the scene during the investigation. Employees of Mountaineer Gas were on scene and assisted the Fire Marshal in conducting line tests. Defendant Russell Barkley admitted to TFC Roy that he removed a natural gas pipe, which he believed or was led to believe was inactive, from the interior of the building on the weekend prior to the explosion. The Barkley building was a total loss.

2. Subsequent to the explosion, the Plaintiffs retained Attorney Dorwin Wolfe. Mr. Wolfe contracted with Casto Investigations to ascertain the cause and origin of the explosion at the Barkley building. Mr. Wolfe contacted a representative of Mountaineer Gas Company to advise him of his action and Mountaineer Gas Company retained Attorney Harry F. Bell, Jr. to

represent its interest. Mr. Wolfe advised Mr. Bell that Casto Investigations was going to perform an assessment of the property for his client, that Mountaineer Gas may observe same, that Mr. Wolfe had no control over the fire scene, and that the City of Parsons was pressuring the Barkley's to demolish the building because it was a safety hazard. Mr. Wolfe did request that Mountaineer Gas obtain permission prior to entering the property to conduct any sort of evaluation. Defendant Mountaineer Gas did not retain an expert to conduct an independent examination of the Barkley building prior to its demolition and did not contact Casto Investigations to observe or participate in its review of the property. Mountaineer Gas has asserted previously that it was denied access to the Barkley property and has stated the following in a Motion to the U.S. Bankruptcy Court:

“After the fire, Debtors [Barkley Defendants] granted access to the property to the agents of the Plaintiffs in the Circuit Court matter and denied access to Mountaineer. Very little physical evidence was preserved and it appears that a great deal of potentially significant physical evidence and artifacts were lost, disposed of, or destroyed.”
Second Motion to Extend Time to File Proof of Claim and Nondischargeability Complaint, p. 2, ¶ 5, in part. June 29, 2010.

3. Ray Griffith from Casto Investigations gathered some materials from the building and placed those items in secure storage. He also took pictures of the scene and generated diagrams of the layout of the building's interior. Mr. Griffith did not conduct a NFPA 921 investigation of the Barkley building. In his deposition, Mr. Griffith stated, with regard to his understanding of his responsibilities at the Barkley building that “Mr. Wolfe was going to use his [Fire Marshall Smith] fire report. I was just there to recover evidence.” *Deposition of Raymond L. Griffith, Jr.*, p. 21, ln. 19-20, June 9, 2010.

4. At hearings in this matter prior to the inclusion of Mr. Sorett as Counsel, Defendant Mountaineer Gas seemed to be relying on the conclusions reached by the West Virginia Fire

Marshal and the West Virginia State Police which ruled the fire accidental and cited the disconnection of an active natural gas pipe from the interior of the home as the cause of the buildup of the natural gas prior to its ignition in the building. In this event, Defendant Mountaineer Gas would not be liable to the Plaintiffs. During the February 18, 2010 hearing, Mr. Bell, counsel for Mountaineer Gas, stated, in the context of the discovery issues in this matter that:

"In addition, the fact that there are no new facts in this case, there is nothing new that has come up. This building was destroyed. The facts giving rise to the incident: Mr. Barkley, I think, undid the pipe; the gas migrated, and there was an explosion. Mountaineer Gas, under law, under our tariff's operations, we are not responsible for anything on the inside." *February 18, 2010 Transcript*, p. 13, ln. 17.

5. Defendant Mountaineer Gas made no attempt to examine the items removed from the Barkley Building until March 2010. During the August 4, 2010 hearing on this matter, Mr. Sorett stated the following in his argument:

"Mountaineer was aware of the incident, but they were also aware that whatever occurred, if it was gas, occurred on the customer side of the meter. Under West Virginia law and its tariff, natural gas companies have no obligation downstream of the meter. For that reason, Mountaineer elected not to send somebody out to investigate this." *Transcript*, August 4, 2010, JAVS Video Courtroom at 20:55¹.

6. Deposition testimony from Defendant Barkley and Rodney Vandevander, an employee of Defendant Mountaineer Gas, regarding the circumstances under which the gas line was disconnected in the Barkley building, seems to indicate that the Mountaineer Gas representative was questioned regarding the safe removal of a gas pipe from the interior of the building. The accounts of the conversation differ; however, the representative of Defendant Mountaineer Gas did turn on the main gas line and begin gas service to the property after being

¹ The Court is referencing the video recording system inasmuch as a transcript of this hearing has not been requested or prepared.

questioned regarding the removal of interior gas pipe. This act or omission by the gas company representative is the source of liability for Defendant Mountaineer Gas.

