

**IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA**

**DOLORES HALBURN and  
MARK HALBURN,**

**Plaintiffs,**

**v.**

**Civil Action No. 07-C-298  
Hon. Robert G. Chafin**

**CITY OF HURRICANE, WEST VIRGINIA,  
a municipal corporation, BEN NEWHOUSE,  
Individually and in his capacity as City Manager  
for the City of Hurricane, CLEVELAND  
CONSTRUCTION, INC. dba Cleveland  
Construction, Inc. of Nevada, and KANAWHA  
STONE COMPANY, INC.,**

**Defendants.**

**MOTION FOR SANCTIONS**

COMES NOW, the defendant, CLEVELAND CONSTRUCTION, INC., d/b/a CLEVELAND CONSTRUCTION INC., OF NEVADA (hereinafter referred to as defendant "Cleveland"), by and through their counsel, Jeffrey K. Phillips, Paul A. Konstanty, and the law firm of Steptoe & Johnson PLLC, and moves this Court, pursuant to Rule 37 of the West Virginia Rules of Civil Procedure, for an Order Sanctioning the plaintiffs for their failure to comply with a prior Order of this Court. In furtherance of said Motion, defendant Cleveland states as follows:

1. By Order dated April 3, 2008, this Court Ordered the plaintiffs to pay defendant Cleveland the sum of \$400.00 for costs and attorneys fees associated with a prior motion to compel discovery responses. (See Exhibit A attached hereto).
2. Since that time, one year has elapsed, and the plaintiffs have failed to pay defendant Cleveland \$400.00 as Ordered.

3. During the intervening twelve (12) months, defendant Cleveland made numerous demands for payment, including a formal filing at the time of the withdrawal of plaintiffs' prior counsel. (See Exhibit B attached hereto).

4. In addition, upon the plaintiffs' retention of new counsel, and a tender of an Order dismissing the claims of Mark Halburn individually, the undersigned wrote to plaintiffs' new counsel regarding the Order for costs and attorneys fees and refused to sign the Order dismissing the claims of Mark Halburn because said Order suggested that each party would bear their own costs and expenses. (See Exhibit C attached hereto).

5. The matter was again before the Court during a status conference held on March 24, 2009, and since that time, defendant Cleveland has not received \$400.00 as Ordered by this Court.

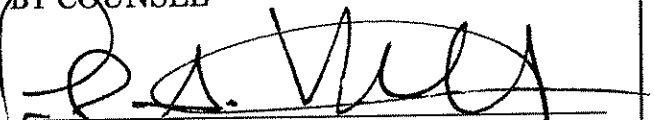
6. Rule 37 exists as a remedy for a party's failure to obey an Order of the Court, and defendant Cleveland respectfully requests that this Court compel the plaintiffs to comply with the prior Order, and pay to defendant Cleveland, the sum of \$400.00 forthwith.

7. Rule 37 also permits, as one of the remedies available, an award of reasonable expenses, including attorney's fees caused by the failure to obey the Court's prior Order, and that such reasonable expenses can be charged to the party failing to obey the order, or the attorney advising that party.

8. In accordance with the representations of counsel for Dolores Halburn, that he does not represent Mark Halburn, a copy of this Motion is being served upon Mark Halburn through certified, return receipt mail at his last known address.

**WHEREFORE**, defendant Cleveland prays that this Court enter an Order, compelling the plaintiffs to immediately remit the amount of \$400.00 to defendant Cleveland, in the form of good and legal tender, and for such other and further relief as to this Court may seem just and proper, including an additional award of costs and attorneys fees for having to make said motion.

**CLEVELAND CONSTRUCTION, INC.**  
BY COUNSEL



Jeffrey K. Phillips, Esq. (WV Bar # 5730)  
Raul A. Konstanty, Esq. (WV Bar # 9210)

Chase Tower, Eighth Floor  
707 Virginia Street East  
Post Office Box 1588  
Charleston, West Virginia 25326-1588

Telephone (304) 353-8000  
Facsimile (304) 353-8180

*Counsel for defendant Cleveland  
Construction, Inc.*

**STEPTOE & JOHNSON PLLC**  
OF COUNSEL

**EXHIBIT A**

**Order Awarding Costs and Attorneys Fees**

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

DOLORES HALBURN and  
MARK HALBURN,

Plaintiffs,

vs.

Civil Action No.: 07-C-298  
Honorable Robert G. Chafin

CITY OF HURRICANE, WEST VIRGINIA, a municipal  
corporation, BEN NEWHOUSE, individually and  
in his capacity as City Manager for the City of Hurricane,  
CLEVELAND CONSTRUCTION, INC. dba Cleveland Construction,  
Inc. Of Nevada and KANAWHA STONE COMPANY, INC.,

Defendants.

