

No. 31356

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

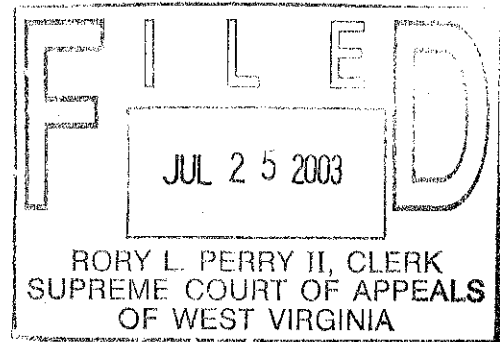
STATE OF WEST VIRGINIA EX REL.
CHARLOTTE PRITT,

Petitioner,

vs.

HONORABLE CHARLES M. VICKERS, Judge
of the Fayette County Circuit Court,
REPUBLICAN NATIONAL COMMITTEE,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
and WEST VIRGINIA STATE VICTORY COMMITTEE,

Respondents.



RESPONSE MEMORANDUM ON BEHALF OF
RESPONDENT CHARLES M. VICKERS

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I. STATEMENT OF FACTS

The complaint initiating the underlying civil action was filed by the plaintiff Charlotte Pritt (hereinafter "petitioner") in the Circuit Court of Fayette County on October 31, 1997. Shortly thereafter, the case was removed by the defendants to federal district court, but was remanded back to state court in the spring of 1998. During a status hearing held on October 15, 1998, the Circuit Court instructed the parties to jointly submit a proposed schedule to govern the remaining discovery in the case. By order entered on November 17, 1998, the Circuit Court set a schedule in accordance with the parties' jointly agreed dates for the completion of all discovery. This scheduling order, governing all fact and expert discovery in the case, required the plaintiff to disclose any experts and provide expert reports by February 15, 1999. The defendants were required to disclose any experts by April 1, 1999 and provide expert reports by April 15, 1999. Under this order, all discovery was to be concluded by May 15, 1999, and a briefing schedule for any summary judgment motions was also included in the agreed-upon schedule. (Appendix - Exhibit 1.)

During the subsequent course of the briefing after the defendants filed their summary judgment motion, the Circuit Court entered an order setting the case for trial to commence on June 5, 2000. This order setting the trial date was entered on July 9, 1999, shortly after the close of discovery. (Appendix - Exhibit 2.) During the period leading up to the initially scheduled trial date, neither the petitioner nor the defendants sought leave of the Circuit Court to reopen discovery or to extend the time for disclosure of experts. A pretrial hearing was held on May 11, 2000, approximately three weeks before the scheduled trial date.

During this pretrial conference, the petitioner's counsel indicated: "I have no real problems, Your Honor. We're ready -- we will be ready for trial." (Appendix - Exhibit 3.) The trial did not take place as scheduled because the Circuit Court granted the defendants' motion for summary judgment by order entered on May 15, 2000; and denied the petitioner's motion for reconsideration of the summary judgment by order on June 13, 2000.

The petitioner's appeal to this Court followed. By decision of this Court on December 12, 2001, the order granting summary judgment was reversed based upon the finding of genuine issues of material fact. Pritt v. Republican National Committee, 210 W. Va. 446, 557 S.E.2d 853 (2001). This Court remanded the case to the Circuit Court "for the continuation of the instant litigation." 210 W. Va. at 456, 557 S.E.2d at 863. Following the remand, during a scheduling conference held on February 13, 2002, a new trial date was set for June 9, 2003.

Eleven months later, on January 13, 2003, the petitioner brought on for hearing a Motion for Trial Scheduling Order, notwithstanding that the trial date had already been set, and other scheduling matters, such as discovery and expert disclosures, were concluded under prior scheduling orders. The apparent position of counsel for the petitioner, as put forth during the January 13, 2003 hearing, was that the petitioner was entitled to name new expert witnesses and engage in further discovery even though the deadlines for both had past under the earlier discovery scheduling order. (Appendix - Exhibit 4.) After opportunity for further briefing on the issues raised during this hearing, on January 28, 2003, the Circuit Court entered an order with respect to the petitioner's motion which, among other things,

ordered that the discovery timeframes were set by the November 17, 1998 scheduling order. (Appendix - Exhibit 5.)

