

PETITION TO APPEAL IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**EUGENE D. MILLER,
PETITIONER/PLAINTIFF,**

APPEAL NO. 100216

V.

**CASE NO. 06-C-303-3
JUDGE FRED L. FOX , II
By SPECIAL ASSIGNMENT TO
FIFTEENTH JUDICIAL CIRCUIT
HARRISON COUNTY, WEST VIRGINIA**

**JUDGE JOHN LEWIS MARKS, JR,
MARY DYER, TOM DYER,
SHERIFF JIM JACK,
DON WILSON, LIZ WILSON,
DANA LAFFERTY, ROBERT LAFFERTY,
AND L & J DEVELOPERS,
RESPONDENTS/DEFENDANTS,**

**APPEAL BY PLAINTIFF , EUGENE D. MILLER TO
HAVE OVERTURNED JUDGE FRED FOX'S FINAL ORDER
"DISMISSAL OF CASE UNDER RULE 41 (B) OF THE
WEST VIRGINIA RULES OF CIVIL PROCEDURE. "**

DATED: 15 SEPTEMBER, 2009.

PLAINTIFF'S ADDRESS: P.O. BOX 1641, COCKEYSVILLE , MD 21030

TN : 410-393-0873

PETITION TO APPEAL TO HAVE OVERTURNED JUDGE FRED FOX FINAL ORDER

**dated 15 SEPTEMBER 2009 Titled as " DISMISSAL OF CASE UNDER RULE 41 (b)
OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE " AND THAT MR MILLER'S CASE
BE FULLY REINSTATED WITH MR MILLER BEING PROVIDED A SCHEDULING ORDER AND
A TRIAL DATE AS EARLIER REQUESTED BY HIM. ALSO HE REQUESTS FROM THIS APPEAL
COURT THEY ORDER THE "VOICE TAPES" of "Trial Case 04-C-630-2 " (that occurred on
September 27 thru 30th, 2005) be given to Mr Miller with NO FURTHER DELAY. He has
requested these tapes from both Judge Marks and Judge Fox to NO AVAIL. WHY ??????
Finally, I believe Judge Fred Fox was shown "GOOD CAUSE" both on AUGUST 10, 2009
at my hearing and also thru 2 Motions that were filed in his Court dated the 28th of
AUGUST 2009 that were NEVER ADDRESSED or RULED ON before his Final Order.**

**" Fraud " is a GOOD CAUSE and WRITTEN HARD EVIDENCE AND AUDIO TAPES WERE IN
BOTH OF THESE MOTIONS PROVIDED TO JUDGE FOX. CLEAR PROOF THAT A FRAUDULENT
JUDGEMENT WAS OBTAINED THRU PERJURY EARLIER BY MANY OF THE DEFENDANTS IN
CASE # 04-C-630-2 and now stand before him . THEIR ACTS FORCED MR MILLER TO FILE FOR
BANKRUPTCY . THEREFORE, HE REQUESTS HUMBLY FROM THIS COURT HE BE ALLOWED TO
BE RESTORED FINANCIALLY BY ALLOWING HIM "HIS DAY IN COURT " BEFORE A JURY. THIS
COURT, I HOPE AND PRAY, HAS THE WISDOM & SENSE OF JUSTICE TO OVER TURN Judge
Fox biased "Final Order" AND IF NEED BE APPOINT ANOTHER JUDGE, AT THE COURT'S
DISCRETION.**

TABLE OF CONTENTS

	PAGE
<u>TABLE OF AUTHORITIES</u>.....	1
<u>RULES & COMMENTS :</u>	1, 2
<u>INTRODUCTION</u>	2
<u>STATEMENT OF RELEVANT FACTS</u>.....	3 thru 8
<u>ARGUMENT</u>.....	8 thru 16
<u>CONCLUSION</u>.....	16 thru 18
<u>APPENDIX of EXHIBITS</u>.....	18 thru 21
<u>FOOTNOTE PAGE LISTING</u>	22

TABLE OF AUTHORITIES

CASES :

- # 1 : *SEE = ELLIOTT v. SCHOOLCRAFT*, 213 W. Va. 69, 73 n. 5, 576 S.E. 2d 796, 800 n. 5 (2002) (*per curiam*) (*reversing summary judgement in part because the trial court did not enter a scheduling order in the case*).
- # 2 : *SEE = State ex rel. Pritt v. Vickers*, 214 W. Va 221,226,588 S.E. 2d 210, 215 (2003).
- # 3 : *SEE = Case No. 34144- Jennifer L. Caruso v. Brian N. Pierce and P & T Trucking, Incorporated v. Quality Machine., Inc., Garry K. Knotts and Joyce K. Hall*
- # 4 : *SEE = Case No. Dimon v. Masey*, 198 W.Va 40,45,46,479, S.E. 2d 339-45 (1996).

