

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

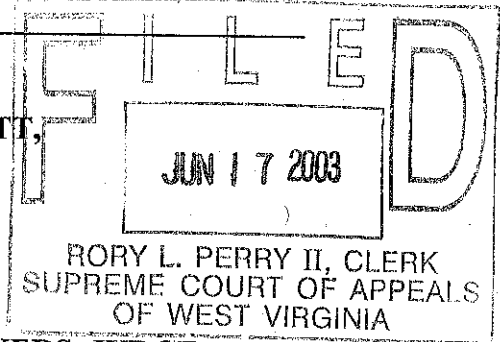
CHARLOTTE PRITT,

Petitioner,

v.

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

Respondent.



IN PROHIBITION NO. 031066

DEFENDANTS' RESPONSE TO RULE TO SHOW CAUSE

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June 17, 2003

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INTRODUCTION

Petitioner's claim that she was wrongfully denied the opportunity to designate experts or depose defendants' experts is, in a word, false. This claim is unequivocally belied by Exhibit 1 to the Petition for Writ of Prohibition, a "*Joint Motion for Entry of Discovery Schedule*," signed by petitioner's counsel and entered by the trial court on November 17, 1998, which establishes the schedule that *petitioner's counsel agreed to* in black and white:

- **"2/1/99: Production of plaintiff's expert reports and disclosures, if any"**
- **"4/15/99: Commencement of depositions of defendants' expert witnesses, if any"**
- **"5/15/99: Completion of expert and fact discovery."**

Pet. Exh. 1; Exh. 2 hereto (emphasis added).

Equally baseless is petitioner's claim that she cannot receive a "full, fair and open trial" absent an extraordinary Writ of Prohibition. This claim flatly contradicts her earlier representations, to the trial court and to this Court, that this case was ready for trial *three years ago*. On May 11, 2000, Judge Vickers asked the parties whether they would be prepared to try the case on the original trial date of June 5, 2000. Petitioner's counsel responded: "*We're ready -- we will be ready for trial.*" Tr. of May 11, 2000 Pretrial Conf. at 23 (Exh. 1 hereto) (emphasis added).

After entry of summary judgment against her four days later, petitioner in her appellate briefs and oral argument to this Court repeatedly represented that this case was ready for trial. Notably, during petitioner's rebuttal at oral argument, Justice Davis asked petitioner's counsel whether he agreed with defendants' counsel that "all discovery that was requested by both parties was had." Counsel responded that "*[a]dequate discovery was conducted,*" and not once did either of petitioner's appellate counsel suggest otherwise. Audiotape of Oral Argument (Oct. 3, 2001). Petitioner's assurances concerning discovery led this Court to remand for trial on

the record as it then stood. See Pritt v. Republican Nat'l Comm., et al., 210 W. Va. 446, 456 (2001).

Nevertheless, less than *three weeks* before the trial date of June 9, 2003, after the passage of almost seven years since the events at issue and following nearly six years of litigation, petitioner for the first time sought an indefinite stay to pursue brand-new discovery and designate brand-new fact and expert witnesses. Yet over the past 16 months, the trial court has properly and consistently adhered to the deadlines set forth in its November 17, 1998 Order, while inviting petitioner to file a motion for relief if she had grounds to do so. Petitioner never filed a motion to re-open discovery, nor did she request that Judge Vickers recuse himself. Instead, petitioner waited until only 19 days before trial to file her Petition for an extraordinary Writ of Prohibition. Quite apart from the Petition's lack of merit, petitioner's delay in submitting it presents an independent ground to deny the Petition.

