IN THE SUPREME COURT OF OHIO

JOYCE WINKLE, et al.	**)**	**CASE NO. 18-0386**
	)	
Plaintiffs-Appellants,	**)**	**On Appeal from**
	)	**Franklin County**
vs.	**)**	**Court of Appeals**
	)	**Case No. 17-AP-50**
THE KROGER STORE #519	**)**	
	)	
Defendant-Appellee.	**)**	

MOTION OF APPEAL OF JOYCE AND JAMES WINKLE FOR RECONSIDERATION

Percy Squire, Esq. (0022010)
Percy Squire Co., LLC
341 S. Third Street, Suite 10
Columbus, Ohio 43215
(614) 224-6528 T
(614) 224-6529 F
psquire@sp-lawfirm.com
Counsel for Plaintiffs-Appellants James and Joyce Winkle

MARY BARLEY-MCBRIDE 0037204
250 Civic Center Drive, Suite 280
Columbus, Ohio 43215
T: (614) 258-6000
F: (888) 811-7144
mmcbride@dmclaw.com
Counsel for Defendant-Appellee The Kroger Co.

MEMORANDUM

In accordance with the provisions of Ohio St. Ct. Rule 18.02 Appellants, Joyce and James Winkle respectfully move for reconsideration of this Court's May 23, 2018 Order declining jurisdiction in this matter. Reconsideration is requested for the following reasons:

1. To provide the Court an opportunity to consider the opinion of the Supreme Court of Appeals of West Virginia decided April 6, 2018, (a time subsequent to final briefs in this matter) concerning when dismissal of a case as a discovery sanction is appropriate. West Virginia Supreme Court of Appeals, Case No. 17-0206, Terry Smith, et al. v. Robert Todd Gebhardt.

2. To provide the Court with an opportunity to consider the opinion of the Superior Court of Pennsylvania, filed March 19, 2018, Ruben Pollock v. F&D Interiors, LLP,, Case No. 865 MDA 2017 concerning when dismissal is appropriate as a discovery sanction; and

3. To provide the Court with an opportunity to consider whether the policy rationale applied in the context of criminal discovery sanctions that a court must impose the least severe sanction that is consistent with the rules of discovery, State v. Darmond,(2013) 135 Ohio St.3d 343, 2013-Ohio-966, should be applied in civil cases where a hearing has not been conducted prior to dismissal and the attorney in the case is known by the trial court and opposing counsel to have been seriously injured in an automobile accident.

This appeal arose from a personal injury action this was voluntarily dismissed and subsequently refiled. Prior to dismissal of the first case Appellee had filed a motion for discovery sanctions. A refiled Complaint was filed on March 28, 2016, Case No. 16CV00313 and dismissed as a discovery sanction nine months later on January 6, 2017. The previously filed action that alleged the same injuries had been voluntarily dismissed by Appellants on March 10, 2016, Case No. 14CV012144.

On April 21, 2016, Appellee filed an Answer, Jury Demand and its First Set of Combined Interrogatories and Request for Production of Documents upon Appellants. Appellants responded to Appellees' discovery requests on August 18, 2016. On October

18, 2016, Appellee filed a Motion to Compel Discovery on grounds that Appellants' discovery responses were inadequate. On November 4, 2016 the trial Court granted the unopposed Motion to Compel. The November 4, 20116 Order directed Appellants to fully respond to Appellee's discovery by November 18, 2016.

Appellants did not provide the requested discovery by November 18, 2016. Counsel for Appellants stated he did not receive the Court's order. On December 6, 2016, Appellee moved to dismiss Appellants' action for failure to comply with the trial Court's November 4, 2016 discovery order, which counsel for Appellant did not receive, and for want of prosecution. The trial Court granted Appellee's Motion to Dismiss on January 6, 2017.

On March 2, 2016 counsel for Appellants advised the trial Court that he had been hospitalized due to an automobile accident on December 12, 2015. Appellants counsel suffered a broken nose, a broken mandible, broken ribs and a broken leg as a result of the accident.

The trial Court denied Appellants' Motion to Continue. On March 10, 2016 Appellants voluntarily dismissed.

