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Case Digests: West Virginia Supreme Court of Appeals Decisions, 1988-1989

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CASE DIGESTS
WEST VIRGINIA SUPREME COURT OF APPEALS DECISIONS, 1988-1989

I. Civil Procedure

Truman v. Farmers and Merchants Bank, 375 S.E.2d 765 (W. Va. 1988).

The plaintiff, formerly employed by the defendant as a bank teller, brought an action against the defendant for wrongful discharge and for defamation. The plaintiff suspected that she had been fired for reasons other than those given by the defendant. The defendant did not respond to her interrogatories and requests for production of documents. The plaintiff moved to compel discovery; the defendant moved for a protective order and then for summary judgment. Without resolving the conflicting motions on discovery, the trial court granted summary judgment for the defendant.

The Supreme Court of Appeals ruled that the trial court had erred in granting a motion for summary judgment. The court determined that when summary judgment was granted, there were material facts in dispute. Among the disputed facts were: whether the plaintiff had violated bank policies, whether false accusations of

theft had been made against her, whether those false accusations had been communicated by the bank to third parties, and what reasons actually convinced the bank to discharge her. By failing to rule on the merits of the motion to compel discovery, the trial court may have foreclosed the plaintiff from developing her case so as to resist the defendants' motion for summary judgment.

The Supreme Court of Appeals held that when, as here, facts relevant to the motion for summary judgment need to be developed by further discovery, the trial court should not grant the motion. A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.

Midkiff v. Kenney, 375 S.E.2d 419 (W. Va. 1988).

The plaintiffs, purchasers of a home, brought an action alleging faulty construction against the defendants, one of whom was both the builder and vendor. An order reflecting the trial date was mailed to counsel for the defendants, but never received by them. As a result, neither the defendants nor their counsel appeared for trial. A default judgment was entered by the circuit court and a jury awarded damages to the plaintiffs. The defendants then filed a motion to have the default judgment set aside. The circuit court, however, refused to grant this motion.

The defendants appealed on the grounds that the trial court erred in refusing to set aside the default judgment for good cause. The Supreme Court of Appeals stated that it has consistently encouraged hearings on the merits. It has given a liberal construction to Rules 55(c) and 60(b), *West Virginia Rules of Civil Procedure*, which allow a default judgment to be set aside. Nevertheless, a lower court's decision to enter judgment by default will not be disturbed on appeal unless there is a showing that the court abused its sound discretion.

In the instant case, the defendants filed a notice of bona fide defense, answered the complaint, and participated in discovery. These actions clearly indicate that if the defendants had received notice, they would have attended and participated in trial. Therefore, the

Supreme Court of Appeals held that the circuit court had abused its discretion. The default judgment was set aside.

Dawson v. Woodson, 376 S.E.2d 321 (W. Va. 1988).

The appellee owned a horse that jumped a fence and collided with the appellant's passing car. The Jefferson County Circuit Court granted the appellee's motion for summary judgment based on the appellee's argument that he was not liable for personal injury damages under W. Va. Code § 19-18-1-5 (1988) (hereinafter 19-18-1-5). Since the statute, which applies to property damage caused by an animal, contains no provision for a damage award for personal injuries, the trial court determined the appellee was not liable for the personal injuries suffered by the appellant in the accident.

The appellee argues that absent evidence at trial that he was negligent, the appellant's claim for negligent care of the horse would be precluded by § 19-18-1-5. Because the appellant stipulated prior to the trial that specific acts of the appellee's negligence would not be produced, the trial court's grant of partial summary judgment to the appellee on the issue of liability was correct.

The Supreme Court disagreed and held that despite the appellee's stipulation that precluded proof of negligence, there were issues of material fact relating to the appellee's negligence raised in the appellant's amended complaint that should be heard and decided by a jury. Moreover, the Supreme Court recognized that an injured party may maintain a common law action for damages if the owner of an animal causing an accident failed to exercise ordinary care to prevent the animal from injuring others. Since animal owners have a fundamental duty to exercise ordinary care to prevent their animals from causing injuries, an injured party may maintain an action for personal injury even though § 19-18-1-5 does not provide a statutory right to damages for personal injury.

Thus, while § 19-18-1-5 does not provide damages for personal injuries occurring under circumstances such as those in this case, the injured party may maintain a common law action for damages under a negligence theory if the defendant failed to exercise ordinary care in preventing injury to others. For this reason, the decision of the circuit court was reversed and the case was remanded.

Bennett v. Warner, 372 S.E.2d 920 (W. Va. 1988).

The appellants appealed an adverse ruling of the Circuit Court of Pendleton County relating to a right-of-way dispute. The appellants sought damages under the tort of "outrage" from the appellee, Commonwealth Land Title Insurance Company (hereinafter Commonwealth), for its failure to correct a title deficiency relating to the disputed right-of-way.

The Supreme Court addressed the following issues: (1) whether W. Va. Code § 52-1-1 was mandatory in its requirement that jury qualification forms be used, (2) whether the circuit court was correct in bifurcating the liability phase of the trial from the damages phase, and (3) the inability of the appellants to depose Commonwealth's attorney because of a court imposed blanket protective order. The Supreme Court reversed the trial court's decision on all three issues raised by the appellants on appeal.

First, the court held that the 1986 jury selection statute, W. Va. Code § 52-1-1, required the use of jury qualification forms, and the circuit court's failure to require their use warranted a new trial (however, prior to the decision of the Supreme Court in this case, the legislature nullified the mandated use of jury qualification forms as of July 1, 1988, and left their use to the discretion of the trial judge).

Second, the court granted a new trial on the issue of the circuit court's *sua sponte* bifurcation of the liability phase and the damage phase of the trial. The court interpreted Rule 42(c) of the West Virginia Rules of Civil Procedure as providing that a trial court may grant a separate trial on any issue when two trials: (1) furthers convenience, (2) avoids prejudice, or (3) is conducive to expedition and judicial economy. However, the trial court in this case did not provide sufficient justification that bifurcation would promote the above recognized goals, which are designed to provide a fair and impartial trial. Since bifurcation in this case would require substantial overlap of witnesses and testimony, two problems that Rule 42(c) is designed to prevent, the trial court erred in bifurcating the trial.

Rule 26(c) of the West Virginia Rules of Civil Procedure was the basis of the court's grant of a new trial on the issue of the trial court's blanket protective order granted to an attorney who had

previously represented the appellee in this case. The protective order precluded the appellants from taking the attorney's deposition in this case. The court determined that the trial court's failure to give full consideration to a more narrowly drawn protective order was an abuse of its discretion under Rule 26(c). The broad protective order granted by the trial court ignored the fact finding function of the proposed deposition as well as its importance in the discovery function.

II. Commercial Law

Stark v. Huntington Housing Auth., 375 S.E.2d 772 (W. Va. 1988).

The defendant, Huntington Housing Authority (HHA), sent out invitations to bid on a project for renovation of the electrical system in a low-income housing project. The appellant's bid was accepted by HHA subject to approval by the federal Department of Housing and Urban Development (HUD). HUD refused their approval, and HHA then awarded the contract to another bidder.

The appellant contended that a binding contract had been formed by the defendant's acceptance of their bid and that the defendant was bound by its invitation to bid, which said nothing about requiring HUD's approval. The Supreme Court of Appeals noted that this argument ignores basic contract law. The court held that HHA's invitation to bid was not an offer. The appellant, by returning its bid, made an offer to perform the work. HHA was not obligated to accept appellant's offer. HHA's solicitation of bids explicitly reserved the right to reject any or all bids. In addition, the court noted that HHA is an agency of the City of Huntington, and W. Va. Code § 5-22-1 (1983) provides that the State and its subdivisions may reject any and all bids.