7. Mr. Vandevander was unable to confirm or deny having conversations with Defendant Barkley regarding whether interior gas lines were active or could be safely removed by Defendant Barkley. Mr. Vandevander indicates that he cannot answer definitively regarding his contact with Defendant Barkley without consulting his gas service orders. These documents would have been generated by Mr. Vandevander on the date of the service call to the Barkley building and maintained by Defendant Mountaineer Gas. Defendant Mountaineer Gas, although having been requested to do so in discovery, has not provided this information to the Plaintiffs and now claims that it cannot find these documents.

8. During a pre-trial hearing held February 18, 2010, this Court was called upon to resolve a discovery dispute between Plaintiffs and Defendant Mountaineer Gas as to the late designation of experts. The Court's Scheduling Order, which was agreed to by all parties, required simultaneous disclosure of expert witnesses to be made by September 30, 2009. This Order was subsequently changed by an Agreed Order submitted by all parties in which it was ordered that the parties "disclose any and all expert witnesses, along with appropriate Rule 26(b)(4) information within thirty (30) days following the completion of the deposition of Mountaineer Gas Company employee Rodney Vandevander²". *Agreed Order*, p. 2, September 23, 2009. At no time prior to the expiration of the expert disclosure deadline did the Defendant Mountaineer Gas object to simultaneous disclosure of experts. Defendant Mountaineer Gas did not file its expert disclosure with this Court until February 16, 2010. Mr. Bell, Counsel for Mountaineer Gas, represented to this Court that the delay was an oversight by his office as the

² Mr. Vandevander was deposed on December 1, 2009.

attorney in his office that was handling this case had fallen ill. This Court did allow Defendant Mountaineer Gas to disclose its expert, David Weber, late; however, the Court ruled that no more experts would be allowed. Furthermore, the Court directed that Defendant Mountaineer Gas make full answer to the Plaintiff's interrogatories within 20 days of the hearing.

9. Defendant Mountaineer Gas made two supplemental disclosures within the Court's new deadline³. The contents of this disclosure included training records for Mountaineer Gas employees and operations manuals. Neither of these disclosures contained any information regarding the opinion of the Defendant's expert David Weber.

10. This case was set for jury trial on May 24-28, 2010; however, the trial was continued as a result of notification that the Barkley Defendants had filed for bankruptcy protection on October 22, 2009, had received a discharge and had their case closed on February 9, 2010, and had failed to list Mountaineer Gas Company as a potential creditor. Upon a motion by Mountaineer Gas to reopen the bankruptcy proceeding, the U. S. Bankruptcy Court reopened the Barkley bankruptcy and stayed these proceedings. Subsequently, the U. S. Bankruptcy Court lifted the stay and this case was allowed to proceed.

11. On June 14, 2010, the Court held a hearing to address the rescheduling of the trial. The jury trial in this matter has been set for the week of September 20-24, 2010. At this hearing, Defendant Mountaineer Gas requested to disclose additional experts and to depose Plaintiff's Attorney Dorwin Wolfe. Defendant Mountaineer Gas informed the Court that they are considering a possible spoliation claim based upon Attorney Wolfe's instructions to Casto Investigation not to conduct a NFPA 921 investigation of the Barkley Building. Defendant Mountaineer Gas claims it has been prejudiced because a NFPA 921 fire investigation was not

³ February 22, 2010 and March 3, 2010.

conducted on the Barkley Building and that without that investigation, its defense of the claim was hampered – particularly without a diagram of the gas pipe lines within the structure. The Court denied Defendant's request to depose Dorwin Wolfe. The Court likewise denied the Defendant's request to add additional expert witnesses, in accord with its February 18, 2010 Order. Prior to issuing the Order on July 1, 2010, the Plaintiffs filed a *Motion for Sanctions* based upon Defendant Mountaineer Gas's refusal to provide any information regarding the opinion of its Expert David Weber. The Court had previously given Defendant's 20 days from February 18, 2010 to disclose this information. The Court granted Plaintiffs' motion and struck Defendant's expert David Weber and will not allow his testimony at trial. The Court incorporated this ruling in its July 1, 2010 Order.

12. Defendant Mountaineer Gas disclosed David Weber's information and opinion to the Plaintiffs on July 12, 2010 and included same as an exhibit in its *Motion to Reconsider This Court's July 1, 2010 Order on Plaintiffs' Motion for Sanctions, For Leave to Designate Experts and to Modify Sanctions*. Plaintiffs filed a *Motion for Default*. All motions were set for oral argument on August 4, 2010.

13. On July 30, 2010, Defendant Mountaineer Gas disclosed a hand-drawn diagram of the interior gas lines in the Barkley building which was prepared on October 19, 2006 (two days after the explosion). The document indicates that it was "measured by Joe & Rod V." who are Mountaineer Gas employees Joe Dignan and Rodney Vandevander.