On February 20, 2003, the petitioner's counsel filed and served a document disclosing six new experts, including a film industry expert, a law professor, an economist, two former state legislators, and a psychiatrist. The defendants filed a motion to strike the petitioner's newly disclosed expert witnesses, based upon the earlier expert disclosure deadline and the absence of any grounds to reopen discovery. This motion was heard as part of the pretrial hearing held on May 15, 2003. (Appendix - Exhibit 6.)

The Circuit Court granted the defendants' motion to strike the plaintiff's new expert witnesses, as reflected in the Pretrial Order entered on May 21, 2003. In this Pretrial Order, the Circuit Court also reiterated that discovery in the case was closed pursuant to prior orders. (Appendix - Exhibit 7.)

II. ARGUMENT

"If the facts don't fit the theory, change the facts."
Albert Einstein (attributed)

In the Petition for Writ of Prohibition seeking extraordinary relief from this Court, the petitioner accuses the Respondent Judge Vickers of "gross prejudicial mismanagement" in the case below. In support of this serious accusation, the contentions in the petition are that Judge Vickers has wrongfully denied the petitioner the right to discovery and the opportunity to call expert witnesses; and has refused to enter a scheduling order. In order to buttress this claim of gross misconduct or error by the trial judge, these allegations ignore and misstate the facts in the record of this case.

The petition essentially reconstructs the facts -- primarily based upon the unsupported (if not absurd) notion that the discovery schedule agreed upon and ordered in this case was just the "summary judgment discovery," and that "trial discovery" would come later. This notion is contrary to established case-management practices, as well as being wholly devoid of support in the record developed in this case.

The petitioner was afforded a full and fair opportunity for disclosure of experts and discovery. More to the point, after the scheduled completion of expert disclosures and discovery, the petitioner has had ample opportunity but has never presented the Circuit Court any motion to reopen discovery or demonstrated any good cause warranting such reopening. As detailed in the following discussion, the record shows that under the discretion necessarily

afforded trial courts in discovery matters, throughout this extended litigation Judge Vickers has impartially resolved the issues brought before him.

A. The Circuit Court's Decision to Preclude the Petitioner's Untimely Proffered Expert Witnesses Was an Appropriate Exercise of Judicial Discretion Under the Circumstances Presented.

The first claim of error argues that Judge Vickers "arbitrarily and capriciously" excluded the petitioner's expert witnesses from testifying at trial. A review of the pertinent facts in the record absolutely refutes this argument.

On November 17, 1998, the Circuit Court entered an order establishing a discovery schedule for the case. This order adopted the parties' agreed-upon dates "to govern the remaining discovery in the case." (Appendix Ex. 1 - Joint Motion for Entry of Discovery Schedule.) One of the agreed-upon dates was that by February 1, 1999, the petitioner would disclose any plaintiff experts and reports. Another date, agreed by the parties and ordered by the Circuit Court, was that expert and fact discovery would be completed by May 15, 1999.

For whatever reason, the petitioner and her counsel chose not to name any experts by the disclosure deadline. In subsequent preparations for the originally set trial date of June 5, 2000, the petitioner made no other effort to disclose any trial experts, with or without leave of court. In fact, during the pretrial conference held on May 11, 2000, **approximately three weeks before the scheduled trial date**, the petitioner's counsel stated: "We're ready -- we will be ready for trial." (Appendix Ex. 3 - Transcript of May 11, 2000 hearing, at p. 23.)