In sum, the Petition utterly mischaracterizes the facts and makes unprofessional and baseless accusations against a respected trial judge. Petitioner's claims of injustice are nothing more than a desperate effort to avoid the very trial she claims to want, before the presiding judge of the venue that she herself chose.¹

STATEMENT OF THE CASE

Petitioner filed her initial Complaint in this case on October 31, 1997 relating to events that occurred more than a year before. After nine months of discovery, the trial court entered a Scheduling Order that was carefully negotiated and agreed to by the parties before its submission to and approval by the court. See Exh. 2 hereto. This November 17, 1998 Scheduling Order -- partially quoted above -- set final deadlines for all discovery, including

¹ This Response is submitted on behalf of defendants Republican National Committee, National Republican Senatorial Committee, and West Virginia State Victory Committee.

designation of expert witnesses and the submission of expert reports by plaintiff, and then by defendants. Id. Petitioner had until February 1, 1999 to designate expert witnesses, but she chose not to designate any. Id. Defendants had until April 1, 1999 to counter-designate expert witnesses. Id. On that date, defendants identified three expert witnesses and produced detailed reports and résumés for each of them. Petitioner had until May 15, 1999 to depose each of these witnesses, but she chose not to do so. Id.

After more than fifteen months of discovery, the parties briefed and argued defendants' motion for summary judgment. At no time before, during, or after that briefing did petitioner ask for additional discovery. Trial was set for June 5, 2000. See Scheduling Order of July 9, 1999 (Exh. 3 hereto). During the Pretrial Conference on May 11, 2000, the trial court asked petitioner's counsel if petitioner would be ready for trial on June 5, 2000; petitioner's counsel responded: "*I have no real problems, Your Honor. We're ready -- we will be ready for trial*" on June 5. See Exh. 1 hereto (emphasis added). Neither before, at, or after the Pretrial Conference did petitioner suggest that her discovery efforts had been thwarted or compromised in any way. Nor did petitioner seek to re-open the period for designation of experts or for deposing defendants' experts.

Trial did not occur because the trial court entered summary judgment on behalf of defendants on May 15, 2000. Petitioner then appealed to this Court. In her appellate briefs, petitioner made abundantly clear that the case was ready for trial at the time summary judgment was entered. Indeed, petitioner's opening brief described at length evidence that she characterized as sufficient for her to *prevail* at trial. See Appellant's Brief at 7-15, 23-27 (June 14, 2001) (Exh. 4 hereto). The entire thrust of petitioner's argument on appeal was that the trial court's entry of summary judgment improperly deprived her of a trial in June 2000. See, e.g., id. at 28 ("By this Appeal [Appellant] request[s] a jury trial of the case."). Further, during

rebuttal oral argument to this Court on October 3, 2001, petitioner's counsel stated in response to questions from Justice Davis that "[a]dequate discovery was conducted" and the case was ready for trial on the record as it then stood. Audiotape of Oral Argument (Oct. 3, 2001). Justice Davis had previously asked for and received assurances from defendants' counsel that petitioner had received all requested discovery, and petitioner's appellate counsel agreed.

By decision dated December 12, 2001, this Court reversed the entry of summary judgment and remanded for trial on the record as it then stood. See Pritt, 210 W. Va. 446, 456.

After remand, the trial court conferred with the parties about scheduling issues. On February 13, 2002, during an informal (and un-transcribed) status conference with the trial court, petitioner suggested for the first time that she might require additional discovery.² Defendants' counsel objected that discovery had closed. During the status conference, the Court set the case for trial on June 9, 2003, but did not re-open discovery.

During the fifteen months between the February 2002 conference and her May 21, 2003 Petition, petitioner never filed a motion for leave to re-open discovery or designate new expert witnesses. The subject next arose on August 17, 2002, when petitioner -- *without* prior approval of the trial court or defendants' consent -- took the unusual step of noticing the deposition of *her own* brand-new "expert" witness. See Notice of Deposition for Steven Fesenmaier (Aug. 17, 2002) (Exh. 5 hereto). Defendants objected to this deposition and reminded petitioner that she had not sought leave to re-open discovery or designate expert

² Contrary to petitioner's suggestion during the informal conference, this Court has long held that public figure defamation plaintiffs must prove falseness by clear and convincing evidence. See, e.g., Hinerman v. Daily Gazette Co., Inc., 188 W. Va. 157, 168-69 (1992); Maynard v. Daily Gazette Co., 191 W. Va. 601, 603 (1994). This burden of proof was not newly imposed on petitioner by the Court's decision on appeal in this case. Petitioner's own error regarding her standard of proof hardly justifies a Writ of Prohibition in her favor. Moreover, petitioner's appellate counsel stated during her opening oral argument before this Court that if the standard of proof for falseness were "clear and convincing evidence," then petitioner still had adduced "enough evidence to go to a jury." Audiotape of Oral Argument (Oct. 3, 2001).

witnesses. See Letter from Jason A. Levine to Hugh H. Roberts (Aug. 19, 2002) (Exh. 6 hereto). Petitioner cancelled the deposition.