14. During the August 4, 2010 hearing, Defendant Mountaineer Gas explained the late disclosure of this document as follows:

"The document that was provided, the drawing, was initially prepared for Mr. Bell by Mr. Dignan in an effort to explain (inaudible), excuse me was prepared by Mr. Dignan for Mr. Bell as part of an attorney-client communication, to explain, client to lawyer what the piping

system looked like. It is an approximation, nobody ever dug out that house to find all that pipe ... We elected to waive the privilege on this document because it seemed to be more fact than privilege communication. So we waived the privilege on this and provided it to the plaintiff... We could have stood our ground, said this is privileged, put up a motion and objected. We thought this document should be disclosed." *August 4, 2010 Hearing, JAVS Video Courtroom at 19:05.*

Defendant Mountaineer Gas likewise prepared a privilege log to present to the Court regarding other documents in its possession. The deposition for Joe Dignan, the preparer of the diagram, was scheduled for August 5, 2010.

15. After the August 5, 2010 deposition, the Plaintiffs filed a *Second Supplemental Memorandum in Support of Their Motion for Default*, wherein the Plaintiffs included excerpts from the Joe Dignan deposition. The following exchange took place during the deposition regarding the preparation of the document:

Q. [Plaintiffs' Counsel] Why, again, did you create this sketch or diagram?

MR. SORETT: It's a sketch.

A. [Joe Dignan] Yeah, if you want to call it a sketch. So that I could remember and understand and maybe able to explain to somebody what the fire marshal was coming off with.

Q. [Mr. McGraw] And who did you think you would have to explain it to?

A. [Joe Dignan] I wasn't sure. I thought, well, I better, you know, I better make some notes there.

Joe Dignan Deposition Transcript, August 5, 2010, p. 110, ln. 6-19.

*Conclusions of Law: Motion for Reconsideration and
Motion to Add Additional Expert Witnesses*

16. Defendant Mountaineer Gas filed a *Motion for Reconsideration of the Court's July 1, 2010 Order* and argued that it was entitled to respond to the Plaintiffs' Motion for Sanctions; that

the Court improperly excluded Mountaineer's expert David Weber, and that it should be allowed to add additional expert witnesses.

17. The Court recognizes that this type of reconsideration does not exist under the West Virginia Rules of Civil Procedure; however, the Court is bound by the decision of the West Virginia Supreme Court of Appeals wherein it observed "[w]e have also recognized that "[a trial] court has plenary power to reconsider, revise, alter, or amend an interlocutory order[.]" Coleman v. Sopher, 201 W.Va. 588, 605, 499 S.E.2d 592, 609 (1997).

18. Argument on this issue was not allowed at the August 4, 2010 hearing inasmuch as this Court is not changing its mind. Mountaineer Gas failed to abide by this Court's Order from the February 18, 2010 hearing. It is *Motion*, Mountaineer Gas admits that it did not supplement Mr. Weber's opinion in the prescribed time frame, but claims that this delay can be mitigated.

19. This Court does not appreciate nor tolerate Defendant Mountaineer Gas's attitude towards Orders of this Court. It was only by leave of this Court that Mountaineer Gas was allowed to include David Weber as an expert inasmuch as Mountaineer Gas had not disclosed him timely and in accordance with the *Agreed Order* setting the date for simultaneous expert disclosure. During the February 18, 2010 hearing, this Court set the 20 day deadline to have this information provided to the Plaintiffs. The Court fully intended for Mountaineer Gas to comply with this disclosure deadline. Mountaineer Gas's argument that it was prejudiced by simultaneous expert disclosure is disingenuous considering that it agreed to same not only once, but twice⁴ during this litigation.

20. Mountaineer Gas has likewise claimed that it could not provide its expert opinion because David Weber needed the testimony of the Barkleys, Mr. Griffith (of Casto

⁴ See *Scheduling Order* entered June 8, 2009 and *Agreed Order* entered September 23, 2009.

Investigations), and Mr. Buchan (Plaintiffs expert), to form his opinion. With the exception of Mr. Buchan, the other witnesses were all known to Defendant Mountaineer Gas prior to the deadline set by the Court and the Defendant could have requested their depositions prior to the expiration of the disclosure deadline. Evidently the earliest Mr. Weber could provide his opinion as to what caused the explosion was July 16, 2010, well past the deadline established by the Court and two months after the original trial date in this matter.

21. The Court's July 1, 2010 Order fully addresses the basis for the sanction decision and it will not be reconsidered.

22. As to the Motion to Add Additional Witnesses, this Motion has been previously made and rejected by this Court in its July 1, 2010 Order. This Motion will again be rejected now. The time to designate expert witnesses has expired and the Court will not grant leave for Mountaineer Gas to add additional experts.

