

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS  
AT CHARLESTON

CHARLOTTE PRITT,

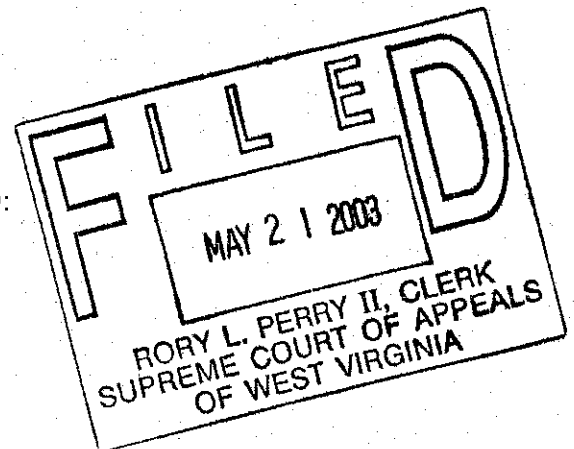
Petitioner,

vs.

HON. CHARLES M. VICKERS, JUDGE,  
FAYETTE COUNTY CIRCUIT COURT,

Respondent.

NO:



PETITION FOR WRIT OF PROHIBITION

Charlotte Pritt petitions this Court looking once again for justice. All she wants is a full, fair and open trial. She has been denied this by Judge Vickers who first wrongfully granted Summary Judgment and has, since this Court sent the case back for jury trial, denied Plaintiff the right to discovery, has now wrongfully denied Plaintiff the opportunity to call expert witnesses and has abused its discretion by refusing to enter a Scheduling Order, all of which has resulted in gross prejudicial mismanagement of the case by the Court to the detriment of Plaintiff.

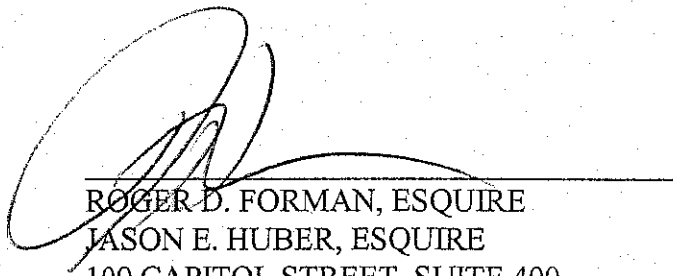
Wherefore your petitioner prays that this Court suspend its rules and hold an immediate emergency hearing, stay the trial date of June 9, 2003 and appoint a special Judge to hear this case and issue an appropriate and complete Scheduling Order with a trial date as soon as practicable.

CHARLOTTE PRITT

By Counsel

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CHARLOTTE PRITT,

Petitioner,

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NO:

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FAYETTE COUNTY CIRCUIT COURT,

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MEMORANDUM OF LAW IN SUPPORT OF  
PETITION FOR WRIT OF PROHIBITION

I. INTRODUCTION

This Court reversed the lower Court's granting of Summary Judgment in this case and remanded to the Fayette County Circuit Court the case for jury trial. Plaintiff's efforts to obtain a fair jury trial have been completely frustrated by Judge Vickers' failure to properly manage the case resulting in reversible error which requires prohibition.

II. STATEMENT OF ERRORS

1. The lower Court has arbitrarily and capriciously granted Defendants Motion to Strike Plaintiff's Rule 26(e) Supplemental Disclosure of Expert Witnesses with the result that Plaintiff expert witnesses have been excluded from testifying.

2. The lower Court has refused to allow Plaintiff to depose the Defendants' expert witnesses guaranteeing trial by ambush.

3. The lower Court has refused to enter a Scheduling Order pursuant to Rule 16 which results in a gross mismanagement of the subject case to the extreme detriment of Plaintiff.

4. By striking Plaintiff's Rule 26(e) disclosure and mismanaging the subject case by refusal to enter a Scheduling Order, the lower Court has clearly committed reversible error warranting prohibition.

### III. DISCUSSION

A. The lower Court has arbitrary and capriciously granted Defendants Motion to Strike Plaintiff's Rule 26(e) Supplemental Disclosure of Expert Witnesses with the result that Plaintiff expert witnesses have been excluded from testifying.

"Under *W.Va. R. Civ. P. 26(b)(4)(A)(i)*, a party is required to disclose to another party the identity of persons whom that party intends to call as expert witnesses at trial only when that party has determined within a reasonable time before trial who his expert witnesses will be. Syllabus Point 3, *Michael v. Henry*, 177 W.Va. 494, 354 S.E.2d 590 (1987)"

Defendants would have us believe that a "Joint Motion" entered by the Court on November 17, 1998, (attached as Exhibit 1) that related only to Defendants' efforts to present a Motion for Summary Judgment, would be an absolute bar to Plaintiff's disclosure of the identity of expert witnesses under Rule 26. In short, Defendants contend and the Court has ruled that Plaintiff was required to identify her expert witnesses more than four years before the June 9, 2003 trial date. This is clearly erroneous and inconsistent with the West Virginia decisions on the question.