A new action, Case No. 16CV003013, was filed by Appellants on March 28, 2016. A single Motion to Compel was filed on October 18, 2016. The Motion to Compel didn't allege that discovery had not been provided, it alleged that the responses were inadequate. The trial Court advised Appellants that failure to respond to the discovery order may result in dismissal. There is no record of what measures, if any, were taken by Appellee's counsel or Court to contact Appellants' counsel to determine if, having been put on notice of his serious injuries, he was aware of the procedural posture

of the action. On January 6, 2017 the trial Court dismissed the new action as a discovery sanction. Dismissal of the case was an abuse of discretion.

This Court has stated:

> A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable or arbitrary. State v. Adams, 62, Ohio St. 2d 151, 157, 404 N.E. 2d 144 (1980). An abuse of discretion includes a situation in which a trial court did not engage in a " 'sound reasoning process.'" State v. Morris, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶14, quoting AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp., 50 Ohio St.3d 157, 161, 553 N.E. 2d 597 (1990). Abuse-of-discretion review is deferential and does not permit an appellate court to simely substitute its judgment for that of the trial court. Id.

As was noted in a concurring opinion in Huntington National Bank v. Zwune, 2009-Ohio-3482, 10th App. Dist., July 16, 2009:

> When a discovery sanction prevents a resolution on the merits of a claim, the typical abuse of discretion standard is actually heightened. Jones v. Hartranft (1997), 78 Ohio St.3d 368, 371 (applying rule when reviewing whether the trial court properly dismissed a case with prejudice). Indeed, " '[j]udicial discretion must be carefully – and cautiously – exercised before [a reviewing court] will uphold an outright dismissal of a case on purely procedural grounds.' " Quonset at 48, quoting DeHart v. Aetna Life Ins. Co. (1982), 69 Ohio St.2d 189, 192.
>
> Generally, when imposing discovery sanctions, a " 'trial court must consider the posture of the case and what efforts, if any, preceded the noncompliance and then balance the severity of the violation against the degree of possible sanctions, selecting that sanction which is most appropriate.' " Settle, quoting Russo at 178.

Id.

Reconsideration is appropriate here in order for the Court to consider the opinion of the West Virginia Supreme Court of Appeals in Smith v. Gebhardt, supra. Where it is stated:

> Dismissal of a civil action as a sanction for a party's inappropriate conduct during discovery is a severe result to be used sparingly. Imposition of such a drastic sanction is justified only where an offending party has engaged in

willfulness, bad faith, or fault. This principle was explained in syllabus point seven of State ex re. Richmond American Homes of West Virginia, Inc. v. Sanders, 226 W.VA. 103, 697 S.E. 2d 139 (2010), as follows:

> 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

This Court also articulated the basis for this approach in Richmond:

> As was stated in *Cattrell Cos. v. Carlton, Inc.*, 217 W.Va. 1, 14, 614 S.E.2d 1, 14 (2005), "dismissal and default [judgment] are [considered] drastic sanctions that should be imposed only in extreme circumstances." See also *Doulamis v. Alpine Lake Prop. Owners Ass 'n, Inc.*, 184 W.Va. 107, 112, 399 S.E.2d 689, 694 (1990) (stating that "dismissal, the harshest sanction, should be used sparingly and only after other sanctions have failed to bring about compliance."); *Bell v. Inland Mut. Ins. Co.*, 175 W.Va. at 172, 332 S.E.2d at 134 (1985) (advising that the sanction of default judgment "should be used sparingly and only in extreme situations [in order to effectuate] the policy of the law favoring the disposition of cases on their merits.").

226 W.Va. at 113, 697 S.E.2d at 149.

> Clearly compelling a two-step inquiry upon appellate review, this Court explained in Richmond that our evaluation must include separate components. First, we must examine "whether the sanctioning court identified the wrongful conduct with clear explanation on the record of why it decided that a sanction was appropriate." Id. Second,
>
> [w]e then must determine whether the sanction actually imposed fits the seriousness of the identified conduct in light of the impact the conduct had in the case and the administration of justice, any mitigating circumstances, and with due consideration given to whether the conduct was an isolated occurrence or a pattern of wrongdoing.

Id.

Here a hearing was not conducted. The trial Court made no findings, it merely accepted the proposed entry provided by Appellee. The West Virginia Court notes dismissal is a drastic sanction that should be imposed only in extreme circumstances. Here, Appellants counsel stated that he never received the relevant Court orders and was

burdened with a life threatening medical condition. Under these circumstances dismissal, without any hearing whatsoever, was not appropriate.

