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West Virginia Supreme Court of Appeals Decision, 1986-1987

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CASE DIGESTS

WEST VIRGINIA SUPREME COURT OF APPEALS DECISION, 1986 - 1987

I. ADMINISTRATIVE LAW

IN THE MATTER OF: PATSY MCGRAW, 359 S.E.2d 853 (W. Va. 1987).

Legal Ethics - Elected Officals

In reviewing the state Judicial Hearing Board's recommendation that a complaint against a Kanawha County magistrate be dismissed, the Supreme Court of Appeals held that there was not clear and convincing evidence to support charges that the magistrate deliberately failed to follow established procedure in refusing to issue a protective order for the complainant. Instead, the court said that the magistrate committed only legal error by basing the refusal to issue the order upon the complainant's oral statement rather than a written complaint or statement.

As to a charge that the magistrate demonstrated undignified behavior toward the complainant, again, the court found a lack of clear and convincing evidence that the magistrate had the necessary intent to prejudice the rights of the complainant, and thus did not violate the judicial code of ethics.

Bruce Stanley

FUTEY v. CITY OF WHEELING, 354 S.E.2d 111 (W. Va. 1986).

Employment - Labor

The Supreme Court of Appeals held that the order of a police civil service commission is not to be reversed at the circuit court level without a finding by the circuit court that the administrative body was "clearly wrong" in its findings of fact.

Bruce Stanley

PRYOR v. GAINER, 351 S.E.2d 404 (W. Va. 1986).

Statutory Construction

This action involves a petition by three widows of circuit court judges, individually and on behalf of others similarly situated, for a Writ of Mandamus ordering the state auditor to make full payment of widows' benefits as provided under W. VA. CODE § 51-9-66 and to prohibit the auditor from reducing intended benefits. The statute in question provides for a pension benefit equal to forty percent of the salaries of the judges. The statute, however, restricts the pool of money available to yearly contributions of all active judges, plus interest. Further, the statute prohibits the use of general revenue funds.

The pool of funds available had decreased, and each widow would not receive the forty percent as provided by statute. The court held that the Auditor had the right to raise the legality of the widows' benefits and proceeded to discuss the issue of whether the auditor could continue to pay a portion of the widows' benefits from general revenue appropriations. The court held that where the legislature restricts an expenditure to be made from a special fund, but, contrary to this restriction appropriates money from general revenues for that expenditure for several years and the legislature has noticed that such appropriations are contrary to the law, the restriction of the expenditure may be held to have been deleted. Thus, the State Auditor was required to pay pension benefits in the amount of forty percent even if it required the use of appropriations other than in the special fund.

Susan Robinson

W. VA. CHIROPRACTIC SOCIETY INC. v. MERRITT, 358 S.E.2d 432 (W. Va. 1987).

Workers Compensation - Maximum Fees

The Workers' Compensation Board failed to comply with the state Administrative Procedures Act, which governs rule-making by administrative agencies, when it set maximum charges payable to chiropractics in a "Chiropractic Fee Utilization Schedule."

The court rejected the commission's contention that the schedule did not rise to the level of rule-making. The court noted that the

schedule, in addition to setting fees, also regulated the number of visits and contained a medical review procedure. The court found that the schedule, by affecting private rights, by involving public policy, by affecting the availability of chiropractic treatment to injured workers, and by having the force of law, constituted a rule within the meaning of the West Virginia Code.

As for the commissioner's contention that the authorizing legislation for establishing the schedule should result in an exemption from the Administrative Procedures Act, the court noted that there was no language in the authorizing legislation expressly giving such exemption.

Bruce Stanley

II. BANKRUPTCY

MILLER v. BARRON, 352 S.E.2d 41 (W. Va. 1986).

Personal Exemption

This case involved the question of how the one thousand dollar personal exemption provided under W. VA. CODE § 38-5A-9 should be applied to successive suggestee executions filed against the debtor's wages.

After noting that exemption statutes are to be liberally construed in favor of the debtor, the court held: (1) The exemption is to be based on the fair market value of the property on the date the exemption is asserted; (2) the procedure for claiming personal exemption for wage payment is protected under the W. VA. CODE § 38-8-3, which applies to personal property existing on the date the personal exemption is filed; (3) to claim wages as exempt, a successive exemption affidavit must be filed for each pay period; and (4) the personal exemption covers only the property claimed or selected by the debtor in the exemption affidavit. Thus, the debtor is not deemed to have his personal exemption reduced by totaling the prior amount of wages so exempt.

Susan Robinson

III. CIVIL PROCEDURE

UMWA v. FAERBER, slip op. No. 125-87 (W. Va. June 15, 1987).

Attorney Fees Award

In determining whether state Secretary of Energy Kenneth Faerber, cited for contempt of court, including an award of attorney fees for the successful prosecution of the contempt motion, could be held personally liable for the award, the Supreme Court of Appeals held that while fees could be awarded where the noncomplying party had acted in bad faith, the commissioner's actions in the present case were not enough to warrant personal liability as the commissioner did not "openly defy the court." Citing federal court cases, the court did imply that personal liability would attach had that been the case.

Bruce Stanley

SHREVE v. WARREN ASSOC., INC., 355 S.E.2d 389 (W. Va. 1987).

Attorney Fees Award

On an appeal of a trial court's award of attorney fees on a motion for sanctions for failure to comply with discovery under Rule 37 of the West Virginia Rules of Civil Procedure, the Supreme Court of Appeals held that the trial court had abused its discretion in giving an award that included fees not related to the discovery process. In addition, on the facts of the case before it, when the trial court failed to rule on the Rule 37 motion, forcing numerous hearings, the court held that it is "unjust" to assess the fees incurred in finally obtaining a ruling. The court also held that the party against whom sanctions were imposed had meritoriously asked for a postponement for compliance with discovery requests, making an award of sanctions inappropriate.

Bruce Stanley

VANMETER v. WARNER, 359 S.E.2d 596 (W. Va. 1987).

Default Judgment - Relief

In this case, the court considered the issue of the necessary requirements for a party to obtain relief from an order or judgment by an independent action pursuant to Rule 60(b) of the West Virginia Rules of Procedure.

Following the requirements it had set forth in a prior decision, the court held that a party should not obtain relief from a default judgment by an independent action where: (1) The defendant had knowledge of the facts which were alleged to make the judgment inequitable at the time of the suit; (2) the defendant received timely notice; and (3) no steps were taken to respond until some four years after the default had occurred.

Susan Robinson

BEGO v. BEGO, 350 S.E.2d 701 (W. Va. 1986).

Pro Se Litigants - Due Process

In *pro se* settings, the court held that it is necessary for the trial judge to insure that the self-represented party is not denied an opportunity to be heard strictly on the basis of that party's unfamiliarity with procedural matters. To do otherwise, the court held, is to violate that party's right to due process. The case at hand was heard before a special divorce commissioner rather than before a circuit court, however, the court held that the duty to accommodate the self-represented party is the same in both forums.

Bruce Stanley

MELLON-STUART CO. v. HALL, 359 S.E.2d 124 (W. Va. 1987).

Sovereign Immunity

The West Virginia Supreme Court of Appeals held that two firms, which contracted with the Board of Regents as sophisticated businesses, are charged with knowledge of the doctrine of sovereign immunity and that subsequently the court of claims is their only source of remedy. The court further held that the clerk of the court of claims is required to recertify those claims in the state budget in the event the state legislature does not pay them in the year they are initially certified.

The court held that *res judicata* and collateral estoppel apply to decisions by the court of claims since the court of claims operates in a judicial capacity; the parties received a full and fair chance to litigate the dispute; and applying the principles would be in harmony

with the legislature's policies in creating the court. The decision would allow the contractors to use the award amounts from the court of claims as a credit or set-off to any judgment the Board of Regents might be awarded in its circuit court action against the contractors.

Bruce Stanley

KNOTTS v. MOORE, 350 S.E.2d 9 (W. Va. 1986).

Writ of Prohibition - Res Judicata

The West Virginia Supreme Court of Appeals reversed a circuit court decision to dismiss an appeal of a county commission order closing a street. The circuit court based its decision not to hear the appeal on the supreme court's earlier order dismissing a petition seeking prohibition of the county commission order. The circuit court believed the high court decision constituted a decision on the merits. The high court held that the dismissal of such a petition does not have a *res judicata* effect, but rather, the appellant is entitled to a hearing on the merits of the county commission order.

Bruce Stanley

IV. COMMERCIAL LAW

ANDERSON v. NICHOLS, 359 S.E.2d 117 (W. Va. 1987).

Contracts - Arbitration

In affirming a circuit court's grant of summary judgment of an arbitration award, the Supreme Court of Appeals refined its basic approach to arbitration law. The claim by the defendant that one of three arbitrators was biased toward the plaintiff was without the merit necessary to vacate the arbitration order, as it is to be expected that a party to arbitration, if allowed by the agreement to choose one of the arbitrators, will choose one with sympathy to his position. In addition, in the absence of "time is of the essence" language in the arbitration agreement, the fact that the arbitration award was made six days later than called for by the agreement is not enough to nullify the award. The court adopted the rule that prejudgment interest will be awarded to arbitration judgments if one party elects to take the judgment into the courts, with the party losing at the trial level being held responsible for both pre- and post-judgment interest.

Bruce Stanley

G. M. MCCROSSIN, INC. V. WEST VIRGINIA BOARD OF REGENTS, 355 S.E.2d 32 (W. Va. 1987).

Contracts - Sovereign Immunity

The Supreme Court of Appeals affirmed a circuit court decision dismissing a suit against the West Virginia Board of Regents on the grounds that the Board of Regents has constitutional immunity from such suits. After McCrossin's claim against the state was disallowed by the Court of Claims, the company sought relief in circuit court, claiming breach of contract or, alternatively, seeking reformation of the contract between McCrossin and the Board of Regents to cure a mistake the company had made in submitting the low bid on a construction contract.

