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Forsyth judge orders sanctions against Pulte for wiping evidence

Plaintiffs' lawyer seeks \$400,000 in attorney fees and costs from home developer

By Kathryn Hayes Tucker, Staff Reporter



Michael Carvalho said the award could be the largest for spoliation of electronic data in state history.

Forsyth County Superior Court Chief Judge Jeffrey S. Bagley has ordered sanctions against Pulte Home Corp. for destroying e-mails and other electronic evidence in an environmental lawsuit.

The sanctions, which will be determined in a hearing March 31, include paying attorney fees for plaintiffs suing the developer.

"We expect that attorney fees and costs will be in the range of \$400,000—making it the largest award of sanctions for willful spoliation of electronically stored information in Georgia history," said Michael P. Carvalho, attorney for Adele and Tim Simerly, who are suing Pulte over stormwater runoff from the Fieldstone subdivision.

Pulte's attorney, W. Gordon Hamlin Jr. of Bryan Cave, responded to questions about the case by e-mail with a prepared statement approved by the company's in-house counsel. "Pulte produced an enormous quantity of documents to counsel for the Simerlys," the statement said. The plaintiffs did not request documents that would have included e-mails "other than a few distinct categories." Furthermore, "none of the deleted e-mails" are relevant to the lawsuit.

"Pulte looks forward to trying this case and demonstrating to the jury that its engineering and erosion controls actually reduced the discharge of sediment dramatically," Hamlin's statement said. "In short, Pulte believes that the evidence will demonstrate that the plaintiffs have not been harmed by any of Pulte's activities."

Related documents:

- [Report and recommendation \(Jan. 3, 2011; pdf\)](#)
- [Order adopting special master's final report and recommendation \(Feb. 9, 2011; pdf\)](#)
- [Order on defendants' motion for reconsideration \(Feb. 9, 2011; pdf\)](#)

The case was filed in January 2009. The plaintiffs, who have been joined in the suit by other homeowners downstream from the Fieldstone subdivision, claim stormwater runoff from Pulte's development has damaged their property and filled their ponds with silt. "The damages are not yet established because they are ongoing," Carvalho said. "Each of the plaintiffs and third party defendants [has] suffered significant property damage due to sediment and [is] receiving significantly more stormwater that has resulted in damage to driveways and bridges."

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In September 2009, Bagley ordered an investigation by a special master into allegations that Pulte's vice-president of land development, George "Ted" Turner, had deleted e-mails related to the case. The order followed a deposition in which Turner said he had deleted e-mails and intended to continue doing so, according to Carvalho.

Bagley appointed Kevin Tallant of Miles Patterson Hansford Tallant in Cumming to be a special master in the case and investigate the claims of deleted e-mails.

Tallant's report concluded that Pulte employees violated Bagley's order on spoliation of evidence, specifically deleting e-mails as well as replacing and reformatting hard drives in some computers. After a Feb. 3 hearing, Bagley issued a ruling Feb. 9 adopting Tallant's findings.

"Pulte argued that despite the fact that significant efforts had been undertaken by the court-appointed forensic expert, 'only 160 documents' had been produced as potentially deleted emails," wrote Bagley. "And of these 160 documents, none of the emails was ultimately determined to be a 'smoking gun,' which would have otherwise caused this court to conclude that Turner's deletion was intended to hide, cover up or obfuscate the truth.

"Despite this court's prior order prohibiting the continued deletion of emails, Pulte continued to engage in a pattern of ... spoliation," the judge added.

The judge noted that the company replaced hard drives without first mirror imaging them. "The specter of spoliation remains and causes this court to find that Pulte continued to engage in a pattern of suspicious activities for which Turner's prior spoliation leaves the court little room to give Pulte the benefit of the doubt," Bagley wrote.

Bagley also ordered Pulte to pay the cost of Tallant's investigation, which the report said cost \$60,000.

The judge signed a separate order denying Pulte's motion for reconsideration.

The issue of destruction of electronic evidence is likely to be an issue in the trial, scheduled for April, said Carvalho. The judge's order said he would allow the plaintiffs to present "evidence of spoliation by Pulte's employees" as a part of the sanctions against the developer.

However, Bagley declined the plaintiffs' request to strike the defendant's answer to the suit. "Regardless of the court's findings of prior spoliation by Pulte, and the more recent questionable activities of Pulte employees," Bagley's order said, "Pulte deserves its day in court before a jury of 12 people."

The case is *Simerly v. Pulte*, No. 09CV-0089.

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