**ORDER**

ON MARCH 11, 2008, the parties, by and through their counsel,  
appeared before the Court upon the motion of defendant Cleveland Construction, Inc.,  
dba Cleveland Construction Inc. of Nevada (hereinafter defendant "Cleveland") to  
preclude for the plaintiffs' failure to comply with the prior Order of this Court, which  
granted defendant Cleveland's motion to compel on December 27, 2007.

After oral argument upon the motion, and the written submission of  
defendant Cleveland, and having had due deliberation thereon, it is

**ORDERED** that the plaintiffs file their responses to defendant  
Cleveland's First Set of Interrogatories and Requests for Production of Documents  
within five (5) days, and it is further;


**ORDERED** that the plaintiffs execute any and all authorizations  
attached to those discovery requests within five (5) days, and it is further;

**ORDERED** that the plaintiffs are sanctioned for their failure to comply with the prior Order of this Court, and are hereby required to reimburse defendant Cleveland in the amount of \$400.00, as and for costs and attorneys fees expended by defendant Cleveland in making successive motions to compel and preclude in order to obtain the plaintiffs' written discovery responses, and it is further;

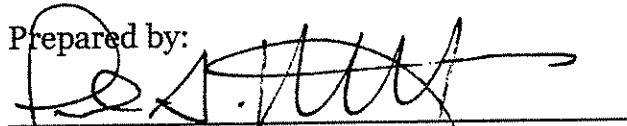
**ORDERED** that counsel for defendant Cleveland shall prepare this Order consistent with the rulings made in open Court this date, and that the Clerk of the Court shall enter the same and send copies to all counsel of record listed below.

The objections and exceptions of any party aggrieved by this Order are reserved unto them.

**ENTER:**

  
HON. ROBERT G. CHAFIN,  
Retired, sitting by designation

Prepared by:



Jeffrey K. Phillips, Esq. (W. Va. Bar # 5730)

Paul A. Konstanty, Esq. (W. Va. Bar # 9210)

**STEPTOE & JOHNSON PLLC**

Chase Tower, Eighth Floor

707 Virginia Street East

Post Office Box 1588

Charleston, West Virginia 25326-1588

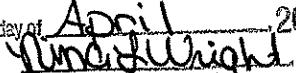
Telephone (304) 353-8000

Facsimile (304) 353-8180

*Counsel for defendant Cleveland Construction, Inc.*

STATE OF WEST VIRGINIA  
COUNTY OF PUTNAM, SS:

I, Nina L. Wright, Clerk of the Circuit Court of said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court. Given under my hand and the seal of said Court

this 3 day of April 2008  
  
Nina L. Wright, Clerk  
Circuit Court  
Putnam County, W. Va. MB

Copies to:

Michael T. Clifford (W. Va. Bar # 750)  
Barbara Harmon-Schamberger (W. Va. Bar # 7296)  
723 Kanawha Boulevard East  
Union Building, Suite 300  
Charleston, West Virginia 25301  
Telephone (304) 720-7660  
Facsimile (304) 720-7753  
*Counsel for plaintiffs*

Johnnie E. Brown, Esq. (W. Va. Bar # 4620)  
PULLIN, FOWLER, FLANAGAN, BROWN & POE  
JamesMark Building  
901 Quarrier Street  
Charleston, West Virginia 25301  
Telephone (304) 344-0100  
Facsimile (304) 342-1545  
*Counsel for defendant City of Hurricane and Ben Newhouse*

Mary H. Sanders, Esq. (W. Va. Bar # 3084)  
Patrick T. White, Esq. (W. Va. Bar #9992)  
HUDDLESTON BOLEN, LLP  
P.O. Box 3786  
Charleston, West Virginia 25330  
Telephone (304) 720-7506  
Facsimile (304) 344-4309  
*Counsel for defendant Kanawha Stone Company*

**EXHIBIT B**

**Defendant Cleveland's Response to Motion to Withdraw**



Chase Tower, Eighth Floor  
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Charleston, WV 25326-1588  
(304) 353-8000 (304) 353-8180  
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Writer's Contact Information

(304) 353-8170

Paul Konstanty@stepToe-johnson.com

August 19, 2008

Nina Wright, Clerk  
Putnam County Circuit Court  
2<sup>nd</sup> Floor, Judicial Building  
3389 Winfield Road  
Winfield, West Virginia 25213

Re: *Halburn v. City of Hurricane, et al.*  
Civil Action No. 07-C-298

Dear Clerk:

Please find enclosed for filing the original *Response to Motion for Leave to Withdraw* in the referenced matter. Copies have been provided to counsel as reflected on the Certificates of Service.