The court refused to overrule an earlier case which specifically recognized sovereign immunity for the Board of Regents. The court reasoned that allowing such claims would, among other things, threaten the budget process as claims resulting from a particular project could deplete budgeted funds prior to the project's completion. In addition, in cases of contract, where the Board of Regents has presumably dealt with a sophisticated bargainer, the court found that resort to the state Court of Claims as the sole recourse available for resolving such disputes is analogous to having entered into a contract which provides for binding arbitration.

Bruce Stanley

APPALACHIAN LABORATORIES, INC. v. BOSTIC, 359 S.E.2d 614 (W. Va. 1987).

Contracts - Covenants Not to Compete

In reversing a circuit court ruling on a covenant not to compete in an employment contract, the Supreme Court of Appeals, while reemphasizing that such covenants are legal, held that on the facts before it, this particular covenant was unenforceable as it was unreasonable. An employer attempting to enforce the covenant must show that the interest he seeks to protect is unique or confidential

enough to deserve such protection, that the employer is not simply attempting to prevent the employee from using his management skills or public knowledge. While in some instances customer lists might be worthy of protection, as the customer list compiled by the employer in the present case was easily ascertainable (coal companies in southern West Virginia), it was not deserving of protection through enforcement of the covenant.

Bruce Stanley

LAYA v. ERIN HOMES, INC., 352 S.E.2d 93 (W. Va. 1986).

Corporations - Piercing the Veil

The West Virginia Supreme Court of Appeals held that to pierce the corporate veil in order to hold a shareholder active in the operation of a business personally liable for breach of contract to a party who contracted with the corporation, there is a two-prong test: (1) "such unity of interest and ownership that the separate personalities of the corporation and the individual shareholder(s) no longer exist (a disregard of formalities requirement) and (2) an inequitable result would occur if the acts are treated as those of the corporation alone (a fairness requirement)." The court listed numerous items that would indicate evidence of the disregard of formalities requirement, among them the commingling of funds and other assets of the corporation with those of the shareholders; diversion of corporate funds to noncorporate uses; failure to maintain corporate formalities or adequate corporate records; identical equitable ownership in two entities; and inadequate capitalization. However, while listing such factors, the court noted that disregarding formalities is not the most important requirement.

As to the use of a summary judgment in determining the propriety of an attempt to pierce the corporate veil, the court held that whether a party should be allowed to attach liability to the individual shareholders is a question of fact for the trier of fact.

Bruce Stanley

BRYAN v. MASSACHUSETTS MUTUAL LIFE INS. CO., No. 153-

87 (W. Va. July 16, 1987).

Insurance - Tortious Interference

Reversing in part a circuit court's decision to grant summary judgment, the Supreme Court of Appeals found that Massachusetts law, stipulated to by the contract, would be used for purposes of interpretation. When an insurance agent is terminated under an "at will" contract, the agent might be entitled to compensation for future earnings from his work. Therefore, more facts are needed to clarify application of Massachusetts law, making summary judgment a premature disposition of the case.

In reviewing the complaint charge of tortious interference with a business relationship, the high court agreed with the lower court's finding that as the defendants showed a financial interest in the induced party's business and that their intent was to influence another party's business policies in which they had an interest, the defendants met the affirmative defense of privilege. As for the plaintiff's charge of defamation through a letter sent by the defendant to customers formerly serviced by the plaintiff, the court agreed that the plaintiff's claim did not meet the required elements of the tort as the letter was truthful.

Bruce Stanley

V. CONSTITUTIONAL LAW

STATE v. HAMBRICK, 350 S.E.2d 537 (W. Va. 1986).

Search - Consent, Waiver - Intoxication

At issue in this case was what constitutes valid consent to a search of premises and whether statements made under the influence of alcohol were inadmissible for failure of a voluntary, knowing, and intelligent waiver of the appellant's constitutional right against self-incrimination. In resolving the first issue, the court derived a two-part analysis. First, consent must be freely and voluntarily given and not a product of duress or coercion as determined from the totality of the circumstances. Second, the consenting party must possess the requisite authority or relationship over the premises to be searched. Existence of the first requirement was not contested in this case. The

court then found that since the consenting party was a co-occupant of the premises and the evidence was located in a common area in which the appellant had no expectation of privacy, the requisite authority existed.

Further, the court determined that a statement procured while a person is intoxicated is not inadmissible per se, unless the degree of the intoxication is such that the person lacks the capacity to voluntarily, knowingly, and intelligently waive his rights.

Susan Robinson

STATE V. DAVIS, 357 S.E.2d 769 (W. Va. 1987).

Arson

The issues in this case were whether: (1) The indictment was properly indorsed by the jury foreman; (2) the state proved that the defendant willfully and intentionally set a fire; (3) the trial court properly charged the jury about the elements of criminal intent; (4) it was error for the lower court to fail to conduct a hearing relative to the defendant's competency to stand trial; and, (5) it was error to allow the state to argue a new theory not supported by the evidence during closing argument. The court held that: (1) The failure to indorse or attest the indictment on the reverse side is not a fatal defect; (2) to prove attempted arson, the state need only show a specific intent to commit the crime and an act toward its completion; (3) reading the instructions as a whole, it is clear that they were adequate and correct; (4) the defendant waived his right to a hearing by failing to request one after receiving notice of the court's determination that he was competent to stand trial; and (5) the state's argument was not sufficiently prejudicial to warrant a reversal.

Patrick Harton

STATE EX. REL. OWENS v. BROWN, 351 S.E.2d 412 (W. Va. 1986).

Change of Venire

The issue in this case was whether the defendant was entitled to a writ of prohibition preventing the respondents from trying him in

one county in front of a jury summoned from another county.

The court held that the defendant was entitled to be tried by a local jury and reaffirmed the longstanding rule that when a change of venire is proposed by the state or the trial court, W. VA. CODE § 52-1-14 must be interpreted to require a "clear and convincing showing that it is necessary to obtain a fair trial."

Patrick Harton

STATE v. BUCK, 361 S.E.2d 470 (W. Va. 1987).

Disproportionate Sentencing

The issue in this case was whether the thirty year sentence given the defendant was disproportionate in that his co-defendant received a one year sentence.

The court upheld the sentence, pointing to evidence that the defendant was the instigator of the crime and used violence in the furtherance of the crime as justification for the greater sentence.

Patrick Harton

STATE v. KELLER, 355 S.E.2d 405 (W. Va. 1987).

Double Jeopardy

The issue in this case was whether the defendant should be granted a writ of prohibition preventing the state from re-trying him after a mistrial was declared. The mistrial had been declared because the defendant's attorney had prejudiced the jury. The court held that the writ should be granted because the prejudice was slight, the trial court granted the mistrial in summary fashion without considering any alternatives that might have corrected the defense counsel's error, and there was no manifest necessity for terminating the trial.

Patrick Harton

STATE v. BRUMFIELD, 358 S.E.2d 801 (W. Va. 1987).

Escape - Kidnapping

The issue is this case was whether, under W. VA. CODE § 61-2-14a, a kidnapping conviction could be upheld when the defendant

locked two correctional officers in a room while attempting to escape from jail.

The court held that because the kidnapping was incidental to another crime, the conviction could not be upheld. In determining whether a kidnapping is incidental to another crime, the court will consider: (1) The length of the time the victim was held and the distance he was forced to move; (2) the location and environment of the place the victim was detained; and (3) the exposure of the victim to an increased risk of harm.

Patrick Harton

STATE v. STEELE, 359 S.E.2d 558 (W. Va. 1987).

Evidence - Witness Sequestration - Battered Women's Syndrome

In a case concerning witness sequestration, the supreme court held that it is within the discretion of the trial judge to prohibit a witness to testify if that witness has failed to comply with a sequestration order. As for the standard of review of the trial judge's decision, the court maintained a requirement that the decision must have arbitrarily prejudiced the defendant's rights. The court held that a sequestration order extends to the listening to recordings of testimony that has come before the trier of fact. If the party violating the sequestration order is a witness for the prosecution, on appeal the defendant must prove that the testimony, if allowed, prejudices the defendant's case.

In defending against a murder charge by claiming battered women's syndrome, the court held the defendant can offer: (1) Expert testimony explaining the defendant's condition, and (2) an opinion as to whether the defendant fits the psychological profile of the condition.

Bruce Stanley

STATE v. COZART, 352 S.E.2d 152 (W. Va. 1986).

Evidence - Breathalyzer Test - Self Incrimination

The issue in this case was whether, in a criminal trial, the admission into evidence of the defendant's refusal to take a breathalyzer

test when arrested for driving under the influence of alcohol violated the defendant's constitutional right against self-incrimination.

The court held that the defendant's refusal to take a breathalyzer test should be admissible in some instances as evidence of his guilty conscience or knowledge. However, upon request by either the defendant or prosecution, the trial judge should hold an in-camera hearing to weigh the probative value of the evidence against its prejudicial effect. If a decision is made to admit the evidence, a cautionary instruction should be given. The instruction should explain that this evidence has only a slight tendency to prove guilt as it does not bear directly on the issue of guilt.

Patrick Harton

STATE V. MCCALLISTER, 357 S.E.2d 759 (W. Va. 1987).

Evidence - Other Crimes

The issue in this case was whether it was error for the trial judge to refuse to give a limiting instruction when evidence of another crime is admitted and the defendant had requested such an instruction.

The court held that in such circumstances, the jury should be told that the evidence should not be considered proof of the defendant's guilt, but may be examined to determine whether a particular element of the present charge has been proven.