RULES & COMMENTS :

- # 1 *SEE = TCR 16.05 (b) concerning "Pretrial Motions."*
- # 2 *SEE = Rule 16 (b) of the West Virginia Rules of Civil Procedure [1998] requires active judicial management of a case, and Mandates that a trial court " SHALL.....enter a scheduling order"*
- #3 *SEE= W. Va R. Civ . Pro. Rule 1....."establish procedures for the orderly process of civil cases as anticipated by W.Va. Const. ART. III sub 10. They vindicate constitutional rights by providing For the administration of **JUSTICE WITHOUT DENIAL or DELAY As required by W. Va Const. Art. III sub 17.***
- #4 *SEE= Comments by Franklin D. Cleckley, et al., Litigation Handbook On West Virginia Rules of Civil Procedure § 16 (b)[2], at 438 and at 439 (3d Edition, 2008).*
- #5 *SEE= Comments by Charles Alan Wright, et al., Federal Practice and Procedure: Civil 2d § 1522.*

#6 SEE= Comments by James Wm. Moore, 3 Moore's Federal Practice, 3d Edition § 16.10[2].

INTRODUCTION

Senior Circuit Court Judge Fred Fox has denied Plaintiff his "right to his day in Court" by failing to follow various Rules, stonewalling techniques of the Court & failure by active Judicial Management of Plaintiff's case. Various Authorities, Cases, Rules, and examples of "Relevant Facts" can be shown that Honorable Judge Fox simply "jumped the gun" and was in a hurry to issue his "Final Order" which I am now appealing. Other important, serious issues have come to light that I hope to address in the context of this Appeal. Simply put, Judge Fox's "Final Order" needs Overturned/and or Reversed. The Plaintiff needs to be given a Scheduling Order with A Trial Date maybe to a new judge due to the revealed circumstances & revelations by various Exhibits, Sworn Federal Statements taken in a Deposition and the like, shown in this Appeal.

STATEMENT OF RELEVANT FACTS

- 1) Mr Miller signed this suit on July 6th, 2006 and it was filed on July 7th, 2006 in the Harrison County Court House.
- 2) Criminal lawyer/ Defendant Tom Dyer files a "Answer" for himself & the rest of the Defendants he represents on August 1st, 2006.
- 3) Criminal lawyer/Defendant Tom Dyer asks for more specifics of the Complaint and Plaintiff / Mr Miller files "Motion to Supplement the Record in My Complaint." Filed on AUGUST 16TH 2006.

Note : To Criminal lawyer/ Defendant Dyer's horror evidence was now entered that he tried keeping out that was damaging to the false picture he painted before his friend Judge Marks & the Jury earlier.

- 4) Criminal lawyer/Defendant Tom Dyer issues 2 Deposition Notices on Plaintiff / Mr Miller and never follows thru with either of them.

The dates were December 19, 2006 & then changed to February 13,' 07.

- 5) Plaintiff/ Mr Miller appeared in the Harrison County CourtHouse for his February 13, 2007 Deposition Hearing. When Criminal lawyer Mr Dyer doesn't show on February 13, 2007, Judge Bedell tries finding him by calling by phone to try and locate /find him – to no avail.

NOTE : CRIMINAL lawyer/ Defendant Tom Dyer will NOW NEVER ISSUE ANOTHER REQUEST FOR A DEPOSITION WHICH SEEMS STRANGE UNTIL

PLAINTIFF/ MR MILLER LEARNS THE FOLLOWING IN A DEPOSITION OF
JUDGE LEWIS MARK'S BALIFF J.R. MOORE IN FEDERAL CASE # 1:06-CV-64
*before Federal Judge Irene Keeley. Baliff Moore's Deposition was taken on January 26th, 2007. ** (See Exhibit 1, page # 53, lines 2 thru 16).*
HERE, Baliff Moore states his Boss, Judge Lewis Marks " had to go to FAIRMONT " for hearings with Judge Fox concerning this case where Judge Fox was Specially Appointed by the West Virginia Supreme Court.
WELL GUESS WHAT- JUDGE MARKS NEVER APPEARED PHYSICALLY at any of the "HEARINGS" I was at in FAIRMONT. ONLY JUDGE MARK's lawyers appeared. SO IT NOW APPEARS, THERE WAS SOME KIND OF CLOSED DOOR MEETINGS, outside my presence. Defendant Judge Lewis Marks was dismissed on November 8th, 2006 by Judge Fred Fox from this current suit. In addition , when Plaintiff / Mr Miller brings these concerns up at the August 10th, 2009 Hearing before Judge Fox about what the Baliff Moore has stated under Sworn Federal Oath concerning these meetings, Judge Fox shows little concern as to what was exactly said. He didn't even want to hear the taped Federal Deposition evidence that indicated something was not right that Mr Miller was ready to play before the Court. Most Judges would have been angered & want to hear that kind of specific evidence & if Judge Fox claims the evidence is false, call the Baliff Moore on the carpet, so to speak. That was never done but quietly Blown off. WHY ???? **< see Exhibit # 13, pages 6 and 7>.**