After the United States Supreme Court denied defendants' petition for writ of *certiorari* on October 7, 2002, the parties attempted to agree to a joint Pretrial Scheduling Order. These efforts were unsuccessful because petitioner insisted on leaving open the possibility of new discovery and the designation of new expert witnesses. On December 13, 2002 -- a year after this Court's remand -- petitioner submitted a "motion for trial scheduling order" that purported to re-open and continue the time for discovery and witness designation, even though the trial court had never provided leave regarding these matters. See Plaintiff's Motion for Trial Scheduling Order (Dec. 13, 2002) (Exh. 7 hereto).

The trial court issued its own Trial Scheduling Order, pursuant to West Virginia Rule of Civil Procedure 16, on January 28, 2003. See Order of Jan. 28, 2003 (Exh. 8 hereto). This Order set deadlines for pre-trial motions and pre-trial conferences. It also stated that the discovery schedule would continue to be governed by the November 17, 1998 Scheduling Order -- the one agreed to and signed by petitioner's counsel before entry by the court -- pursuant to which discovery had ended on May 15, 1999. Id.

In another instance of flagrant defiance of the Trial Scheduling Order, and without seeking leave to do so, petitioner designated *six* brand-new "expert witnesses" -- a "film industry" expert, a law professor, an accountant, two former legislators, and a psychologist -- on February 20, 2003. See Supplement to Plaintiff's Disclosure Under Rule 26(a)(1) (Feb. 20, 2003) (Exh. 9 hereto). Despite the specific and stipulated requirements of the 1998 Order, petitioner's new designations were 48 ½ months late *and* failed to include any expert reports or even résumés. Id. Defendants moved to strike the new expert designations because they came

four years too late, they failed to include expert reports, and they were barred by the January 28, 2003 Scheduling Order.

The trial court granted defendants' motion to strike at the Pretrial Conference on May 15, 2003. See Tr. of May 15, 2003 Pretrial Conference (Exh. 10 hereto). The trial court also ruled that it would not permit petitioner to depose defendants' expert witnesses, the deadline for which had expired without objection on May 15, 1999. Most important to the trial court's resolution of these issues was petitioner's failure to seek leave or provide justification for additional discovery:

I've heard this issue now for several months; maybe years. I have respected what you've tried to tell me. I have reviewed the past orders in this case that counsel has signed. I have heard your positions with regard to what those orders meant.

In January of 2003, I had counsel come up here for a pretrial conference. . . . I told you at that time that I would enter the Rule 16 order, which I did. I think it's very clear. To my knowledge, since that time, there has been *no motion or effort to change that order*. That order stands. . . .

Let me say, I don't think anybody's being misled. Mr. Roberts has presented these orders numerous times. They're in his pretrial brief. I've looked at them. . . . This is where the Court is having a problem. I know he has briefed this issue. I've ruled. . . There's no reconsideration. . . There's no anything. . . .

I think *with regard to experts*, time has been given. They've been noticed. *They've had opportunity to be deposed*. . . .

Mr. Roberts [petitioner's lead counsel] has argued this and argued this and argued this, and I take the position . . . that the experts that were named were the experts you were going to use. In January, I said that [those were] the deadlines that were in place.

See Exh. 10 hereto at 14, 17-18, 20 (emphasis added).

At the Pretrial Conference, the parties also agreed to dates for pretrial submissions, and submitted their Joint Proposed Pretrial Order to the trial court four days later.