Thank you for your consideration.

Very truly yours,

*Paul A. Konstanty*

Paul A. Konstanty

PAK/tlm  
Enclosure

cc: Michael T. Clifford, Esquire (w/enc.)  
Johnnie E. Brown, Esquire (w/enc.)  
Mary Hylton Sanders, Esquire (w/enc.)  
Hon. Robert G. Chafin, Judge (w/enc. – *Via E-mail*)

FILE COPY

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

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Civil Action No. 07-C-298  
Hon. Robert G. Chafin

CITY OF HURRICANE, WEST VIRGINIA,  
a municipal corporation, BEN NEWHOUSE,  
Individually and in his capacity as City Manager  
for the City of Hurricane, CLEVELAND  
CONSTRUCTION, INC. dba Cleveland  
Construction, Inc. of Nevada, and KANAWHA  
STONE COMPANY, INC.,

Defendants.

RESPONSE TO MOTION FOR LEAVE TO WITHDRAW

COMES NOW, the defendant, CLEVELAND CONSTRUCTION, INC.,  
d/b/a CLEVELAND CONSTRUCTION INC., OF NEVADA (hereinafter referred to  
as defendant "Cleveland"), by and through their counsel, Jeffrey K. Phillips, Paul A.  
Konstanty, and the law firm of Steptoe & Johnson PLLC, and in response to the  
Motion For Leave To Withdraw filed by Attorney Michael T. Clifford, states as  
follows:

1. Defendant Cleveland has no objection to the relief sought by  
Attorney Michael T. Clifford, but responds to said motion in an effort to remind the  
parties of outstanding obligation and Orders entered in this civil litigation.

2. Initially, the Court granted a motion to compel, and  
subsequently awarded costs and fees in the sume of \$400.00 to defendant  
Cleveland for the plaintiffs' failure to substantially engage in the discovery process.

[See Order entered April 03, 2008].


3. More importantly, the Court's Scheduling Order sets various deadlines for the completion of discovery and the filing of written motions. One such deadline is August 29, 2008, at which time pretrial motions, including motions for summary judgment are to be filed with the Court.

4. Assuming *arguendo* that Attorney Clifford is granted leave to withdraw, whether before or after that date, remaining defense counsel will require specific guidance from the Court as: (1) whether the current schedule will remain in place; and if so, (2) the manner in which counsel may serve motions, pleadings and other correspondence upon the plaintiffs in the absence of counsel.

**WHEREFORE**, defendant Cleveland prays that the Court require plaintiffs to obey the prior Order of the Court awarding costs and fees in the amount of \$400.00 to defendant Cleveland immediately, and that the Court provide guidance to defense counsel as to the current Scheduling Order and the manner in which plaintiffs shall be provided with notice of motions, pleadings and other correspondence in the absence of counsel, and for such other and further belief as to the Court may seem just and proper.

**STEPTOE & JOHNSON PLLC**  
OF COUNSEL

**CLEVELAND CONSTRUCTION, INC.**  
BY COUNSEL

  
Jeffrey K. Phillips, Esq. (WV Bar # 5730)  
Paul A. Konstanty, Esq. (WV Bar # 9210)  
Chase Tower, Eighth Floor  
707 Virginia Street East  
Post Office Box 1588  
Charleston, West Virginia 25326-1588  
Telephone (304) 353-8000  
Facsimile (304) 353-8180  
Counsel for defendant Cleveland  
Construction, Inc.

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**Defendants.**

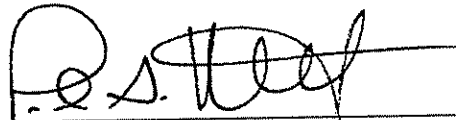
CERTIFICATE OF SERVICE

I hereby certify that on the 19<sup>TH</sup> day of August, 2008, I served the foregoing ***Response to Motion For Leave to Withdraw***, upon all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Michael T. Clifford (WV Bar # 750)  
Barbara Harmon-Schamberger (WV Bar # 7296)  
723 Kanawha Boulevard East  
Union Building, Suite 300  
Charleston, West Virginia 25301  
Telephone (304) 720-7660  
Facsimile (304) 720-7753  
*Counsel for plaintiffs*