Conclusions of Law: Motion for Default Judgment

23. The Plaintiffs have moved for a Default Judgment in this case predicated upon the discovery abuses on the part of Defendant Mountaineer Gas. The Court recognizes that this is the most severe sanction it could impose; however, there appears to be no lesser alternative to cure the prejudice the Plaintiffs have suffered in this matter.

24. "The inherent power of courts to sanction misconduct includes the authority to enter default judgment orders in appropriate circumstances." Syl Pt. 4, State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, Docket No. 35440, ___ W.Va. ___, ___ S.E.2d ___ (2010).

25. In the Richmond American decision, the Supreme Court of Appeals of West Virginia recognized that:

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. Id., Syl. pt. 7

26. The Richmond American decision was guided by the Court's precedent in Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996), wherein Justice Cleckley, writing for the Court, explained the framework for issuing sanctions against an offending party as follows:

"Although Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not formally require any particular procedure, before issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct." Id., Syl. Pt. 1.

"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., Syl. Pt. 2.

27. Accordingly, the Court has identified the following wrongful conduct on the part of Defendant Mountaineer Gas in this litigation:

a. **Written Discovery Abuses.**

Plaintiffs served their interrogatories and request for production of documents in March 2009. Defendant Mountaineer Gas had made some responses to the Plaintiffs' requests. At the February 18, 2010 hearing, in granting the Plaintiffs' Motion to Compel, Defendant Mountaineer Gas was ordered to provide "[a]ll discovery, twenty days from today." *February 18 2010 Hearing Transcript*, p. 19, ln. 1. The Defendant did provide two additional disclosures prior to the discovery deadline; however, these submissions were far from complete. As for the missing discovery, Defendant Mountaineer Gas's counsel stated at the August 4, 2010 hearing that "[w]hen I got the Motion for Default, we went looking and had some serious examinations about what it was that might be missing." *August 4, 2010 Hearing*, JAVS Video Courtroom at 16:25. Plaintiffs' Motion for Default was filed July 27, 2010, and Defendant Mountaineer Gas supplemented its discovery on July 30, 2010. As this case has progressed, the following acts and omissions in discovery on the part of Defendant Mountaineer Gas have caused prejudice to the Plaintiffs.

i. **Failure to provide requested documentation – Vandevander Records.**

Plaintiffs deposed Rodney Vandevander on December 1, 2009. During his deposition he was questioned at length regarding his contact with Defendant Barkley while inspecting the Barkley building prior to beginning natural gas service. Plaintiffs had been provided with some documents relating to Mr. Vandevander's service calls to the Barkley building but were informed during the deposition that other documents had been generated relating to the service call. During his deposition, Mr. Vandevander was unable to answer specific questions regarding the service call without referring to the documents he generated and submitted to Mountaineer Gas.

Defendant Mountaineer Gas does not deny the documents existed; it simply cannot locate the documents. Defendant Mountaineer Gas has represented to this Court that it went looking for the documents, but claims that these documents may have been lost in the shuffle during the sale of Mountaineer Gas.

This presents a difficult situation for the trier of fact. Rodney Vandevander's service calls to the Barkley Building and his interaction with Defendant Barkley constitute the liability link between Mountaineer Gas and the Plaintiffs. Plaintiffs and Defendants Barkley are prejudiced by Rodney Vandevander's position because Mr. Vandevander claims not to have an independent recollection of the events those dates and Mountaineer Gas cannot provide his documented account of the events those dates.

However, Defendant Mountaineer Gas has asserted that Defendant Barkley is not being truthful in his accounts of his interactions with Mr. Vandevander relative to the gas pipes on the interior of the building all the while having in its custody and control (at some point in time) documents that could tend to prove or disprove Mr. Barkley's assertions.

The alleged loss of the Rodney Vandevander records coupled with Mr. Vandevander's equally absent independent recollection of events conveys a considerable tactical advantage to Defendant Mountaineer Gas that could potentially interfere with a rightful decision in this case.

ii. Failure to promptly provide requested documentation – Odorization Tests.

During the deposition of Rodney Vandevander on December 1, 2009, he indicated that Donnie McWilliams, a fellow Mountaineer Gas employee, did an odorization test after the explosion and completed a written form indicating the results of the test. The written form was given to Mr. Vandevander who filed it with Mountaineer Gas. The

Plaintiffs renewed their request for this information via letter to Defendant Mountaineer Gas's counsel prior to the Court's discovery cutoff. During the deposition of Assistant Fire Marshall Smith, he was questioned by Defendant Mountaineer Gas regarding the natural gas odorization tests performed by agents of Mountaineer Gas. Mr. Smith was not aware that these tests had been conducted by Defendant Mountaineer Gas. The results of the odorization tests were not provided to the Plaintiffs until July 30, 2010. The odorization tests were certainly discoverable information that was wrongfully withheld from the Plaintiffs during the discovery period. The withholding of this information until after the completion of the majority of the depositions and less than two months prior to the trial threatens to interfere with a rightful decision in this case.

iii. Failure to raise a privilege objection to documents in its possession and withholding same without any cause – Joe Dignan Drawing.