Alternatively, the court stated that HHA's acceptance of appellant's bid, by imposing the condition of HUD's approval, could be seen as an acceptance on terms varying from those offered by appellant. An acceptance which varies materially from an offer is a counter-offer. *Bowers Co. v. Kanawha Valley Prod. Co.*, 100 W. Va. 278, 130 S.E. 284 (1925) (syllabus point 2). A counter-offer is

a rejection of the original offer. *Id.* HHA's counter-offer was not accepted by Stark; but if appellant had accepted HHA's counter-offer, which included the condition of HUD's approval, the condition was not met because HUD did not approve. By any analysis, a contract did not result.

Kesner v. Lancaster, 378 S.E.2d 649 (W. Va. 1989).

Kesner, the buyer of a tractor-loader purchased at the seller's home, discovered substantial defects in the machine after the sale. He then sought to revoke his acceptance and recover the purchase price of the loader under the provisions of the Uniform Commercial Code (UCC), W. Va. Code § 46-2-608. The jury returned a verdict for the buyer, and the seller appealed. The seller first argued that the UCC does not apply to transactions in which neither party is a merchant. Seller then argued that the buyer failed to show prima facie evidence that the defect was difficult to discover or that the machine was substantially impaired.

The Supreme Court of Appeals affirmed the verdict for the buyer. The court held that all of the provisions of the UCC which are not expressly limited to merchants apply to any sale of goods. Therefore, although this transaction was an isolated sale in which neither party was a merchant, it was still subject to the revocation provisions of the UCC, W. Va. Code § 46-2-608.

The revocation provisions of the UCC specify four conditions which a buyer must meet in order to revoke his acceptance of goods for nonconformity to the contract of sale: (1) the buyer must notify the seller of his revocation; (2) notification must be given within a reasonable time after discovery of the defect and before any substantial change in the condition of the goods; (3) the nonconformity must substantially impair the value of the merchandise to the buyer; (4) the buyer must accept the merchandise without discovering its defects, either because of the difficulty of discovery or because of the seller's assurances. Only the last two conditions were contested on appeal. The court held that there was *prima facie* evidence for the jury to find that these two conditions had been met.

Substantial impairment of the value of goods must meet both a subjective test and an objective test. From a subjective standpoint,

because the loader did not conform to the contract of sale, it could not do the work for which the buyer purchased it. Due to nonconformity to the contract, the merchandise did not meet the buyer's needs and expectations. From an objective standpoint, substantial repairs were necessary to correct actual defects that were not trivial.

The buyer, who was a layman, satisfied the "difficulty of discovery" test because he made a reasonable inspection of the machine at the time of sale, and these defects were not then apparent. Only after the machine malfunctioned and the buyer had removed the seats, floorboard and belly pan did he discover the defective parts.

III. Criminal Law/Procedure

State v. Jenkins, 379 S.E.2d 156 (W. Va. 1989).

The appellant, a mildly retarded defendant with an IQ of approximately 65, was convicted of sexual abuse. The appellant contended that the trial court had erred in finding him competent to stand trial. The appellant had been examined by three experts, a psychiatrist and two psychologists. All three experts agreed that the appellant was mildly to moderately retarded. Two of the experts, the psychiatrist and one psychologist, concluded that the appellant was competent to stand trial: he could understand the charges and the nature of the proceedings against him well enough that he could assist his counsel at trial. The third expert, however, testified that the appellant was not competent to stand trial. That expert did admit, however, that the appellant had correctly answered most questions about the roles of judge, jury, prosecuting attorney and defense attorney. The third expert also felt that the appellant was able to inform his counsel of facts surrounding the incident in question.

The Supreme Court of Appeals stated the established rule that no person may be subjected to trial on a criminal charge when, by virtue of mental incapacity, that person is unable to consult with his attorney and to assist in his own defense with a reasonable understanding of the nature and object of the proceedings against him. *State v. Barrow*, 359 S.E.2d 844 (W. Va. 1987) (syllabus point 6).

The trial judge, acting as the finder of fact during the competency hearing, found by a preponderance of the evidence that the

accused, despite mild mental retardation, was competent to stand trial. The Supreme Court of Appeals agreed, noting that it would reverse a trial court's finding of fact only if that finding were contrary to a preponderance of the evidence.

State v. Molisee, 378 S.E.2d 100 (W. Va. 1989).

A magistrate court had found the appellant's dog to be a vicious animal and ordered it euthanized. The appellant, *pro se*, appealed the decision to the circuit court. The case was first docketed before a circuit judge. Then, in response to the appellant's request, it was rescheduled for a trial by jury. The new trial was docketed one month earlier than the originally scheduled bench trial. The appellant failed to appear, and the trial judge reinstated the magistrate's order.

On appeal, appellant contended that she did not receive any notice whatsoever of her new trial date and was therefore deprived of an opportunity to be heard. The State produced no evidence that notice was actually sent to the appellant. The Supreme Court of Appeals noted that it has emphasized the importance of adequate notice to *pro se* litigants who prosecute appeals from magistrate court. The court held that failure to provide effective notice of the time and place of trial is a violation of fundamental due process rights guaranteed by both the United States Constitution and the West Virginia Constitution. Therefore, the Supreme Court of Appeals reversed the decision of the circuit court and remanded the case for trial.

State v. Hanna, 378 S.E.2d 640 (W. Va. 1989).

The defendant, who was angry because his ex-girlfriend had begun dating someone else, kicked in the locked front door of her new boyfriend's house and demanded to speak to her. After an argument involving all three persons, the defendant's ex-girlfriend left the room. The defendant, who had threatened to kill both of them, pointed a pistol at the new boyfriend and insisted that the ex-girlfriend return. She did, and she and the defendant left the house without further discussion. She has not been seen or heard from since, and efforts by the police to locate her have been unsuccessful. As a result, the defendant was convicted of the crimes of kidnapping, abduction with intent to defile, and burglary.

The defendant appealed his conviction for kidnapping and abduction with intent to defile on the following grounds: 1) that the trial court erred in overruling his objection to the use of cameras in the courtroom during trial; 2) that the state failed to prove the intent necessary for both the abduction and kidnapping charges; 3) that the state failed to show that the defendant used force or compulsion to compel the victim to go with him; 4) that the trial court erred in admitting into evidence past acts of violence by the defendant against the victim.

The trial court allowed the use of still photographic cameras in the courtroom. During the trial, the defendant's counsel twice objected that noise made by the camera shutters was distracting. On appeal, the Supreme Court of Appeals held that mere general allegations of prejudice are not sufficient. The defendant did not meet the burden of showing with specificity how the noise impaired his counsel's performance or how it adversely affected his constitutional right to a fair trial.

With regard to abduction with intent to defile, the Supreme Court of Appeals held that a specific purpose, the motivation to defile, is an essential element of the offense. The court ruled that the State did not show beyond a reasonable doubt that this was the defendant's purpose. Therefore, the conviction for abduction with intent to defile was reversed.

The court, however, held that State did present evidence of intent and evidence of coercion sufficient to affirm the defendant's conviction for kidnapping. The specific intent necessary for the offense of kidnapping is the intent to demand "any concession or advantage of any sort." W. Va. Code § 61-2-14a (1984). The defendant forcibly removed the victim from a friend's home in order to gain the opportunity to talk to her alone and attempt a reconciliation. That opportunity, the court reasoned, was the concession or advantage sought by the defendant. There was sufficient evidence to establish the requisite specific intent.