Johnnie E. Brown, Esq. (WV Bar # 4620)  
PULLIN, FOWLER, FLANAGAN, BROWN & POE  
JamesMark Building  
901 Quarrier Street  
Charleston, West Virginia 25301  
Telephone (304) 344-0100  
Facsimile (304) 342-1545  
*Counsel for defendant City of Hurricane and Ben Newhouse*

Mary H. Sanders, Esq. (WV Bar # 3084)  
Patrick T. White, Esq. (WV Bar #9992)  
HUDDLESTON BOLEN, LLP  
P.O. Box 3786  
Charleston, West Virginia 25330  
Telephone (304) 720-7506  
Facsimile (304) 344-4309  
*Counsel for defendant Kanawha Stone Company*



---

Paul A. Konstanty (WV Bar # 9210)

**EXHIBIT C**

**Correspondence from Attorney Konstanty to Attorney Peyton re: Objection  
to Proposed Dismissal Order of Mark Halburn dated January 28, 2009**



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Charleston, WV 25326-1588  
(304) 353-8000 (304) 353-8180 Fax  
www.steptoe-johnson.com

Writer's Contract Information

January 28, 2009

**By Facsimile & Mail (304) 755-1255**

Harvey D. Peyton, Esq.  
PEYTON LAW FIRM, PLLC  
P.O. Box 216  
Nitro, WV 25143

Re: Halburn v. City of Hurricane, et al.  
Putnam County Civil Action No.: 07-C-298

Dear Harvey:

I am in receipt of your January 20, 2009 correspondence and proposed stipulation of dismissal, which proposes to dismiss all of the claims asserted by Mark Halburn in the above-titled litigation. I object to the language of the proposed stipulation of dismissal in as much as it stipulates that each party to this action shall bear their own costs and attorneys fees.

Prior to your appearance in this litigation on behalf of the plaintiffs, Judge Chafin granted a motion for costs and fees on behalf of my client in the amount of \$400.00, a copy of which I have enclosed for your benefit. You should also know that at the time of Mr. Clifford's withdrawal, I filed a response in opposition to the motion for withdrawal to the extent that the costs and fees awarded had not been paid at that time.

Therefore, I object to the proposed stipulation of dismissal to the extent that it implies that Mark Halburn individually is not responsible for complying with the prior Order of this Court to pay the costs and fees awarded.

To the extent that the plaintiffs forward a check to me for \$400.00 as and for those fees, in satisfaction of Judge Chafin's Order, I will not oppose the stipulation of dismissal. To that end, I have copied Judge Chafin on this correspondence as notice of my objection. Thanking you for your courtesies, I remain,

Very truly yours,

  
Paul A. Konstanty

**FILE COPY**

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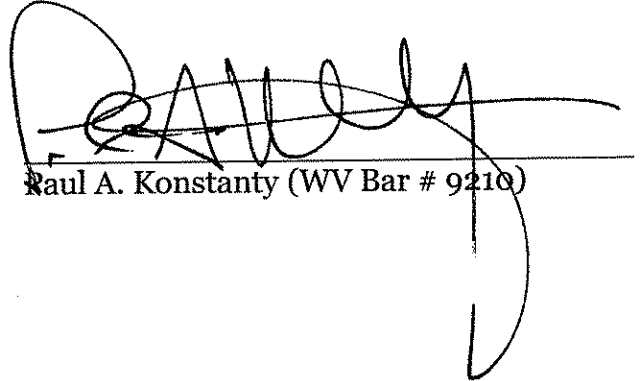
I hereby certify that on the 07<sup>th</sup> day of April, 2009, I served the  
foregoing ***Motion for Sanctions***, upon all counsel of record, by depositing a true  
copy thereof in the United States mail, postage prepaid, in an envelope addressed as  
follows:

Mr. Mark Halburn (via certified mail, return receipt requested)  
Rt. 4, Box 455  
Hurricane, West Virginia 25526  
*Pro se*

Harvey D. Peyton, Esq. (WV Bar # 2890)  
PEYTON LAW FIRM, PLLC  
P. O. Box 216  
Nitro, West Virginia 25143  
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*Counsel for Dolores Halburn*

Johnnie E. Brown, Esq. (WV Bar # 4620)  
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P.O. Box 3786  
Charleston, West Virginia 25330  
Telephone (304) 720-7506  
Facsimile (304) 344-4309  
*Counsel for defendant Kanawha Stone Company*

A handwritten signature in black ink, appearing to read "RAUL A. KONSTANY", is written over a horizontal line. The signature is stylized and somewhat illegible due to the cursive nature of the handwriting. A large, vertical, curved mark extends downwards from the right side of the signature, possibly a flourish or a stray stroke.

Raul A. Konstany (WV Bar # 9210)