

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

THOMAS BARRY SISLER, JR. and
KAREN P. SISLER, individually
and as next friend and natural
mother of THOMAS BARRY SISLER, III,
WILLIAM POWDERLY SISLER and
ROBERT GILBERT SISLER, all minors,

Plaintiffs,

v.

Civil Action No. 5:04CV98
(STAMP)

FORD MOTOR COMPANY,

Defendant.

MEMORANDUM OPINION AND ORDER
DENYING DEFENDANT'S MOTION TO STRIKE,
DENYING MOTION TO DISQUALIFY COUNSEL AND
OBJECTION TO APPLICATION FOR ADMISSION PRO HAC VICE,
DENYING MOTION OF BARRY HILL TO WITHDRAW AND
GRANTING ATTORNEYS WATTS AND PINEDO'S
APPLICATION TO APPEAR PRO HAC VICE

The issue before this Court is whether certain counsel for the plaintiffs improperly failed to disclose the death of plaintiff, Thomas Barry Sisler, Jr. ("Sisler, Jr."), prior to reaching a settlement agreement with the defendant, and whether the defendant is entitled to certain relief for plaintiffs' counsel's failure. After considering initial briefs on the issue, conducting a motions hearing and considering briefs entered after the hearing, this Court finds that defendant's motion to disqualify counsel should be denied, but that certain counsel should be censured.

I. Procedural History

On August 6, 2004, this action was filed in the Circuit Court of Marshall County, West Virginia, by plaintiffs, Thomas Barry Sisler, Jr. and Karen P. Sisler, individually and as next friend and natural mother of Thomas Barry Sisler, III, William Powderly Sisler and Robert Gilbert Sisler, all minors. On September 9, 2004, the defendant, Ford Motor Company ("Ford"), removed the action to this Court. On March 14, 2005, plaintiff Karen Sisler filed a motion to appoint a guardian ad litem for the minor plaintiffs, indicating that parties had reached a tentative settlement resolving the issues in this case. Accordingly, this Court entered an order scheduling an infant settlement hearing for April 12, 2005.

On April 4, 2005, plaintiff Karen Sisler filed a motion to substitute for Thomas Barry Sisler, Jr., who had died on October 24, 2004, over five months earlier. On April 11, 2005, Ford filed a motion to continue the infant settlement hearing, contending that the plaintiffs had mislead Ford in settlement negotiations by not disclosing the death of Thomas Sisler, Jr. prior to the settlement initially agreed upon by Ford. Plaintiffs' local counsel, Barry M. Hill ("Hill"), filed a response indicating that the infant settlement hearing was likely impractical in light of Ford's motion. On April 11, 2005, this Court vacated the infant settlement hearing.

On May 6, 2005, Ford filed a motion to disqualify Mikal C. Watts ("Watts"), T. Christopher Pinedo ("Pinedo") and the Watts Law Firm, L.L.P. ("Watts Law Firm"). On May 17, 2005, Hill, local counsel for the plaintiff, filed a motion for leave to withdraw. Counsel for the plaintiffs filed a response in opposition to Ford's motion to disqualify, and Ford filed a response with reservations to Hill's motion to withdraw. On June 15, 2005, some nine months after this action was removed to this Court, plaintiffs' counsel, Watts and Pinedo, filed an application for admission pro hac vice. Ford filed an objection to this application, and the parties filed a joint motion to vacate the scheduling order that had been reinstated following the implosion of the tentative settlement.

On July 12, 2005, this Court entered an order directing the parties to appear for a motions hearing (the "motions hearing") on Hill's motion to withdraw, Ford's motion to disqualify, and Watts' and Pinedo's application for admission pro hac vice. Following oral argument, this Court directed the parties to file any briefs in support of their position by the close of business on Monday, July 18, 2005. On July 18, 2005, Ford filed a reply in support of its motion to disqualify. On July 19, 2005, the plaintiffs filed a response in opposition to the motion to disqualify. On July 20, 2005, Ford filed a motion to strike the plaintiffs' response in opposition to the motion to disqualify as untimely pursuant to this

Court's briefing schedule given from the bench.¹ No response has been filed to Ford's motion to strike but this Court nevertheless considered the plaintiffs' response.

II. Facts

This case arises out of an automobile accident that occurred on or about August 7, 2003 when Thomas Sisler, Jr. was involved in a rollover accident while he was driving a 1997 Ford Explorer. Thomas Sisler, Jr. survived the accident, but sustained injuries that rendered him a quadriplegic. The plaintiffs' complaint alleges, in part, that Thomas Sisler, Jr. would "continue to incur medical and life care expenses for the rest of his life." (Compl. ¶ 29.)

On October 24, 2004, plaintiff, Thomas Barry Sisler, Jr., died.² (Mot. Disqualify Hr'g Tr. 8., July 12, 2005.) At that time, counsel for the plaintiffs failed to file a suggestion of death or motion for substitution pursuant to Federal Rule of Civil Procedure 25.³ Instead, initial disclosures were submitted to

¹ This Court directed the parties to file additional responses to defendant's motion to disqualify on or before July 18, 2005.

² Ford contends that, according to the coroner's report on Thomas Sisler, Jr., the plaintiff died of causes unrelated to the accident at issue. Id. at 8. However, Mr. Watts, plaintiffs' attorney, stated at the hearing that he did not accept as a fact the representations that Thomas Sisler, Jr.'s death was unrelated to the accident at issue.

³ As stated above, plaintiffs did not file a motion for substitution until April 4, 2005. A suggestion of death was never submitted.

opposing counsel on November 12, 2004, and identified eleven medical treatment providers who were disclosed as having discoverable information pertaining to Thomas Sisler, Jr.'s "prognosis." (Def.'s Mot. Disqualify, Ex. A.) Attorney Gregory Gowan of the Watts Law Firm stated that he signed the disclosures made in this action, but did not learn of Thomas Sisler, Jr.'s death until January or February 2005.

Attorney Pinedo, whose job it was at the Watts Law Firm to prepare the initial disclosures, testified at the motions hearing that he could not remember exactly when he learned of Thomas Sisler, Jr.'s death, but that he believed it to be in November 2004. (Mot. Disqualify Hr'g Tr. 32-33.)⁴ Attorney Hill stated at the motions hearing that he learned of Thomas Sisler, Jr.'s death from Pinedo at some time in November 2004. Id. at 21. Attorney Pinedo agreed that he had an affirmative duty to supplement his initial disclosures pursuant to Rule 26 of the Federal Rules of Civil Procedure, but indicated that he did not remember taking "any affirmative action on the case in November." Id. at 34.⁵

⁴ Attorney Pinedo indicated that he could not give this Court a more specific date as to when he first learned of Sisler, Jr.'s death.

⁵ It should be noted that, in the plaintiffs' response to Ford's motion to disqualify, plaintiffs' counsel indicated that the need to file a motion to substitute or supplement disclosures had become moot once the plaintiffs reached a settlement with Ford. Appropriately, Attorney Pinedo rejected this argument in his testimony at the hearing by admitting that the plaintiffs had an affirmative duty to supplement. Similarly, Attorney Watts agreed

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