ONE MAJOR NOTE: Plaintiff / Mr Miller still has a Complaint against Judge Lewis Marks with the Disciplinary Council & he has wanted to call Judge Marks as a witness in Judge Fox's Courtroom , before the Council took any kind of action. This could be a SERIOUS UNDERLYING MOTIVE IN NEVER ISSUING A SCHEDULING ORDER/CONFERENCE with a TRIAL DATE.

THERE IS ONE OTHER IMPORTANT NOTE : < see EXHIBIT # 15>*****

PLAINTIFF/ MR Miller found out by a Private Investigator that apparently JUDGE FOX's OFFICE TREATS other PRO-SE LITIGANTS DIFFERENTLY.*****

6) On August 25th, 2008 Plaintiff/ Mr Miller calls & asks Judge Fox's secretary if he can get some kind of hearing because he had just located a out of state "important witness" named = Mr Wally Higginbotham .
(see Exhibit 11 of Phone Call Records). < NOTE> The 6 more following phone calls the Plaintiff/ Mr Miller made to Donnie Kopps Office inquiring whether a Trial Date or anything has come out from Judge Fox's Office. Again, Plaintiff/ Mr Miller states on August 10th, 2009 before Judge Fox about getting some kind of hearing from him earlier. Clearly, he knows about my earlier attempts because I'm never rebuffed by him as stating something not true. < see Exhibit # 13 , pages 8 and 9> NOTE: Mr Miller clearly states on those pages = " I've waited three years. I've contacted this Court numerous times. I've called the Clerk down there in Clarksburg. I've said, when am I going to get a hearing ? Is there anything going on in my case ? I've been waiting patiently."

- 7) Plaintiff/ Mr Miller files "MOTION TO REQUEST THAT BECKY HINKLE BE ARRESTED FOR PERJURY IN CIVIL CASE TRIAL 04-C-630-2." on the date= 6th September 2008. <PLEASE NOTE> In this motion, Plaintiff/Mr Miller tells Honorable Judge Fred Fox that = " Mr Wallace Higginbothan has *agreed to testify* ". THIS IS ANOTHER PROOF THAT MR MILLER WAS SEEKING SOME KIND OF PRE-TRIAL HEARING to get his case moving from Judge Fox. Note: According to West Virginia "TCR" Rule 16.05 (b) the Court is to respond to "Motions" within a 2 month time frame. This Court just simply chose to ignore Mr Miller's requests either written or by phone calls made to his secretary .
- 8) In last part of June of 2009 Plaintiff/ Mr Miller made a trip over into West Virginia to see friends & he stopped into Fox's Office to give his personal secretary a updated contact number and asked Judge Fox's secretary to please tell the Judge that I needed a scheduling order & some kind of Trial Date because potential witnesses were moving away and one has already died. < see Exhibit # 12>. She told me she would let Judge Fox know.
- 9) On July 3rd , 2009, The Plaintiff/ Mr Miller called Judge Fox's Office & spoke to his Secretary & asked her if she gave the Judge his message request back in late June of 2009 when he drove over to Judge Fox's office. She claimed that she did give Judge Fox my message/ requests. I then asked if anything had come out yet. Her response was that my

case had been given over to the Law Clerk and she had no idea what was being done to it. I would soon find out from the Court.