In March 2009, the Plaintiffs served Interrogatories and Requests for Production of Documents to Defendant Mountaineer Gas. Requests numbered 9 and 23 specifically requested the Defendant to disclose any drawings, etc. relating to this matter. Defendant Mountaineer Gas did not disclose the existence of the Joe Dignan Drawing in its responses to the discovery requests and did not claim any privilege relating to this document. On July 30, 2010, Defendant Mountaineer Gas provided the drawing to the parties and argued at the August 4, 2010 hearing that the drawing was considered by the Defendant to be a communication between client and attorney and therefore privileged. However, the Defendant chose to waive the privilege and provide the document. At the August 5, 2010 deposition of Joe Dignan, Mr. Dignan did not testify that he prepared the document for his attorney, but rather for his own record and understanding.

This drawing is very significant. Since the February 18, 2010 hearing, Defendant Mountaineer Gas has claimed that parties conspired to spoil⁵ the evidence at the Barkley Building and failed to conduct an NFPA 921 examination of the structure. Defendant Mountaineer Gas has asserted these failures have made it difficult for the company to defend itself against liability particularly since there was no preservation of the piping system or drawing of same to help the Defendant prepare its defense.

The Defendant's conduct is inexcusable. Failing to disclose the existence of the document, failing to assert a privilege regarding same⁶, disclosing it over a year after it was first requested and two months before trial, claiming falsely that it fell under the protections of attorney-client privilege, having the benefit of the document while questioning Plaintiffs witnesses and Defendants Barkley during depositions, and all the while crying foul over the manner in which the Plaintiffs developed their case which Defendant Mountaineer Gas asserted foreclosed its ability to formulate the very document it has in its possession is blatantly wrongful conduct which has impacted discovery to a point that it threatens to interfere with a rightful decision in this case.

b. Late Disclosure of Expert Witnesses.

At the February 18, 2010 hearing, the Court was requested to grant leave to the Defendant Mountaineer Gas to disclose its expert, David Weber, after the deadline to do so had passed. Over the Plaintiffs' objection and in consideration of Defendant's counsel's illness, the Court allowed the inclusion of Mr. Weber as an expert witness, but clearly ruled in response to

⁵ A complete discussion of the spoliation claim will follow in section 26c.

⁶ Defendant Mountaineer Gas also arrived at the August 4, 2010 hearing with a privilege log. The Court does not believe that these items had been disclosed and identified as privileged during discovery. Plaintiffs did not ask the Court to review the documents to ascertain whether a privilege applied. However, this is another example of the Defendant Mountaineer Gas's failure to note items as privileged initially to allow the determination of whether an item truly is privileged to be addressed by the Court.

Plaintiffs' counsel's inquiry regarding whether Defendant could continue to disclose additional experts that "No, that time is over." *February 18, 2010 Transcript*, p. 19, ln. 24.

In light of the very clear order from the Court, Defendant Mountaineer Gas has continued to request leave to disclose additional expert witnesses, has filed additional expert witness disclosures as part of Motions, and has attempted to schedule depositions of these expert witnesses with opposing counsel in anticipation of the Court including these witnesses. These actions indicate a complete lack of respect of the rulings of this Court regarding this discovery issue.

c. Accusations of Spoliation.

After Mr. Sorett's inclusion as counsel for Defendant Mountaineer Gas, accusations of spoliation were first made against the parties in the litigation. The spoliation case is very weak given the discovery omissions by Defendant Mountaineer Gas. The argument by Defendant Mountaineer Gas is that it was relying upon Mr. Wolfe's representation that he would have a NFPA 921 investigation completed and that it was not given notice of a change in instructions to Casto Investigations. Defendant Mountaineer Gas likewise asserts that it was denied access to the property prior to its demolition. However, Defendant Mountaineer Gas was notified that an investigation was going to be conducted and that it could have representatives present if it desired. Additionally, Mr. Bell, in a November 1, 2006 letter to Mr. Wolfe, advised that he was going to have an expert present for Mountaineer Gas during the Casto Investigation review of the property and that he would coordinate that with Casto Investigations. Contrary to his letter, Mr. Bell did not secure an expert to review the Barkley Building prior to its demolition.

During the August 4, 2010 hearing, Defendant Mountaineer Gas made the following pertinent admission on the record:

"Mountaineer was aware of the incident, but they were also aware that whatever occurred, if it was gas, occurred on the customer side of the meter. Under West Virginia law and its tariff, natural gas companies have no obligation downstream of the meter. For that reason, Mountaineer elected not to send somebody out to investigate this."