The court held that in this situation fraud did not occur because the recipient could not be defrauded by representations he knows to be untrue or could have known to be by exercising ordinary prudence using means readily at hand.

Patrick Harton

STATE v. STIFF, 351 S.E.2d 428 (W. Va. 1986).

Evidence - Photographic Array

The issue in this case was whether error was committed in the lower court by admitting into evidence a photographic array used to identify the defendant.

The court held that although there were discrepancies between the victim's and arresting officer's recollection of the array, and some of the men in the array were much older than described by the victim, the array was still admissible.

Patrick Harton

STATE v. MAYLE, 357 S.E.2d 219 (W. Va. 1987).

Evidence - Juror Threatened - Felony Murder

The main issues in this case were: (1) Whether a court should declare a mistrial when a juror is threatened; and (2) whether the felony murder rule applies when the death occurs one-half hour after the robbery and 2.1 miles away from the scene of the robbery. The court held that declaring a mistrial because a juror was threatened would "open the season on juries" and a mistrial should be granted only when "the juror's impartiality has been so affected that he can no longer fairly decide the facts." As to the felony murder issue, the court held that the defendants "were still involved in the chain of events surrounding the robbery."

Partick Harton

STATE v. ORTH, 359 S.E.2d 136 (W. Va. 1987).

Fraud - Bad Checks

The issue in this case was whether the defendant could be convicted of knowingly writing bad checks when the recipient of the checks knew of the defendant's tendency to write bad checks and had an elaborate system for determining if there were sufficient funds in an individual's account to cover a check. The court held that the recipient could not be defrauded by representations he knows to be untrue or could have known to be untrue by exercising ordinary prudence already at hand.

Patrick Harton

MORRISON v. HOLLAND, 352 S.E.2d 46 (W. Va. 1986).

Harmless Error - Shifting Burden of Proof

In following a Fourth Circuit Court of Appeals decision which found that, where the state has presented a prima facie case, a jury instruction placing the burden of proof on the defendant to prove reasonable doubt of his guilt when pleading the defense of alibi is unconstitutional, the West Virginia Supreme Court of Appeals limited the application of that decision only to cases in litigation or on appeal where the error has been preserved. As a timely objection was made in the case at hand, the analysis then shifted to whether, under the doctrine of harmless constitutional error, the conviction should stand or whether a writ of habeas corpus should be entered and a new trial ordered.

The standard for determining whether an instruction on an alibi that shifts the burden of proof to the defendant has been harmful is the credibility of the alibi testimony. For the error to be harmless, the court must find that testimony to have been "incredible."

Bruce Stanley

STATE v. GLOVER, 355 S.E.2d 631 (W. Va. 1987).

Ineffective Assistance of Counsel - Dilligent Investigation

The issue in this case was whether the failure of defense counsel to contact, subpoena and call alibi witnesses when an alibi defense was the defendant's only possible defense constitutes ineffective assistance of counsel.

The court held that since the record was inconclusive as to whether counsel diligently investigated the defense, the case would have to be remanded for development of the record and a ruling by the trial court on the point.

Patrick Harton

FACILITY REVIEW PANEL v. HOLDEN, 356 S.E.2d 457 (W. Va. 1987).

Jail Conditions - Cruel and Unusual Punishment

The primary issue in this case was whether jail conditions violated the prohibitions against cruel and unusual punishment contained in the eighth amendment to the United States Constitution and Article

III, Section 5 of the West Virginia Constitution. The Court held that to determine whether or not jail conditions constituted cruel and unusual punishment, the jail must be evaluated by a "totality of the circumstances" test. In the present case, the court found that the uncontroverted facts showing inadequate food, shelter, clothing, sanitation, medical care and personal safety constituted cruel and unusual punishment.

On a secondary issue involving a prisoner's good time credit, the court held that good time credit is a liberty interest protected by the due process clause, W. VA. CONST. art. III § 10, and it is mandatory that the prisoner be granted his credits if he faithfully complies with all rules and regulations.

Patrick Harton

STATE v. HOLMES, 351 S.E.2d 422 (W. Va. 1987).

Judicial Intervention - Vague Testimony

The issue in this case was whether it is error for a trial judge to advise the state, *sua sponte*, to re-call a witness so that the witness might clarify ambiguous testimony by repeating statements he had made to the judge in chambers.

The court held that the trial judge's actions were within his right to control the orderly process of the trial and thus reversible error was not committed.

Patrick Harton

STATE v. LINKOUS, 355 S.E.2d 410 (W. Va. 1987).

Jury Prejudice - Physical Restraints

The two issues in this case were: (1) Whether a criminal defendant has a right to be tried free of physical restraints; and, (2) whether it is reversible error for a trial judge to try a criminal defendant with a jury panel that may have seen him in handcuffs for a brief period of time prior to trial.

The court held that: (1) A criminal defendant does have a right, absent some necessity relating to security or order, to be tried free

of physical restraints; and, (2) in this case, however, there was no reversible error where the defendant only initially appeared in handcuffs and was not restrained throughout the trial.

Patrick Harton

STATE v. MCKINNEY, 358 S.E.2d 596 (W. Va. 1987).

Jury Prejudice - Physical Restraints

The issue in this case was whether a prisoner has a right to be tried free of physical restraints and also whether omission of the word "felonious" in a felony indictment makes the indictment worthless.

The court held that: (1) A defendant does have a right to be tried free from physical restraints; and (2) if an indictment clearly indicates that the charge is a felony, it is valid.

Partick Harton

State ex rel. M.L.N., G.F. & M.L.W. v. Griener, 360 S.E.2d 554 (W. Va. 1987).

Juveniles

The issue in this case was whether youths between the ages of eighteen and twenty years come within the definition of "child" as mentioned in W. VA. CODE § 49-5-16(A) (1986).

The court held that such individuals who remain under juvenile court jurisdiction are children within the meaning of W. VA. CODE 49-5-16(A) and must be given the same rehabilitative opportunities afforded by that section as children under eighteen. Furthermore, they must be housed in a section of a jail designed exclusively for juveniles if they are held in county jails.

Patrick Harton

STATE v. REEDY, 352 S.E.2d 158 (W. Va. 1986).

Jury Prejudice - Criminal Trials

The issue in this case was whether error was committed in a recidivist proceeding in which the defendant was seen in prison attire prior to voir dire of a juror later impaneled.

After reiterating its commitment to construing the West Virginia recidivist statute in a restrictive fashion to mitigate its harshness, the court held that a criminal defendant may not be compelled to wear identifiable prison attire at trial, which encompasses recidivist proceedings. The court considers this prohibition a constitutional right, based on the presumption of innocence, and designed to afford substantive due process protection.

Patrick Harton

KENNEDY v. FRAZIER, 357 S.E.2d 43 (W. Va. 1987).

Plea Agreements

The issue in this case was whether it was an abuse of discretion for the trial judge to refuse the plea agreement between the prosecution and defendant where the probation department's investigation report contained statements by the defendant that he had been entrapped and sexually harassed by a police officer.

The court held that the defendant's guilty plea was a "voluntary and intelligent choice" among the alternatives available to him, and thus the trial judge abused his discretion in refusing the plea agreement. In this case, there was a good chance that a jury would have convicted the defendant and rendered him vulnerable to further sentence enhancement under W. VA. CODE §§ 61-11-18 (1943) and 60A-4-408 (1971). In such circumstances, a defendant may consent to a prison sentence and still deny participation in the crime.

Patrick Harton

STATE v. HUMPHREY, 351 S.E.2d 613 (W. Va. 1986).

Presentment Rule - Felony Murder - Witness Credibility

In concluding that the trial court correctly admitted a defendant's written confession into evidence, the West Virginia Supreme Court of Appeals held that the presentment rule as outlined in the West Virginia Code and the West Virginia Rules of Criminal Procedure is not violated when the defendant is held in custody while police seek physical evidence mentioned in the recorded statement as long as the delay from the time of the defendant's arrest until the time he was

taken before a magistrate did not affect the voluntary nature of the confession.

The court also held that the trial court correctly rejected the defendant's request for an involuntary manslaughter instruction. Although the defendant had said in his written statement that the shotgun he had used to attempt a robbery had gone off accidentally, such an accidental shooting would not remove the case from the felony murder rule to an involuntary manslaughter scenario.

The court held that the trial court correctly refused to declare a mistrial as requested by the defendant after the trial court had stated in an *in camera* hearing that it did not believe a key witness for the prosecution. While the defendant interpreted the trial court's statement as one going to the competency of the witness, the Supreme Court of Appeals found that the trial court was within its discretion in treating the statement as going to the witness's credibility, which was not "so incredible as to be completely untrustworthy."

Bruce Stanley

STATE v. GOOD, 355 S.E.2d 371 (W. Va. 1987).

Prosecutorial Misconduct

The issue in this case was whether it was improper for the prosecutor to contact a defense witness and threaten to place him at the scene of the robbery if he testified in a manner which provided an alibi for the defendant and to agree not to prosecute the witness if he either took the stand and told the truth or refused to testify.

The court held that the prosecutor's conduct deprived the defendant of due process of law by intimidating his alibi witness. The conviction was reversed since the defendant had been denied the opportunity to present a witness in his behalf.

Patrick Harton

STATE v. COLLINS, 354 S.E.2d 610 (W. Va. 1987).

Prosecutorial Misconduct

The two issues in this case were: (1) Whether prosecutorial misconduct occurred when the prosecutor, referring to the defendant's

wife who was also charged with murder, remarked to a number of witnesses: "We will see you in June when we nail Nanny's hide to the wall"; and (2) whether the defendant had a valid claim of prosecutorial overmatch.