- 10) On July 21st, 2009, Plaintiff/ Mr Miller was sent a letter that his case was up for Dismissal.
- 11) On July 24th, 2009, Plaintiff/ Mr Miller files a large Motion asking that his case Not Be Dismissed and the reasons why.<exhibit 14>.
- 12) On AUGUST 10TH, 2009, Plaintiff/ Mr Miller appears at the Dismissal hearing and pleads his case. Criminal lawyer/Defendant Tom Dyer and his clients never appear. < see Exhibit # 13 about Dismissal Hearing >.
- 13) On August 26th, 2009, Plaintiff/ Mr Miller files with the Court his Witness List.
- 14) On August 28th, 2009, Plaintiff/ Mr Miller signed a “MOTION REQUEST THAT HONORABLE JUDGE FOX REVIEW THE FOLLOWING INFORMATION CONCERNING FEDERAL COURT CASE WITNESS’S SWORN TESTIMONY OF DEPUTY SCOTT LATTEA WHICH CLEARLY CONTRADICT THE FALSE STATEMENTS THAT WAS PRESENTED TO JUDGE LEWIS MARKS AS SHOWN IN THE TRIAL TRANSCRIPT. “
Note : Judge Fox never responds before issuing his Final Order on September 15, 2009.
- 15)_ On August 28th, 2009, Plaintiff/ Mr Miller signed an additional “ MOTION REQUEST THAT HONORABLE JUDGE FOX REVIEW THE FOLLOWING INFORMATION CONCERNING EVIDENCE ALREADY

ENTERED OF TELEPHONE TRANSCRIPT WITNESS KRISTI WARDELL
VERSUS WHAT WAS PRESENTED TO JUDGE LEWIS MARKS, AS
SHOWN IN THE TRIAL TRANSCRIPT, CLEARLY SHOWING HIM AS
BEING DECEIVED BY THE OPPOSING PARTY'S PRESENTATION OF
THEIR "SO CALLED FACTS" PRESENTED TO THE COURT.

Note : Judge Fox never responds before issuing his Final Order
on September 15, 2009.

- 16) On November 4th, 2009, Judge Fred Fox issued " Order Granting
Extension to File Appeal." < see Exhibit # 16 >

ARGUMENT

POINT # 1 >

It is a Embarassing Fact that a " PRO-SE" Litigant is likely NOT TO BE TREATED
THE SAME THROUGHOUT the Great State of West Virginia, especially if a
Certain Circuit Judge feels that it is within His Powers to Squelch a Case
through liberally either ignoring the Rules/Laws/Precedents/etc. or just turn
a "death ear" to a "Pro-se's numerous timely pleas or requests. It can be
shown that other Prominent West Virginia Circuit Court Judges would have
acted differently than Honorable Judge Fred Fox. They would have

immediately have “ issued a Scheduling Order, Trial Date, etc, once the Defendants had replied to the initial Law Suit / Complaint. “ < please see Survey Exhibits # ‘s 3, 4, 5, 6, 7, 8, 9 >. All of these great W.V. Judges would have acted Fairly, Appropriately and DIFFERENTLY than Honorable Fred Fox. They have acted Clearly, Consistently & with Uniformity after the Federal Rules of Civil Procedure. The great State of West Virginia Court’s System patterns itself after the Federal Courts System concerning many of it’s practices. The Federal Courts immediately would have “issued a Scheduling Order, Trial Date, etc, once the Defendants had replied to the initial Law Suit / Complaint. “
see Footnote 1¹ on Footnote Page/Listing.

POINT # 2 >

The Lack of Issuing a Scheduling Order and a Trial Date may be a oft repeated error or manifests persistent disregard for either procedural or substantive law and may raise new and important problems or issues of law of first impression. *Judge Fox has no “Local Rules” that I’m aware of, that would inform a Pro-Se Litigant that the person must request a Scheduling Order and a Trial Date, although this plaintiff did make these attempts.* < see Statements of Relevant Facts items 6, 7, 8, & 9.

POINT # 3 >

In Addition, Under West Virginia Rules of Civil Procedure 16(b) it clearly states = “ 16 (b) Scheduling and Planning. the judge shall,.... enter a scheduling order that limits the time:” see Footnote 2¹ on Footnote Page/Listing.

Furthermore, the Plaintiff/ Mr Miller has found out, through the use of a

Investigator that he has been discriminated against by selectively being treated differently by what was told to another "Pro-Se litigant" about how Judge Fox's Office would handle Civil Procedures when it comes to Issuing Scheduling Orders & Trial Dates. <see Exhibit # 15, Letter from Private Investigator Mr Bruce Johnson >.

POINT # 4 >

Under Rule 16 (b) , it is mandatory that Trial Courts enter a scheduling order that limits the time to join parties, amend pleadings, file and hear motions, and complete discovery. < see TABLE of AUTHORITIES/ Case 1 { referenced ELLIOTT v. SCHOOLCRAFT..... }.>

POINT # 5 >

In parallel thought, although this is not a "Medical Case", West Virginia considers those cases (Medical) under W.Va. Code § 55-7B-6 (a) to have restrictions to have a mandatory status conference "not less than nine nor more than twelve months following the filing of answer by all defendants." The State then must consider this a "reasonable time period" and that active Judicial Management is OCCURING.

