

Not Reported in F.Supp.2d, 2008 WL 2120840 (S.D. Ohio)
(Cite as: **2008 WL 2120840 (S.D. Ohio)**)

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United States District Court,
S.D. Ohio,
Western Division.
Justin CURATOLA, Plaintiff,
v.
AMERICAN ELECTRIC POWER, et al., Defendants.

No. 1:06-CV-839.
May 19, 2008.

[Christopher D. Kuebler](#), Dennis M. O'Bryan, O'Bryan BaunCohen Kuebler, [Gary W.M. Baun](#), Birmingham, MI, for Plaintiff.

[Megan C. Ahrens](#), [Todd Matthew Powers](#), Schroeder Maundrell Barbieri & Powers, Cincinnati, OH, for Defendants.

ORDER

[SUSAN J. DLOTT](#), District Judge.

*1 On May 5, 2008, the Court held a status conference in this case, at which time the parties notified the Court that a private investigator hired by counsel for the Defendants had contacted the Plaintiff, Justin Curatola, directly without first contacting Plaintiff's counsel. The Court ordered defense counsel to submit the records of all correspondence with the private investigator, including emails, letters, faxes, reports, and time entries, and an index of the documents. On May 7, 2008, defense counsel submitted the requested records, which the Court has now fully reviewed.

In this case, Plaintiff asserts a Jones Act [FNI](#) claim against Defendants MEMCO Barge Line ("MEMCO"), and its parent company, American Electric

Power ("AEP"), alleging that he sustained injuries while employed by MEMCO as a deckhand aboard one of MEMCO's ships on April 4, 2006. Counsel for defendants retained a private investigator, Nancy Hughes, for the purpose of conducting surveillance on Plaintiff to determine the extent of his alleged injuries and the effect they have had on his life activities. Over the course of several months, Hughes monitored Curatola and his family, obtained surveillance footage of Curatola going about his daily activities, and reported her findings periodically to Megan Ahrens, an attorney for Defendants.

[FNI](#). See 46 U.S.C. § 688.

According to Plaintiff, sometime after he was injured, his father moved in with him in order to assist Curatola and his family. Plaintiff's father apparently runs a construction business and had placed signs in the yard advertising the "Curatola Construction" company. Hughes reported the signs to Ahrens who then did some initial research into the company. Ahrens was unable to determine who owned and operated the company and therefore instructed Hughes, via an email sent January 7, 2008, to "contact Curatola Homebuilders." Ahrens claims she did not caution Hughes specifically against making any *ex parte* contact with the plaintiff, Justin Curatola, because she did not foresee that Hughes would attempt such contact.

However, on February 14, 2008, Hughes contacted Curatola Construction pretending to be a homeowner looking for a construction crew to do renovations on her house. That same day, at approximately 4:30 p.m., Hughes met and spoke with Curatola and his father to discuss the purported renovation.

At some point, Justin Curatola had apparently discovered that Hughes was a private investigator.

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Curatola had complained to his attorney that someone was harassing him and his family members by following them and attempting to contact them. When first contacted about the problem, Plaintiff's counsel advised Plaintiff that he needed greater detail about who was following him and what contact had occurred. Shortly after the February 14, 2008 meeting, Curatola called Hughes and left a voicemail message indicating that he knew she was an investigator. Curatola also spoke to his attorney about the meeting. Subsequently, on March 5, 2008, Plaintiff's counsel sent an email to counsel for Defendants addressing the inappropriate contact.

*2 In the meantime, counsel for Defendants, having realized that Hughes had inappropriately contacted Curatola, attempted to assess the severity of the problem and determine the best way to address it. Defense counsel first became aware of Hughes' communications with Plaintiff on February 15, 2008 via a fax from Hughes to Ahrens describing the meeting that took place on February 14, 2008. Three days later, on February 18, 2008, Hughes left a voicemail for Ahrens, notifying her that Plaintiff Curatola knew Hughes was investigating him. On February 20, 2008, Ahrens instructed Hughes to cease any further investigation of Curatola and his family. At the time Ahrens received Hughes' fax and voicemail, defense co-counsel Todd Powers was out of town. When Powers returned to town and was fully informed of the situation, he and Ahrens spoke with other attorneys at their law firm about the ethical implications of the contact. After determining their course of action, on March 6, 2008, defense counsel self-reported their possible ethical violation to the Cincinnati Bar Association and then spoke with the Defendants in order to obtain permission to advise Plaintiff's counsel of the inappropriate contact. That same day, defense counsel sent a letter to Plaintiff's counsel confirming his concerns that inappropriate contact had occurred. In this letter, defense counsel explained the nature of the contact and provided a copy of the fax received from Hughes describing the meeting she arranged

with Curatola and his father.

In effort to resolve the situation, Defendants have already offered to agree that none of the video, photographs, or information obtained during the February 14, 2008 meeting will be used as evidence in this case. Defendants also offered to produce Hughes for deposition at their own expense so that Plaintiff may confirm the information provided in Hughes' fax.