Transcript, August 4, 2010, JAVS Video Courtroom at 20:55⁷.

This admission runs counter to arguments previously made by Defendant Mountaineer

Gas claiming that it was denied access to the structure by the Barkley Defendants and by Mr. Wolfe. Obviously, it elected not to investigate. Additionally, Defendant Mountaineer Gas's late disclosure of the Joe Dignan Drawing indicates that Defendant Mountaineer Gas did have total access to the Barkley Building on October 19, 2006 (two days after the explosion). Finally, Defendant Mountaineer Gas did not even attempt to review the materials collected during the Casto investigation until March 2010 – over three years after these items had been collected. The spoliation claim is frivolous and as a result of the attempt to pursue this claim, the specific wrongful conduct on behalf of Defendant Mountaineer Gas has occurred:

i. As it relates to Dorwin Wolfe, Esq.

Dorwin Wolfe, Esq. was the attorney the Plaintiffs hired immediately after the explosion. Prior to the June 14, 2010 hearing, Defendant Mountaineer Gas requested to depose Mr. Wolfe regarding his case preparation relating to his directives to Casto Investigations, specifically his instruction not to conduct a full NFPA 921 investigation of the building. During the June 14, 2010 hearing, Defendant Mountaineer Gas went through a lengthy list of the ways in which its case preparation had been impacted by the acts of Mr. Wolfe and implored the Court to allow both discovery and expert witnesses

⁷ The Court is referencing the video recording system inasmuch as a transcript of this hearing has not been requested or prepared.

that would allow it to prove that Mr. Wolfe had prejudiced its case. All Plaintiffs were present in the Tucker County Courtroom during this hearing.

Making a baseless attack against Plaintiffs' counsel in open Court and in the presence of Plaintiffs undermines the attorney-client relationship these Plaintiffs have with Mr. Wolfe. The Supreme Court of Appeals of West Virginia has previously held that "[a]n attorney's nondelegable duty of loyalty to his client and the level of trust a client places in his attorney are ... essential elements of the attorney-client relationship." Delaware CWC Liquidation Corp. v. Martin, 213 W.Va. 617, 622, 584 S.E.2d 473, 478 (2003). In this case, the Plaintiffs certainly must have a great deal of trust and respect for Mr. Wolfe because they retained him almost immediately after this explosion, and Mr. Wolfe has represented⁸ these Plaintiffs for over three years regarding this claim. For Defendant Mountaineer Gas to argue that Mr. Wolfe has destroyed evidence and that the Defendant Mountaineer Gas will be able to present evidence of this act to the jury, effectively plants seeds of doubt in the Plaintiffs minds as to whether they can trust Mr. Wolfe to competently handle this case. This is unacceptable particularly if the parties attempt to mediate this claim prior to trial inasmuch as the Plaintiffs may be induced into taking less because of a reduction in their level of trust in Mr. Wolfe. This undertaking by Defendant Mountaineer Gas threatens to interfere with a rightful decision in this case.

ii. As it relates to Barkley Defendants.

The Barkley Defendants have been proceeding *pro se* throughout this case. They have likewise been involved in a bankruptcy proceeding during the pendency of this

⁸ Mr. Wolfe, at some point, brought in Mr. Brown and Mr. McGraw as co-counsel on this matter.

matter in which they failed to list this civil action. Defendant Mountaineer Gas filed a claim against the Barkleys in Bankruptcy Court requesting that any liability and damages imposed on the Barkley Defendants be characterized as non-dischargeable. In its *Second Motion to Extend Time to File Proof of Claim and Nondischargeability Complaint*, Defendant Mountaineer Gas makes several accusations against the Barkleys and Mr. Wolfe regarding the investigation of the Barkley building, implying some sort of collusion and fraudulent activity on the part of these parties. The Court assumes that Mountaineer Gas is implying in this filing that the Barkley's denied access to the property for Mountaineer Gas to conduct an investigation but allowed access to Mr. Wolfe's investigator who intentionally refused to conduct a NFPA 921 investigation to prejudice Mountaineer Gas.

The accusations in this filing dated June 29, 2010 are simply untrue and run counter to the admission made by counsel for Defendant Mountaineer Gas on August 4, 2010 – "... Mountaineer elected not to send somebody out to investigate this." *Transcript*, August 4, 2010, JAVS Video Courtroom at 20:55. Defendant Mountaineer Gas has made these spoliation claims and – for the benefit of the Bankruptcy Court, fraud and collusion claims - placing the Barkley Defendants at a distinct disadvantage to have to defend themselves against the substantive claims in this case and the fringe spoliation claim in Bankruptcy Court. This Court specifically finds and concludes that no collusion or fraud involving the Barkley Defendants and Mr. Wolfe has taken place in this matter⁹.

