No. 33195 *State of West Virginia ex rel. R.E. Hamrick, Jr., M.D., v. the Honorable James C. Stucky, Judge of the Circuit Court of Kanawha County, et. al.*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
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Benjamin, Justice, concurring, in part, and dissenting, in part:

In its opinion, the majority does something very good. It develops a new syllabus point which will serve as a valuable procedural guide for circuit courts and litigants in future discovery-related disputes at the trial level. I cannot, however, agree with the majority's decision to then disregard this very principle of fair procedure and arbitrarily remove the circuit court's choice for discovery commissioner without *any* opportunity for the litigants to prove and dispute the allegations against the fairness of the discovery commissioner and the opportunity of the discovery commissioner to respond to any personal accusations made against him. I earnestly encourage the majority to reconsider that portion of its decision which avoids an evidentiary hearing below.

In setting forth Syllabus Point 6, requiring that an evidentiary hearing be held to determine the legitimacy of an objection to a discovery commissioner appointed by a circuit court, this Court properly protects both the discretion of trial court judges and the rights of litigants. Discovery commissioners provide not only the litigants, but also the trial

court, with a valuable resource in complex litigation. It is important that the circuit court have in a discovery commissioner someone it can trust and rely upon. It is equally important for the litigants that the discovery commissioner be both fair and knowledgeable in the finer aspects of discovery. I concur with the majority in the establishment of this mechanism as necessary and proper where one party has a bona fide objection to the circuit court's selection of a discovery commissioner.

Had the majority stopped there, it could have rightly patted itself on the back for resolving the issue raised by this petition seeking extraordinary relief and of stopping short of exceeding the proper role of an appellate body in reviewing discretionary discovery decisions on such petitions. Unfortunately, the majority did not restrain itself from short-circuiting appropriate process and instead usurped a discretionary decision regarding discovery and trial procedure properly left to the circuit court.

"Do what I say. Don't do what I do!" is perhaps the best way to describe the majority's speculative plunge into the discovery management matters of this litigation. Despite ruling that an evidentiary hearing is the necessary mechanism to properly test the legitimacy of a litigant's objections to an appointed discovery commissioner, the majority arbitrarily disregards its own ruling and, in so doing, removes the circuit court's choice of discovery commissioner *without any required evidentiary hearing whatsoever* and *without*

any proof of Petitioner's allegations. The Petitioner's allegations of potential and actual bias by the discovery commissioner may be legitimate. And then again, they may not be. Instead of permitting the circuit court to make the proper evidentiary findings to determine whether the Petitioner's allegations of bias may be legitimate, the majority instead simply accepts as true the unsubstantiated claims and allegations of the Petitioner.

Discovery has increasingly become a "tool" of opportunity in the strategy arsenal of many of today's litigators. Purposeful delaying, oppressive requests, unwarranted "fishing expeditions", boiler plate objections, and myriad other "tools" are too often today the means by which one side or another to a case seeks an advantage. As a Court, we must encourage trial judges to manage discovery in cases before them fairly and to sanction those who would misuse the discovery system. That includes affirming the choices a trial court makes regarding a discovery commissioner absent an abuse of discretion. The trial court knows the finer aspects of the parties and the case herein far better than this Court ever could. This is especially so when the matter is before us on the limited record of a petition seeking extraordinary relief. It is that trial judge who knows best who should be a discovery commissioner absent an objective basis for bias by the discovery commissioner or other proper cause.

I am further concerned that the Court's willingness to factually venture into

trial discovery issues such as this will simply encourage the use by parties of petitions seeking writs for extraordinary relief during the pendency of pretrial matters to avoid adverse, or possibly adverse, trial court discovery rulings. Indeed, the inappropriate resort to petitions seeking extraordinary relief may serve no purpose other than delay. While such resort to extraordinary relief may be unavoidable in situations involving claims of privilege, work product, and so on, I do not believe that a trial court's appointing of a discovery commissioner whose recommendations are subject to trial court review (and, later, appellate court review) rises to the level of imminent prejudice to a party justifying the extraordinary power of a writ of prohibition – particularly where, as here, the only allegations of bias are completely unsubstantiated.

Finally, I am concerned about the majority's decision on this discovery commissioner, a member of the West Virginia Bar. Of course, the majority did not "find" bias; but, it may as well have done so. By ruling that a new discovery commissioner must be appointed, the majority unfairly and improperly brings into question the professionalism of the current discovery commissioner where the record simply does not objectively support any such negative inference. We owe the current discovery commissioner much more consideration than that which I believe he has been shown by the majority in its opinion. We owe him at least the voice which an evidentiary hearing provides.

One might justly question why the Petitioner herein waited to make allegations against the discovery commissioner, and then only in vague terms. Petitioner may have hoped to avoid confrontation or embarrassment. We don't know who is right and who is wrong.[1] Absent a hearing, the discovery commissioner is defenseless to the claims of the Petitioner. At this point, however, my review of the limited record before us on this petition provides absolutely no objective basis whatsoever to support the majority's removal of this discovery commissioner on the basis of alleged bias; no basis in the discovery recommendations to date to support a finding of bias; and no other basis for an assertion of impropriety involving this discovery commissioner. In the absence of an evidentiary hearing, I respectfully dissent from the remainder of the majority's decision.

[1] It goes without saying that someone is wrong. If the allegations are correct, the discovery commissioner, as a member of the Bar, had a duty to disclose such potential bias. If not, then a proper question needs to be raised regarding the good faith basis for the allegations being raised.