The court held that: (1) There was no prosecutorial misconduct absent evidence of bad faith or an attempt to influence the trial; and (2) because there was no proof in the record of ineffectiveness of counsel or an indication that counsel was intimidated by the prosecution, prosecutorial overmatch was not proved.

Patrick Harton

STATE v. WILDER, 352 S.E.2d 723 (W. Va. 1986).

Right to Counsel

The issue in this case was whether the defendant's sixth amendment right to counsel was violated by the admission of statements implicating him in subornation of perjury a crime for which he was not indicted. At his trial for receiving stolen property, the defendant's own witness testified that prior to trial, the defendant offered him a sum of money to perjure himself.

The court held that since the defendant had not been indicted for subornation of perjury, his sixth amendment right to counsel had not attached. The court placed great emphasis on the fact that the statements were admitted to impeach the defendant and not to prove the charge in the indictment.

Patrick Harton

STATE v. MCWILLIAMS, 352 S.E.2d 120 (W. Va. 1986).

Sanity - Burden of Proof

The issue in this case was whether the state failed to prove that the defendant was sane at the time of the commission of the crime.

The court held that the defendant had established his insanity at the time of the commission of the crime through extensive expert testimony, that the state presented no expert testimony in rebuttal, and that the lay testimony offered by the state was insufficient to satisfy its burden of proof.

Patrick Harton

STATE v. MUEGGE, 360 S.E.2d 216 (W. Va. 1987).

Searches by Private Guards

The two issues before the court were: (1) Whether evidence obtained during a search by a private security guard should have been admitted at trial; and (2) whether the trial court erred when it admitted into evidence statements made by the defendant on a questionnaire presented to him by the security guard.

The court held that: (1) When searches are conducted outside the judicial process they are *per se* unreasonable. The only exceptions to this rule are when a search must be made to uncover weapons that might be used against the officer or to prevent evidence from being destroyed. (2) The admission into evidence of the questionnaire was violative of the defendant's right against self-incrimination because the evidence was obtained after the defendant refused to sign a waiver of his constitutional rights and asked for permission to contact his attorney.

Patrick Harton

STATE v. ALLMAN, 352 S.E.2d 116 (W. Va. 1986).

Sexual Assault - Social Companion

The issue in this case was whether the defendant's granddaughter, a ward placed in his care, was a voluntary social companion within the meaning of W. VA. CODE § 61-88-3(a)(1), which requires the state to show serious injury or use of a deadly weapon in order to prove first degree sexual assault. In the case of a non-voluntary social companion, the state need only prove the victim was forced to engage in sexual intercourse to get a conviction in the first degree.

The court held that the statute was intended to cover dating situations; thus, the victim was not the voluntary social companion of the defendant within the meaning of the statute. The court refused to "allow a defendant to take advantage of the fact that he was appointed in a position of trust over a child to obtain a lesser sentence when he forcibly raped his ward."

Patrick Harton

STATE v. DRACHMAN, 358 S.E.2d 603 (W. Va. 1987).

Speedy Trial

In this case, the court considered whether the sixth amendment right to a speedy trial applies when, absent an actual arrest, formal charges have been brought in an indictment or information.

The court held that in such situations the speedy trial right does apply, and the length of the delay triggers the inquiry. The four factors to consider in determining whether there has been an unreasonable delay are: (1) The length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. The conduct of the state must be balanced against the conduct of the defendant on a case-by-case basis. No single factor is either necessary or sufficient to support a claim that the defendant has been denied a speedy trial.

Patrick Harton

STATE v. MULLINS, 355 S.E.2d 24 (W. Va. 1987).

Warrant Arrest

The issue before the court was whether there were such exigent circumstances to justify arresting the defendant in his home without a warrant.The court held that a person can only be arrested for felony in his home without a warrant when the police reasonably believe that evidence will be destroyed, the accused will flee, or the safety of others will be jeopardized if he is not arrested immediately. In the present case, such exigent circumstances were not apparent from the facts.

Patrick Harton

STATE v. TURLEY, 350 S.E.2d 695 (W. Va. 1986).

Youthful Offender Statute

The issue in this case was whether a trial judge has the authority and jurisdiction under the Youthful Offender Statute to commit the

defendant to a youthful offender center when the defendant used a pistol to commit the crime.

The court held that the trial court did have the authority and jurisdiction to suspend the sentence and commit the defendant to a youthful offender center for up to two years.

Patrick Harton

VI. CRIMINAL PROCEDURE

IN RE: PETITION BY JAMES M. MATHERLY, 345 S.E.2d 603 (W. Va. 1987).

Evidence - DUI Defense

The court held that a driver charged with driving under the influence of alcohol could not raise as a defense, at an administrative hearing to revoke his license, either his extreme intoxication or his extreme emotional distress for his refusal to respond to a request that he submit to a blood-alcohol test.The court reasoned that, while the state statute does not address the question of whether a non-response to a request to submit to such a test is the equivalent of a refusal to take the test, to not allow such an inference by silence would effectively gut the statute.

As for the argument that the driver was too intoxicated or too distressed to understand the officer's request of him, the court refused to read into the statute that a refusal to take the test be "intelligently, knowingly and willingly made."

Partick Harton

STATE v. LEVERETTE, 359 S.E.2d 344 (W. Va. 1987).

Ineffective Assistance of Counsel - Habeas Corpus Relief

The defendant, after being convicted of robbery by violence, filed a petition for a writ of habeas corpus alleging ineffective assistance of counsel. The issue was whether, under the facts of this case, the defendant was entitled to habeas relief.

The court held that the standard for determining whether counsel is ineffective to the point of prejudicing the defendant is a balancing

test which compares counsel's performance with the customary degree of skill and knowledge possessed by attorneys who are reasonably knowledgeable of criminal law. In the present case, the defendant was entitled to relief because the evidence clearly indicated that counsel had failed to investigate the case or adequately prepare for trial and, at trial, was suffering from a mental disability that prevented him from engaging in the proper practice of law.

Patrick Harton

STATE v. FINLEY, 355 S.E.2d 47 (W. Va. 1987).

Reversible Error - Jury Prejudice

In a defendant's appeal from his criminal conviction and sentence, the West Virginia Supreme Court of Appeals held that the trial court committed reversible error by not questioning individual prospective jurors either on motion from counsel or *sua sponte*, out of the hearing of other prospective jurors, as to whether they had been prejudiced by statements from one prospective juror during *voir dire* that the defendant had been indicted for other crimes.

On a second issue, the court applied the holding of the Supreme Court of the United States that a trial judge may take into consideration, when sentencing a defendant, the trial judge's own belief that the defendant committed perjury as a witness. The court emphasized, however, that the trial court cannot give a harsher sentence to punish the defendant for that perjury.

Bruce Stanley

STATE v. BIAS, 352 S.E.2d 52 (W. Va. 1986).

Competency to Stand Trial

Pursuant to *W. Va. R. App. P.* 13 and W. VA. CODE § 58-5-2 (1967) the following questions were certified to the court:

(1) "Does the trial court lack jurisdiction to try a criminal defendant who was on three occasions between 1969 and 1973 found to be incompetent to stand trial and was committed to a state mental hospital, by virtue of W. VA. CODE § 27-6A-2, as effective in 1974?"

(2) Does the court lack jurisdiction to try this defendant, by virtue of W. VA. CODE 62-3-21 (1959)? (Three Term Rule)

The court held that:

(1) Because the alleged criminal offense occurred prior to the 1979 amendment, W. VA. CODE 26-6A-5 (1974) should be applied. The 1979 amendment did not indicate any legislative intent for retroactive application; therefore, the defendant may be tried.

(2) Where, in any term, the defendant procures a continuance of a trial on his own motion after an indictment is returned or otherwise prevents a trial from being held, that term is not counted toward discharge under the three term rule.

Patrick Harton

VII. EDUCATION

KEITH D. v. BALL, 350 S.E.2d 720 (W. Va. 1986).

Students - Reinstatement

In an original mandamus action, the West Virginia Supreme Court of Appeals refused to issue a writ on behalf of several expelled school students seeking reinstatement. The court rejected the students' contention that a handbook rule stating the minimum penalty for making a bomb threat, clearly labelled as the minimum penalty, was misleading as the maximum penalty of a one year expulsion was implemented.

In stating the test for review of school board decisions on disciplinary matters, the court limited intervention to "extreme cases." While denying the writ, however, the court took exception to the school board's interpretation of the statutory language of "school year." The court held that the term refers to a 180 day school term and not a calendar year, gaining the students readmission to school sooner than the board's decision would have.

Bruce Stanley

COLLINS v. RITCHIE, 351 S.E.2d 416 (W. Va. 1986).

Student Transportation

The West Virginia Supreme Court of Appeals was presented with the following issues: (1) Whether a county board of education is required to provide transportation to send children to and from their residences; and (2) whether the West Virginia State Department of Highways is required to maintain a road on which children live so that a school bus could traverse the road.

This court had previously ruled on the first issue and had held that the board has an obligation to provide transportation and that this obligation is not abrogated because of the poor condition of a road on which the children live. *Shrewsbury v. Bd. of Education*, 265 S.E.2d 767 (W. Va. 1980).

The court further held that the board's responsibilities are the same whether the child lives on a well-maintained public road or on a poorly maintained road, whether the road remains private or becomes public under W. VA. CODE 17-1-3 (1963). The road in question was deemed to be public by virtue of the Code. The court ordered the Department of Highways to increase the level of maintenance on the road to the point the children could be provided transportation to and from school.

Susan Robinson

VIII. EMPLOYMENT

NEW v. TAC & C ENERGY, INC., 355 S.E.2d 629 (W. Va. 1987).

Conflict of Laws

On appeal from an order from the Circuit Court of Mingo County dismissing plaintiffs' complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, the West Virginia Supreme Court of Appeals addressed for the first time the question of conflict of laws in the context of an employment contract.