The court then addressed the element of force or compulsion with regard to the offense of kidnapping. The State is not required to show that the accused used actual physical force or express threats.

If the victim submits because of reasonable fear of harm or injury from the accused, consent of the victim is not a defense. *People v. Stephenson*, 10 Cal. 3d 652, 111 Cal. Rptr. 556, 517 P.2d 820 (1974); *Coleman v. State*, 264 Ind. 64, 339 N.E.2d 51 (1975); *State v. Holt*, 223 Kan. 34, 574 P.2d 152 (1977). In its proof that the victim consented out of fear for her safety and the safety of her companion, the State first introduced evidence that the defendant threatened them both and pointed a gun at her. Then, in order to show that the victim's fear was reasonable, the State introduced evidence of past acts of violence by the defendant against the victim. The defendant claimed that admission of evidence that he had committed other criminal acts or acts of misconduct against the victim in the past was error. Rule 404(b) of the West Virginia Rules of Evidence provides that evidence of other criminal acts or misconduct is not admissible to prove the character of a person in order to show that he acted in conformity therewith, but such evidence may be admissible for other purposes, such as proof of motive. "Here" or "in the instant case", lack of consent by the victim was an element of the crime, and the defendant's prior conduct toward the victim was clearly relevant to show that the victim's action was not consensual. The court held that it could not say that the probative value of evidence as to the appellant's past violent behavior was outweighed by its possible prejudicial effect. Therefore, the court could not reverse the lower court's ruling on this issue.

Wolfe v. Hedrick, No. 18261 (July 20, 1988).

The relator was convicted of kidnapping and armed robbery and sentenced to life in the state penitentiary with a recommendation of mercy. The relator, an indigent, requested that new counsel be appointed to represent him on appeal. Consequently, new counsel was appointed. The new attorney requested transcripts of the trial, but he did not receive them until nearly two years later. Review of the transcripts then revealed only two issues for appeal. On those issues, the Supreme Court of Appeals had refused an appellate petition alleging identical errors brought by a co-indictee in the same case. The second attorney so informed Wolfe. Subsequently, a third attorney was appointed and filed an appeal in his behalf. The relator then filed this proceeding in habeas corpus claiming that the State

was guilty of extraordinary dereliction in failing to provide him with an appeal and that he was therefore entitled to immediate release from custody.

In determining the appropriate relief in habeas corpus when defense counsel has not prosecuted a timely appeal, the appropriate remedy is not discharge but such remedial steps as will permit the effective prosecution of an appeal. *Carter v. Bordenkircher*, 159 W. Va. 717, 226 S.E.2d 711 (1976) (syllabus point 2). *Carter*, however, does provide for discharge in the case of extraordinary dereliction on the part of the State.

The Supreme Court of Appeals found that there was not such extraordinary dereliction as to justify the relator's request for discharge from custody. The court reasoned that since the relator had not yet served the minimum amount of time on his sentence, any delay in filing an appeal was harmless. The relator did not show that he suffered actual injury as a result of the delay. An appeal had been filed and would be heard. That was the appropriate remedy. The writ of habeas corpus was discharged.

City of Fairmont v. Schumaker, 375 S.E.2d 785 (W. Va. 1988).

The defendant was charged with violating a Fairmont, West Virginia city ordinance, driving under the influence of alcohol. The defendant requested a jury trial, which was granted by the municipal court of Fairmont. However, rather than providing a jury trial in municipal court, the municipal court judge removed the case to the Marion County Circuit Court for the jury trial.

The defendant filed a motion in circuit court to have the case remanded to municipal court for the jury trial. The circuit court determined that the defendant was entitled to a jury trial in municipal court, but certified the question to the Supreme Court for resolution.

The Supreme Court held that art. 3, section 4 of the West Virginia Constitution requires that an individual charged with a felony or misdemeanor be provided a jury trial, if the defendant requests it, when the offense involves a statutory possibility of incarceration. Since Fairmont's driving under the influence statute provides for

possible incarceration, the circuit court was correct in its decision. Furthermore, the Supreme Court held that the West Virginia Constitution entitled the defendant to a jury trial in municipal court, rather than in circuit court.

IV. Employment Law

Mace v. Pizza Hut, 377 S.E.2d 461 (W. Va. 1988).

The West Virginia Human Rights Commission (Commission) dismissed the appellant's complaint alleging that her employer had fired her in retaliation for her filing an age discrimination complaint. The appellant contended that the Commission erred in ruling that she had not made a *prima facie* showing of retaliatory conduct on the part of the employer.

The court noted that whether the employer's intent was retaliatory was a question of fact. The court stated that it has long followed the principle that findings of fact by the Commission should be affirmed if they are supported by substantial evidence or are uncontested by the parties. The court will consider the record as a whole, and findings of the Commission as to discriminatory intent will not be reversed unless those findings are clearly wrong.

The court could not determine from the record whether the hearing examiner had been aware of some of the evidence which the appellant submitted to the court. The court noted that it normally limits its review of administrative decisions to the record made at the agency's hearing. This issue was moot, however, because the court found that even if the appellant had established *prima facie* evidence of retaliatory discharge, there was credible evidence on the record to support the employer's assertion of legitimate, nondiscriminatory reasons for its action. The appellant had not rebutted this evidence. Thus, the court could not say that the Commission was clearly wrong in determining that there was no showing of retaliatory action by the employer. The court affirmed the Commission's decision.

St. John's Home v. West Virginia Human Rights Comm'n, 375 S.E.2d 769 (W. Va. 1988).

The petitioner, who was employed as a cook at a residential care facility for emotionally disturbed children, expressed to the executive director her interest in applying for a position as a boys' cottage supervisor. The petitioner was told that a male was being sought for the position. Females had previously held this position, but the boys in residence had frequently assaulted female staff members. Fights between the boys themselves had occurred frequently as well. After a male supervisor was hired, these problems abated. Some time later the petitioner was laid off from her position as cook, and she filed a complaint with the West Virginia Human Rights Commission for sex discrimination.

Under the provisions of W. Va. Code § 5-11-9 (1981), it is an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, to limit employment because of sex. The Supreme Court of Appeals held that requiring a male for the position of house supervisor of a cottage for disturbed, aggressive teenage boys was a bona fide occupational qualification. The job required close supervision of some residents who were potentially assaultive or suicidal. This necessarily included supervision of the boys in showers, lavatories and sleeping quarters. Previous female cottage supervisors had often been physically attacked and sexually assaulted. The court held that a male cottage supervisor would be less embarrassing to the boys in such settings, and that a male would present less of a target for sexual assault.

This same issue was decided by the Supreme Court of the United States in *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). The U.S. Supreme Court held that being male was a bona fide occupational qualification for prison guards in "contact positions" at the state of Alabama's maximum security male penitentiaries because those positions required closer physical proximity to inmates.

Hazelock v. West Virginia Civil Service Comm'n and West Virginia Dep't of Human Services, No. 18262 (Nov. 29, 1988).

The petitioner sought a writ of mandamus to compel payment of a 1987 Supreme Court order. In the petitioner's 1987 appeal, the

Supreme Court reversed a ruling of the West Virginia Civil Service Commission and ordered the petitioner reinstated to his previous pay classification, from which he had been arbitrarily demoted, as well as reimbursement for his attorney fees.