This point alone shows the clear paradox of the petitioner's current argument that the November 17, 1998 scheduling order dealt only with "summary judgment discovery" and that "trial discovery" was intended to come later. This nonsensical argument is not even supported by the petitioner's own conduct. On May 11, 2000, the petitioner was ready for trial, without any request or apparent need for an additional period of time for further expert disclosures or discovery. The June 5, 2000 trial date had been set since shortly after the close of discovery under the earlier scheduling order. At no time, from the close of discovery all the way through the final preparations for trial discussed during the May 11, 2000 pretrial hearing, did the petitioner's counsel ever indicate to the Circuit Court any need for further discovery or extension of the expert disclosure deadline.

Discovery is discovery -- it is undertaken both in relation to the possibility of dispositive motions *and* in preparation for trial. The petitioner's contrived argument for a distinction between "summary judgment discovery" and "trial discovery" is nothing more than an attempt to avoid responsibility for earlier litigation strategies or decisions.

Following this Court's reversal of the order granting summary judgment, the case was remanded to the Circuit Court, and a new trial date was set in a status conference held shortly thereafter. In the 15 months that led up to the new trial date, any party could have presented a motion to the Circuit Court to consider specific reasons or extenuating circumstances constituting good cause to reopen the expert disclosure and discovery schedule. Eventually, the issue was indirectly presented to the Circuit Court twice in the final months before trial. In the first instance, on January 13, 2003, counsel for the petitioner provided no cause for

reopening discovery, and only continued in the unsupported insistence that the prior discovery scheduling order “merely set up procedure for us to develop expert witnesses relative to the summary judgment proceeding.” (Appendix Ex. 4 - Transcript of January 13, 2003 hearing, at p. 14.) After this hearing, the Circuit Court properly ruled in its January 28, 2003 order that the schedule set in the earlier discovery order still controlled.

Notwithstanding the January 28, 2003 ruling, the petitioner several weeks later named six new experts. Therefore, the issue was again addressed, under the defendants’ Motion to Strike argued during the May 15, 2003 pretrial hearing. And again, the petitioner’s counsel failed to provide the Circuit Court with any good cause or circumstance warranting the reopening of the previously agreed and ordered discovery schedule. Counsel simply continued to unjustifiably argue “that the Court’s [prior] order addressed discovery and development up until summary judgment.” (Appendix Ex. 6 - Transcript of May 15, 2003 hearing, at p. 19.) Therefore, in the May 21, 2003 Pretrial Order, Judge Vickers appropriately ruled that the petitioner’s newly proffered expert witnesses would not be permitted to testify.

The petitioner’s reliance upon the holding in Michael v. Henry, 177 W. Va. 494, 354 S.E.2d 590 (1987) is clearly misplaced under the facts of the present case. First of all, as this Court recognized in Michael, “expert witnesses need not be identified until the later stages of discovery.” 177 W. Va. at 498, 354 S.E.2d at 594. The instant case was filed on October 31, 1997, and discovery began in early 1998 following the removal to federal district court. Then, after remand to state court, during the October 15, 1998 hearing Judge Vickers

instructed the parties to determine a schedule to govern the remaining discovery in this case. The parties arrived at such an agreed timetable and jointly moved for entry of the discovery schedule, which included the expert disclosure deadlines. These expert disclosure deadlines, consistent with Michael, were set for “the later stages of discovery.” Accordingly, not only did the petitioner have an extensive period of discovery prior to the expert disclosure deadline, but the deadline was of her *own* choosing. Secondly, the holding in Michael cannot be applied to the instant case because that decision pre-dates the promulgation of Rule 16 of the Civil Procedure Rules, and did not even involve the entry of a scheduling order regarding discovery. If the petitioner’s argument is now to be supported by the holding of Michael, Rule 16 and scheduling orders are essentially rendered meaningless.

A case illustrating the issues at hand is Ruane v. Amore, 287 Ill. App. 3d 465, 677 N.E.2d 1369 (Ill. App. 1997). In Ruane, the trial court entered a scheduling order providing that discovery would end on December 15, 1994, set a pretrial hearing for December 22, 1994, and set the trial for January 25, 1995. After discovery closed, during the pretrial hearing the plaintiffs moved to reopen discovery and to disclose an expert witness. The trial court denied the plaintiffs’ motions, and prior to trial granted the defendants’ motions for summary judgment.