In the decision of *Michael v. Henry*, 177 W.Va. 494, 354 S.E.2d 590 (1987) Justice Neely, in reference to Rule 26, stated:

"The great majority of courts that have construed this rule agree that expert witnesses need not be identified until the later stages of discovery, *See Jackson v. Kroblin Refrigerator Express, Inc.*, 49 F.D.R. 134, 135 (N.D.W.Va. 1970) and cases there cited; Annot., 19 A.L.R.3d 114 (1968). The Advisory Committee Note dealing with Rule 26(b)(4)(A) of the *Federal Rules of Civil Procedure* states

in pertinent part: "Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. 48 F.R.D. 487 at 504."

In the *Michael* case, a Writ of Prohibition was granted by the West Virginia Supreme Court which prohibited Berkley Circuit Judge Patrick G. Henry III from requiring Michael, the plaintiff, to disclose expert witnesses before he could conduct discovery of the defendants expert witnesses. Thus prohibition lies in questions of this nature.

In third syllabus of the *Michael* decision, the Court reiterates that under Rule 26, "A party is required to disclose to another party the identity of persons whom that party intends to call as expert witnesses at trial only when the party has determined **within a reasonable time before trial** who his expert witnesses will be." (Emphasis provided). Surely, disclosing to Defendants the identity of Plaintiff's expert witnesses three months and nineteen days before the trial date is "within a reasonable time before trial".

At the conference with the Court on February 21, 2003<sup>1</sup>, the Court made it clear that it was following the "shall" language in Rule 16(b) with the Order of January 28, 2003 but the Court appears to have decided to do nothing further under Rule 16(c) since the language for that paragraph of the rule is "may". At this conference, the Court informally denied Plaintiff's request for a "Trial Scheduling Order" although no formal order had been entered. This was a clear abuse of the Court's discretion. A case of this nature requires effective management by the Court.

Plaintiff supplemented its expert disclosures on February 20, 2003 (attached as Exhibit 2)

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<sup>1</sup> The Court apparently thought that this should be an informal conference and conversed with the parties' attorneys at Counsel table rather than from the bench or in chambers. The result, there is no transcript of this hearing.

and now the Court denies Plaintiff the right to call said witnesses. The Court is clearly in error relying on a stale pre-remand schedule that applied only to summary judgment proceedings.

B. The lower Court has refused to allow Plaintiff to depose the Defendants' expert witnesses guaranteeing trial by ambush.

In its Pre-Trial Order (attached as Exhibit 3), the Court denied Plaintiff the right to depose Defendants' experts. The Court referenced to the 1-28-03 Order (attached as Exhibit 4) which **never** established a discovery schedule and stated that discovery was set by the Order dated November 17, 1998. The "Order" of November 17, 1998 (attached as Exhibit 1), incorporated the parties joint motion which addressed discovery before the Court granted Summary Judgment.

The effect of the lower Court's ruling is to preclude all discovery after May 15, 1999, four plus years before trial.

Because Judge Vickers refused to allow any discovery after this Court reversed the Summary Judgment, counsel wrote the counsel for Defendants on April 17, 2003 (attached as Exhibit 5) and requested a cooperative discovery schedule by agreement.

Defendant's response of April 22, 2003, (attached as Exhibit 6) typical for a Washington, D.C. lawyer, was that we were sunk because we didn't depose four years earlier.

Judge Vicker's encouragement and cooperation in Defendants' intransigent position on discovery creates an absurd result requiring trial by combat.

It is clearly reasonable to conduct discovery after reversal of Summary Judgment in order to satisfy this Court's mandate for a jury trial. The Court's ruling on this matter must be prohibited. This inaction is not proper management, it is gross mismanagement.

C. The lower Court refused to enter a Scheduling Order pursuant to Rule 16 which resulted in a gross mismanagement of the subject case to the extreme detriment of Plaintiff.

Plaintiff brought before the Court below a Motion for a Trial Scheduling Order and Memorandum in support thereof, which was noticed for hearing on January 13, 2003 at 11:00 a.m. Said Motion is a "speaking" Motion and includes Exhibits supporting it (attached as Exhibit 7).

During a January 10 phone conference, it became apparent that Defendants contended that a "Joint Motion for Entry of Discovery Schedule", granted by the Court on November 17, 1998, should be treated as a Rule 16 "Scheduling Order" and thus preclude Plaintiff from seeking a Rule 16 "Scheduling Order".