⁹ The Court would note that Plaintiffs' counsel has on two occasions volunteered to provide copies of documents and discovery to the Barkley Defendants when the Barkleys' have represented that they did not receive these materials. The Court appreciates the professionalism exhibited by Plaintiffs' counsel in dealing with *pro se* Defendants and certainly wishes this were the rule rather than the exception in civil litigation.

iii. As it relates to Casto Investigations and Fire Marshal Edsel Smith.

Defendant Mountaineer Gas has also devoted considerable argument and time in discovery to criticizing the investigation conducted by Casto Investigation and by West Virginia Assistant Fire Marshal Smith in the context of spoliation. Defendant Mountaineer Gas has stated openly on the record that it was considering a separate cause of action against Casto Investigations relating to its work on the Barkley building. If Mountaineer did not believe that these investigations were appropriate, it should have retained an expert and properly disclosed that expert within the time frame to do so. A collateral attack of spoliation is not appropriate.

28. The wrongful conduct enumerated in paragraph numbered 27 and its subparts is certainly worthy of sanction by this Court. In formulating 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." Syl. Pt. 2, Bartles, 196 W.Va. at 381, 472 S.E.2d at 827. The actions by Defendant Mountaineer Gas rise to the level of "serious litigation conduct" as contemplated in syllabus point 7 of Richmond American decision and require the most serious sanction of default judgment for the following reasons:

a. Defendant Mountaineer Gas willfully withheld the Joe Dignan drawing during discovery, later claimed it was privileged material (attorney-client work product privilege which it did not raise in its responses to Plaintiffs' Requests for Production of Documents), and less than 24 hours after claiming the document to be attorney-client communication/work product Defendant's own witness testified that the drawing was done for his own reference rather than for Mr. Bell. While withholding this document, Defendant Mountaineer Gas claimed it was

being prejudiced by the incomplete nature of the investigation conducted by Casto Investigations -- specifically its lack of detail of the interior gas pipes. Defendant Mountaineer Gas's withholding of the document also impacted the quality of fact-finding in the depositions of all witnesses wherein the gas pipe layout was in issue. No lesser sanction than default will cure this deliberate act by Defendant Mountaineer Gas because the intentional withholding of both the identity of the document and the document itself made preparation for trial more difficult and prejudiced the Plaintiffs and Defendants Barkley. Furthermore, Defendant Mountaineer Gas was dishonest in its assertion that it did not know the details of the interior gas pipe layout.

b. Defendant Mountaineer Gas willfully failed to cooperate with written requests for discovery, specifically with respect to odorization tests (which were provided late) and the Rodney Vandevander written materials (which were not provided at all). The non-disclosure of the Rodney Vandevander materials conveys a huge tactical advantage to Defendant Mountaineer Gas because Mr. Vandevander has testified in his deposition that he does not know what happened at the Barkley building without consulting his notes from that day and Mountaineer Gas cannot provide that documentation. Mr. Vandevander's contact with Mr. Barkley is the source of Defendant Mountaineer Gas's liability in this matter and a clear understanding of what transpired between these individuals is key to not only the Plaintiffs' case against Mountaineer Gas, but in Defendant Mountaineer Gas's claim against Defendants Barkley. Defendant Mountaineer Gas's excuse that it cannot find the document and blaming same on a sale of the company may be more compelling had Defendant Mountaineer Gas not hidden the existence of the Joe Dignan drawing throughout discovery. As it stands, the Court cannot be satisfied that Defendant Mountaineer Gas is truthfully representing the status of these documents.

c. The allegations of spoliation leveled against Dorwin Wolfe represented a bad faith attempt to interfere with the attorney-client relationship to the Plaintiffs' detriment. The spoliation claim has failed given the admission by Defendant Mountaineer Gas's counsel that Mountaineer elected not to send someone out to investigate the explosion. Prior to this admission, Defendant Mountaineer Gas claimed that it was prevented from accessing the property by the Barkleys (evidently in collusion with Mr. Wolfe) and that Mr. Wolfe directed that Casto investigations not conduct a NFPA 921 investigation when Defendant Mountaineer Gas was relying on same. Furthermore, Defendant Mountaineer Gas's statements at the June 14, 2010 hearing regarding potential independent spoliation claims that the Plaintiffs may have against Casto Investigations in the Plaintiffs' presence, which was a further attempt to undermine the attorney-client relationship between the Plaintiffs and Mr. Wolfe, particularly since Casto Investigations was hired on the Plaintiffs behalf by Mr. Wolfe.

d. For all other reasons indicated in the identification of wrongful conduct section.

