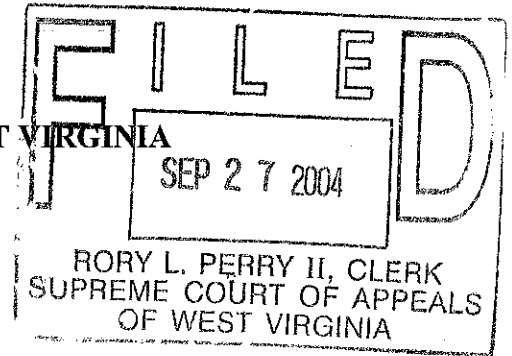


Appeal No. 31730

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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**CARLTON, INC., a West Virginia corporation;  
CHARLES V. MAESCHER & COMPANY,  
a foreign corporation; BBL-WEST VIRGINIA,  
L.L.C., a West Virginia limited liability company;  
BBL-CARLTON, L.L.C., a West Virginia  
limited liability company; MAESCHER  
CONTRUCTION, INC., a foreign corporation;  
MAESCHER INDUSTRIES, INC., a foreign  
corporation; MATRIX BUILDING COMPANY,  
a foreign corporation; BARRY, BETTE & LED  
DUKE, INC., a foreign corporation; BBL-CENTRAL,  
L.L.C., a limited liability company; DONALD LED  
DUKE; CARL F. AGSTEN; ROBERT COMPTON;  
GRANT V. HESSER; JOHN DOE; and  
DOUGLAS W. BARKER,**

**Appellants,**

v.

**CATTRELL COMPANIES, INC.,**

**Appellee.**

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**REPLY BRIEF OF APPELLANTS  
BARRY, BETTE & LED DUKE, INC. AND GRANT V. HESSER**

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## ARGUMENT

**A. Appellee attempts to argue its case in chief but the merits of this appeal.**

In Appellee's Statement of the Case (Appellee's Brief, pages 1-4), the Appellee attempts to argue its case in chief, rather than the merits of this appeal. This appeal is based upon a disproportionate sanction over a routine deposition scheduling dispute and a minor skirmish over the production of discovery documents. None of the Appellee's speculations regarding transfers of assets has ever been proven. There is no basis to treat Appellant's speculations as true by this Court for the purposes of this appeal. Rather, those factual issues are still in dispute.

While Appellee would like have the focus of this appeal directed to its version of the merits of the case below, the proper focus of this appeal must be on whether the ultimate sanction -- specifically, the Circuit Court's Findings of Fact, Conclusions of Law and Order on October 1, 2003 striking the defenses and rendering judgment by default for discovery abuses against BB&L Duke and Mr. Hesser -- is appropriate under the circumstances.

**B. Appellee misstates discovery issues: there is no pattern of disregard for the Court's Orders.**

Appellee claims that Appellants failed to comply with the Circuit Court's prior Order on discovery (Appellee's Brief, Page 5). This is not correct. On December 14, 1999, Appellee Cattrell filed a motion for discovery sanctions and a hearing was held January 6, 2000. On January 20, 2000 Appellants provided responses with objections. The Circuit Court entered an Order on February 8, 2000 requesting Appellants to file full answers under oath and to produce copies of all the requested documents within twenty days of the Order. Cattrell's attorney's fees relating to compelling discovery were promptly paid by Appellants after the entry of the February 8 Order. The Appellants had already complied with the requirement to respond

to the discovery and completed their responsibilities under the February 8, 2000 Order by paying Cattrell's attorney's fees.<sup>1</sup> Also, Appellee claims that the Appellants did not comply with Appellee's May 2, 2000 motion to strike Hesser and BB&L Duke's Answers to the Complaint. The Appellee's May 2, 2000 motion remains unresolved, and the trial court has never granted that motion. Appellee has not shown a pattern of disregard for Court orders issued in this case, because the Appellants did not disregard the orders of the Court.

Appellee further cites to Appellants' internal communication regarding scheduling depositions (Appellee's Brief at 6-7 and 12-13). These problems do not indicate a pattern of abuse vis-a-vis the Court, but were internal issues that the Appellants were experiencing. As stated in the Appellants' initial brief, there were routine scheduling issues, which contributed to problems with the depositions. Cattrell noticed depositions for July 19, 2001 on July 6, 2001. Both deponents reside outside the state of West Virginia, but Cattrell did not seek any subpoena for depositions in any foreign jurisdictions. Mr. Hesser had no indication his deposition was scheduled by Cattrell throughout this time period. There is simply no basis to convert routine scheduling issues into allegations of failure to comply with the orders of the trial court.