The question raised in the mandamus hearing was limited to whether the West Virginia Civil Service Commission or the West Virginia Department of Human Services, the petitioner's employer, is responsible for payment of the petitioner's attorney fees resulting from his 1987 legal action.

The court granted the writ of mandamus, holding that the petitioner established a clear legal right to the reasonable fees, and the Department of Human Services, as the appointing authority, had a legal duty to pay the fees. The Supreme Court reasoned that although the Civil Service Commission was ordered "to reimburse the petitioner," in the 1987 litigation, it was referring to the adjudicatory authority of the West Virginia Civil Service Commission to require the appointing authority, the Department of Human Services, to pay the attorney fees.

Collins v. Elkay Mining Co., 371 S.E.2d 46 (W. Va. 1988).

The appellant, who had been employed in a supervisory position by Elkay Mining Company, a mining subcontractor for the co-defendant, Pittston Company, alleged that he was discharged from his employment for refusing to falsify safety reports. The appellant argued that his discharge violated public policy designed to protect employees from discharge for their safety related activities. Additionally, the appellant asserted that he had an implied employment contract that Elkay breached when he was discharged. The Logan County Circuit Court granted summary judgment to the appellees. The appellant's circuit court action was not ripe because he had not pursued state and federal administrative remedies prior to his circuit court action.

The Supreme Court reversed the decision of the trial court and remanded the case for a new trial on both issues raised by the appellant. First, the court held that the plaintiff was not required to exhaust his administrative remedies before bringing a tort action in circuit court. The court reasoned that permitting an administrative

action and/or a civil action would enhance the substantial public policy interests embodied in the Mine Safety Act. The tort remedies available to the appellant included claims for intentional infliction of severe emotional distress, and punitive damages, remedies that are not available in administrative actions. Moreover, the administrative process has positive attributes that the court thought should remain available to plaintiffs, including awards of back pay and attorney's fees. The availability of either or both remedies and the monetary damages accompanying each will insure that employers follow the intent and letter of safety statutes. Therefore, the trial court's grant of summary judgment on the issue of retaliatory discharge was reversed.

On the second issue, the court found that the appellant's cause of action based upon Elkay's breach of an implied employment contract was recognized under West Virginia law. A verbal promise by an employer, or language contained in an employment handbook or a policy manual, that can be interpreted as an express or implied promise of continuing employment may create an offer for an employment contract that an employee accepts by continuing to work for the employer. In this case, the appellant alleged that he had been induced to remain with his employer because the appellee promised him financial security until retirement. Thus, the appellant's detriment on relying on the appellee's promise of job security, and the defendant's benefit of employing the appellant could create an employment contract. The issue of the possible existence of a valid employment contract required that the case be remanded for a new trial.

Helm v. Gatson, 378 S.E.2d 667 (W. Va. 1989).

The appellee was employed as a teller and sales representative for the appellant bank. During her employment tenure, the appellee received a written reprimand for being rude to customers and for failure to follow bank procedures. On the second occasion of failure to follow bank procedures, she was terminated. Subsequent to her termination, the appellee applied for unemployment compensation. The administrative law judge found that the appellee was not discharged for misconduct and granted her unemployment benefits.

The appellant appealed the decision of the administrative law judge and the decision was set aside by the Board of Review of the West Virginia Department of Employment Security (hereinafter Board). The appellee appealed the decision of the Board to the Kanawha County Circuit Court which reversed the Board's decision and reinstated the appellee's unemployment benefits. The appellant then appealed the ruling of the circuit court.

W. Va. Code § 21A-6-3(2) precludes unemployment compensation benefits for an employee discharged from employment for gross misconduct. Gross misconduct may be found when an employee has committed an act of misconduct and received a written warning that termination may result if the misconduct reoccurs.If the misconduct reoccurs following the written warning, the employee may be found to have engaged in gross misconduct, which precludes the employee from being eligible for unemployment benefits.

In this case, the appellee had received a prior written warning for the same offense that led to her termination. The Supreme Court held that the appellee had been discharged for gross misconduct and was not entitled to unemployment compensation. The court reasoned that since the appellant's procedure manual clearly outlined the policy that the appellee violated, the appellee's failure to follow the work rule was unreasonable. Additionally, the appellee's unreasonable violation was a second offense for which she had received a prior written warning. Therefore, the appellee's conduct constituted gross misconduct. In affirming the finding of the Board and reversing the circuit court, the Supreme Court stated that in an unemployment case, the decision of the Board should not be set aside unless clearly wrong.

Huntington Publishing Co. v. Caryl, 377 S.E.2d 479 (W. Va. 1988).

The West Virginia State Tax Commissioner (Commissioner) found that the Huntington Publishing Company (Publisher) had not paid business and occupation taxes on retail sales on its newspapers, and assessed the Publisher for the delinquent taxes. The sales in question were made by youth carriers who deliver the newspapers to the ultimate customer. The Publisher appealed the Commissioner's decision to the Kanawha County Circuit Court. The circuit court reversed the administrative decision of the Commissioner.

The Commissioner appealed the adverse decision of the Kanawha County Circuit Court on the question of whether the newspaper carrier's sales constituted retail sales under W. Va. Code § 11-13-2(c) (1971).

On appeal, the Publisher argued that the newspaper carriers are independent contractors who purchase the newspapers at wholesale and sell to retail customers. Thus, the newspaper carriers, rather than the Publisher, are responsible for the business and occupation taxes. The Publisher, in justifying the independent contractor status of the carriers, argued that: (1) the carriers are not under the Publisher's control concerning method of delivery, (2) the carriers can set the price they wish to charge for the newspapers, (3) the carriers can hire assistants, and (4) the carriers have the option of packaging the newspapers in the manner they prefer.

The Supreme Court determined that the newspaper carriers were not independent contractors. The court reasoned that the Publisher was involved in the carrier/customer relationship in several ways: (1) the newspaper carriers had no real control over the price charged for the papers, (2) the Publisher aided in the collection of delinquent accounts, (3) poor performance by a carrier could have resulted in his termination by a route manager, and (4) the Publisher provided record keeping systems to the carriers. Therefore, the court concluded that the degree of control exercised by the Publisher over the carriers supported a finding that the retail sales are actually taking place between the Publisher and the customer.

Moreover, even if the carriers were independent contractors, they could be considered agents of the Publisher for tax purposes. Consequently, the Publisher would be making retail sales through its agents, the carriers, and the Publisher would still be liable for the business and occupation taxes. The court reasoned that to hold otherwise and to allow contractual shifts in tax burdens would open a stampede of tax avoidance.

The Supreme Court reversed the Kanawha County Circuit Court and remanded the case with directions to enter the tax judgment against the Publisher. The Supreme Court stated that the Publisher cannot retain the amount of control exercised over the carriers and assert that it is making wholesale sales to the carriers.

Appalachian Regional Health Care v. West Virginia Human Rights Comm'n, 376 S.E.2d 317 (W. Va. 1988).

The West Virginia Human Rights Commission (Commission) reopened a hearing *sua sponte* six years after it had originally dismissed the appellee's action. In the reopened hearing, the Commission found that the appellee, a female doctor, had been the victim of sex discrimination. Moreover, the Commission found that the appellee had been discharged from her employment with the appellant, Beckley Appalachian Regional Hospital (Hospital) in retaliation for filing the sex discrimination charge. In finding that the appellee's rights had been violated, the Commission awarded her substantial compensatory damages.