29. The Court was not presented with any mitigating factors to excuse Defendant Mountaineer Gas's behavior in this action. The only information presented by way of mitigation was Defendant's claim that some documents had been lost during the sale of Mountaineer Gas. This does not explain why it was not until receipt of the Motion for Default that "we went looking and had some serious examinations about what it was that might be missing." *August 4, 2010 Hearing, JAVS Video Courtroom at 16:25.* The Court does not believe that Defendant Mountaineer Gas just discovered the withheld information immediately prior to supplying it on July 30, 2010.

30. The actions by Defendant Mountaineer Gas seem to indicate a pattern of conduct. After the deposition of Mountaineer Gas employee Rodney Vandevander on December 1, 2009,

the Defendant Mountaineer Gas was first seriously concerned about their potential liability to the Plaintiffs. At this point, Defendant Mountaineer Gas had not conducted a review of the property by its expert, the building was already demolished, and expert witness disclosures were due 30 days after the deposition. Instead of formulating a defense, Defendant Mountaineer Gas went on the offensive accusing the parties of evidence spoliation and refusing to provide relevant discovery timely. This was certainly a pattern of conduct and a purposeful plan of action by Defendant Mountaineer Gas.

31. In light of all the wrongful and sanctionable conduct by Defendant Mountaineer Gas and in consideration of this conduct's threat to a rightful decision in this case, the Court has no choice but to impose the sanction of default judgment. Continuances and Defendant's offer to bring witnesses in for depositions on its dime will not cure the harm to the Plaintiffs' case. Defendant Mountaineer Gas has previously been subject to a Motion to Compel, which resulted in a Court Order that it largely ignored, and subsequent lost its expert witness (which was disclosed late and allowed by leave of this Court) on Plaintiffs' Motion to Strike. Evidently lesser sanctions do not have the desired effect of bringing discovery in this matter to completion. Plaintiffs are entitled to have this case brought to completion inasmuch as the injury occurred in 2006 and the matter has been pending against Mountaineer Gas since 2008. Plaintiffs have diligently prepared their case and have been impeded by the conduct of the Defendant in refusing to provide requested discovery information.

32. Furthermore, it would be unfair to the Barkley Defendants to allow the claims leveled against them by Defendant Mountaineer Gas to stand based upon the same identified misconduct committed by the Defendant Mountaineer Gas. As to Plaintiffs' claims against the Barkley Defendants, Defendant Mountaineer Gas's conduct has deprived the Barkley Defendants

a meaningful opportunity to defend themselves, in particular the refusal to provide documentation relating to Rodney Vandevander's gas service call at the Barkley building and concealing the piping diagram. Inasmuch as "[a] court 'has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.' 14 Am. Juris., Courts, section 171." Syl. Pt. 3, Shields v. Romine, 122 W. Va. 639, 13 S.E.2d 16 (1940), the Court will dismiss these claims.

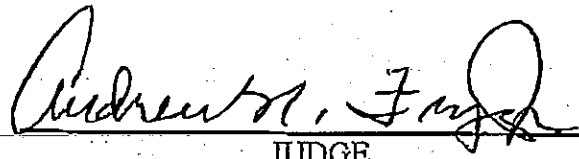
ACCORDINGLY, it is hereby ORDERED:

1. Defendant Mountaineer Gas's *Motion for Reconsideration and Leave to Add Additional Witnesses* is DENIED.
2. Plaintiffs' *Motion for Default* is GRANTED.
3. Defendant Mountaineer Gas's Third Party Complaint is DISMISSED.
4. Plaintiffs' Complaint, as it relates to Defendants Russell Barkley and Cindy Barkley, is DISMISSED.
5. The style of this case shall henceforth be: JONATHAN WILSON, CHERI WILSON, and STEVEN OWENS, JR., a minor, by his mother, personal representative, and next friend, Cheri Wilson, Plaintiffs v. MOUNTAINEER GAS COMPANY, a West Virginia Corporation, Defendant. Civil Action No. 08-C-67.
6. This matter is hereby continued until September 8, 2010 at the hour of 9:00 am for a pretrial conference. The jury trial on the issue of damages only shall commence on September 20, 2010 at the hour of 9:00 a.m. for jury selection immediately followed by opening statements and the presentation of evidence. The Court is reserving the entire week of September 20, 2010 for this trial.

7. The Circuit Clerk shall provide a copy of this Order to all counsel of record, an attest copies to Russell Barkley, Cindy Barkley, and to the United States Bankruptcy Court for the Northern District of West Virginia for filing in Case No. 09-02398.

8. Objections to any adverse rulings by the Court are hereby saved.

ENTERED this 23rd day of August 2010.


JUDGE

A TRUE COPY:

ATTEST: MONNA JEAN BAVA, CLERK
CIRCUIT COURT OF TUCKER COUNTY, WV

BY Monna Helms DEPUTY