The court, adopting the Restatement (Second) of Conflicts § 196 (1971), held that absent an agreement between parties, the validity and rights of a contract for the rendition of services are determined by the law of the state where the contract is required to be performed unless some other state has a more significant relationship to the transaction and the parties. The court held that West Virginia had

the more significant connection to the employment relationship. It based its decision on evidence that: (1) All of the parties are residents of West Virginia residing in Kentucky only for the duration of the job, and (2) the contract was made and partially performed in West Virginia, thus creating strong ties to this state. Therefore, West Virginia law applies.

Susan Robinson

WIGGINS v. EASTERN ASSOCIATED COAL, 357 S.E.2d 745 (W. Va. 1987).

Discrimination - Administrative Remedies

Where an employee filed a wrongful discharge action in circuit court claiming discrimination resulted from his refusal to operate mining equipment in violation of safety rules, the circuit court dismissed the action, stating that the exclusive remedy for the employee was through administrative channels. The Supreme Court of Appeals reversed, holding that the employee could bring a tort action in circuit court for compensatory and punitive damages not available at the administrative level under the anti-discrimination portions of federal and state mine safety laws. The court re-emphasized an earlier exception to the common law exclusivity of remedy rule, noting that the purpose of anti-discrimination provisions is to encourage compliance with safety rules, not to remedy private wrongs.

As for a claim that the employee had not exhausted all of the administrative processes available to him in that he pursued his claim under federal and not state provisions, the court ruled that, as the two processes were nearly identical and as the employee would not have been granted any additional relief had he pursued the state administrative procedure, employees will not be required to pursue such procedures to their exhaustion.

Bruce Stanley

CURREY v. WEST VIRGINIA HUMAN RIGHTS COMMISISON, 360 S.E.2d 387 (W. Va. 1987).

Discrimination - Review Standards

In an appeal from a Kanawha Circuit Court order reversing a decision by the West Virginia Human Rights Commission that found E.I. DuPont deNemours and Co. guilty of sex discrimination, the court upheld the circuit court's action. The circuit court used the appropriate standard of review of the evidence presented to the commission. The Supreme Court agreed that a review of the evidence did not show that DuPont had practiced sex discrimination against the complainant when it did not award her one of five new positions created by the company, and that the company's procedure in filling the positions was constitutionally acceptable.

The West Virginia Administrative Procedures Act requires the circuit court to reverse an administrative decision when the administrative agency has prejudiced a party by violating statutory or constitutional provisions; by exceeding its authority; by using unlawful procedures; by committing other legal error; by making a finding clearly wrong in the face of the evidence; or by abusing its discretion.

Bruce Stanley

KERNS v. BUCKLEW, 357 S.E.2d 750 (W. Va. 1987).

Discrimination - Federal Protection - State Immunity

The court held that, in cases of employment discrimination, federal constitutional protection against such discrimination supercedes the state's constitutional governmental immunity, as the West Virginia Human Rights Act is the federal/state cooperative effort to enforce the fourteenth amendment at the local level.

Upon a writ of mandamus sought by a woman denied employment by West Virginia University and the West Virginia Board of Regents, the court ordered that the University and Regents pay the damages awarded by the West Virginia Human Rights Commission, including an award of back pay even though the complainant had never been hired. The court said the back pay award cannot be challenged by a party that practiced discrimination, and that such discrimination prevents the party from denying an employee/employer relationship.

Bruce Stanley

CONAWAY v. EASTERN ASSOCIATED COAL CORP., slip op. No. 16969 (W. Va. December 9, 1986).

Discrimination - Test for Claims - Statute of Limitations

Affirming the circuit court's granting of summary judgment for the defendant against the plaintiff's claims of age discrimination, wrongful discharge and breach of contract, the Supreme Court of Appeals adopted as a test for proving claims of age discrimination that: (1) The plaintiff be a member of a protected class; (2) the employer's decision have an adverse effect on the plaintiff; and (3) that the defendant would not have made the decision if the plaintiff were not a member of the protected class. To meet the third element, the plaintiff is required to show evidence giving rise to an inference that the employer acted discriminatorily. The employer would then have to show that the action was not discriminatory. The plaintiff would then have a chance to rebut the defendant employer's claimed reason. Thus, the court, while not overruling them, limited the application of previous discrimination tests it had adopted to specific fact situations like those where they were initially applied.

The court also held, on the issue of wrongful discharge, that while the plaintiff had started the age discrimination claim before the West Virginia Human Rights Commission, saving that claim from the statute of limitations, that action did not preserve the wrongful discharge claim from the tolling of the statute. In addition, despite previous treatment by the court of an employee handbook as a unilateral contract, the plaintiff presented no factual evidence to show that such a contract had been breached, thus failing to save it from summary judgment.

Bruce Stanley

DILLON v. BOARD OF EDUCATION OF THE COUNTY OF WYOMING, 351 S.E.2d 58 (W. Va. 1986).

Education - Seniority - Board Discretion

When a county board of education exercises discretion in matters concerning employment, it must exercise that discretion reasonably. In the event that a board of education abuses its discretion, man-

damus lies with the courts to correct the abuse. Thus, when a county board of education did not consider seniority in filling a vacant teaching position with one of two otherwise equally qualified persons, the court found that the board did not conform to the legislative intent behind the statute governing such situations. By accepting a superintendent's uninvestigated recommendation that one applicant was more qualified than the other, the board failed to follow its own procedure requiring the investigation and evaluation of the two candidates' qualifications.

The court, finding that the board acted arbitrarily in exercising its discretion to fill a vacant teaching position, held that the circuit court was to issue a writ of mandamus requiring the board to repost the position and to fill it with a candidate chosen from a selection process that follows established procedure.

Bruce Stanley

MAYNARD V. BOARD OF EDUCATION OF THE COUNTY OF WAYNE, 357 S.E.2d 246 (W. Va. 1987).

Education - Immunity - Contracts - Laches

In responding to two certified questions from the circuit court level, the Supreme Court of Appeals held that: (1) Governmental immunity from contractual liability available to the state Superintendent of Schools and the state Board of Education does not extend to county boards of education even when those counties have followed the directives and instructions of the state officials, and (2) that it is the written contract between the county school board and school system employee that determines the applicable statute of limitations when fixing liability in contractual questions, not the statutory law incorporated into the contract. As a result, the ten year statute of limitations that applies to written contracts controls, not the two year statute of limitations that applies to violations of statutes.

The court also addressed the question of laches, holding that it is incumbent upon the party challenging the legality of a decision affecting the public interest to act diligently in bringing the challenge. Otherwise, the challenging party is barred from relief through the equitable defense of laches, as allowing that party to bring an action

so long after events leading to the challenge had transpired (nine years) would result in an inequity. Thus a suit in equity can fail for laches even though the legal statute of limitations has not expired.

Bruce Stanley

WEST VIRGINIA DEP'T OF HUMAN SERVICES V. BOLEY, 358 S.E.2d 438 (W. Va. 1987).

Education - Teacher Discipline

The West Virginia Supreme Court of Appeals affirmed a circuit court decision that a public school teacher is not subject to removal under the West Virginia child neglect and child abuse statute for alleged incidents of abuse in the classroom. The court noted that there is statutory language providing specific removal procedures in cases requiring teacher discipline, and that traditional approaches to statutory construction give specific statutes precedence over general ones.

Bruce Stanley

COURTNEY v. RUTLEDGE, 351 S.E.2d 419 (W. Va. 1986).

Misconduct - Prior Written Warning

In reversing an administrative law judge's finding of gross misconduct by the plaintiff, a finding later upheld by the Board of Review and the Circuit Court of Kanawha County, the West Virginia Supreme Court of Appeals found nothing in the record to show that the plaintiff had been given prior written warning that his acts might result in termination of his employment. As such, prior written warning is required as a matter of law for a determination of gross misconduct, and as incorrect findings of law or plainly wrong findings of fact are subject to be set aside by the courts, the high court reversed the circuit court affirmation, replacing it with a finding of simple misconduct that will result in only a six week disqualification from unemployment benefits.

Bruce Stanley

MCCLUNG v. MARION COUNTY COMM'N, 360 S.E.2d 221 (W. Va. 1987).

Retaliatory Discharge - Punitive Damages - Sufficiency of Evidence

The primary substantive issue before the court speaks to liability for retaliatory discharge where it is claimed that such discharge resulted from a public employee's exercise of constitutional and statutory rights.

Second, the court considered the question of whether punitive damages and reasonable attorney's fees should be awarded in a suit for retaliatory discharge. Procedurally, the court discussed whether there was sufficient evidence to support the jury's verdict in favor of the employee for retaliatory discharge.

The court, recognizing that a public employee may not be discharged for the exercise of a constitutionally protected right unless a substantial governmental interest outweighs the individual's interest in exercising such right, held that an individual's right to bring an action for overtime wages outweighs the government's interest in promoting efficiency in public service.

On the second issue, the court held that where the defendant in a retaliatory discharge case acted wantonly, wilfully, or maliciously, punitive damages may be recovered. Whether such motive was present is left within the province of the fact finder. Similarly, a finding that there was sufficient evidence of bad faith, vexations, wanton or oppressive conduct will support an award of reasonable attorney's fees.

The court applied prior tests for examining the sufficiency of evidence to support a jury verdict and found that the evidence was sufficient in this case. Furthermore, the court held that judgment not withstanding the verdict should not be granted where the jury could have properly found for either party upon the factual issues.

Susan Robinson

PEERY v. RUTLEDGE, 355 S.E.2d 41 (W. Va. 1987).