See Proposed Pretrial Order of May 19, 2003 (Exh. 11 hereto). This proposed Order also specifically states that defendants' motion to strike petitioner's new expert witness designations is "granted," it "reiterates" that "discovery in this case is closed," and it "ORDERS that no further depositions, written discovery requests, or new expert witness designations shall be permitted." Id. (emphasis in original). Despite her agreement to the form of the Joint Proposed Pretrial Order, petitioner sought a Writ of Prohibition just two days later. This Court issued the Rule to Show Cause on May 30, 2003. See Exh. 12 hereto.³

On June 6, just one week later, petitioner inexplicably returned to the trial court and submitted a Motion for Disqualification, requesting that Judge Vickers recuse himself. In view of the Petition pending in this Court for the *same* relief, the Motion is apparently an afterthought by petitioner, who now is trying to correct her failure to ask the trial court for relief before taking the matter to this Court. Judge Vickers responded to petitioner's Motion in a remarkably restrained letter to Chief Justice Starcher dated June 12, 2003 (Exh. 13 hereto). The letter explains that Judge Vickers harbors no "partiality" or "bias" toward petitioner, and that he simply ruled on the matters pending before him while encouraging the parties to file motions if they sought to modify any scheduling orders or seek relief from any rulings. As Judge Vickers states, petitioner filed no appropriate motions, and thus failed properly to raise her concerns regarding discovery and expert witnesses in a manner appropriate for decision by the court. Id.

³ Defendants' counsel made several attempts to keep the case on track for trial on June 9, but to no avail. Shortly after the Petition was filed, defendants' counsel asked petitioner's trial counsel, Roger Forman, whether petitioner would be willing to negotiate a resolution to the issues raised in the Petition. Mr. Forman stated that petitioner demanded all the relief sought. Defendants' counsel again contacted petitioner's counsel after the Court issued the Rule to Show Cause on May 30, and offered consent to petitioner's requested discovery and witness designations in time for trial to commence on June 9. Petitioner's counsel rejected this proposal as well, stating that they insisted on the removal of Judge Vickers.

ARGUMENT

Prohibition is “an extraordinary remedy and should be granted in only the most extraordinary cases.” State ex rel. Rose v. Pancake, 209 W. Va. 188, 190 (2001) (denying prohibition). See also State ex rel. Gordon Mem’l Hosp. v. West Va. State Bd. of Examiners for Registered Nurses, 136 W. Va. 88, 105 (1951) (denying prohibition and describing it as “an extraordinary remedy for use only in cases of necessity”). For this reason, prohibition is available in matters “involving a trial court’s pretrial ruling on discovery or the admissibility of evidence” only upon “*compelling evidence of irremediable prejudice*.” Policarpio v. Kaufman, 183 W. Va. 258, 261 (1990) (denying prohibition) (quoting and modifying State ex rel. Williams v. Narick, 164 W. Va. 632 syl. pt. 2 (1980)) (emphasis added). Petitioner seeks an extraordinary Writ of Prohibition *solely* on the basis of Judge Vickers’ enforcement of longstanding -- and mutually-agreed -- scheduling orders governing discovery. Petitioner proffers no evidence whatsoever, let alone “compelling evidence,” that either the original **stipulated** discovery order, or the order enforcing it, were erroneous, or that she will be unfairly prejudiced if the Petition is denied.

Further, although petitioner demands the disqualification of Judge Vickers from presiding over future proceedings in this case, she does not suggest, let alone demonstrate, that he is “motivated by interest or by prejudice and bias against” her. State ex rel. West Va. Dep’t of Public Assistance v. See, 145 W. Va. 322, 336 (1960). See also Fahey v. Brennan, 137 W. Va. 37, 45-46 (1952) (disqualifying trial judge on prohibition, for “prejudice, hatred, and partisanship against the petitioner”). On the contrary, petitioner contends simply that Judge Vickers’ pretrial discovery rulings were adverse to her. Absent any indication of prejudice, bias, or self-interest on the part of Judge Vickers, his wholly routine and well-supported rulings simply do not warrant his removal from this case as a matter of law.