The issue in the case arises from the appellee's failure to request the rehearing or to appeal the dismissal at the time the Commissioner dismissed the original action. The appellant alleges the Commission lacked jurisdiction to reopen the hearing *sua sponte* since it had dismissed the charges and closed the case six years earlier.

The Supreme Court held that the Commission did not have statutory authority to *sua sponte* reopen a hearing. Furthermore, the court determined that the appellee should not have been the beneficiary of the discrimination and retaliatory discharge award because she did not file an objection or appeal the Commission's dismissal of her original claim. The court reasoned that to hold otherwise would disrupt the orderly disposition of cases and the parties' justified reliance that the case was closed.

V. Evidence

Reager v. Anderson, 371 S.E. 2d 619 (W. Va. 1988).

The appellant, one of two defendants below, claimed as error that the jury verdict against him for medical malpractice was based on insufficient evidence of liability and insufficient evidence as to apportionment of liability. The Supreme Court of Appeals disagreed. The court ruled that questions of negligence, due care, proximate cause and concurrent negligence are issues of fact for jury determination. Comparative negligence, which the court said should more accurately be called comparative causation, is also a question

of fact for jury determination. The court stated that comparative negligence should not be determined as a matter of law unless the facts are undisputed and there is no genuine issue as to the conclusion to be drawn from the facts.

The appellant also claimed as error that the damages awarded were excessive because evidence on the projected loss of future earnings was speculative and because expert testimony was admitted into evidence regarding a novel prosthetic device which had not gained general acceptance in the field of prosthetics. The court noted that it would not set aside a jury verdict as excessive unless the verdict were monstrous, outrageous and beyond all measure. The court then held that the damages awarded were supported by the evidence of permanent pain and suffering alone, without consideration of the special damages. Even if the damages claimed as error were excluded, the amount of damages awarded was not unreasonable. Therefore, the errors alleged did not affect the substantial rights of the defendant and were harmless error under Rule 61 of the West Virginia Rules of Civil Procedure.

The appellant also asserted that he was prejudiced by the trial court's refusal to disclose to the jury a "Mary Carter" agreement between the plaintiffs and his co-defendant whereby the co-defendant agreed to pay $500,000 to the plaintiffs, subject to reimbursement from the plaintiffs of any judgement in excess of $1,000,000. The co-defendant remained a party to the action, and the jury was not told of the agreement.

The Supreme Court of Appeals held that disclosure to the jury of the general nature of a "Mary Carter" agreement is not required in each case. Disclosure lies within the sound discretion of the trial court. In the instant case, the "Mary Carter" agreement was reached after the evidence had been presented and before closing arguments. Therefore, it could not have affected the presentation of evidence or the examination of witnesses. In closing arguments, the plaintiffs emphasized the fault of the appellant over the fault of the co-defendant, but the trial court decided that disclosure of the settlement was nevertheless unnecessary. The Supreme Court of Appeals held that the appellant failed to make a particularized showing of prejudice and that the trial court did not abuse its discretion.

Finally, the court considered issues as to apportioning payment between the appellant and the other defendant, who were held jointly and severally liable. First, the other defendant's liability was reduced by the amount guaranteed in his "Mary Carter" agreement. Then, the appellant was liable to the plaintiff for the full amount remaining. However, the other defendant, in settling pursuant to a "Mary Carter" agreement, remained an active party and incurred a joint judgment. Therefore, the other defendant remained liable to the appellant for comparative contribution to a joint tort-feasor under the provisions of W. Va. Code § 55-7-13 (1931), the contribution after judgment statute.

Catlett v. McQueen, 375 S.E.2d 184 (W. Va. 1988).

The appellant suffered severe injuries to his feet as a result of an automobile accident. Following the accident, the appellant was taken to the hospital emergency room and was treated by the appellee, an orthopedic surgeon. At trial, the defendant testified that he wanted to amputate one of the appellant's injured feet to reduce the possibility of infection. Although the appellant would not consent to the amputation of his foot, he did consent to the surgical removal of three toes. Subsequent to the amputation of the toes, the site of the amputation became infected and ultimately resulted in the removal of the appellant's leg below the knee.

The appellant assigned as error the fact that the trial court refused to admit evidence consisting of pictures that showed the extent of the injuries to his feet. The trial court refused to admit the pictures as evidence, ruling that the gruesome pictures would prejudice the outcome of the trial if admitted. The Supreme Court upheld the trial court's exclusion of the pictures. The court determined that absent an abuse of discretion in admitting the pictorial evidence, the trial court's decision in admitting the evidence was proper.

The appellant also assigned as error the trial court's jury instructions. The error involved a jury instruction requested by the defendant concerning the appellant's consent to surgery. The Supreme Court held that if there is evidence lending support to a proposed instruction, then it should be permitted. Thus, the jury's verdict should not be disturbed based on the rejected instructions if the

evidence supported the defendant's requested instructions. Furthermore, the court stated that each party is entitled to have his theory of the case presented through instructions.

When read as a whole, the instructions could not have misled the jury in holding for the defendant. Moreover, the instructions as given provided ample opportunity for the jury to find for the plaintiff, which it declined to do. Therefore, the judgment of the circuit court was affirmed.

VI. Family Law

Vance v. Vance, 375 S.E.2d 427 (W. Va. 1988).

At issue on appeal was the lower court's division of a couple's assets pursuant to the equitable distribution statute, W. Va. Code § 48-2-32 (1986 Replacement Vol.). Mrs. Vance contended that the lower court had erred in failing to divide equally between the parties the assets of an ambulance business and two certificates of deposit amounting to $40,000.

As to the ambulance service, at least part of the purchase price was paid from earnings of the parties during the marriage. All property and earnings acquired during a marriage are marital assets. W. Va. Code § 48-2-1(e) (1986 Replacement Vol.). In addition, both parties took an active part in the operation of the business. Even though Mr. Vance had purchased the ambulance service prior to marriage, the Supreme Court of Appeals held that it was marital property at the time of separation.

At one point the parties assumed joint ownership of the ambulance business and divided the corporate stock evenly between them. Mrs. Vance later transferred her interest back to her husband, but after the transfer she continued to work full-time in the ambulance service. When Mr. Vance was disabled due to injury, she operated it alone for two years. After Mrs. Vance transferred her interest back to her husband, the business was a marital asset. In order for property that is transferred between spouses to be separate property rather than marital property, there must be proof that it was intended as an irrevocable gift. *Roig v. Roig*, 364 S.E.2d 794, 798 (W. Va. 1987). Mr. Vance did not meet the burden of proof

to show that such a gift was intended, particularly in view of Mrs. Vance's increased role in running the ambulance service after the transfer. Therefore, the court held that Mrs. Vance was entitled to equitable distribution of the property as a marital asset.

The Supreme Court of Appeals also held the certificates of deposit to be marital property. Even though they were titled to Mr. Vance alone, he had accumulated the money to purchase them from his earnings during the marriage. Mr. Vance contended that there had been an informal agreement between the parties that the funds were his separate property. However, an agreement between a husband and wife is unenforceable unless it is in writing. W. Va. Code § 48-3-9 (1986 Replacement Vol.).

The Supreme Court of Appeals held that the court below also erred in failing to take into account the value of Mrs. Vance's non-economic contributions when dividing the marital property. Although Mr. Vance had made a greater economic contribution to the marriage than did Mrs. Vance, neither party had overcome the statutory presumption in favor of equal distribution of all marital assets between them.

In re Kilpatrick, 375 S.E.2d 794 (W. Va. 1988).