Unemployment Compensation - Misconduct

In reversing a circuit court ruling disqualifying a claimant from unemployment compensation because the claimant had refused to undertake what he believed to be an unsafe risk, the West Virginia Supreme Court of Appeals held that disqualification provisions found

in the Unemployment Compensation Law are to be construed narrowly. As a result, the claimant is not guilty of the disqualifying act ("misconduct") so long as the claimant acted reasonably and in good faith.

The court held that it is the employer's burden to show that the work rule job assignment which the claimant violated was reasonable in nature, with the burden of proof for showing reasonableness for his acts falling to the employee. That the claimant knew there were risks when he accepted employment does not mean that by accepting the claimant had waived his right to make his burden of proof.

Bruce Stanley

PACK v. VAN METER, 354 S.E.2d 581 (W. Va. 1986).

Workers' Compensation

The plaintiff, Pack, an employee of Nelson's Dress Shop, was injured on the premises after a fall and subsequently sued the building owner, Van Meter. Van Meter filed a third-party action against Nelson's, citing an indemnity clause in the lease with the dress shop. Among the issues facing the court were whether a building owner can be liable to his tenant's employee; whether, when a safety statute has been violated, a defendant can raise assumption of risk as an affirmative defense; and whether an offset can be had for compensation from the Worker's Compensation Fund.

On the issue of liability of the owner to the employee, the court adopted the position that the employee can bring suit against the building owner, citing the shared responsibility between landlord and tenant for the safety problem (no handrail and unsafe tread on stairwell) and landlord-tenant law that holds the landlord responsible for "common use" situations or where the landlord "knew or should have known" of the defect.

As to whether the defendant landlord should be able to raise an assumption of risk defense, the court adopted the test that, when violation of a safety statute is involved, the defense becomes available only when he can prove that the employee had an alternative which the defendant voluntarily chose not to exercise, thus acting with

"willful, wanton or reckless disregard for his own safety." The court held, that in the fact pattern before it, the defense was not available to the defendant.

On the question of remittitur of Workers' Compensation benefits, the court held that, as with all collateral source income, the information was inadmissible.

Bruce Stanley

IX. EVIDENCE

STATE v. BANJOMAN, 359 S.E.2d 331 (W. Va. 1987).

Criminal Procedure - Character Witness - Acts of Misconduct

When cross-examining a defendant's character witness about that witness' knowledge of specific acts of misconduct by the defendant, the prosecution must disclose the specific questions in an in-camera hearing. The prosecution must present the court with documents or witnesses, upon which the court must find a good faith basis in fact that the misconduct did occur. The prosecution must also limit its questions about the misconduct to facts about the defendant's character put in issue on direct examination, and the court must determine whether the probative value of the evidence outweighs its prejudicial value.

Once the court allows the questioning, the jury should be informed that the questions go to the credibility of the character witness and not to the defendant's guilt on the present charge. The court found the trial court acted correctly in allowing the prosecution to question a character witness about an incident involving the defendant where the defendant attempted to obtain money from her insurance company by telling them that her property had been stolen. The court said the questions went to the credibility of the witness' testimony as to the defendant's honesty. However, the trial court committed error in admitting testimony as to an incident of child abuse involving the defendant. However, that error was harmless as the remaining evidence was sufficient to find the defendant guilty beyond a reasonable doubt, and the evidence did not have a prejudicial effect upon the jury.

Bruce Stanley

STATE v. SMITH, 358 S.E.2d 188 (W. Va. 1987).

Hearsay - Excited Utterance

In considering an appeal challenging a trial court's admission of hearsay evidence, the Supreme Court of Appeals held that when a witness testifies as to an excited utterance by a third party that witness' presence at the event where the utterance occurred is not a necessary requirement for admissibility.

The requirements for admissibility of hearsay evidence under the West Virginia Rules of Evidence include: (1) Whether the statement is trustworthy; (2) whether it is offered to prove a material fact, (3) whether it is the most probative evidence available to the offering party; (4) whether the statement is within the general purpose of the Rules of Evidence; and (5) whether the contesting party has been given proper notice to prepare to meet the statement.

The court reaffirmed its position that, under the Rules of Evidence, a party, in attempting to rebut evidence to which a sound objection has been registered, has not waived his original objection to the admission of the evidence.

Bruce Stanley

VENTURA v. WINEGARDNER, 357 S.E.2d 764 (W. Va. 1987).

Reversible Error - Instructions - Similar Incidents - Expert Testimony

The West Virginia Supreme Court of Appeals reversed a Monongalia County Circuit Court decision in a negligence case for refusing to give a defendant's instruction on assumption of risk where there was evidence to support such a theory of the case. The court also found error where the trial court would not allow the defendant to put on evidence of no prior occurrences of similar incidents of the type that formed the basis of the complaint. The court noted, though, the weak nature of such evidence and that such error, in and of itself, does not constitute reversible error.

In an issue concerning expert testimony, the court found error with the admission of witness testimony on behalf of the plaintiff.

The witness, qualified as a vocational expert, testified as to the expected playing life span and salary levels of professional tennis players. The opinion testimony as to salary was based on figures from Tennis Week Magazine, which was not shown to be an authoritative source for expert testimony.

Bruce Stanley

X. FAMILY LAW

WOOTEN v. WALLACE, 351 S.E.2d 72 (W. Va. 1986).

Adoption - Duress

In this case, the court addressed the issue of whether the adoption in question was a product of duress, which statutory law (W. VA. CODE § 48-4-1(a)) requires the adoption to be set aside.

In reviewing this case, the court held that "duress" in a general sense existed. The consenting mother was divorced, untrained, emotionally upset, and unable to provide support for herself or her child. However, the court held that mere "duress of circumstances" does not constitute duress under West Virginia statutory law. The statute is to be construed narrowly as contemplating duress created or contrived by the adopting parents.

Susan Robinson

BUTCHER v. BUTCHER, 357 S.E.2d 226 (W. Va. 1987).

Alimony and Child Support

At issue in this case was whether military nondisability retirement benefits are subject to alimony and child support payments under W. VA. CODE § 48-2-15(i) and whether they are considered marital property subject to distribution. Also at issue was the propriety of rehabilitative alimony in this case.

After a lengthy discussion of the prior history of the treatment of military pensions in this context, the court concluded that military nondisability retirement benefits are subject to alimony and support payments and are marital property subject to equitable distribution. In calculating the nonmilitary spouse's share, the court adopted a

"coverture factor" approach. The factor, applied once the initial marital share is determined, consists of the ratio of the number of years the parties have been married while the spouse has been in the military to the total number of years served by that person in the military. The amount of marital assets is to be determined and divided according to equitable distribution principles prior to determining the need for alimony and support. This is because such need may be affected should the spouse receive income-producing property.

In discussing the second issue, the court followed previously established guidelines. Noting the advanced age of the wife, her lack of particular skills, and her qualification for only minimum wage type of employment, the court found the award of six months rehabilitative alimony unrealistic.

Susan Robinson

GOLF v. GOLF, 356 S.E.2d 496 (W. Va. 1987).

Alimony and Child Support

On assignment of error, the court entertained the following questions: (1) Whether allowing credits against accrued support obligations is proper; (2) whether the circuit court erred in terminating monthly alimony payments; and (3) whether interest should be allowed on support payments in arrears.

Finding that the authority of the courts to modify alimony and child support payments is, absent a showing of fraud in obtaining award, prospective only, the court held that the power to modify or cancel accrued arrearage does not exist.

The court also found that a modification should only be granted upon a showing of a "substantial change of circumstances." Thus, a termination of alimony payments where the economic position of the parties had not changed substantially was improper.

The court determined that matured alimony payments were judgment decrees, which like other judgments for the payment of money, should bear interest from the due date of the payments.

Susan Robinson

LAMBERT v. MILLER, 358 S.E.2d 785 (W. Va. 1987).

Alimony and Child Support

In this child support case, the court considered the issue of whether a "substantial change of circumstances," not within the contemplation of the parties at the time a support order is entered, has occurred where, following the original order, one party voluntarily assumes custody of one child and agrees to continue support of the other. The court also considered the effect of remarriage of the paying spouse in the context of a request for modification of a child support order.

The court identified several factors to consider in determining if a substantial change has occurred. These factors are: (1) Change of financial resources on the part of the obligated parent; (2) the needs of the child; (3) the motivation for the reduction request; and (4) whether the change is to be temporary or permanent.

The court held that when the father obtained custody of his child and entered into an agreed order to support the child, the change in circumstances created as a consequence of custody should have been within the contemplation of the parties at that time.

With regard to the second issue, the court held that remarriage is a factor to consider in weighing the equities of the situation, but remarriage alone does not justify a modification of a child support order. Further, the court held that the starting of a second family and acquiring custody of one child does not constitute a "substantial change of circumstances" justifying a modification of the agreement for the support of the other child.

Susan Robinson

STATE EX REL W. VA. DEP'T OF HUMAN SERV. v. CHERYL M., 365 S.E.2d 181 (W. Va. 1987).

Child Custody

In this case, the court examined the issue of a natural parent's right to the custody of his or her child.

The court found that a mother, absent compelling circumstances to justify a denial, is entitled to a meaningful improvement period

in which to demonstrate her ability to care for her child before her parental rights may be terminated. Based upon the facts that the mother in this case was unjustifiably denied an improvement period, that the Department of Human Services did not provide a family case plan to the court or did not in good faith render assistance to the mother, and that the evidence was not clear and convincing, the court reversed the decision to terminate the parental rights of the mother.

Although the child had resided with foster parents for three years, it was determined that the paramount consideration of what is in the best interest of the child was not applicable since the mother did not voluntarily consent to relinquishment of her parental rights.

Dissenting opinion filed by Justice Neely.

Susan Robinson

STATE v. STEELE, slip op. No. 16804 (W. Va. May 15, 1987), pet. *reh'g denied* (July 16, 1987).