Here due to counsel's lack of notice, which no doubt was attributable to his serious personal injuries, Appellants had no opportunity to demonstrate to the trial court why dismissal was inappropriate. The decision to dismiss here was based on a record with no input from Appellants.

The Superior Court of Pennsylvania in case no. 865 MDA 2017, Ruben Pollock v. F& D Investors, LLP stated:

> Generally, the imposition and severity of sanctions for a party's failure to comply with discovery is subject to the trial court's discretion. See *Reilly v. Ernst & Young, LLP*, 929 A.2d 1193, 1199 (Pa. Super. 2007) (en banc). Where, however, the trial court enters a sanction that terminates the underlying litigation, we apply a strict scrutiny standard of review. *Steinfurth v. LaManna*, 590 A.2d 1286, 1288 (Pa. Super. 1991); see also *Rohm and Haas Co. v. Lin*, 992 A.2d 132, 141-42 (Pa. Super. 2010) (holding appellate review stringent where a default judgment is entered as a discovery sanction).
>
> As this Court recognized in *Stewart v. Rossi*, 681 A.2d 214, 217 (Pa. Super. 1996), "since dismissal is the most severe sanction, it should be imposed only in extreme circumstances, and a trial court is required to balance the equities carefully and dismiss only where the violation of the discovery rules is willful and the opposing party has been prejudiced." Our
>
> Supreme Court reaffirmed in *City of Philadelphia v. FOP Lodge No. 5 (Breary)*, 985 A.2d 1259, 1270 (Pa. 2009), that it "highly disfavor[ed] dismissal of an action . . . as a sanction for discovery violations absent the most extreme of circumstances." It also adopted, for "trial and appellate courts alike," the factors this Court has developed and applied in "determining the general severity and vitality of a discovery sanction[.]"

Id.

> Those factors include:
>
> (1) the prejudice, if any, endured by the non-offending party and the ability of the opposing party to cure any prejudice;

> (2) the noncomplying party's willfulness or bad faith in failing to provide the requested discovery materials;
>
> (3) the importance of the excluded evidence in light of the failure to provide the discovery; and
>
> (4) the number of discovery violations by the offending party.

Id.

Lastly, this Court has stated in the context of a criminal discovery sanctions that the least drastic sanction should be imposed. Specifically:

> A trial court has broad discretion in determining a sanction for a discovery violation. *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 33; *State v. Simmons*, 2014-Ohio-3695, 19 N.E.3d 517, ¶ 41 (1st Dist.).
>
> Nevertheless, the trial court must consider several factors before imposing a discovery sanction. These factors include: (i) whether the failure to disclose was a willful violation of Crim.R. 16; (2) whether foreknowledge of the undisclosed material could have benefited the accused in the preparation of a defense; and (3) whether the accused was prejudiced. *Darmond* at ¶ 35-36; Simmons at ¶ 42. The court "must impose the least severe sanction that is consistent with the rules of discovery." *Darmond* at syllabus, quoting *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987), paragraph two of the syllabus.

The policy underlying the criminal standard should be applied equally in the civil context where private parties are deprived of their day in court and there are clearly extenuating factors, such as the medical condition of counsel, that should be given consideration. To simply nonsuit citizens, without the benefit of even a hearing under these circumstances is a clear abuse of discretion.

CONCLUSION

For the above reasons reconsideration is respectfully requested.

Respectfully submitted,

s/Percy Squire, Esq.
Percy Squire, Esq. (0022010)
341 S. Third Street, Suite 10
Columbus, Ohio 43215
(614) 224-6528 T
(614) 224-6529 F
psquire@sp-lawfirm.com
Counsel for Plaintiffs-Appellants
James and Joyce Winkle

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via electronic mail upon counsel listed below on May 31, 2018.

MARY BARLEY-MCBRIDE 0037204
250 Civic Center Drive, Suite 280
Columbus, Ohio 43215
T: (614) 258-6000
F: (888) 811-7144
mmcbride@dmclaw.com
Counsel for Defendant-Appellee The Kroger Co.

s/Percy Squire, Esq.
PERCY SQUIRE, ESQ (0022010)