

No. 31506 – *West Virginia Department of Health and Human Resources Employees
Federal Credit Union v. Cynthia Tennant*

FILED

June 30, 2004

released at 10:00 a.m.

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, concurring in part, dissenting in part:

I concur in the judgment rendered in this case. The appellant complains that she did not receive a jury trial after she made a proper demand for a jury trial in magistrate court but failed to renew that request after, upon her motion, the case was removed from magistrate court to circuit court.

As the majority opinion also points out, appellant failed to object to the lack of a jury trial when the circuit court commenced a bench trial in her case on December 2, 2002. Accordingly, in my judgment, appellant clearly waived her right to a jury trial by not entering an objection at that point. I, therefore, concur in the result.

However, I dissent from the reasoning employed to reach the result. The majority opinion is grounded on the fact that appellant failed to make a demand for a jury trial under Rule 38(b) of the West Virginia Rules of Civil Procedure after removal of the case to circuit court. I believe that once an effective demand for a jury trial was made in the magistrate court, that demand should remain effective upon the subsequent removal of the case to the circuit court. In short, I believe our court system should favor jury trials not

undertake to construct as many exceptions and pitfalls as possible. Moreover, it should be a matter of importance to this Court to recognize that many proceedings in the magistrate courts involve unrepresented persons not intimately familiar with court procedures.

Finally, I would note that the statute permitting removal to the circuit court, W.Va. Code § 50-4-8, contemplates first, that the civil action first initiated in the magistrate court is in totality transferred to the circuit court by its removal. Secondly, the statute expressly provides that all appropriate documents shall be forwarded to the clerk of the circuit court upon the removal of a civil action from the magistrate court. Therefore, in plain terms, the statute contemplates that a demand for a jury trial first made in magistrate court would be physically transferred to the circuit court upon removal. Such a demand should be honored in circuit court.

The majority opinion plainly splits a hair that does not need to be and should not be split.

I am authorized to state that Justice Starcher joins in this opinion.