**C. Default Judgment was not properly granted under the circumstances.**

Appellee ironically relies on caselaw that proves that the sanction in this case was too harsh. In each case raised by the Appellee, the party receiving the sanction was guilty of far more egregious conduct than could be said to have occurred in the instant case, and, unlike the Appellants, the parties were given a warning before the court issued its ultimate sanction. The Appellee cites to Smallwood v. Raleigh General Hospital, 459 S.E. 2d 159 (W.Va. 1995), but the

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<sup>1</sup> Additionally, the Appellee's brief at page 5 states that the "Appellees [*sic*] failed to withdraw their untimely objections..." following the January 6, 2000 hearing. This strange argument has no legal basis. There is no legal requirement that a party must withdraw an objection after losing on a motion.

facts in Smallwood include instances where counsel for the sanctioned party failed repeatedly to respond to discovery requests and failed to appear for a hearing which would have prevented dismissal of the action. While the case was ultimately dismissed, the dismissal only occurred after the plaintiff was given a last chance by the circuit court before the case was dismissed. Appellant was given no such last chance by the trial court below.

Similarly, in Kincaid v. Southern West Virginia Clinic, 475 S.E.2d 145 (W.Va. 1996), the trial court gave the plaintiff one last chance before dismissing the case entirely. In Kimberly Industries v. Lilly Explosives, 486 S.E. 2d 324 (W.Va. 1997), the plaintiffs failed to respond to interrogatories and failed to appear at a hearing in relation to a motion to compel. Still, the trial court gave a warning and held a hearing (at which the errant counsel failed to appear) before issuing the sanction of dismissal. In State ex. rel. McDowell County Sheriff's Dept. v. Stephens, 452 S.E.2d 432 (W.Va. 1994), plaintiff's counsel failed to comply with the court's order compelling discovery, failed to appear for three depositions, and eventually failed to appear at the hearing on the petitioners' motion to dismiss before that motion was subsequently granted. In Given v. Field, 484 S.E. 2d 647 (W.Va. 1997), the defendant ignored eleven separate orders by the trial court issued over a two-year period. As opposed to the discovery disputes at issue in the instant case, the discovery in Given was consistently ignored, put off, and postponed by the defendant for over two years.

The Appellee tries to distinguish Mills v. Davis, 567 S.E. 2d 285 (W.Va. 2002), from the instant case but with little success. Mills is practically identical to the instant case because it involves misunderstandings and miscommunications as to scheduling issues. As noted above, the Appellants never ignored an Order compelling discovery of any type. The trial court never issued an order to attend the deposition. Here, there was no circumstance so obnoxious as ignoring eleven court orders over a period of two years. And, importantly,

Appellants were not afforded the opportunity for a last chance, enjoyed by the offending parties in Smallwood, Kincaid, Kimberly, Stephens, and Given. Appellants were given a sanction which, ultimately, was too harsh a punishment for the purported offense and without a warning that the ultimate sanction would follow.

**D. Deposition attendance under Rule 37(d).**

The Appellee's reliance upon R.W. International Corp. v. Welch Foods Inc., 937 F.2d 11 (1<sup>st</sup> Cir. 1991) is misplaced. As in the instant case, there was no order compelling answers to questions in R.W. International. Because such an order did not exist, dismissal of the suit could not be sustained. While Rule 37(d) does authorize sanctions for a party's failure to attend a properly noticed deposition, it is clear that less onerous sanctions than dismissal should first be attempted. Typically, courts will use Rule 37(d) to award a monetary sanction to rectify the damages. See W.Va. R. Civ. P. 37(d); 7 James Wm. Moore, Moore's Federal Practice § 37.90 (Matthew Bender 3d ed.). Here, attorney's fees relating to compelling discovery were promptly paid by Appellants after the trial court's February 8 Order.

The Appellee incorrectly speculates about Fleet National Bank v. Tellier, 171 B.R. 478 (D.R.I. 1994), by changing the facts to fit the instant case. Appellee states that "if the authority of Fleet were to be applied to this matter, then a 37(d) sanction of default judgment would be sustained. (Appellees Brief at 21.) Appellee's conclusion is a futile legal argument and without basis in law. Appellee's further statement that "discovery violations abound" in the instant case is simply not supported by the facts. There were numerous mitigating circumstances for the delayed deposition of the Appellant's representative. The representations made to the trial court and to counsel were that the New York counsel had been in trial and unable to make the arrangements. Further, New York counsel made an offer for taking the deposition four days after the date in the notice of deposition, but Appellee's counsel rejected the offer.

**E. Judgment was not entered for a sum certain.**

The damage claims against Appellant do not lend themselves to a “sum certain” order. To accept Appellee’s arguments on this point is to make the “sum certain” language of W.Va. R. Civ. P. 55. Rule 55(b)(1) completely irrelevant. Rule 55 provides that a claim is for a sum certain “where the amount due cannot be reasonably disputed, is settled with respect to amount, ascertained and agreed upon by the parties, or fixed by operation of law.” None of these criteria is met.

