

Wilburn v. Caterpillar, Discovery Commissioner Opinion #6
(July, 1989)

EVASIVE DISCOVERY TACTICS

This is a wrongful death case, wherein Plaintiffs' decedent was killed when a Caterpillar, self-loading paddle scrapper, ran over a stationary automobile in which the decedent, Wilburn, was sitting. Plaintiffs have alleged the Caterpillar machine was dangerously and defectively designed because it was manufactured with a visual blind spot which prevented operators of the paddle scrapper from seeing objects in front of the machine. The incident took place in February of 1986, and the lawsuit was filed in January of 1988.

Plaintiffs were dissatisfied with the responses to interrogatories and requests for production submitted by the Defendants in April of 1988, and after attempts to work out the problems failed, a Motion to Compel was filed by Plaintiffs in September of 1988, which came before the Discovery Commissioner for hearing on October 5, 1988. While the Motion to Compel was the culmination of Plaintiffs' frustrated discovery attempts, the problems were foreshadowed in the Case Conference Report, wherein documents sought by the Plaintiffs were recorded, but at that point in time Plaintiffs were still attempting to obtain material from the Defendants without need of dispute resolution. The Commissioner finds the disputed action or inaction of the Defendant to arise from both non-cooperation in

the 16.1 procedure, as well as non-cooperation in the formal discovery proceedings in this case. By the time of the conference before the Commissioner in October of 1988, already six months of discovery time had passed and little response had been made to the Plaintiffs' initial interrogatories and requests for production.

In October of 1988, the Commissioner accorded to the Defendant, as has been the policy of the Discovery Commissioner, one chance to "foul up" discovery cooperation since the enactment of the new discovery rules of January 1, 1988. No sanctions were imposed but the Defendant was warned concerning cooperation in the discovery procedure and the particular interrogatories and requests to produce at issue were gone over in a painstaking fashion, with the hearing lasting in excess of two hours. The bottom line of the October 5th proceeding was to recommend that Defendant supplement its answers with additional information on or before October 25, 1988, and if no proper responses were made, severe sanctions would be recommended. At a status check on October 25, 1988, Defendant advised that additional documents were still forthcoming and the Plaintiffs were reasonable in their agreement to await further information which the Defendant claimed was difficult to obtain and assemble. Once again, however, the Commissioner warned the Defendant that sanctions would be issued if the information was not forthcoming and a

status check was set for January of 1989. The January, 1989, status check was continued by agreement to February 2, 1989, at which time Plaintiffs alleged the interrogatories and requests for production had still not been satisfactorily answered and that additionally a second set of interrogatories and requests were also answered in an unsatisfactory manner. Plaintiffs then filed this Motion for Discovery Sanctions which ultimately came on for hearing March 30, 1989.

This case presents the perfect example of a breakdown of the discovery process. It has now been over a year since the Plaintiffs first submitted interrogatories to the Defendant and yet some of the original questions remain unanswered or incompletely answered at best. The Defendant has chosen to put its head in the sand in regard to its duty to supply discoverable information, has chosen to exaggerate to a frivolous degree the amount of difficulty required to obtain information sought by the Plaintiffs and has demonstrated a clear pattern of habitual disregard for the rules of discovery, both in spirit and technical compliance. If satisfactory answers to the remaining interrogatories and requests for production are not received by the Plaintiffs by May 12, 1989, the Commissioner will recommend that Defendant's Answer be stricken. The Commissioner also finds that monetary sanctions are appropriate for the actions of the Defendant up to this point, not only for the complete failure to respond to

pertinent interrogatories and requests for production, but also for the total disregard by the Defendant of the Discovery Commissioner's recommendations and warnings concerning the discovery posture of the Defendant in this case.

To go over each and every interrogatory and request demonstrating Defendant's failure would unduly prolong this recommendation; however, some of the most blatant examples of the Defendant's behavior will be cited to make it absolutely clear what behavior is being castigated as intolerable under the rules of discovery in the State of Nevada.

For instance, question number 14 of Plaintiffs' second set of interrogatories asked "with regard to the Director of Safety at Caterpillar, John Carr, state in detail . . ." The response by Defendant was to state that it "could find no record of a John Carr." In fact the Director of Safety at Caterpillar is James Carr, not John, and the Defendant deliberately chose not to answer the interrogatory. This is the epitomy of game playing by Defendant, but only the tip of the iceberg.

A more lengthy example of Defendant's recalcitrance can be seen in its response to Plaintiffs' initial interrogatories numbered 2 and 3. Interrogatory number 2 asked if Caterpillar had a research and development or design department and if so who was in charge of each department from the design date of the paddle scrapper to the present. Interrogatory number 3 inquired that if the answer to the preceding interrogatory was

in the affirmative, that the names, addresses and company positions of the persons who designed the paddle scrapper should be listed along with the name, address and company position of the person who presently had possession of the records concerning the design of the paddle scrapper. In its first response to these two interrogatories Caterpillar objected to the interrogatory as being overly broad and burdensome and irrelevant, but without waiving the objection, Caterpillar stated that Jim Kelley was knowledgeable about the design and development process. That answer was given for both interrogatories.