During the May 5, 2008 hearing before this Court, Plaintiff's counsel argued that defense counsel acted inappropriately by either directly instructing Hughes to make contact with Curatola through Curatola Construction or by failing to specifically instruct Hughes against making such contact. On that basis, Plaintiff moved for a variety of sanctions, including but not limited to striking the Defendants' Answer to the Plaintiff's Complaint (doc. 7) or granting partial summary judgment for Plaintiff on the issue of medical causation. Defendants opposed Plaintiff's motion and defense counsel claimed that they never instructed the investigator to make direct contact with the Plaintiff and addressed the situation as soon as possible after learning of the transgression.

Rule 4.2 of the Ohio Rules of Professional Conduct, which governs an attorney's duties when communicating with someone who is represented by counsel, provides that “[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”^{FN2} Expounding upon the type of behavior this rule prohibits, the comparison note for Rule 4.2 states that it “is analogous to [DR 7-104\(A\)\(1\)](#)” of the former Ohio Code of Professional Responsibility.^{FN3} DR 7-104(A)(1) specifically prohibits an agent of an attorney from communicating ex-parte with a represented individual, as follows:

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FN2. Because this action has been filed in the Southern District of Ohio, the conduct of the attorneys in this matter is governed by the Ohio Rules of Professional Conduct. See *Schmeltz v. CSX Transp., Inc., No. 3:95 CV 7243, 1996 WL 936668, at *2 (N.D. Ohio Mar. 29, 1996).*

FN3. The Ohio Rules of Professional Responsibility superceded the former Ohio Code of Professional Responsibility and have been in effect since February 1, 2007.

***3** During the course of his representation of a client a lawyer shall not: (1) Communicate *or cause another to communicate* on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
 (Emphasis added).

In the instant case, there is some indication that defense attorney Megan Ahrens caused Hughes to communicate with Plaintiff Curatola by instructing Hughes to contact Curatola Construction. However, the Court finds no evidence that Ahrens intended to cause the inappropriate contact that occurred in this case. Instead, it appears that Ahrens did not fully appreciate the full consequences of instructing Hughes to contact Curatola Construction. Further, the documents submitted to the Court by defense counsel demonstrate that once they appreciated the extent of the ethical violation, they acted quickly to report their actions to the Cincinnati Bar Association and advise Plaintiff's counsel of the inappropriate communication. Under the circumstances, the Court finds that defense counsel's error does not warrant such severe sanctions as striking the Defendants' Answer or granting summary judgment as to a key issue such as medical causation.

Plaintiff cites no cases in which a Court awarded such remedies, which directly touch the merits of the case and would severely penalize the Defendants. To the contrary, the cases that Plaintiff relied upon during the May 5, 2008 conference suggest sanctions ranging from "the severe sanction of disqualification, to the more lenient sanction of precluding counsel from using any information obtained through the *ex parte* contacts." *In re Complaint of PMD Enterprises Inc., 215 F.Supp.2d 519, 531 (D.N.J.2002)*; see also *Weibrecht v. Southern Illinois Transfer, Inc., 241 F.3d 875, 883-84 (7th Cir.2001)* (holding that where the Plaintiff's attorney violated an ethical rule prohibiting attorneys from contacting parties represented by other counsel, the sanction of dismissal with prejudice was not warranted and was "too harsh a response"). In *In re Complaint of PMD*, the district court revoked the *pro hac vice* admission of counsel for the plaintiff after finding that the attorney had violated several ethical duties through a number of inappropriate actions that included directing a private investigator to engage in *ex parte* communications with members of the opposing party's litigation control group. The court imposed the severe penalty of attorney disqualification in that case in part due to its finding that the attorney had "a lengthy and well documented history of misconduct" and had previously directed the same investigator to initiate inappropriate *ex parte* communications in a previous case. *Id.* at 524-27 (describing the repeated ethical violations that the attorney had committed including threatening to kill opposing counsel).

***4** The violation that occurred in the instant case does rise to the level of misconduct that occurred in *In re Complaint of PMD*, and the Court finds that lesser sanctions will adequately remedy any harm caused by the actions of defense counsel. See *Gallagher v. Van Lott, Inc., No. 6:05-0642-RBH-WMC, 2006 WL 3254464, at *3-4 (D.S.C.2006)* (excluding evidence obtained from a defense investigator's *ex parte* communication with the plaintiff). Accordingly, the Court

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precludes any further use of the evidence collected by Investigator Hughes as a result of the inappropriate contact with Plaintiff and orders that Hughes conduct no further investigation of Plaintiff or his family. The Court additionally prohibits Defendants from hiring any other private investigators to investigate Plaintiff or his family in connection with this matter. Finally, the Court orders Defendants to forward all video or auditory recordings and any other evidence obtained through Hughes' *ex parte* communications with Curatola to Plaintiff and to produce Hughes for deposition at Plaintiff's request.

IT IS SO ORDERED.

S.D. Ohio, 2008.
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