The amount awarded was based entirely on the Complaint, which is predicated upon the unpaid balance of the jury award in the Underlying Action. A claim is not for a sum certain merely because the complaint states a specific amount -- any sum must be reasonably linked to the default. The verdict in the Underlying Action is based on two distinct claims: (i) unpaid contract amounts and (ii) impairment of Cattrell’s bonding capacity. It is unclear how these claims and amounts have a nexus to the default judgment in favor of Cattrell. Furthermore, the October 1, 2003 Order makes an award of punitive damages. This is directly contrary to the holding in Kocher v. Oxford Life Ins. Co., 2004 WL 1381005 (W.Va., Jun 17, 2004)(Slip Op. 31539). In Kocher, Oxford’s conduct was so purposeful that it merited severe sanctions. The trial court struck Oxford’s defenses and granted a judgment on liability against Oxford. This Court agreed with the judge’s decision on liability; but, the jury instructions issued by the trial court left the jury no choice other than to award punitive damages. This Court ruled that the instruction that punitive damages must be awarded was too great a sanction: the issue of punitive damages should be left to the discretion of a jury. Here, the assumption that punitive damages could somehow simply be construed from the complaint is even more outrageous than instructing a jury to award punitive damages. For these reasons, at a minimum, an evidentiary

hearing must be held so that BB&L Duke and Mr. Hesser may cross-examine witnesses, present mitigating evidence, and refute the presumed nexus between the default and the proposed award.

**F. Jurisdiction over Appellant Hesser was not proper because the Trial Court never ruled on the timely filed Motion to Dismiss for Lack of Jurisdiction filed by Mr. Hesser.**

No hearing was ever been held, nor has any ruling been made, by the trial court regarding the “Motion of Donald Led Duke, Carl F. Agston, Robert Compton, Grant V. Hesser, and Douglas Barker filed a Motion to Dismiss Plaintiff’s Complaint For Lack Of Personal Jurisdiction.” The Appellee’s argument (Appellee Brief at page 26) that the “effect” of the Circuit Court’s discovery ruling was to deny the Appellant’s Motion goes too far. Instead, the trial court ignored the Motion and proceeded to rule on Cattrell’s subsequently filed Motion for Sanctions relating to discovery issues.

Despite the Appellee’s claims to the contrary, Mr. Hesser has represented by affidavit that he did not transact business in the state, did not supply services in the state, did not cause a tortious injury in the state, has no substantial revenue from actions in the state, did not have a warranty, does not own West Virginia real estate, or did not contract to injure any person or property. These requirements are spelled out in W. Va. Code § 56-3-33, are addressed in greater depth in the Appellant’s initial Brief. Mr. Hesser has no continuous or systematic contacts with the state. Before any sanction can be entered under these facts, Mr. Hesser should have been heard on his jurisdictional motion. Instead, the Court never addressed the jurisdictional issues presented by Appellants in this case and never ruled on the Appellant’s Motion. Any subsequent rulings by the trial court, including its granting of Cattrell’s motion for default against Mr. Hesser regarding the discovery issues, should be voided.

Since the trial court failed to take up jurisdictional issues, the default judgment entered against Mr. Hesser, who filed a motion to dismiss for lack of personal jurisdiction,

should be reversed and the matter remanded to the trial court to determine the threshold issue as to whether the court has jurisdiction over the parties before it.

**CONCLUSION**

Mr. Hesser and BB&L Duke respectfully request that this Court reverse the October 1, 2003 default judgment, vacate it, and remand the case to the trial court. Any remand should be with appropriate instructions for the trial court to enter an order setting a date and conditions by which certain depositions may be taken or certain written discovery concluded and to rule on motions to dismiss.

Respectfully submitted this 27th day of September, 2004.

**BARRY, BETTE & LED DUKE, INC. and  
GRANT V. HESSER**

By SPILMAN THOMAS & BATTLE, PLLC

*Charles L. Wood*

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Appellee.

**CERTIFICATE OF SERVICE**

I, Charles L. Woody, hereby certify that service of the foregoing **Reply Brief of Appellants Barry, Bette & Led Duke, Inc. and Grant V. Hesser** has been made upon counsel of record by placing a true copy thereof in an envelope deposited in the regular course of the United States Mail, with postage prepaid, on this 27th day of September 2004, addressed to counsel as follows:

Marc B. Chernenko, Esq.  
William E. Watson & Associates  
P.O. Box 111  
Wellsburg, WV 26070



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Charles L. Woody