This is a case of first impression in this jurisdiction. A couple wishing to marry challenged the constitutionality of W. Va. Code § 48-1-6, which requires a standard serological test for syphilis in order to obtain a marriage license. The appellants, citing a canon of the Universal Life Church which prohibits the removal of blood for testing, contended that the statute violates the free exercise clause of the first amendment of the United States Constitution and a similar provision of art. III, section 15 of the West Virginia Constitution.

Recognizing that a compelling state interest is necessary to justify inhibiting first amendment freedoms, the Supreme Court of Appeals held that the health interests of society, the health interests of prenuptial couples and the health interests of future children constitute a compelling state interest. The required serological test is a minimally intrusive means of protecting those interests. Therefore, the

court held that the statute does not violate the free exercise clauses of the federal and state constitutions.

In so holding, the court viewed as critical the distinction between belief and conduct recognized by the United States Supreme Court in *Cantwell v. Connecticut*, 310 U.S. 296, 303-4, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1218 (1940). The court went on to say that the free exercise of religion may allow every person to hold his or her own convictions, but it does not allow one to act on those convictions to the detriment of compelling state interests.

Crone v. Crone, 375 S.E.2d 816 (W. Va. 1988).

The appellee, who was on a two week military leave, was not permitted to visit his child by his ex-wife, the appellant, who had custody of the child. The appellee petitioned the Circuit Court of Mineral County to clarify his visitation privileges. Without notice to the appellant of the hearings, the circuit court granted the appellee exclusive visitation privileges for a portion of his annual military leave. The wife appealed the order of the circuit court, arguing that her constitutional right to due process had been violated because she was not present or represented at the hearing.

W. Va. Code § 48-2-15(e) vested the circuit courts of West Virginia with continuing jurisdiction to modify original divorce decrees concerning alimony, custody and child support as required by the altered circumstances of the parties and the needs of the children. However, while the court did have jurisdiction to modify the decree, the Supreme Court held that the circuit court violated both federal and state constitutional guarantees of due process when it failed to afford the former wife notice of the hearing to modify the father's visitation rights.

Based on the circuit court's violation of the wife's due process, the Supreme Court reversed the decision of the circuit court and remanded the case for a new hearing on the issue of the father's visitation rights.

VII. Legal Ethics/Professional Responsibility

Jewell v. Maynard, 383 S.E.2d 536 (W.Va. 1989).

The petitioner, an attorney practicing in Mingo County, brought an action to prohibit the Circuit Court of Mingo County from ap-

pointing him to any additional criminal cases. The petitioner demonstrated that in the year 1987, twenty-seven percent of his time was devoted to court appointed cases. He claimed that because of these appointments, he had to turn down paying clients and that he could not provide effective assistance of counsel to court-appointed clients.

The court appointed a special master to hold hearings and hear evidence concerning West Virginia's criminal appointment system. After considering this evidence, the court found that inadequate rates of pay and delays of as much as a year in payments of hourly rates and of out-of-pocket expenses place an unconscionable burden on the 24 percent of the bar who represent 92 percent of the appointed caseload. The court also found that an inequitable share of that burden falls more heavily upon rural lawyers and young lawyers.

However, the court upheld and firmly endorsed the long-standing tradition that part of a lawyer's time be devoted to uncompensated public service. The court ruled that this principle is reinforced by the fact that lawyers are awarded substantial public benefits. The court also specifically refused to require court-appointed lawyers to be paid fair market rates. The court reached the conclusion, however, that equal protection and due process principles require some upper limit on involuntary appointments.

The court ruled that it is an unjust taking of property without just compensation to require lawyers to devote more than ten percent of their work to involuntarily appointed cases. Even more seriously, financial burdens upon lawyers created by inadequate rates of pay, arbitrary maximums, long delays in receiving payment and the absence of any upper limit on the number of appointments may result in a conflict of interest between lawyer and client that implicates the client's constitutional right to effective assistance of counsel. Without some limit on required appointments, the court reasoned, economic pressures could adversely affect the manner in which at least some cases are conducted.

Accordingly, the Supreme Court of Appeals held, effective immediately: 1) that no lawyer in West Virginia may be *required* to devote more than ten percent of his normal work year to court

appointed cases (the court's emphasis); 2) that lawyers from other circuits may be appointed to represent indigent criminal defendants and that their reasonable travel expenses are payable automatically, above and beyond the $500 expense limit set forth in W. Va. Code § 29-21-14(e)(3). The court then held, effective July 1 1990: 1) that no lawyer may be involuntarily appointed unless the hourly rate of pay is $45 for out-of-court work and $65 for in-court work; 2) that the legislature, in order to allow periodic compensation of lawyers as services are performed, must create a mechanism allowing lawyers to receive $1,500 cash advances for out-of-pocket expenses, subject to approval by the circuit judge.

Committee on Legal Ethics v. Charles E. Anderson, No. 18804 (Feb. 17, 1989).

Annulment of license - Retroactive annulment

The respondent, an attorney licensed to practice law in the State of West Virginia, pleaded guilty in Federal District Court to two felonies, obstruction of justice and subscribing to a false tax return.

In recommending that the respondent's license to practice law be annulled, the Committee on Legal Ethics (hereinafter Committee) asserted to the West Virginia Supreme Court of Appeals that the convictions violated the Code of Professional Responsibility because the acts: (1) involved moral turpitude, (2) were dishonest, and (3) adversely reflected on the respondent's fitness to practice law.

The Supreme Court followed the recommendation of the Committee and held that the Committee had met their burden of proving, by clear evidence, that the respondent was guilty of crimes involving moral turpitude. Consequently, mandatory annulment of his license to practice law was required under section 23, part E, article VI of the By-Laws of the West Virginia State Bar.

The Supreme Court did permit the annulment of the respondent's license to practice law to be retroactive to the date he closed his law office, rather than the date of the final annulment order.

Committee On Legal Ethics v. Coleman, 377 S.E.2d 485 (W. Va. 1988).

A complaint was filed against the respondent, an attorney, by a former client he represented in a series of workers' compensation hearings. The petitioner alleged that the attorney had charged him a fee that was in excess of the statutory ceiling provided by W. Va. Code § 23-5-5 (1975) (hereinafter 23-5-5).

The Committee on Legal Ethics of the West Virginia State Bar (hereinafter Committee) agreed with the petitioner and concluded that the respondent did charge a higher fee than permissible. The Committee recommended suspension of the respondent's license for thirty days and that the respondent make restitution to the petitioner for the amount of the fee over the statutory limit.

The issue raised in this case is the interpretation of 23-5-5, which places a ceiling on an attorney's fee for Workers Compensation awards by limiting the attorney fees to 20% of the award for a 208 week time period. The respondent argues that the 208 week statutory time limitation applies only to future benefits. Therefore, he is entitled to 20% of the benefits accrued from the time of the client's injury, in addition to 20% of the future benefits for a period of 208 weeks.

The Supreme Court interpreted 23-5-5 as limiting fees to a total of 208 weeks for both accrued and future benefits. Thus, the Court determined that the fees charged by the respondent were excessive. Nonetheless, the court held that the respondent based his fee upon a good faith interpretation of an ambiguous statute that was designed to place a ceiling on fees. Therefore, the respondent's fee was not illegal or excessive under Disciplinary Rule 2-106(A), and disciplinary action for an ethics violation was not appropriate where there was a lack of intent to violate an ambiguous statute. However, the Supreme Court did direct that the respondent pay restitution of the portion of the fee that was above the statutory limit.

VIII. Local Government/Public Officials

Scott v. Marion County Comm'n, 377 S.E.2d 476 (W. Va. 1988).