Examination of the "Joint Motion", subsequent correspondence between the parties (see letter dated June 21 1999 from Jason Levine, (attached as Exhibit 8) and a subsequent "Scheduling Order" dated July 9, 1999, (attached as Exhibit 9) reveals that their contention is without merit. This Joint Motion in no way resembles a Rule 16 "Scheduling Order". Further, it was not the product of a scheduling conference as required by Rule 16(b):

*" 16(b) Scheduling and planning. — Except in categories of actions exempted by the Supreme Court of Appeals, the judge shall, after consulting with the attorneys, for the parties and any unrepresented parties, by a scheduling conference, telephone, mail or other suitable means, enter a scheduling order. . ."*(Emphasis provided).

On the other hand, the July 9, 1999 "Scheduling Order" perfectly meets the criteria as a Rule 16(b) "scheduling order" in that it was the product of a telephonic conference between the Court and the parties on May 28, 1999. It is entitled "Scheduling Order" and it sets the trial date as provided by Rule 16(b)(4).

The obvious conclusion that the July 9, 1999 "Scheduling Order" is a "scheduling order" is supported by remarks in a letter dated June 21, 1999 from Defense Attorney Jason Levine wherein he stated:

**"Preliminary Scheduling Order that includes only those subjects we discussed with Judge Vickers and can be supplemented later should this case survive summary judgment."** [Emphasis provided].

The "Joint Motion" was an agreement between the parties to expedite the progress of case and related only to the Defendants' Motion for Summary Judgment<sup>2</sup>. **The summary judgment did not survive.** This "Joint Motion" not only expired after the summary judgment was fully processed but it was abrogated by the denial of the Summary Judgment by the West Virginia Supreme Court. Defendants should not be allowed to disavow their representation that the "Joint Motion" was to accommodate the Summary Judgment proceedings.

In regard to the July 19, 1999 Scheduling Order, this Order goes into effect when and "if defendants' pending motion for summary judgment is denied." It is not conditioned on denial by the Circuit Court but conditioned on denial generally. The West Virginia Supreme Court has denied the Summary Judgment and mandated that the case be tried to a jury.

**Plaintiff's effort to obtain a "Scheduling Order" was merely an effort to comply with the July 19, 1999 "Scheduling Order" and get the parties and the Court to honor that Order.**

The continuing effort by Plaintiff to obtain a trial scheduling order is demonstrated by the

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<sup>2</sup> See *State of West Virginia ex rel. Jack Crafton v. Honorable Robert Burnside*, 207 W.Va. 74, 78, 528 S.E.2d 768, 771 (Feb. 2, 2000) "A stipulation of counsel originally designed to expedite trial should not be rigidly adhered to when it becomes apparent that it may inflict a manifest injustice on one of the contracting parties."

record.. Contemporaneously with the July 19, 1999 "Scheduling Order" Plaintiff attempted to get a more complete scheduling order. The next effort was in April of 2000 and again on August 27, 2002.

Defendants filed their "Opposition" to the Motion by Plaintiff. Defendants "Opposition" was (1) without merit, (2) ignored and did not respond to the compelling reasons for a Trial Scheduling Order as set forth in Plaintiff's Motion, (3) misinterprets the November 7, 1998 Joint Motion, (4) ignores the Court's Scheduling Order that was entered on July 9, 1999 and (5) erroneously reports a ruling by a Court on February 13, 2002 to the effect that Plaintiff "may not re-open discovery and name new witnesses unless and until the Court grants her leave to do so." Plaintiff is unaware of any ruling prior to the Pre-Trial Order that prohibited Plaintiff from naming new witnesses. The Pre-Trial Order wrongfully did so.

D. By striking Plaintiff's Rule 26(e) disclosure and mismanaging the subject case by refusal to enter a Scheduling Order the lower Court has clearly committed reversible error warranting prohibition.

The Court has now refused to allow discovery or witness supplementation and has grossly mismanaged this case to the point of absurdity. Ms. Pritt cannot get a full and fair trial.

#### CONCLUSION

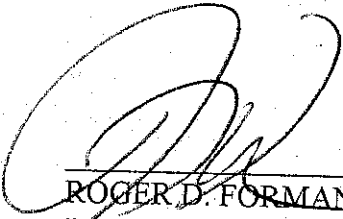
Wherefore, Charlotte Pritt prays for a rule to show cause, stay of the trial now scheduled for June 9, 2003 and a new Judge to be appointed who will be directed to implement a full Scheduling Order allowing for proper discovery.

Petitioner requests that this matter be expedited and that the rules be suspended so she can get as early a trial as possible.

CHARLOTTE PRITT  
By Counsel

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VERIFICATION

I, Charlotte Pritt, being first duly sworn says that the statements made in the PETITION FOR A WRIT OF PROHIBITION and MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION, are true and correct upon information and belief.

Charlotte Pritt  
CHARLOTTE PRITT

STATE OF WEST VIRGINIA,

COUNTY OF Kerawala, TO-WIT:

Taken, subscribed and sworn to before me this 21 day of May, 2003.

My commission expires February 11, 2013.

Tracy D. Jones  
Notary Public