Finally, petitioner ignores and does not attempt to satisfy even her most basic burden of proof for a Writ of Prohibition. Where, as here, “it is claimed that the lower tribunal exceeded its legitimate powers,” the Court examines whether: (1) the petitioner has “no other adequate means, including direct appeal, to obtain the desired relief”; (2) the petitioner will be damaged “in a way that is not correctable on appeal”; (3) the trial court’s order is “*clearly erroneous* as a matter of law”; (4) the order is an “oft repeated error or *manifests persistent disregard* for either procedural or substantive law”; and (5) the order raises “new and important problems or issues of law of first impression.” State ex rel. Hoover v. Berger, 199 W. Va. 12, syl. pt. 4 (1996) (emphasis added). See also State ex rel. Allen v. Bedell, 193 W. Va. 32, 37 (1994) (petitioner “has the burden of showing that the lower court’s jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy.”).

In stark contrast to the extraordinary circumstances required for a Writ of Prohibition, particularly regarding pretrial discovery rulings and the disqualification of the trial judge, petitioner raises only run-of-the-mill disputes that she could assert and attempt to remedy on direct appeal if she were to lose at trial. Petitioner also does not demonstrate that the trial court committed “clear error” or manifested a “persistent disregard” for the law. For all these reasons, the Petition should be denied.

I. THE PETITION DOES NOT JUSTIFY A WRIT OF PROHIBITION.

A. No Scheduling Order Permitted Plaintiff To Re-Open Discovery or Designate New Expert Witnesses.

The linchpin of petitioner’s argument appears to be her novel claim that the November 17, 1998 Scheduling Order governed only discovery up until the summary judgment stage, but contemplated the re-opening of all fact and expert discovery after the summary judgment stage. See Mem. for Writ at 2. As Judge Vickers repeatedly ruled, however, the

Scheduling Order plainly indicates on its face that it governed *all* discovery. It was this end to discovery that triggered defendants' summary judgment motion, and that permitted petitioner to represent on May 11, 2000 that she was "ready for trial" just four weeks later on June 5, 2000.

See Exh. 1 hereto.

Not only is petitioner's contention contrary to the plain wording of the November 17, 1998 Scheduling Order, and to her counsel's earlier understanding of it, it is contrary to basic, orderly trial procedure, which contemplates completion of fact and expert discovery, then motions for summary judgment, then pretrial proceedings (e.g., witness and exhibit lists), and then trial. Indeed, Rule 56(c) specifically recognizes that summary judgment is triggered by the *end* of discovery, and for this reason the trial court in deciding a summary judgment motion is to consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits." W. Va. R. Civ. P. 56(c). If, as petitioner claims, discovery were automatically re-opened after denial of a summary judgment motion, then the Rule 56(c) procedure would be a nullity and consecutive summary judgment motions could be filed up until the day of trial.

Petitioner's additional claim that a later Scheduling Order entered by the trial court on July 9, 1999 somehow entitles her now to continue discovery and designate brand-new expert witnesses is equally baseless. See Mem. for Writ at 5-7. The 1999 Order picked up where the 1998 Order left off and addressed *other* aspects of pre-trial preparation such as the possibility of mediation or settlement, and designated a trial date of June 5, 2000; it also indicated that deadlines for pre-trial motions and the like would be set in the future. See Scheduling Order of July 9, 1999 (Exh. 3 hereto). Those pre-trial dates were set forth, again by agreement of the parties, in the Joint Proposed Pretrial Order of May 19, 2003 (Exh. 11 hereto).

There simply is no support for petitioner's assertion that this 1999 Order was intended to nullify or supersede the deadlines set in 1998.

B. The Trial Court Properly Excluded Petitioner's New Expert Witnesses.

On February 20, 2003, petitioner submitted a "supplemental disclosure" identifying, for the first time, *six* brand-new expert witnesses. See Exh. 9 hereto. Her deadline to disclose experts, however, had expired on February 1, 1999 pursuant to a stipulated schedule her counsel agreed to (Exh. 2 hereto), and, as Judge Vickers noted, petitioner *never sought or obtained* leave of court for these untimely designations. Petitioner also failed to provide expert reports or résumés for any of her purported "expert" witnesses, thus precluding effective and timely discovery of their opinions and anticipated testimony. Even now, petitioner still has not provided expert reports or résumés, in flagrant disregard of the November 17, 1998 Joint Scheduling Order that her own counsel agreed to and signed. Id. Further, petitioner's new expert designations directly contradicted her prior representations to the trial court, and to this Court, that this case was ready for trial as of May 2000.