West Virginia Code § 7-17-12 (1984) provides that before a county commission can impose a fire service fee upon the users of the serv-

ices, "ten percent of the qualified voters" must petition for such a fee. In 1987, the Marion County Commission passed an ordinance imposing a fire service fee on residents not served by city fire departments. Suit was filed to enjoin collection of the fee on the grounds that ten percent of the registered voters in the county had not petitioned for it. Rather, the petitioner charged, only ten percent of the voters in the areas to be affected had signed the petition. The circuit court certified to the Supreme Court of Appeals the question whether the phrase in the statute "ten percent of the qualified voters" means only the qualified voters of the affected area or the qualified voters of the entire county.

The court held that the legislature intended the phrase to mean ten percent of the voters who would pay the fee. The court reasoned that it would make little sense to establish a procedure by which voters who would neither receive the services nor pay the fee could petition to force strangers to do so. Moreover, the court held, the legislature specifically used the words "qualified voters *of the county*" in a different provision of the same statute. The court reasoned that this indicated the legislature did not intend the phrase "ten percent of the qualified voters" to be interpreted to mean all the voters of the entire county, unless it specifically included the phrase "of the county."

In 1988, the legislature amended § 7-17-12 to define "qualified voters" as meaning registered voters who reside in the affected fire service district and are users or prospective users of the fire services provided.

Jones v. West Virginia Bd. of Hearing Aid Dealers, No. 18633 (Dec. 15, 1988).

The petitioners had applied for licenses as hearing aid dealers with the West Virginia Board of Hearing Aid Dealers (Board). The Board refused to issue them licenses. In this mandamus proceeding, the petitioners requested the court to require the Board to notify them of their results on the hearing aid dealer examination in accordance with W. Va. Code § 30-26-7 (1986), and to conduct a full hearing on the Board's decision as required by W. Va. Code § 30-26-16 (1986). After the petitioners filed this writ, the examination

results were communicated to them and the hearing was scheduled. As a result, the petition became moot.

The court reiterated its holding in *Nelson v. Public Employees Insurance Board*, 300 S.E.2d 86 (W. Va. 1982) (syllabus point 4), that "[w]here a public officer wilfully fails to obey the law, attorney's fees will be awarded." The court then held that the Board had a statutory duty to notify the petitioners of the examination results and to schedule a hearing. Because the Board had willfully failed to perform these legal duties until after the petition was filed, the petitioners were awarded their attorney's fees.

IX. Property

In re Estate of Foster, 376 S.E.2d 144 (W. Va. 1988).

The petitioners, co-administrators of the estate of Lena G. Harris, sought to separate her personal property and monies from the estate of her alleged common law husband, William E. Foster.

West Virginia does not recognize common law marriage, but will accord legal effect to marriages consummated in another state and recognized as valid in that state. Harris and Foster cohabited for a period of thirty years, first in the District of Columbia and then in Virginia. The circuit court adopted the finding of the Fiduciary Commissioner who ruled that, under the laws of the District of Columbia, Harris and Foster were married by virtue of their cohabitation. As a result, the petitioners were not entitled to Harris' assets because those assets had descended to William Foster as her common law husband. On appeal the petitioners argued that the existence of a common law marriage in the District of Columbia requires an express agreement between the parties to be husband and wife, and they contended that Harris and Foster never expressed such an intention.

The West Virginia Supreme Court of Appeals held that the weight of the evidence supported the finding of a common law marriage between Harris and Foster. While both of the parties were deceased, District of Columbia case law holds that their intentions may be inferred from circumstantial evidence. *United States Fidelity and Guaranty Co. v. Britton*, 269 F.2d 249 (D.C. Cir. 1959).

The Supreme Court of Appeals, in affirming the decision of the court below, noted that when findings of fact by a commissioner in chancery have been confirmed by a circuit court, they are entitled to peculiar weight in the appellate court.

Adams v. Gaylock, 378 S.E.2d 297 (W. Va. 1989).

The appellants brought a civil action for breach of implied warranty of habitability and retaliatory eviction against their landlord, the appellee. The Logan County Circuit Court directed a verdict for the appellee after the appellants' case in chief.

The appellants rented a mobile home from the appellee that: (1) lacked proper drainage from the bathroom and kitchen, (2) had doors that would not shut, (3) had broken windows, and (4) had an inoperable furnace. The appellants refused to pay further rent until the appellee repaired the defective items. However, the appellee evicted the appellants, allegedly in retaliation for their complaints concerning the substandard living conditions.

The Supreme Court reversed the circuit court's directed verdict and remanded the case for further proceedings. The court held that the appellants presented a prima facie case of breach of the warranty of habitability and that a jury should have rendered a verdict after hearing the facts of the case.

W. Va. Code § 37-6-30 imposed a duty on the landlord to provide fit and habitual residential property. Additionally, the court recognized that the appellants are protected from the appellee's retaliatory eviction, and are entitled to defend against an eviction procedure.

Lastly, the court addressed the issue of damages. It held that in cases involving breach of the implied warranty of habitability, the measure of damages is the difference between the fair market value of the premise in habitable condition and the fair market value of the premises in substandard condition. Therefore, the appellants would be entitled to damages measured by the difference between the rental price they paid for the premises and the fair market value of the premises in their substandard condition.

Blair v. Preece, 377 S.E.2d 493 (W. Va. 1988).

The appellant appealed an adverse judgment of the Mingo County Circuit Court in a case involving a boundary line dispute. The evidence showed that the two parcels of land in question had transferred ownership several times. During one transfer, an outconveyance allegedly consisting of the disputed property was made by a prior owner of the appellee's property to a prior owner of the appellant's property.

The appellant, proceeding *pro se*, presented evidence and testimony concerning the location of the boundary line. However, the appellees had the property surveyed, and their surveyor testified that the strip of land in question was owned by the appellees. The appellant contended that the trial court abused its discretion in allowing a survey map prepared by the appellee's surveyor to be admitted into evidence. The Supreme Court held that the trial court did not abuse its discretion in allowing the map to be entered into evidence because it was both independent of and illustrative of the surveyor's testimony.

In an alternative defense, the appellees argued that even if the survey did not positively prove their ownership of the strip of the land in question, they had title by adverse possession. The appellant responded that the predecessor in interest of the appellant's property had granted a life estate to the predecessor's husband and that the creation of the life estate interrupted the running of the statute of limitations for adverse possession. The Supreme Court, in holding against the appellant, found that the law is clear, that once adverse possession commences, the creation of a life estate will not interrupt its running.

The appellant further alleged that adverse possession is barred because the appellees failed to do a title search that would have disclosed the appellant's ownership of the property prior to the appellee's purchase. The Supreme Court confirmed that the requirements for adverse possession do not require a title search when it reiterated the five elements of adverse possession: (1) that the tract be held adversely or hostilely, (2) that the possession has been actual, (3) that the possession has been open and notorious, (4) that the

possession has been continuous, and (5) that the possession has been under a claim or a color of title. In fact, a fundamental character of adverse possession is an act that deprives a title owner of the property.

The appellant claims the trial court erred in refusing to give several of the jury instructions she submitted. However, the Supreme Court determined that some of the instructions were not related to the issues of the case, certain instructions contained language that constituted binding instructions, and other instructions were unsupported by the evidence.

Lastly, the appellant argued that the trial court erred in refusing to grant a judgment notwithstanding the verdict. However, the Supreme Court held that although the evidence was conflicting, the decision of the jury was supported by substantial evidence and unless a preponderance of the evidence conflicts with the verdict, the verdict of a jury will stand.