On appeal, the Court first noted “that a trial court is afforded great latitude in ruling on discovery matters . . .” 677 N.E.2d at 1374. Further, the Court acknowledged that: “The decision as to whether to reopen discovery rests in the sound discretion of the circuit court and this court will not disturb such rulings on appeal absent a showing of abuse of

discretion.” Id. The Court also observed that the applicable rule requiring disclosure of expert witnesses as part of scheduling orders “was designed to eliminate late or surprise disclosures of expert witnesses by establishing a uniform, but not inflexible, framework for timely revelation of identity of expert witnesses and the subject matter of their testimony.” 677 N.E.2d at 1375.

Upon review of the record, the Court in Ruane concluded that the plaintiffs failed to establish any basis why their noncompliance with the discovery deadlines was reasonable or justified by extenuating circumstances. Accordingly, the Illinois Appellate Court held that the trial court did not abuse its discretion in denying the plaintiffs’ motions to reopen discovery and to disclose an expert witness. 677 N.E.2d at 1376.

In the case at hand, the petitioner *never* provided the Circuit Court with any extenuating circumstances or other specific facts establishing good cause to excuse compliance with the agreed-upon expert disclosure deadline in the discovery scheduling order. In fairness to all parties, Judge Vickers certainly could not (in the words of the present petition) arbitrarily and capriciously ignore the prior scheduling order simply based upon counsel for the petitioner’s wholly unsupported position concerning “summary judgment discovery” and “trial discovery.”

B. The Petitioner Failed to Provide Any Good Cause to Excuse the Failure to Depose the Defendants' Experts under the Discovery Schedule.

Pursuant to the agreed-upon discovery scheduling order, the defendants timely disclosed three expert witnesses, with credentials and reports. Under the scheduling order, the petitioner then had another 45 days within which to depose these witnesses if desired. Apparently, the petitioner never sought to depose these witnesses before discovery ended. And along the same lines of the discussion above, the petitioner's counsel appeared at the pretrial hearing on May 11, 2000 and indicated readiness for the trial set to begin three weeks later. They had chosen not to depose the defendants' experts -- and were ready for trial.

Now, because the petitioner elected not to take the opportunity under the discovery schedule to depose these experts in advance of the original trial date, Judge Vickers is accused of "guaranteeing trial by ambush," and "gross mismanagement." It was not Judge Vickers who failed to depose these experts under the established timeframe.

Leading up to the post-remand trial date, counsel for the petitioner failed to provide any change of circumstance or other reason to allow these experts to be deposed outside of the timeframe. Pursuant to Rule 16(b), the discovery schedule under the November 1998 order could be modified by leave of the trial court. The petitioner, however, *never* gave the Court any reason, much less a good reason, to justify or explain the noncompliance with the expert deposition deadline in the earlier discovery schedule. Under analogous circumstances, when a party requests a continuance for further discovery in order to oppose a pending dispositive motion, this Court has uniformly held that the requesting party "must demonstrate

good cause for failure to have conducted the discovery earlier.” Syl. Pt. 1, in part, Powderidge Unit Owners Assoc. v. Highland Properties, Ltd., 196 W. Va. 692, 474 S.E.2d 872 (1996); Syl. Pt. 6, in part, Harrison v. Davis, 197 W. Va. 651, 478 S.E.2d 104 (1996).

C. The Circuit Court Entered Appropriate Scheduling Orders Throughout the Course of These Proceedings.

Prior to the appeal of the order granting summary judgment, the Circuit Court entered two scheduling orders governing the various timeframes of this case. The November 17, 1998 Order set the discovery schedule specifics. (Appendix Ex. 1.) The July 9, 1999 Order set the mediation deadline and the original trial date. (Appendix Ex. 2.) It is important that this Court again keep in mind that prior to the original trial date the petitioner’s counsel stated to Judge Vickers that they were “ready for trial” under those two orders.

