

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANDREW P. BRANDES,)
Plaintiff,)
)
v.) C.A. No. N10C-06-025-PLA
)
EBSCO INDUSTRIES, INC.,)
a Delaware corporation, OUTDOOR)
SIGNS AMERICA, an Alabama)
company, SAM'S WEST, INC.,)
a foreign corporation, t/a SAM'S)
CLUB, and WAL-MART STORES)
INC., a Delaware corporation,)
Defendants.)

SUBMITTED: March 15, 2012

DECIDED: March 28, 2012

UPON DEFENDANT EBSCO INDUSTRIES INC.,
OUTDOOR SIGNS AMERICA, SAM'S WEST, INC.
t/a SAM'S CLUB and WAL-MART STORES, INC.'S
MOTION FOR RECONSIDERATION
DENIED

Defendants, EBSCO Industries, Inc., Outdoor Signs America, Sam's West, Inc. t/a Sam's Club, and Wal-Mart Stores, Inc. have filed a Motion for Reconsideration of this Court's Order denying their Motion in Limine that sought to preclude Plaintiff Andrew Brandes' liability expert from testifying due to spoliation. Defendants argue that the Court's decision to deny the relief was based in part upon its conclusion that Defendants should have

acted sooner to inspect the sign that was ultimately lost or destroyed. In so doing, Defendants argue that the Court ignored its own Trial Scheduling Order and made no mention of the fact that Defendants at all times acted in compliance with that Order. Because this Court was well aware of the deadline for submission of Defendants' expert report when it rendered its decision, and because it considers its conclusion that Defendants delayed -- literally, almost until the last minute -- in arranging for an inspection of the sign, to be an appropriate consideration, notwithstanding that the expert report deadline in the Trial Scheduling Order had not yet lapsed, the Motion for Reconsideration is denied.

The facts of this case are thoroughly set forth in the Court's Opinion denying the Motion in Limine and need not be repeated here. In a nutshell, this is a personal injury case in which Brandes alleges that he was injured by the sharp edges of a large sign while he was installing it. He contends that the edge rendered the sign defective. The sign was inspected by Plaintiff's expert and a report was submitted to defense counsel on June 24, 2010. Defendant did not seek to inspect the sign until November 2011, only one month before the deadline for submission of defense expert report. By that time, the business where it had been stored had been sold and the sign presumably had been discarded. The Court denied the defense request to

preclude Plaintiff's expert from testifying due to spoliation and concluded that an adverse inference instruction was a more appropriate remedy. In so doing, the Court noted that Defendants were partially responsible for the predicament because they made no effort to arrange an inspection until only a month before the expert report deadline on December 13, 2011.

The Defendants have moved for reargument, claiming that the Court overlooked the fact that Defendants had not yet missed the deadline for the submissions of their expert's report, and therefore the Court should not have taken the length of time it took to request an inspection into consideration at all in reaching its decision.

A Motion for Reargument pursuant to Superior Court Civil Rule of Procedure 59(e) will be granted if "the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."¹

The short answer to Defendants' Motion for Reargument is that this Court did not overlook the Trial Scheduling Order deadlines when it decided the spoliation question, nor did it fail to consider that Defendants still had time left before the deadline for submitting their expert report. Irrespective of the fact that Defendants still had additional time under the Trial

¹ *Kennedy v. Invacore, Inc.*, 2006 WL 488590 at *1 (Del. Super. Jan. 31, 2006) (citation omitted).

Scheduling Order, nothing in the Court’s analysis suggests that the deadline was even relevant to its analysis. The Defendants waited seventeen months after receiving Plaintiff’s report to schedule an inspection when there was less than a month left to have an expert examine the sign and write his report. Had this type of procrastination not occurred, the sign may have been salvaged. The Court was well aware of the deadline but it still believes that the length of time it took for Defendants to take any action contributed to the likelihood that the sign would have been discarded or misplaced.

Nor is the Court persuaded by Defendants claim that they purposefully waited to the last minute for “strategic” reasons so that Plaintiff’s expert would not be able to amend his report. Defendants could not seriously have worried about the possibility of an amended report. It is rare that Plaintiff’s expert ever provides a supplemental report to address the opposition’s expert for the simple reason that a report that is modified on the basis of the opposing party’s expert report would provide ample fodder for cross-examination and would seriously undermine the expert’s credibility. Under these circumstances, the Court simply cannot believe the argument that Defendants’ delay was a deliberately planned strategy.

Moreover, as Plaintiff’s counsel points out in his response to this motion, the defense could have had the sign inspected far earlier and still

have exercised the same strategy by submitting the report closer to the deadline. In essence, the defense “strategy” appears to be little more than an excuse for its dilatoriness in preparing this case for trial. In fact, the Court questions whether a report could even have been filed timely given the brief window of time Defendants were allotting for their expert to complete his task.

Nothing in the Court’s analysis or its decision is affected by the fact that Defendants were in compliance with the Court Order and the Court was fully aware of that fact when it reached its decision. Since it did not misapprehend or overlook either the facts or the law, the Motion for Reconsideration is denied.

IT IS SO ORDERED.

/s/ Peggy L. Ableman

PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary
cc: All counsel via Lexis