

**IN THE CIRCUIT COURT OF WETZEL COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION**

SEP 16 PM 2:20

**MARKWEST LIBERTY MIDSTREAM  
& RESOURCES, L.L.C.,**

**Plaintiff,**

v.

**CIVIL ACTION NO. 16-C-82  
JUDGE H. CHARLES CARL, III**

**J.F. ALLEN COMPANY; AMEC  
FOSTER WHEELER ENVIRONMENT  
& INFRASTRUCTURE, INC.;;  
REDSTONE INTERNATIONAL, INC.;;  
CIVIL & ENVIRONMENTAL  
CONSULTANTS, INC.; and  
COASTAL DRILLING EAST, LLC,**

**Defendants,**

v.

**THE LANE CONSTRUCTION  
CORPORATION,**

**Additional Defendant.**

**ORDER DENYING MOTION TO RECONSIDER**

This matter came on for consideration this 16<sup>th</sup> day of September 2020, upon Plaintiff MarkWest Liberty Midstream & Resources, L.L.C.'s Motion to Reconsider Order Granting Defendants' Joint Motion to Strike Plaintiff's Amended Witness List and Defendant's Joint Motion for Sanctions Against the Plaintiff For Its Late Supplementation of Discovery. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and pertinent legal authorities, the Court rules as follows.

Standard of Law

On a motion to reconsider, the Court may revise any order not certified to be final by before the entry of judgment adjudicating all of the claims and rights and liability of the parties. *State ex re. Consolidation Coal Co. v. Clawges*, 206 W.Va. 222 (1999); W. Va. R. Civ. P. 54(b).

Conclusions of Law

Plaintiff MarkWest Liberty Midstream & Resources, L.L.C. (hereinafter "Plaintiff" or "MarkWest") has filed the instant Motion to Reconsider Order Granting Defendants' Joint Motion to Strike Plaintiff's Amended Witness List and Defendants' Joint Motion for Sanctions Against the Plaintiff For Its Late Supplementation of Discovery. In the motion, MarkWest requests the Court reconsider its September 2, 2020 Order Granting Defendants' Joint Motion to Strike Plaintiff's Amended Witness List and Defendants' Joint Motion for Sanctions Against the Plaintiff For Its Late Supplementation of Discovery. See Pl's Mot., p. 3. MarkWest avers it disclosed "additional documents reflecting actions taken since the close of discovery in this case". *Id.* at 2. Specifically, MarkWest details that the additional documents and witnesses "relate solely to the repair of the Wall...". *Id.* at 3. MarkWest proffers that it entered into a contract for repair work on the Wall on or about August 11, 2020 (which was produced on August 12, 2020) and proffers it seeks to introduce the contract as evidence of costs for future repairs. *Id.* at 4, 8.

West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings, and thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for

discovery violations are committed to the discretion of the trial court. *JWCF, LP v. Farruggia*, 232 W. Va. 417, 752 S.E.2d 571 (2013).

As an initial matter, the Court finds that the two motions which were pending before the Court – Defendants’ Joint Motion to Strike Plaintiff’s Amended Witness List and Defendants’ Joint Motion for Sanctions Against the Plaintiff For Its Late Supplementation of Discovery – essentially sought the same relief, exclusion of new witnesses and evidence regarding what Plaintiff calls the ongoing state of the Wall. The Court is mindful of a party’s duty to supplement. However, this case was ready to be tried in June of this year, and was continued, upon *MarkWest’s motion*, due to the COVID-19 pandemic and the related West Virginia Supreme Court of Appeals’ Emergency Orders.

Discovery in this matter has been closed since 2019 and was not reopened when the case was continued due to COVID from June 2020 to September 2020. The Court is cognizant and sympathetic that repairs are now beginning on the Wall, but this case has been pending since 216, and the Court finds it must impose some sort of cutoff or stopping point to discovery. The Court does not find any prejudice will result on the part of Plaintiff in not introducing the evidence/witnesses related to the ongoing state of and/or repairs to the Wall, because all the parties are in the same position now as they would have been if the case were tried as scheduled in June 2020.

MarkWest avers that the evidence and witnesses are necessary due to the ongoing state of the Wall. See Pl’s Mot., p. 12. MarkWest admits in the instant motion that “[h]ad the repairs to the Wall not come to fruition before the trial, then MarkWest would not have sought to use the [repair] contract at a trial of this case, and the surveying data, along with the other repair

documents, would be a non-issue". See Pl's Mot., p. 9. No party was to gain from the necessity for a brief continuance.

The Court considers MarkWest's argument in the instant motion regarding burden-shifting to MarkWest to avoid the sanctions. The Court considers the motion for sanctions seeking only to exclude evidence was filed on the eve of trial, without sufficient time to conduct further hearing or briefing scheduling prior to trial commencing next week. The Court considers the difficulties for the Court and all parties in scheduling a three-week trial. The Court notes it heard detailed oral argument from the parties at the hearing held on August 6, 2020. The Court is cognizant that the Nicholson contract was produced on or about August 12, 2020, but the Court heard oral argument at the August 6, 2020 hearing regarding voluminous new data produced used as the basis for the repair work and purported to point to the state of the Wall to date. It heard Plaintiff's argument/position regarding the "ongoing status" of the Wall as well.

Further, specifically, the Court's own notes of the August 6, 2020 hearing reflect that the Court heard argument related to liftoff testing material, LiDar data, GSA data, GEI testing readings and performance of additional work. Additionally, the Court was aware of MarkWest's positions regarding the witnesses proffered to introduce evidence of the ongoing state of the wall/impending commencement of repair work in its Response to the Motion to Strike Amended Witness List. Finally, the Court considered MarkWest's arguments in the instant motion as to its position/response to the motion for sanctions. Therefore, even though the Court, due to time constraints due to the impending trial date, could not issue a traditional briefing order, the Court was able to consider MarkWest's position before determining that both the witnesses and the document production related to the ongoing state of the Wall, should be excluded, and the scheduled trial date should be protected from a necessity of a continuance by putting a cap on

potentially ever-evolving discovery (which has been closed since 2019) in this matter. The Court notes it is not precluding MarkWest from making its claim for damages; MarkWest may still make its case for damages as it planned to at the June 2020 scheduling of this trial.

Considering all of the foregoing, the Court's ruling regarding the instant evidence and witnesses remains the same. Accordingly, the instant motion must be denied.

**WHEREFORE**, it is hereby **ORDERED** and **ADJUDGED** that Plaintiff MarkWest Liberty Midstream & Resources, L.L.C.,'s Motion to Reconsider Order Granting Defendants' Joint Motion to Strike Plaintiff's Amended Witness List and Defendant's Joint Motion for Sanctions Against the Plaintiff For Its Late Supplementation of Discovery is hereby **DENIED**.

The Court notes the objections of the parties to any adverse ruling herein.

The Clerk is directed to enter this Order as of the date first hereinabove appearing, and send attested copies to all counsel of record, as well as to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 16<sup>th</sup> day of September 2020.



JUDGE H. CHARLES CARL, III  
West Virginia Business Court Division