After the appeal and remand, additional scheduling orders have been entered “for the continuation of the instant litigation.” 210 W. Va. at 456, 557 S.E.2d at 863. Specifically, after the remand the Circuit Court entered scheduling orders on January 28, 2003 (Appendix Ex. 5) and May 21, 2003 (Appendix Ex. 7).

What the petitioner’s current argument is really about is that, without demonstrating good cause, she should be entitled to start over regarding discovery. Rule 16(b) specifically contemplates that a scheduling order shall be entered that limits the time to complete discovery. That is precisely what the November 17, 1998 order did. Other matters covered by Rule 16(b) have been covered by other orders, but the petitioner is only arguing about the

discovery matters. Furthermore, the two post-remand orders have addressed the discovery issues as well -- simply not to the petitioner's liking.

Judge Vickers certainly recognizes that discovery timeframes in scheduling orders, while important to the parties and the courts in managing case progress, cannot be viewed as inflexible when appropriate justification provides reason for modification. If the petitioner had provided the Circuit Court with good cause or extenuating circumstances warranting a modification of the discovery schedule, these reasons would have been considered. In order to remain fair and impartial to all litigants operating under this discovery scheduling order, Judge Vickers' rulings were made based upon the demonstrated facts before him.

D. The Petitioner Has Failed to Show Any Clear and Substantial Abuse of Discretion Warranting a Writ of Prohibition.

A complete review of the matters argued by the petitioner reveals that, for whatever reason, she chose not to name experts and chose not to depose the defendants' experts under the timeframes both sides agreed upon and jointly requested the Circuit Court to order. A scheduling order can be modified if the trial court is provided a legitimate basis for modification. The petitioner never demonstrated good cause, but now seeks a writ of prohibition under accusations that the trial judge has "grossly mismanaged" the case. A review of the actual facts in the record shows these accusations to be plainly wrong.

Not only is the petitioner alleging matters that substantially mischaracterize the facts, these particular claims clearly do not come within the scope of those matters to be addressed by the extraordinary remedy of a writ of prohibition. As this Court stated in State ex rel.

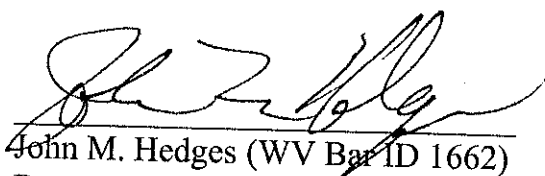
Arrow Concrete Co. v. Hill, 194 W. Va. 239, 244, 460 S.E.2d 54, 59 (1995): “We are mindful that a writ of prohibition is rarely granted as a means to resolve discovery disputes.” The threshold for issuance of a writ in such cases is as follows: “A writ of prohibition is available to correct a clear legal error resulting from a trial court’s substantial abuse of its discretion in regard to discovery orders.” Syl. Pt. 1, State Farm Mut. Auto. Ins. Co. v. Stephens, 188 W. Va. 622, 425 S.E.2d 577 (1992). There is no clear legal error or substantial abuse of discretion on the part of the trial court on the matters raised in the petition before this Court.

III. CONCLUSION

Based upon all of the foregoing matters, the Respondent Judge Charles M. Vickers respectfully requests that the writ of prohibition be denied.

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Respondent

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CERTIFICATE OF SERVICE

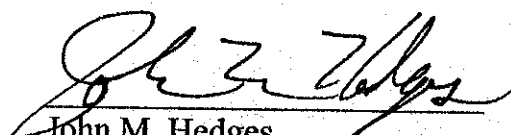
I, John M. Hedges, do hereby certify that I served a true and correct copy of the *Response Memorandum on Behalf of Respondent Charles M. Vickers*, by U.S. First Class Mail, postage prepaid, this 24th day of July, 2003 upon the following:

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