POINT # 6 >

Also, in parallel thought, under "Medical Cases", the status conference is scheduled reasonably prior to the date the parties are required to designate their expert witnesses and in the W.Va. Code § 55-7B-6 "the statute actually requires the defendant to schedule such conference." *****

POINT # 7 >

The West Virginia Supreme Court has the Right to Address & Clarify the Rules and Issues raised in this Appeal “under article [VIII], section three of our Constitution, the Supreme Court of Appeals shall have the power to Promulgate Rules for all of the courts of the State related to PROCESS, PRACTICE, and PROCEDURE, which shall have the force and effect of law.” I am asking this Court to address these critical issues. <see Footnote 3¹ on Footnote Page>.

POINT # 8 >

THE FOLLOWING GUIDELINES SHOULD BE FOLLOWED Concerning RULE 41 (b)

Under Rule 41 (b) (2) the question in effect asks “did the plaintiff make inquiries as to the status of his case during the period of dormancy.” *THIS MUST BE ANSWERED SOUNDLY --- “YES”.* <see “STATEMENT of RELEVANT FACTS” of Items 6, 7, 8, 9 and also the Exhibit # 11 with the corresponding phone #'s >.

POINT # 9 >

THE FOLLOWING GUIDELINES SHOULD BE FOLLOWED Concerning RULE 41 (b)

Under Rule 41 (b) (3) in essence deals with “other relevant factors bearing on good cause AND substantial prejudice.” Note : Plaintiff/ Mr Miller lost most of his wealth thru a Fraudulent Judgement Obtained Thru Perjury in Case # 04-C-630-2 before Judge Lewis Marks (who was friends with Criminal Atty/Defendant Thomas Dyer) and now he is DEFRAUDED out of a FAIR TRIAL because of Court Manipulations where he is treated differently than other Pro-Se litigants that come before FOX < see Exhibit # 15 >, secret meetings between 2 Judges per FEDERAL SWORN TESTIMONY of Judge Mark’s Baliff J. R.

Moore. Then Honorable Judge FRED FOX somehow appears to be unaware, of a timely Motion filed on Sept 6th, 2008 (see Exhibit 10) that he never ruled on, during the Dismissal Hearing of August 10th, 2009. (see Exhibit 13 pages 4 thru 6). He refers to it this as a "bizarre five page motion" in his Final Order. Technically, it was TIMELY FILED, and should have been addressed within 2 months after it was filed. This clearly shows the Plaintiff was attempting to "prosecute his case and get it moving." Honorable Judge Fred Fox simply "JUMPED THE GUN in trying to MAKE SURE THIS CASE NEVER WENT TO TRIAL UNDER RULE 41 (b) of The WEST VIRGINIA RULES of CIVIL PROCEDURES."

POINT # 10 >

Petitioner argues that the Court's Action to Dismiss, beginning with it's Letter sent out on July 29, 2009, was filed way to prematurely because the one year time frame did not expire from the time when Mr Miller's Outstanding Motion was legally filed with the Court on September 6th, 2008 . <see Exhibit # 10>. Judge Fred Fox broke "TCR 16.05 (b)" and simply ignored the Motion Filing till it was again brought to his attention during the "Dismissal Hearing" held on August 10th, 2009. In addition, the Plaintiff/ Mr Miller went ahead and filed his Witness List (filed on August 26th, 2009), Filed 2 more Motions on August 29, 2009 that were NEVER RULED ON or GIVEN A Hearing before the "Final Order" being issued on September 15th, 2009. Honorable Judge Fred Fox simply "JUMPED THE GUN ", which plaintiff believes is impartial and biased and requests a newly " Specially Appointed Judge" , who CAN & WILL issue a Scheduling Order with a TRIAL DATE. The Record, in this case, clearly shows

that this Circuit Court did not religiously follow all the guidelines set for by West Virginia Rules, Statutes, and it's own Laws governing the Circuit Courts.

POINT # 11 >

In Elliot v. Schoolcraft, No 30431, Supreme Court of Appeals of West Virginia, Filed on November 18, 2002. The Overview states= "The Trial Court should have entered a Scheduling Order before considering defendants motion for summary judgement and abused it's discretion by granting defendants motion without granting plaintiff an opportunity to conduct formal discovery."

