Not Intended for Print Publication

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

ROY F. KING, JR., ETC., ET AL.	)	
	)	
Plaintiffs,	)	Case No. 1:03CV00040
	)	
v.	)	**OPINION AND ORDER**
	)	
ISLAND CREEK COAL COMPANY,	)	By: James P. Jones
	)	Chief United States District Judge
	)	
Defendant.	)	

Annesley H. DeGaris, Cory, Watson, Crowder & DeGaris, P.C., Birmingham, Alabama, and Gerald L. Gray, Gerald Gray Law Firm, Clintwood, Virginia, for Plaintiff; Stephen M. Hodges, Penn, Stuart & Eskridge, Abingdon, Virginia, for Defendant.

This case arises from a workplace accident that occurred at a coal mine in this district owned by the defendant, Island Creek Coal Company ("Island Creek"). Charles Cottingham, the decedent, was working for an independent contractor unloading equipment, and was killed when a piece of the equipment fell on him. Trial is scheduled to begin on October 12, 2004.

In the Complaint, it is alleged that the death was caused by Island Creek's failure to follow certain federal mine safety regulations. (Compl. ¶ 38.) In addition,

the plaintiffs have responded to interrogatories from Island Creek in which they expressly set forth the regulations that they claim were violated. However, in the disclosure of opinions made on June 18, 2004, by the plaintiffs' expert, Gary L. Buffington, it is opined that Island Creek violated "the standard of care in the mining industry" in various respects, leading to Cottingham's death.

On July 9, 2004 Island Creek filed a First Motion in Limine seeking an order barring expert witness Buffington from stating any opinion at trial not based on the violation of specific federal mine safety regulations and to bar him from testifying as to non-regulatory industry standards or safe procedures. Island Creek complains that the expert has introduced a new cause of action into the case, based upon an industry standard of care rather than the violation of governmental regulations. It thus seeks an order preventing the expert from opining as to any standards of care other than those mandated by the regulations.

The plaintiffs did not respond to the motion, although the Scheduling Order required a response to any contested motion within fourteen days. (Scheduling Order ¶ 4.) On July 28, 2004, I entered an order granting the First Motion in Limine.

On August 3, 2004, the plaintiffs filed a pleading entitled Objection to Defendant, Island Creek Coal Company's, Unserved First Motion in Limine and Request for Reconsideration of Order. In the pleading, and in later oral argument,

counsel for the plaintiffs contended that they had no prior knowledge of the First Motion in Limine until receipt of the order granting it, that no service of the motion had been made, and that "[t]he oversight in failing to serve counsel was likely an unintended staff error." (Obj. ¶ 6.) After hearing argument, I reserved decision on the request for reconsideration and in the meantime allowed the plaintiffs to respond to the First Motion in Limine.

The court has discretion to reconsider an interlocutory order at any time, without the limitations of the strict standards imposed for reconsideration of a final judgment. *See Am. Canoe Ass'n, Inc. v. Murphy Farms, Inc.*, 326 F.3d 505, 514-15 (4th Cir. 2003). Nevertheless, the court's discretion to grant reconsideration ought to be governed by the circumstances of the particular case, including mistake, inadvertence, or excusable neglect. *See Gridley v. Cleveland Pneumatic Co.*, 127 F.R.D. 102, 103 (M.D. Penn. 1989).

This court has adopted certain procedures for filing and serving pleadings and papers by electronic means, as authorized by Rule 5 of the Federal Rules of Civil Procedure. The First Motion in Limine was filed by electronic means, although the certificate of service attested that copies of the pleading had been served by mail on opposing counsel. Nevertheless, lead counsel for the plaintiffs in this case, Annesley H. DeGaris, had previously submitted an electronic case filing registration form on

June 3, 2004, by which he consented to receive notice of filings pursuant to the court's electronic filing system. Thus, when the First Motion in Limine was filed electronically by counsel for Island Creek, the system sent to Mr. DeGaris a notice to the email address designated in his registration form. In oral argument, Mr. DeGaris contended that he had not actually seen the notice of filing, because his secretary handles his email. Nevertheless, proper service of the pleading was completed on transmission. *See* Fed. R. Civ. P. 5(b)(2)(D).

Thus, the basis for the plaintiffs' motion for reconsideration, that service was never made, is without merit. However, even were I to accept counsel's failure to keep track of email notices from the court as excusable neglect, I would not reconsider my earlier order because I do not find it incorrect. Having reviewed the response that I permitted the plaintiffs to file, I adhere to my previous view that it would be unfair to allow the plaintiffs at this late date in the litigation to change the fundamental basis of their liability claim.

For these reasons, it is **ORDERED** that the objection and motion for reconsideration is DENIED.

ENTER: August 18, 2004

/s/ JAMES P. JONES
Chief United States District Judge