Petitioner now seeks to justify her unauthorized and untimely expert designations by reference to this Court's decision in Michael v. Henry, 177 W. Va. 494 (1987). See Mem. for Writ at 2-3. The Michael decision is inapposite here for three reasons. First, the Court in Michael considered the unique question of whether a party may be sanctioned for failing to answer "expert" discovery requests that were submitted before the identification of expert witnesses. See 177 W. Va. at 498. Second, the Court's ruling in Michael that expert witnesses "need not be identified until the later stages of discovery" (id.), is consistent with the November 17, 1998 Scheduling Order in this case. Discovery began on February 4, 1998, and petitioner's expert disclosures were not due until February 1, 1999 -- a full *year* later, and only three months before the close of all discovery. See Exh. 2 hereto. The regularity of the

November 17, 1998 Scheduling Order is confirmed by the fact that defendants *did* timely designate experts, whom petitioner *elected* not to depose. Finally, Michael was decided before the promulgation of West Virginia Rule of Civil Procedure 16, and the trial court in that case had not entered a scheduling order. Unlike petitioner here, the parties in Michael faced no deadlines for the identification of expert witnesses and the Court's decision did not nullify such a deadline. For these reasons, Michael does not justify a Writ of Prohibition in this case.

C. The Trial Court Properly Ruled that Petitioner Is Not Entitled to a Second Chance To Depose Defendants' Expert Witnesses.

Defendants timely designated three expert witnesses on April 1, 1999, and provided comprehensive expert reports and résumés for each of them. Although petitioner had until May 15, 1999, to depose these witnesses, she made no effort to do so. At no time prior to the initial trial date of June 5, 2000, or in her briefs or oral argument to this Court, did petitioner suggest that she was improperly deprived of the opportunity to take these depositions -- because her counsel clearly opted not to do so. Indeed, in response to a direct question from Justice Davis, petitioner's counsel Hugh Roberts admitted that petitioner had been allowed "adequate discovery." Not until several months after this Court remanded the case for trial did petitioner first raise this issue, and even then she failed to seek leave of court to take the depositions. Lest there be any doubt, the trial court confirmed on January 28, 2003 that the November 17, 1998 Joint Scheduling Order was still in effect, and that discovery was closed. See Exh. 8 hereto. The trial court reiterated this ruling at the Pretrial Conference on May 15, 2003. See Exhs. 10, 11 hereto.

Petitioner now claims that the trial court ratified a "trial by ambush" (Mem. for Writ at 4), but this contention is as false as it is exaggerated. Defendants' expert designations -- *unlike* those of petitioner -- include detailed expert reports and résumés that set forth quite

precisely the qualifications and anticipated testimony of each expert witness. Petitioner had a full and fair opportunity to take the depositions of each of these experts. See Exh. 1 to Petition; Exh. 2 hereto. For reasons good or bad, however, petitioner made the decision not to depose any of defendants' experts. Nor has she moved to re-open discovery to do so. Petitioner has never attempted to explain why she should be relieved from the consequences of these decisions. Put simply, petitioners' regret over her own litigation misjudgment is no ground for a Writ of Prohibition.

