

No. 31856 – *State of West Virginia ex rel. Eric P. Mantz, M.D., et al. v. The Honorable Paul J. Zakaib, Jr., Judge of the Circuit Court of Kanawha County, West Virginia; St. Paul Fire and Marine Insurance Company, a Minnesota Corporation; Commercial Insurance Service, Inc., a West Virginia Corporation; Christopher P. Bastien, Gerald R. Lacy, and Susan K. Dirks, Special Masters*

FILED

December 2, 2004

McGraw, Justice, dissenting:

released at 10:00 a.m.

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

This is the most blatant case of the fox guarding the hen house I have ever seen.

While the majority opinion correctly states that a special master is a pro-tempore part-time judge who must comply with Code of Judicial conduct, it then suffers a severe bout of myopia. After seemingly agreeing that foxes should not guard hen houses, the majority then fails to recognize the fox right in front of us.

The special masters in this case are all from an insurance defense firm that has multiple, longstanding ties to the insurance industry as a whole, as well as specific ties to defendant St. Paul. According to the petitioners, Bastien & Lacy lists a total of 13 representative clients in Martindale-Hubble, and 11 of those are insurance companies or related business. Petitioners point out that Bastien & Lacy is a major sponsor of an insurance trade group, the Professional Independent Insurance Agents of West Virginia, which has the espoused purpose of being “an unrelenting advocate for independent insurance agents.” For example, the firm sponsored the group’s golf tournament in 2001.

To put it in layman's terms, the insurance industry pays the bills for Bastien & Lacy. The attorneys' Mercedes payments, country club memberships, and indeed, even their golf partners, all come straight from the insurance industry. Of course there is nothing wrong with this, standing alone. While the attorneys who practice there are no doubt honorable people who will do their best to be fair and impartial, the law requires more. The law requires not only that they *be* impartial, but that the public at large *believe* them to be impartial. As the majority quotes from *Tennant*:

To protect against *the appearance* of impropriety, courts in this country consistently hold that a judge should disqualify himself or herself from any proceeding in which his or her impartiality might reasonably be questioned. Again, we have repeatedly held that where “the circumstances offer a possible temptation to the average ... [person] as a judge not to hold the balance nice, clear and true” between the parties, a judge should be recused. (citation omitted) (emphasis added). Syl. pt. 3, in part, *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994). (Emphasis added; citation omitted). *See also State v. Hodges*, 172 W. Va. 322, 305 S.E.2d 278 (1983); *Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976).

Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 108, 459 S.E.2d 374, 385 (1995) (emphasis added). Applying this logic to the instant case – the average person would see Bastien & Lacy as intimately involved with the insurance industry as a whole, and with St. Paul in particular. Most people would agree that, if it looks like a fox, gets paid by a fox, and plays golf with a fox – it shouldn't be guarding the chickens.

As the Court concluded in *Tennant*: “To be clear, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself.” *Id.* It is my fervent hope that the experienced and able circuit judge in this case, now that he can see the issues for what they are, will be able to separate the foxes from the chickens.

Accordingly, I must respectfully dissent.