Put succinctly, " under Rule 16 (b) trial courts must enter a scheduling order. < see Franklin D. Cleckley, et.al., Llitigation Handbook on West Virginia Rules Of Civil Procedure § 16 (b) [2], at 438 (3d Edition, 2008). >

POINT # 12 >

In Case, Caruso v. Pearce No 34144 it states succinctly, " under Rule 16 (b) Trial Courts must enter a Scheduling Order. [..... A failure by a judge to issue a Scheduling order as required by Rule 16...]. The Scheduling Order is not a frivolous piece of paper, idly entered. Rule 16 promotes the concept of " Active Judicial Management of cases. "

POINT # 13 >

Clearly, the Plaintiff continued to take down Federal Depositions that had serious relevance to this case (this was done after Federal Judge Irene Keeley issued a Scheduling Order) , track down witnesses and gather evidence to this case , Filed a Motion in this case on September 6th, 2008 with the hope of trying to get some kind of "pre-trial Hearing" involving the Witness Mr Wally

Higginbotham concerning the Perjury of Sheriff Jim Jack's niece Mrs Becky Hinkle and other issues. Plaintiff Mr Miller continued to make follow up calls as to this case as to when I could get a Hearing, a Scheduling Order & Trial Date to no avail from Judge Fox's Office.

It is important for this Appeal's Court to Note = Judge Fred Fox never claimed otherwise during the August 10 th, 2009 Hearing, that plaintiff never did these things before his court. < see Exhibit # 13 of Hearing Transcript>.

POINT # 14 >

The West Virginia Rules of Civil Procedure were designed to secure Just, Speedy and inexpensive determinations in every action, for all parties to the action. The Rules establish procedures for the orderly process of civil cases as anticipated by W.Va. Const. Art III § 10. They operate in aid of jurisdiction and facilitate the public's interest in just, speedy and inexpensive determinations. They vindicate constitutional rights by providing for the Administration of Justice without denial or delay as required by W. Va const. Art III § 17.

An integral part of this just, speedy and inexpensive system is the establishment of time periods within which actions must be taken, if they are to be taken at all. Plaintiff feels strongly that this was not done by Circuit Court Judge Fox in his administration (lack of) of his case, unfortunately . < see James Wm. Moore 3 Moore's Federal practice, 3d Edition § 16.03 (2007).

POINT # 15 >

Rule 16 (b) mandates that a trial court "shall.... enter a Scheduling Order" establishing time frames for the joinder of parties, the amendment of

pleadings, the completion of discovery, the filing of dispositive motions, and generally guiding the parties toward a resolution of the case. < see State ex rel. Pritt v. Vickers, 214 W.Va. 221, 226, 588 S.E. 2d, 210, 215 (2003).>

POINT # 16 >

“Rule 16 is explicitly intended to encourage active judicial management of the case developmental process and of trial in most civil actions. Judges must fix deadlines for completing the major pretrial tasks, and judges are encouraged to actively participate in designing case-specific plans for positioning litigation as efficiently as possible for disposition by settlement, motion, or trial. “

< see James Wm. Moore, 3 Moore’s Federal Practice, 3d Edition § 16.02 (2007).

POINT # 17

While Rule 16 (b) does not specify a time period in which a scheduling order must be entered, “ trial courts should strive to have a scheduling order entered within one to two months after the defendant has filed an answer.”

<see Franklin D. Cleckley, et al. Litigation Handbook on West Virginia Rules of Civil Procedures § 16 (b) [2], at 439 (3d edition, 2008). >

POINT # 18

Plaintiff Mr Miller believes because of all the Culminating Evidence provided within this Appeal Filing that the rights to have his day in Court has been severely hampered by the Lack of Judicial Management by this Circuit Court.

He also believes this was NOT just some random oversight because of the Culminating Evidence given within this filing and the fact we are dealing with the MOST SENIOR CIRCUIT JUDGE IN THE STATE OF WEST VIRGINIA. There are

major players on the Witness List that have various vested interests that this case never gets heard.

CONCLUSION

The circuit court substantially abused its discretion in not issuing a Scheduling Order with a Trial Date in a **TIMELY MANNER** to a Pro-Se Litigant Mr Miller . Judgement of Final Order, dated 15th September 2009, needs to be reversed due to the unconscionable claim that there was inactivity when evidence shows otherwise. A Motion was timely filed on September 6th, 2008 and never ruled on within a 2 month period. Judge Fox claims in his Final Order = “this Court does not recognize such a “motion” as advancing the plaintiff’s case in any way.” How would Judge Fox know this, if the court is keeping silent to Mr Miller’s numerous requests to get some kind of Pre-Trial Hearing concerning a key witness (Mr Wally Higginbotham) that he wants to be heard ? With a Pre-Trial Hearing, it just might open the Judge’s eyes and cause the Defendants to admit that they lied in the first trial that was heard before Judge Marks. Then we could find out who put them up to it by the questions being asked both by the Plaintiff and Judge Fox. Even King Solomon of the Bible asked

inquiring questions and didn't play the "bump on the log" when cases were brought before him.