When Plaintiffs' attorney complained the interrogatories had not been answered, the Defendant provided supplemental answers. In response to interrogatory number 2, Caterpillar maintained its previous objections, and stated the responsibility for the design and development for the paddle scrapper was done by the Decatur Engineering Department of Caterpillar and that Jim Kelley was knowledgeable about the design and development process as he was a design engineer in the Decatur Engineering Department. Caterpillar repeated its objection to interrogatory number 3 but added that Jim Kelley would also have possession of the records regarding the design of the paddle scrapper model which were still in the possession of the company. As the interrogatories had still not been answered, Caterpillar submitted a third set of answers in

October of 1988, which in response to interrogatory number 2, dropped their objection and answered the question in the affirmative. In response to interrogatory number 3 the Defendant supplied only the name of Jim Kelley as being knowledgeable regarding the design and development process for the model in question, and stated there were "numerous engineering groups in several different geographical locations involved in the design and development of the model" and that "literally hundreds of people have been involved in this activity over nearly twenty years since the development began." The Defendant absolutely refused to answer the question or make any reasonable attempt to answer the question.

The Defendant failed, in any of its three alleged "answers," to mention that it had a series of books called the Caterpillar engineering standard design reference in which, among other things, is a discussion of visibility and use of mirrors. The manual applied to all Caterpillar-produced products as a design guideline. This information came not from Caterpillar in response to discovery requests in this case, but from deposition testimony by Eugene Sweeney, Manager of Technical Support for Caterpillar, who testified to the above information in August of 1988 in another case in another state. Of particularly startling note is the further fact that Mr. Sweeney has also been the person who has submitted all discovery responses on behalf of Caterpillar in the case at

bar! The Defendant's denial of this cover-up is an insult to the courts of the State of Nevada.

At the heart of Plaintiffs' complaint in this matter is the allegation that the Defendant's paddle scrapper was dangerous and defective in design because it was manufactured with a visual blind spot and Defendant Caterpillar failed to adequately test the paddle scrapper for blind spots. Interrogatory number 4 asks the Defendant if it or any independent testing laboratory conducted tests concerning the area of driver forward and side visibility or blind spot potential in the paddle scrapper. Defendant replied that it routinely tested prototypes of its machines during its development process and that such testing was done in the laboratory, at Caterpillar test facilities and on customer job sites; further, the testing was conducted by experienced engineers and operators and the testing included all aspects of machine operation, including visibility for the operator of the machine. When asked in interrogatory number 5 to state the methodology for testing, results, persons who perform the tests and the persons who had custody of the test results, once again the Defendant responded that Jim Kelley was knowledgeable about the testing activity. When Plaintiffs complained that interrogatory number 5 was not answered, Defendant responded that the testing done on the model 623 was done prior to November 1973, documentation was no longer available and that

Jim Kelley was knowledgeable concerning the test procedure. Incredibly the Defendants ignored the question and as has been its routine in this case, simply provided the information it chose to provide, in response to the interrogatory. As Plaintiffs point out in their motion, Caterpillar admitted that Kelley was knowledgeable, but chose to give none of that knowledge in response to the interrogatory, let alone respond to the specific requests made in the question. The response was just one of many which demonstrated internal inconsistencies in the answers supplied by the Defendants.

A further interrogatory was submitted to the Defendants asking whether or not there had been any litigation instigated against the Defendant concerning driver forward and side visibility and or blind spots of a paddle scrapper. The Defendant, in it first response, after objecting to the question as being overly broad and burdensome indicated that it knew of no litigation "initiated against it in which it was claimed that a 623 B travelling forward struck a parked vehicle." (game playing) The Defendant's second response to the interrogatory, after objections stated "it knows of no litigation initiated against it in which a model 623 B was travelling forward and struck an object or person due to limited visibility." (more game playing) The Defendant's third answer stated "Caterpillar has no record of any litigation involving the 623 B or any other elevating scrapper

in which allegations of forward or side visibility or blind spots is an issue. (refined game playing) Finally, in response to Plaintiffs' continued claim that Defendant was not supplying it with sufficient information concerning visibility in mirror cases, the Defendant submitted an affidavit of Eugene Sweeney, who answered the interrogatories in this case, and in an affidavit signed March 22, 1989, Mr. Sweeney stated "Plaintiff further alleges in his pleading that Caterpillar has 'a list of visibility and mirror cases.' Affiant states that its computers will not produce such a listing." The Statement of the affiant is directly inconsistent with the previous answers of Caterpillar wherein it was able to supply information concerning particular models and particular types of visibility problems. The only conclusion is that the Defendant has been trapped in its own web of deceit in trying to hide information to which the Plaintiffs are entitled in this case.