Evidence - Witness Sequestrations and Tape Recordings

This case involves the following issues: (1) Whether a witness sequestration order prohibits prospective witnesses from listening to tape recordings of prior testimony of other witnesses; (2) whether a conviction should be overturned when a witness violates a sequestration order and is subsequently permitted to testify; (3) whether testimony should be permitted on the battered women's syndrome; and (4) whether evidence concerning prior acts of violence on the part of the victim should be inadmissible.

On the first issue, the court held that the West Virginia sequestration rule prohibits prospective witnesses from listening to mechanical recordings of the prior testimony of other witnesses.

On the second issue, the court held that it is within the discretion of the trial judge to determine whether a witness who violates a sequestration order should be permitted to testify. Further, only where the trial court acts arbitrarily to the prejudice of the defendant's rights is a reversal warranted. The court noted that in cases where the witness's testimony is unrelated to the taped testimony or is related mainly to collateral matters, no prejudice would result.

In reviewing the other issues, the court held that in appropriate cases, evidence regarding the battered women's syndrome may be introduced. Further, the court held that prior acts of violence on the part of the victim must first be known to the defendant before testimony regarding such acts is admissible. Also, where such acts are remote in time, it is within the sound discretion of the judge to exclude testimony of such acts.

Susan Robinson

IN RE: DAVID ANDREW NEARHOOF, 359 S.E.2d 587 (W. Va. 1987).

Grandparents' Rights

Upon certified question from the Circuit Court of Kanawha County, the court considered whether a grandparent's right to visit with the grandchild of his deceased child continues when the child is adopted out of the grandparent's family.

In resolving this issue, the court sought to reconcile the conflicting provisions of two statutes. W. VA. CODE § 48-2B-1 provides for grandparent visitation upon petition by a parent of a deceased child, and W. VA. CODE § 48-4-11(a) provides for termination of all relationships between the child and his natural parents and lineal or collateral kindred. The court found that the objective of both statutes is to provide substitute parentage for the child. Therefore, it concluded that even if a child has been adopted by the spouse of the child's natural parent, a grandparent shall have reasonable and seasonable visitation rights with the grandchild, provided such visitation is in the best interest of the child.

Susan Robinson

STATE EX REL M.L.N. v. GREINER, slip op. No. 17536 (W. Va. 1987).

Juvenile Law - Continuing Jurisdiction

At issue before the court in this case was whether the legislature has conferred upon judges statutory authority to incarcerate persons between the ages of eighteen and twenty and under continuing juvenile jurisdiction in county jails with adult prisoners.

In recognizing that the state's interest in taking custody of delinquents is rehabilitation and that the nature of such custody must conform to such rehabilitative purpose, the court found that the legislative intent was to prohibit the jailing of youths who are under continuing juvenile jurisdiction within the sight and sound of adult prisoners. As a result, such persons can be held in county jails only if they are specially housed beyond the sight and sound of the adult prisoners.

Susan Robinson

NANCY R. v. RANDOLPH W., 356 S.E.2d 464 (W. Va. 1987).

Termination of Parental Rights

In this case, the court examined the termination of parental rights and questioned whether the evidence presented to the trial court was sufficient to support its finding that Randolph W. was a fit parent.

Randolph W. was indicted for the murder of his wife, the child's mother. The child's maternal aunt, Nancy R., petitioned the court for custody. The trial court ruled that the father was a fit parent and therefore entitled to designate a guardian for the child. As a result of Randolph W.'s conviction for first degree murder, Nancy R. sought a reconsideration of the custody order. During the reconsideration hearing, the trial court was requested to incorporate records of the criminal action into the record of the custody proceeding. The court declined.

The court concluded that the record of the criminal proceeding should have been admitted into evidence in the custody proceeding or should have received judicial notice. Further, such a conviction and subsequent prolonged incarceration are significant factors to be considered in ascertaining parental fitness and, ultimately, the termination of parental rights. Accordingly, the court committed the child to the permanent guardianship of the West Virginia Department of Human Services.

Susan Robinson

XI. FREEDOM OF INFORMATION ACT

CHILD PROTECTION GROUP v. CLINIC, 350 S.E.2d 541 (W. Va. 1986).

Medical Records

The court addressed the question of whether the Freedom of Information Act requires disclosure of a school bus driver's medical records that are in the possession of the school board to parents of children who ride his bus.

In determining if these records, which fall under W. VA. CODE § 29B-1-4(2) (1980), are exempt from public disclosure, the court held that the public's need to know must be balanced against the individual's right to privacy. As to whether disclosure constitutes an unreasonable invasion of privacy, the court adopted a five part test: (1) The court must determine if disclosure would result in a substantial invasion of privacy and, if so, how serious; (2) the court looks to the extent or value of the public interest and the purpose for which such information is sought; (3) the court considers whether the information is available from alternative sources; (4) the court considers whether the information was given with an exception of confidentiality; and (5) the court asks whether invasion of privacy can be minimized in granting the relief requested.

Susan Robinson

DAILY GAZETTE CO. v. WEST VIRGINIA BD. OF MEDICINE, 350 S.E.2d 66 (W. Va. 1986).

Medical Practice

The issue in this case was whether certain sections of the West Virginia Medical Practice Act, which generally provide that the reports and records of the West Virginia Board of Medicine and its peer review committees are strictly confidential and immune from public discovery, are unconstitutional.

The court held that under W. VA. CODE § 30-3-14(o) (1986), if the Board finds the preliminary existence of probable cause to substantiate charges of disciplinary disqualification, all information from such proceedings is open to the public. Also, where the complaint has been dismissed for failure to find probable cause, the court held that the complaint or other document setting forth the charges, findings of fact, and conclusions of law supporting the dismissal are accessible to the public. Furthermore, the court held that information relating to hospital peer review proceedings is open to the public once

the information is brought before the Board following a finding of probable cause to substantiate the charges.

Susan Robinson

DAILY GAZETTE CO. v. WITHROW, 350 S.E.2d 738 (W. Va. 1986).

Elected Officials

Several issues were before the court in the present case. Primarily, the court entertained the issue of whether release of settlement documents relating to the conduct of the public's business in the possession of a public body's attorney or insurer's attorney are "public records." The court also questioned whether a public official has a duty to create and maintain a record of settlement of litigation against public officials or employees in their official capacity and whether the prevailing party can recover attorney's fees in an action brought under the State Freedom of Information Act.

In resolving the first issue, the court, interpreting the language of 29-B-1-1 *et seq.*, held that the disclosure procedures contained in the State's Freedom of Information Act are to be liberally construed and that the term "public record" includes within its definition a writing containing information "relating to the conduct of the public's business. . . ." Thus, a release or other settlement document involving a public party acting within his official capacity is a public record. Furthermore, for the purpose of the Act, a writing is "retained" if it is subject to the control of the public body. The court also noted that an agreement of confidentiality is void to the extent that it conflicts with the definition of a "public record" under the State's Freedom of Information Act.

On the latter issue, the court held that it is the common law duty of a public official to create and maintain such information for public inspection and copying. Finally, the court ruled that for the prevailing party to recover reasonable attorney's fees under the State's Freedom of Information Act, the evidence must show bad faith, vexatious, wanton, or oppressive conduct on the part of the public record(s) custodian.

Susan Robinson

XII. INSURANCE

JONES v. MOTORISTS MUTUAL INS. CO., 356 S.E.2d 634 (W. Va. 1987).

Automobile - Named Driver Exclusion

In this case, the court addressed the issue of whether a "named driver exclusion" clause in an automobile liability insurance policy is valid in West Virginia.

The plaintiff received an automobile liability policy from the defendant and agreed to exclude her son from coverage while he operated the vehicle. While the son was operating the vehicle, an accident occurred which caused damage to the insured's automobile and property damage to third parties. The insured filed suit claiming damages arising out of the incident.

The court noted that West Virginia requires that insurance policies provide a mandatory coverage for third-party liability purposes where the operator of the car was a permissive user.

As a result, the court held that, where the driver was a permissive user, insurer must defend actions and/or pay claims for third-party property damage or personal injury, up to the statutory limits, even if the operator is specifically excluded from coverage. The court further held, however, that the issue of insurance for the insured's own property is a matter left to the agreement, and, as such, the exclusion is effective to bar a claim made by the insured for damage to her or her son's personal property.

Susan Robinson

NATIONAL MUTUAL INS. CO. v. MCMAHON & SONS, INC., 356 S.E.2d 488 (W. Va. 1987).

Automobile - Exclusionary Clause

The primary issue addressed by the court in this case was whether a "care, custody and control" exclusionary clause operated so as to relieve the insurer of any liability to the plaintiffs. Further, the court

considered whether the insurer should be estopped from denying coverage where it undertook to defend an action arising out of the incident.

The court noted that the circuit court issued its ruling of a declaratory judgment in favor of the insurer with sparse factual development. The decision was reversed and remanded for further factual development and a ruling consistent with the guidelines provided by the court.

In determining whether the exclusionary clause should apply in this case, the court adopted a multi-factor test. The court will examine: (1) The nature of the property; (2) the characteristics of the property; and (3) the insured's relationship to the property. The last factor includes the insured's duties regarding the property, the nature and extent of the insured's control, and any interest with respect to the property the insured may have. Additionally, to determine the applicability of the exclusion, the court must consider whether the insured had a reasonable expectation of coverage under the general liability policy.

In addressing the subsidiary issue, the court adopted a general rule that an insurer which knowingly and unconditionally defends an action brought against its insured may waive policy terms and be estopped to assert those grounds, if detrimental reliance exists. The court created a presumption that prejudice results where an insured shows that his insurer has defended an action. This presumption is rebuttable by evidence showing no actual prejudice and that the insured did not relinquish his right to conduct his defense.