This Court also states in the "Final Order" on page 4, that "the Court cannot advance a case to trial without initiative by the plaintiff." We'll that's a 2 way street, if the Court deliberately refuses to issue a Scheduling Order and a Trial Date, as required, then it puts the Pro-Se Litigant at a severe disadvantage because of this Lack of Judicial Management. My requests to his Office was simply Ignored.

Plaintiff believed early on by the actions of Judge Fox something was amiss. First, by not turning over the Voice Tapes of the trial Case # 04-C-630-2 (that was heard before Judge Marks) as requested. This might constitute Withholding of Evidence by the State. The tone of Judge's Marks instructions to the jury in that trial was somewhat intimidating, etc. Secondly, Judge Fox was going to force plaintiff to give his Deposition to Mr Dyer in a publicly funded, tax paid for room inside the Harrison Court House, when Defendant's Office was only a few blocks away. This was a obvious attempt by Judge Fox to intimidate the plaintiff, since this was outside of the Office of Judge Lewis Marks, whom he had just let off as a Defendant in the Plaintiff's suit. Numerous Court House officials had never heard of a Private Deposition being taken on the "TAX PAYERS

DIME” till then. It does make people wonder how close is Judge Fox to the Defendants and if he is really impartial.

All the “ARGUMENTS” (Points 1 thru 18) and the “ STATEMENT OF RELEVANT FACTS” and this Appeal Filing in it’s entirety Clearly shows that JUDGE FRED FOX’S “ FINAL ORDER” needs to OVERTURNED and Plaintiff Eugene D. Miller given a Scheduling Order, along with a TRIAL DATE. Please apply all applicable Laws, Statutes and Rules to Plaintiff’s APPEAL.

Respectfully submitted, including following Exhibits & Footnotes

Eugene D. Miller

19 Feb 2010

EUGENE D. MILLER

dated

P.O. Box 1641

Cockeysville, Md. 21030

PH. (410)-393-0873

APPENDIX OF EXHIBITS

EXHIBIT 1 Federal deposition TRANSCRIPT of Bailiff James R. Moore taken January 26, 2007 in Federal Case # 1:06-cv-64 under Sworn FEDERAL OATH .

EXHIBIT 2 WEST VIRGINIA RULES OF CIVIL PROCEDURES specifically Rule 16 concerning PRETRIAL CONFERENCES; SCHEDULING MANAGEMENT, etc.

EXHIBIT 3 **SURVEY LETTER RESPONSE back from HONORABLE JUDGE ANDREW N. FRYE, Jr.** that his CIRCUIT COURT would Automatically issue a Scheduling Order & Trial Date.

EXHIBIT 4 **SURVEY LETTER RESPONSE back from HONORABLE JUDGE CHRISTOPHER G. WILKES** , that his CIRCUIT COURT would “ Generally enters a Scheduling Order in a civil case once the Defendant files an Answer to the Complaint. “

EXHIBIT 5 **SURVEY LETTER RESPONSE back from HONORABLE JUDGE IRENE C. BERGER** her CIRCUIT COURT would Automatically issue a Scheduling Order & Trial Date.

EXHIBIT 6 **SURVEY LETTER RESPONSE back from HONORABLE JUDGE ROBERT A. “BOB” WATERS** office = “ I believe each of the 3 Judges set the case for a Scheduling hearing at which time case is set for trial “

EXHIBIT 7 **SURVEY LETTER RESPONSE back from HONORABLE JUDGE J. D. BEANE** his CIRCUIT COURT office would “ *Upon service being completed on the defendant, whether or not an answer been filed, I will set a scheduling conference and send out notice to the parties. At the scheduling conference, I will set the matter for either jury trial or bench trial, and do a scheduling order.*”

EXHIBIT 8 **SURVEY LETTER RESPONSE** back from **HONORABLE JUDGE JAY M. HOKE** states that their **CIRCUIT COURT** requires that a *Scheduling Order* be entered at that time at the very beginning of the case's litigation.

EXHIBIT 9 **SURVEY LETTER RESPONSE** back from **HONORABLE JUDGE JAMES J. "JIM" ROWE** his **CIRCUIT COURT** would automatically issue a Scheduling Order & Trial Date.