Defendant's conduct became increasingly obstructive as the Plaintiffs submitted a second set of interrogatories, wherein they asked at number 3 whether there had ever been any litigation instigated against Caterpillar for "any blind spot hazard . . . concerning blind spot visibility on any Caterpillar heavy moving equipment other than that stated in interrogatory number 1?" Further information was requested such as the title and date of the actions and the Defendant

objected indicating that to search all of their files for litigation concerning allegations of blind spots and visibility would be extremely burdensome, [emphasis added] harassing and not reasonable calculated to lead to the discovery of admissible evidence, but they do refer to their answer to the first interrogatory which stated that Caterpillar has no record of any litigation involving certain models in which "forward visibility or forward blind spots" was in issue. Although the Defendant could produce some information, the Defendant claimed that searching through the files would be extremely burdensome and oppressive.

The response of Defendant has a certain initial and superficial logic behind it. After all, Caterpillar is known as a major manufacturer of heavy equipment and has been around for many years. Think of the hundreds or thousands of lawsuits --- maybe it would be burdensome. But no, the only files available consist of open litigation files, as Caterpillar chooses to destroy all files which are settled or otherwise closed, and keep only a copy of the complaint and final resolution papers.

How burdensome and oppressive was Defendant's task? Mr. Sweeney gave a deposition in another case in August of 1988, wherein he testified extensively concerning the availability of data in connection with litigation filed against Caterpillar. The Plaintiffs produced a major portion of the deposition of

Mr. Sweeney, wherein he testified at length as to the ability of Caterpillar to handle inquiries concerning products and other litigation in which Caterpillar had been involved. Some 250 pages of Mr. Sweeney's deposition have been submitted to the Commissioner and Plaintiffs quote extensively from the deposition in their points and authorities, none of which testimony has been taken out of context. What is clear from the deposition, and a myriad of examples could be put forth to support the proposition, is that Caterpillar has arranged to have an extensive litigation section in its company. Mr. Sweeney is the head of a team which provides technical support for litigation, keeps at least one copy of all the files in one room, has computer assistance to cross-reference all of the files, has a limited number of files which consist of active litigation and 20 to 25 files which have not reached the litigation stage. The files are cross-referenced with such information as who testified in each case, which experts testified on behalf of Caterpillar and on behalf of any Plaintiff, and particularly appropriate to this case, the files are cross-referenced as to whether a case involved either fully or partially an allegation of impaired or non-visibility. Anytime that Caterpillar produced a document in a lawsuit, that information went into the computer data base and they would know what documents had been produced. Mr. Sweeney testified that anything of significance in a case would be added to the

data base to allow Caterpillar more ready access than to have to search through all of the papers in the hard copy file.

Finally, Mr. Sweeney testified extensively as to the numbers of files which he had to review and his testimony in the deposition of August, 1988, was directly contrary to his affidavit given in the present case.

Imposing sanctions on parties for the conduct of litigation will not have a chilling effect on advocacy when they are used to control litigants for not using legitimate advocacy techniques and who are failing to comply with the rules of the Court. Sanctions should be used to eliminate misuse and abuse of the Rules by preventing frivolous defenses, baseless objections and harassment of opponents which unjustly impose burdens on the party and obstruct the judicial process. The elimination of such tactics can only help rid the civil justice system of a problem which currently brings it into disrepute. The Nevada Supreme Court has been setting a strong example in the area of sanctions. e.g. Kelly Broadcasting v. Sovereign Broadcast, 96 Nev. 188, 606 P.2d 1089 (1980); Holiday v. Barnett, 103 Nev. 60, 732 P.2d 1376 (1987); Fire Insurance Exchange v. Zenith, 103 Nev. 648, 747 P.2d. 911 (1987). Rules 11, 16 and 26 require the use of sanctions in cases of violation of the rules, wherein such things as frivolous answers and obstructionist tactics are used, especially in a deliberate fashion. These are particularly

important in halting discovery abuses which deprive other litigants of an opportunity to use the Court as a serious dispute/settlement resolution mechanism. The instant case is a classic example of abuse of the system, as the Discovery Commissioner has spent in excess of 20 hours on these particular discovery problems alone, not to mention the time which has been spent by attorneys on all sides in resolving questions which could have been avoided with forthright responses from the Defendant to discovery questions submitted to it.

II.

RECOMMENDATIONS

IT IS HEREBY RECOMMENDED that Defendant supplies full and complete answers to the interrogatories and requests for production as set forth in the findings above, on or before May 12, 1989, or the Defendant's Answer should be stricken.

IT IS FURTHER RECOMMENDED that monetary sanctions against the Defendant in the amount of \$7,000.00 be paid by the Defendant to the Plaintiffs on or before May 12, 1989, such sanctions 1) to repay Plaintiffs for the great amount of attorney time and expense incurred in preparing for and appearing on the motions, 2) to repay the time and expense in obtaining evidence to be presented with the motions, 3) in response to the Defendant's actions which were contrary to the direction of the Discovery Commissioner in his recommendations

of October 5, 1988, 4) in response to the Defendant's position that quotations from the deposition of Mr. Sweeney were submitted out of context to the Commissioner, 5) in response to the affidavit submitted by the Defendant which directly contradicts the same affiant's sworn deposition testimony on the same subject and 6) to deter the Defendant from such a pattern of habitual disregard of the Rules of Discovery in this case or any future case.

The above ruling was affirmed by the District Court and by the Nevada Supreme Court which denied Defendant's petition for a writ.