First Nat'l Bank of Morgantown v. McGill, 377 S.E.2d 464 (W. Va. 1988).

A testatrix made specific devises and bequests to the appellants and left the residuary of her estate to other relatives. The appellants contended that the testatrix intended her bequest to them to be tax free, with the residuary estate paying the estate taxes.

The Monongalia County Circuit Court granted summary judgment to the appellee, the executor of the estate. The circuit court found that the only question presented is one of law; specifically, whether it was the clear intent of the testatrix to pay the appellant's inheritance taxes out of the residuary estate. The circuit court ruled that the appellants were liable for the inheritance taxes because the will, on its face, did not contain a clear charge that the residuary estate was to pay the taxes.

The West Virginia inheritance tax, prior to its repeal in 1985 (subsequent to this action), was a tax on the beneficiary in proportion to the amount of the estate received. The beneficiary is responsible for the tax unless the testator or testatrix clearly and specifically expressed otherwise in the will. *Cuppett v. Neilly*, 143

W. Va. 845, 105 S.E.2d 548 (1958). Consequently, the Supreme Court held that the clause in the will which contained a general direction to pay debts, expenses, taxes and other "stock" language was not sufficient to shift estate tax liability to the residuary estate. The Supreme Court determined that the true inquiry was not what the testatrix meant to express in her will, but what the language actually expressed. Affirmed.

Bennett v. 3 C Coal Co., 379 S.E.2d 388 (W. Va. 1989).

The appellee instituted an action against the 3 C Coal Co., alleging that the defendant's mining activity led to the desecration of his relatives' graves. The alleged desecration resulted from subsidence of the ground under the cemetery, which was located above a coal seam that was recently mined by the defendant, a contract miner employed by co-defendant Consolidation Coal Company (hereinafter Consol). The Wyoming County Circuit Court awarded compensatory and punitive damages to the appellee for the defendant's damage to the cemetery.

The evidence showed that the appellee had noticed cracks suddenly appearing in the graveyard. The appellee and other witnesses testified that the cracks were caused by subsidence of the ground caused by underground mining activity. Consol acknowledged that recent underground mining had taken place in the vicinity of the cemetery. While admitting no liability for the damage, Consol filled the cracks and holes with dirt and replanted grass seed.

The Supreme Court ruled that a cemetery lot is a perpetual easement, and that a human body is a species of property right. Therefore, relatives have a cause of action for damages when desecration of a cemetery occurs. However, while the Supreme Court permitted recovery of compensatory damages for mental distress, it overturned the trial court's award of punitive damages. The Supreme Court held that the evidence did not justify the award of punitive damages, as there was no showing of a wilful, wanton, reckless, or malicious act, one of which is required for an award of punitive damages. Additionally, the court found error in the appellee's attorney disclosing the requested damage award in his opening and closing statements to the jury.

The judgment of the circuit court was set aside and the case remanded for a new trial on the issue of damages.

Bane v. Whitman Land Resources, 376 S.E.2d 151 (W. Va. 1988).

The appellee brought this action in the Marshall County Circuit Court to cancel an oil and gas lease. The trial court granted the appellee's motion for a default judgment when the defendant, Whitman Land Resources, did not respond to service of process.

The default judgment against Whitman Land Resources was challenged by Striker Oil & Gas Corp. (hereinafter Striker) and Discovery 1981 Private Drilling Program (hereinafter Discovery) under Rule 19(a) of the West Virginia Rules of Civil Procedure. Striker and Discovery moved the circuit court to set aside the default judgment against Whitman Land Resources because their interest in the lease made them indispensable parties in the action to cancel the lease. The appellants are appealing an adverse ruling on the motion to set aside the default judgment against Whitman Land Resources.

The first question presented to the Supreme Court involved what interest in the lease Whitman Land Resources received from its assignor, Whitman Oil & Gas Corporation. Whitman Land Resources obtained the lease in question from Whitman Oil & Gas as a security interest to collateralize a loan made to Whitman Oil & Gas. Subsequent to the transfer of the lease to Whitman Land Resources, Whitman Oil & Gas transferred its remaining interest in the oil and gas lease to Striker and Discovery.

The Supreme Court determined that although Whitman Oil & Gas assigned the leases to Whitman Land Resources, it was merely "an assignment to create a collateral security agreement." Thus, Whitman 0il & Gas had valid ownership of the lease in question, subject to the security interest of Whitman Land Resources, when it assigned its remaining interest to Striker and Discovery. Therefore, both Striker and Discovery had a valid interest in the lease which was the subject of the default judgment in circuit court.

The court held that the appellants should have been parties to the suit because they had a substantial ownership interest in the lease that would be destroyed by the default judgment. The failure of the

trial court to set aside the default judgment did not allow for an equitable adjudication of Striker and Discovery's interest. For that reason, the court reversed the decision of the circuit court and remanded the case to have the default judgment set aside.

Cabot Oil & Gas v. Pocahontas Land Corp., 376 S.E.2d 94 (W. Va. 1988).

The issue presented to the Supreme Court in this case involved the contractual obligations of the successors in interest to the parties of a mineral lease. Pocahontas Land Corporation (hereinafter Pocahontas), the appellee, was the successor in interest to the original lessor; Cabot Oil & Gas Corporation of West Virginia (hereinafter Cabot), the appellant, was the successor in interest to the original lessee of the property.

Pocahontas sought a declaratory judgment in the McDowell County Circuit Court to determine which of the parties had the contractual obligation to relocate a gas line crossing the property on which the parties had the respective leases of the coal and oil mineral rights. The circuit court interpreted the original lease and ruled that the plain and unambiguous language in the lease required Cabot, successor in interest to the original lessee, to relocate the gas line.

The Supreme Court sustained the ruling of the circuit court, holding that the original lease was a valid instrument which expressed the intent of the parties with clarity and did not require judicial interpretation. The court determined that the assignment of the leases in question conveyed the same obligations to the assignees that the original parties had. Therefore, Cabot, successor to the original lessee of the gas rights, had the responsibility to relocate the gas line.

Canei v. Culley, 374 S.E.2d 523 (W. Va. 1988).

The appellants brought the action to enjoin a neighboring landowner from denying them use of an easement across neighboring property. The Hancock County Circuit Court denied the appellant's request for the use of the easement and the court's decision was affirmed by the Supreme Court.

For an easement by way of necessity to exist, the property requiring access must be landlocked with no other way of ingress/egress. Because the appellants had access to their property by another road, the court determined that the appellants were not entitled to a way of necessity across the neighboring land. Moreover, the court held that the plaintiffs had not established their right to a prescriptive easement because they could not show that they had used the easement for the required ten years of continuous and uninterrupted use.

The appellants also claimed that a survey of the disputed easement established that the appellants owned the land on which the easement was located. However, the appellant's surveyor had based the survey on the appellants' oral statements concerning the location of the boundary line, rather than existing survey monuments. The court held that the survey was not conducted in conformity with generally accepted survey practices and was invalid for the purpose of proving ownership of the disputed easement.

Lastly, the Supreme Court held that the trial court had not erred in its findings of fact and conclusions of law. A trial court sitting in lieu of a jury will be afforded the same weight as a jury verdict and the court's decision will not be disturbed on appeal unless the evidence is clearly against the court's findings of fact and conclusions of law. For the above reasons, the judgment of the trial court was affirmed.

Robert V. Leydon
Gary S. Wigal