EXHIBIT 10 **MOTION REQUEST " THAT BECKY HINKLE BE ARRESTED FOR PERJURY IN CIVIL CASE TRIAL # 04-C-630-2 " FILED WITH JUDGE FRED FOX on SEPTEMBER 6th, 2008. Judge Fox's Secretary was called & asked if they had received this motion and that I was requesting some kind of hearing because " Mr Wallace Higginbotham has agreed to testify that the statements made by her under oath were false."**

Note: According to the "TCR" (Trial Court Rules of WV) TCR RULE 16.05(b) states " Pretrial Motions. An order shall be entered which sets forth a ruling on pretrial motions which require a hearing or ruling within two months of submission or on the date of trial, whichever is earlier."

EXHIBIT 11 **RELEVANT PHONE RECORDS INVOLVING CASE # 06-C-303-3 FROM 06/16/2008 THRU 05/19/2009.**
CALL MADE ON 6/16/2008 TO KOPP'S OFFICE
CALL MADE ON 8/25/2008 TO JUDGE FOX OFFICE SECRETARY

CALL MADE ON 10/23/2008 TO KOPP'S OFFICE
CALL MADE ON 12/16/2008 TO KOPP'S OFFICE
CALL MADE ON 01/13/2009 TO KOPP'S OFFICE
CALL MADE ON 02/13/2009 TO KOPP'S OFFICE
CALL MADE ON 03/23/2009 TO KOPP'S OFFICE
CALL MADE ON 05/19/2009 TO KOPP'S OFFICE
CALL MADE ON 07/02/2009 to JUDGE FOX OFFICE SECRETARY

EXHIBIT 12 LUCILLE B. HARRISON deceased on 11/10/2007 NOTICE

EXHIBIT 13 RULE 41B DISMISSAL HEARING COURT TRANSCRIPT in CASE #
06-C-303-3 held before Judge Fred Fox on August 10, 2009.

*Note: only Eugene Miller appearing . In Judge Fox "Final Order",
the Judge incorrectly states " Thomas g. Dyer, Esquire, appeared
on behalf of the defendants."*

EXHIBIT 14 Plaintiff' s 16 page Motion Request prior to Dismissal Hearing.

EXHIBIT 15 LETTER FROM PRIVATE INVESTIGATOR MR BRUCE JOHNSON.

EXHIBIT 16 " ORDER GRANTING EXTENSION TO FILE APPEAL"
Dated November 19th, 2009.

EXHIBIT 17 Plaintiff's " REQUEST for RECONSIDERATION" letter
Dated November 11th, 2009.

EXHIBIT 18 Judge Fox's " ORDER DENYING REQUEST FOR
RECONSIDERATION " Dated November 13th , 2009.

EXHIBIT 19 FINAL ORDER DATED 15th SEPTEMBER 2009 by Judge Fred Fox.

FOOTNOTE PAGE LISTING

Footnote 1¹ = Because the West Virginia Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, we often refer to interpretations of the Federal rules when discussing our own rules. See *Painter v. Peavy*, 192 W. Va 189, 192 n. 6, 451 S.E. 2d 755, 758 n. 6 (1994) (“Because the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, we give substantial weight to federal cases ... in determining the meaning and scope of rules.”).

Footnote 2¹ = “ **16 (b) Scheduling and Planning. Except in categories of actions exempted by the Supreme Court of Appeals, *the judge shall*, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail or other suitable means, enter a scheduling order that limits the time:**”

Footnote 3¹ = Syl. Pt. 1. *Bennet v. Warner*, 179 W. Va. 742, 372 S.E. 2d 920 (1988).

CERTIFICATE of SERVICE

I, EUGENE MILLER, appearing pro-se, hereby certify that I have served
The foregoing “ **APPEAL BY PLAINTIFF, EUGENE D. MILLER TO HAVE
OVERTURNED JUDGE FRED FOX’S FINAL ORDER “ DISMISSAL OF CASE
UNDER RULE 41 (B) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURES.”**
DATED : 15 September, 2009 “ UPON DEFENDANT/RESPONDENTS BY
DEPOSITING A TRUE COPY OF THE SAME IN THE UNITED STATES MAIL,
POSTAGE PREPAID, UPON THE FOLLOWING COUNSEL OF RECORD TO
CRIMINAL ATTORNEY THOMAS DYER case # 06-C-303-3
349 WASHINGTON AVE.
P.O. BOX 1332,
CLARKSBURG, W.V. 26302

Sincerely,

Eugene Miller

EUGENE MILLER

19 Feb 2010

dated