

No. 31579 - *State ex rel. Westfield Insurance Company v. Madden*

**FILED**

**June 30, 2004**

released at 3:00 p.m.

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

McGraw, Justice, dissenting:

I dissent to the majority opinion because it gives defendants in bad faith actions another way to delay trials. The usual goal of a defendant, like the one in this case, is delay. Delay is the defendant's ally and the injured party's mortal enemy. The majority opinion, while well drafted and logical in its approach, hands defendants another delaying tactic to add to an already burgeoning arsenal.

The procedures set in place by the majority presume that a defendant will always act reasonably and in good faith when making claims of privilege, but the lower court had already determined that this defendant was not cooperating. Judges have great discretion in managing the discovery process:

A trial court is permitted broad discretion in the control and management of discovery, and it is only for an abuse of discretion amounting to an injustice that we will interfere with the exercise of that discretion. A trial court abuses its discretion when its rulings on discovery motions are clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock our sense of justice and to indicate a lack of careful consideration.

Syl. Pt. 1, *B.F. Specialty Co. v. Charles M. Sledd Co.*, 197 W. Va. 463, 475 S.E.2d 555 (1996); *accord*, syl. pt. 5, *State ex rel. Atkins v. Burnside*, 212 W. Va. 74, 569 S.E.2d 150 (2002) (*per curiam*). The judge was faced with a recalcitrant insurance company that resisted

discovery at every turn. The judge, in his discretion, opted to sanction the company by ordering discovery of the documents in question. Nothing about this should “shock our sense of justice.” *Id.*

By creating this procedure whereby an insurance company may claim that 450 documents are privileged and then require a busy circuit court judge to examine each one (or put the State to the time and delay of appointing a special master to do so), the majority helps create the kind of delay sought by most defendants. I believe that, “[j]ustice delayed is justice denied.” *State v. Bail*, 140 W. Va. 680, 88 S.E.2d 634 (1955). Therefore, I must respectfully dissent.