D. The Trial Court Did Not Fail To Enter a Trial Scheduling Order.

Petitioner falsely asserts that the trial court refused to enter a trial scheduling order. In fact, the Court *did* issue a Trial Scheduling Order, pursuant to Rule 16, on January 28, 2003. See Exh. 8 hereto. Petitioner's real complaint is that the trial court refused to enter the one-sided Trial Scheduling Order that *petitioner* proposed on December 13, 2002 (Exh. 7 hereto). See Mem. for Writ at 5-6. The court subsequently requested and received from the parties a jointly-proposed Pretrial Order, also consistent with Rule 16, that sets deadlines for the exchange and filing of witness and exhibit lists, pre-marked copies of exhibits, objections to or stipulations regarding the admissibility of exhibits, stipulations of fact, juror questionnaires, jury instructions, and verdict forms. See Exh. 11 hereto. Having consented to this Pretrial Order, petitioner cannot now pretend that it does not exist. Indeed, the parties were in the process of complying with this most recent Pretrial Order when the Rule to Show Cause was issued on May 30, 2003. In view of the *two* recent Pretrial Orders, it appears that petitioner's argument is merely a proxy for her claims regarding discovery and expert witnesses, because *her* proposed order improperly provided that she was entitled to re-open discovery and designate new expert witnesses. See Exh. 7 hereto.

E. Petitioner Offers No Valid Reason To Remove Judge Vickers.

Judge Vickers has had a long career as an attorney in private practice, as a Fayette County elected official, and as a Circuit Court Judge. A graduate of West Virginia University in 1961, he served in the United States Navy from 1961 through 1965. Judge Vickers graduated from Washington & Lee University Law School in 1968 and returned to his home town of Fayetteville where he engaged in the private practice of law until 1984. A lifelong Democrat, like petitioner, Judge Vickers served two terms on the Fayette County Commission from 1972 until 1983 and was elected Prosecuting Attorney of Fayette County in 1984, a position he held for two terms until 1992. He then was elected to the Circuit Court in 1992, and was re-elected in 2000 without Republican opposition. When petitioner chose to file her Complaint in Fayette County, which has only *two* presiding judges, she surely understood that her case might well be assigned to Judge Vickers.


Even if (contrary to the facts and the law) the Court were to conclude that petitioner is entitled to re-open discovery and designate new expert witnesses, there is no reason for this Court to remove Judge Vickers. Petitioner does not suggest that Judge Vickers suffers from bias, prejudice, or hatred toward her, or has any interest in the outcome of this case. See Department of Public Assistance, 145 W. Va. at 336; Fahey, 137 W. Va. at 45-46. Judge Vickers himself rejected these contentions in his letter-response to petitioner's Motion for Disqualification. See Exh. 13 hereto. And even the commission of errors (absent here) does not justify replacement of the trial judge. Contrary to petitioner's bizarre assertion that this case was "grossly mismanaged" to the point of "requiring trial by combat" (Mem. for Writ at 4), the trial court in fact correctly ruled that petitioner was not entitled -- absent any showing whatsoever -- to re-open discovery and designate brand-new expert witnesses four years after the governing deadlines elapsed. For these reasons, even if this Court were to grant the Petition in all other

respects, it should deny petitioner's request that a new trial judge be appointed to preside over future proceedings in this case.

CONCLUSION

Judge Vickers has done exactly what a trial judge is supposed to do: he gave the parties an opportunity to agree upon dates to govern discovery; he accepted this joint proposal and entered it on November 17, 1998; and he entered the agreed-upon deadlines to keep the case on track, while repeatedly suggesting to petitioner that any change in the schedule could be requested by motion. The facts show that petitioner had ample opportunity to prepare her case, and her counsel has repeatedly admitted as much. Her new recognition that she is not ready for trial is no basis for accusations of "gross mismanagement" against a respected and able trial judge. The Petition for Writ of Prohibition should be denied, and trial should proceed before Judge Vickers.

Respectfully submitted,



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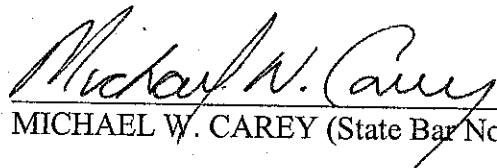
June 17, 2003

CERTIFICATE OF SERVICE

I, Michael W. Carey, one of counsel for defendants, do hereby certify that I served the foregoing "Defendants' Response to Rule to Show Cause" and "Appendix to Defendants' Response to Rule to Show Cause" upon counsel of record herein by placing a true and exact copy thereof in the United States mail, postage prepaid, on the 17th day of June, 2003, addressed as follows:

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