

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

JOANNE HERRON, Individually)
and as Personal Representative of)
the Heirs and Estate of CHARLES)
HERRON, Deceased,)
) C.A. No. 07C-11-042 ASB
Plaintiff,)
)
v.)
)
CERTAINTEED CORPORATION,)
et al.,)
)
Defendant.)

On Consideration of Superior Court Civil Rule 16(f) Sanctions
IMPOSED ON DEFENDANT UNITED GILSONITE LABORATORIES

ORDER

Joseph Rhoades, Esquire and A. Dale, Bowers, Esquire, The Law Offices of Joseph Rhoades, Wilmington, DE; Of Counsel, Jerome Block, Esquire and Sharon Zinns, Esquire, Levy, Phillips & Konisberg, New York, NY, Attorneys for Plaintiff

Donald R. Kinsley, Esquire, Megan Mantzavinos, Esquire, Marks, O’Neil, O’Brien & Courtney, Wilmington, DE; Kenneth J. Powell, Jr., Esquire, Marks, O’Neil, O’Brien & Courtney, Philadelphia, PA, Attorneys for Defendant United Gilsonite Laboratories

JOHNSTON, J.

1. This case was one of over 70 scheduled for the trial setting beginning May 4, 2009. Prior to jury selection, the Court allocated significant resources in order to resolve as many cases as possible. Every available conference room in chambers was commandeered, resulting in disruption and inconvenience to Court staff and other litigants. Another non-asbestos trial was continued to make the trial judge available.

2. Three mediators, Judge Slights, Special Master Boyer and former Commissioner White, expended considerable time over several days. The case involving defendant United Gilsonite Laboratories is the only case that did not settle.

3. Superior Court Civil Rule 16 outlines the procedures for compulsory alternative dispute resolution (“ADR”). Rule 16(f) provides:

Sanctions. If a party or party’s attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party’s attorney is substantially unprepared to participate in the conference, or if a party or party’s attorney fails to participate in good faith, the judge, upon motion or the judge’s own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party, or both, to pay the reasonable expenses incurred because of any noncompliance with this Rule, including attorneys’ fees, unless the judge finds that the noncompliance was

substantially justified or that other circumstances make an award of expenses unjust.

4. At the first mediation session with counsel, the Court emphasized to counsel for both parties not only Rule 16's requirement that the parties participate in ADR in good faith, but also the particular need for compliance with Rule 16 in this case given the multiple cases on the asbestos trial docket for May and the Court's already strained resources. The mediator specifically advised counsel that, given the substantial resources that were being dedicated to mediation and to trial if necessary, every reasonable and good faith effort should be made during the mediation to resolve the case. The mediator further admonished counsel that the Court would carefully scrutinize any settlement that occurred after the commencement of trial to ensure that the settlement was based on circumstances or events that arose during trial and that could not have been reasonably anticipated by counsel in advance of or during mediation.

5. Thereafter, two mediators, including a sitting judge of this Court, dedicated in excess of twenty five hours in discussions with the parties in an effort to resolve the matter. Throughout this process, counsel were reminded of the mediator's admonition that an in-trial settlement would be carefully scrutinized by the Court. At the conclusion of the mediation efforts, counsel for both parties

assured the mediators that they had exhausted all options to resolve the case short of trial and that a trial would be required to resolve the case.

6. Trial in this case was expected to last 10 days. After the first week of trial, on Monday, May 11, 2009, the Court was informed that the parties had agreed to settle the case. Before releasing the jury, the Court convened a conference among the trial judge, Judge Slights, Mr. White and trial counsel. The Court requested an explanation from counsel as to why the settlement could not have been made during the time set aside for ADR, and before substantial consumption of valuable and limited Court resources: including bailiffs, several clerks, jury services, court reporters, a courtroom, a jury room and a trial judge. Further, the people of the State of Delaware were burdened by taking time out of their lives to serve as jurors.

7. Plaintiffs' counsel informed the Court that the settlement amount exceeded the sum plaintiffs had been willing to accept during ADR.

8. Defendant's counsel stated that defendant concluded that settlement was appropriate after the testimony of defendant's employee. However, counsel was unable to point to any aspect of the testimony that differed unfavorably to that witness's testimony in numerous prior depositions and trials. Additionally,

counsel cited certain complications in obtaining the agreement of several insurance adjustors.

9. It is clear to the Court that defendant United Gilsonite Laboratories did not participate in ADR in good faith and was substantially unprepared to enter into a binding settlement prior to trial. Defendant's conduct is consistent with taking a case to trial as a settlement strategy. That strategy is neither acceptable in Delaware nor in compliance with the spirit and letter of Rule 16. During ADR, defendant's counsel did not have the authority of the decision-makers to settle the case for an amount that constituted defendant's highest and best offer. There is absolutely no reason why this case needed to proceed through jury selection and half of trial.

10. The Court rules that Rule 16(f) sanctions be imposed against defendant United Gilsonite Laboratories. Such sanctions shall be measured as follows:

Special Master Boyer –Jury	5.7 hours at \$395 per hour	\$ 2,251.50
Selection:		
David A. White, Esq. –Mediation:	19.1 hours at \$425 per hour	\$ 8,160.00
Total		\$10,411.50

11. This amount shall be paid by defendant within 30 days of the date of this Order to Delaware's Combined Campaign for Justice, P.O. Box 2113, Wilmington, DE 19899, with a copy of the covering letter and check filed with the Prothonotary.

IT IS SO ORDERED this 27th day of May, 2009.

/s/ Mary M. Johnston

The Honorable Mary M. Johnston