Susan Robinson

PERKINS v. STATE FARM MUTUAL AUTO INS. CO., 350 S.E.2d 711 (W. Va. 1986).

Statutory Construction

On certified question from the United States District Court, the court entertained the issues of: (1) Whether the substantive law of a foreign jurisdiction should be applied to an action brought in this state for recovery of damages for personal injury or wrongful death

caused in the foreign jurisdiction; and (2) whether West Virginia public policy or legal doctrine exists to bar a claim under an uninsured motorist endorsement. The applicable foreign law does not require physical contact to establish liability while the insurance policy and the law of West Virginia requires physical contact.

The court followed the traditional principle that, in tort cases, the law of the place of wrong is applicable, and it held that the law of the foreign jurisdiction should be applied in this case.

The insurance company argued, in this instance, that even if liability is established under the laws of the foreign jurisdiction, West Virginia law should govern the claim under the contract itself. The court construed W. VA. CODE § 33-6-31(g) (Supp. 1986), which declares that an endorsement can require nothing more than the establishment of legal liability, and found that no public policy of West Virginia requires that the physical contact requirement be met when the law of the place of the tort does not have such a requirement.

Susan Robinson

XIII. ETHICS

COMMITTEE ON LEGAL ETHICS v. WALKER, 358 S.E.2d 234 (W. Va. 1987).

Burden of Proof

Upon the recommendation of the West Virginia State Bar's Committee on Legal Ethics that the respondent's license to practice law be annulled, the court addressed three basic issues: (1) Whether the committee met its burden of proof; (2) whether the existence of emotional problems operates as a defense to ethics violations; and (3) whether the recommended disciplinary action is appropriate.

The facts disclosed that the respondent staged a breaking and entering, knowingly gave false reports to the law officials, and implicated an innocent person in connection with the breaking and entering. Further, the respondent set fire to his own home, tendered bad checks, and threatened physical violence to two individuals. These events were not denied; rather, the respondent asserted that he was having financial, marital, and emotional problems.

Based on this evidence, the court held that the Committee met its burden of proving the charges by "full, preponderating and clear" evidence as required in West Virginia to annul the license to practice law. In discussing the impact of emotional problems on ethical violations, the court determined that while emotional problems are not to be recognized as a complete defense, they may be considered as mitigating circumstances in determining the appropriate disciplinary action. Also, they may be considered in determining when the respondent has the capacity to assist in the preparation of his case. The court determined that an appropriate disciplinary action would serve the purposes of punishment to the individual, deterrence to others, and restore public confidence in the ethical standards of the legal profession. In this instance, an annulment of the respondent's license to practice law was deemed appropriate.

Susan Robinson

COMMITTEE ON LEGAL ETHICS v. WHITE, 349 S.E.2d 919 (W. Va. 1986).

Commingling Funds - Burden of Proof

On a recommendation for disbarment by the West Virginia State Bar's Committee on Legal Ethics, the West Virginia Supreme Court of Appeals addressed the following issues: (1) Whether the committee met its burden of proving the charges; and (2) whether the procurement of a loan for a third party with a client's funds and commingling the funds held as a co-trustee with an attorney's own funds violated the Code of Professional Responsibility.

The court, in discussing the first issue, recognized that conflicts in testimony existed, but affirmed its position that recommendations made by the Committee are to be given substantial consideration absent a mistake of law or arbitrary assessment of the fact. Thus, the court held that the Committee met its burden of proving the charges against the attorney by "full, preponderating and clear evidence."

The court further ruled that an attorney who procures a loan without disclosing all of the relevant facts, misrepresents the nature

of transactions, and further co-mingles money which he held as co-trustee with his own is subject to disciplinary action.

For consideration in mitigating the disciplinary action recommended, the attorney produced evidence of reimbursement. The court recognized that in some instances reimbursement would be considered to mitigate the disciplinary action. The facts of this case, however, did not warrant mitigation. The attorney was disbarred.

Susan Robinson

XIV. TAXATION

MORGANTOWN v. WEST VIRGINIA BD. OF REGENTS, 354 S.E.2d 616 (W. Va. 1987).

Amusement Tax

On an appeal from the City of Morgantown from a circuit court declaratory judgment that the Board of Regents is not required to collect an amusement tax for events sponsored by West Virginia University, the Supreme Court of Appeals held that, as the events are not conducted for private benefit, they cannot be taxed.

The court held that such events are part of the education provided by the state university with the profits collected from them going to the benefit of a public institution. "There is no individual person, company, or interest that stands to profit from university sponsored events. . . ." The court thus rejected the city's position that since the funds generated go into accounts separate from the Board of Regents general revenue fund, since the state collects a consumer sales tax on ticket sales, and since the funds are not used in direct support of the university function, they should be treated as private for the purposes of taxation.

Bruce Stanley

IN RE 1975 TAX ASSESSMENTS AGAINST ONEIDA COAL CO., 360 S.E.2d 560 (W. Va. 1987).

In reversing a circuit court decision that reduced the valuation assessed by the Webster County Assessor and upheld by the county commission, the West Virginia Supreme Court of Appeals held that

the evidence of lower valuations for surrounding properties is insufficient to have an assessment declared constitutionally unequal and nonuniform. Rather, the party contesting the higher assessment must show that the assessor's lower valuation of surrounding properties was "intentional and systematic."

Citing precedent, the court held that while a showing of unequal assessments is not proof of intentional and systematic undervaluation, the complaining taxpayer can take his complaint to the county commission, sitting as the Board of Equalization and Review, to have the valuation of surrounding property raised. The complaining taxpayer will not, however, have its assessment lowered as long as the property has been valued at market value.

Bruce Stanley

CALHOUN COUNTY ASSESSOR V. CONSOLIDATED GAS SUPPLY, 358 S.E.2d 791 (W. Va. 1987).

Assessment Procedure Statutes

The West Virginia Supreme Court of Appeals held that the county assessor can require utility companies holding oil and gas leases from third parties to provide information about those properties. The court held that while taxation statutes are construed against the government, assessment procedure statutes are construed in favor of the government and that the lease between the utility and the property owner is of a sufficient "representative or possessory character" to require the utility to provide the name of the property owner and "other reasonable information" so long as the assessor's inquiry is reasonable.

Bruce Stanley

ASHLAND OIL v. ROSE, 350 S.E. 2d 531 (W.Va. 1986).

B & O Taxes

In light of a 1984 United States Supreme Court decision invalidating the West Virginia Business and Occupation Tax on wholesale sales by out-of-state manufacturers, the question facing the West Virginia Supreme Court of Appeals was whether to apply the higher

court's decision in a retroactive manner. Prior to the Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638, which struck down the West Virginia tax as an unconstitutional burden on interstate commerce, Ashland Oil contested a deficiency assessment by the West Virginia Tax Commissioner. Upon the higher Court's ruling, Ashland Oil was granted a summary judgment in circuit court. The state tax commissioner appealed that judgment.

In concluding that the Court's decision in *Armco, Inc.* should be applied prospectively rather than retroactively, the West Virginia Supreme Court of Appeals, citing precedent, cited the following items: (1) The substantive issue before the Supreme Court of the United States was in a traditionally settled area of law (state taxation); (2) the case involved substantive rather than procedural law; (3) the case involved a statute, not common law; and (4) the Court's decision was a "clear departure" from prior substantive law. The summary judgment ruling was reversed and the case remanded.

Bruce Stanley

XV. TORTS

HUNTER v. JOHNSON, 359 S.E.2d 611 (W. Va. 1987).

Negligence - Jury Instruction - Unavoidable Accident

The issue in this case was whether an unavoidable accident instruction should be given in a negligence case.

The court had previously regarded such an instruction with disfavor in negligence cases and considered it prejudicial error to charge the jury on such a theory where negligence was supported by the evidence. Further, such instruction was considered confusing and as forestalling reasoned analysis of the negligence, foreseeability, and proximate cause issues. Thus, the court held that an unavoidable accident instruction should not be given in a negligence case.

Susan Robinson

MILLER v. GIBSON, 355 S.E.2d 28 (W. Va. 1987).

Third-Party Contribution - Employee - Mandolidis-Injury

The issue entertained by the court in this case was whether an employer is liable in contribution to a third party as a joint tortfeasor in a tort action brought by an employee.

Following the *Mandolidis* standard, the court ruled that in an action brought by his employee, an employer may be liable in contribution to a third party as a joint tortfeasor only if the employer is guilty of wilful, wanton and reckless misconduct which proximately caused the injury or death of the employee.

Susan Robinson

COVEY v. FIELDS, 354 S.E.2d 413 (W. Va. 1987).

False Arrest

This appeal involves an action against an individual for false arrest and wrongful prosecution where the trial judge directed a verdict. The issue presented to the court was whether the complaint stated a claim against the defendant. The court concurred with the decision of the trial court that the complaint failed to make out a *prima facie* case of false arrest or wrongful prosecution. However, the court held that allegations in the complaint that the defendant had in effect threatened and used profanity and insulting words toward the plaintiff causing him distress and humiliation stated a cause of action under West Virginia's "insulting words" statute (W. VA. CODE § 55-7-2). The court further ruled that plaintiff was not required to put on proof of damages and that failure to do so does not support a directed verdict.

Susan Robinson

JONES v. TRUSTEES OF BETHANY COLLEGE, 351 S.E.2d 183 (W. Va. 1986).

Statute of Limitations - Latent Injury Manifestation

The question presented to the court in this action was whether the statute of limitations is tolled by the manifestations of a latent injury.

The general rule in West Virginia has been that the statute of limitations begins to run in an action for personal injuries on the

date the injury is inflicted. In malpractice actions, where the plaintiff may be unaware that injury has been inflicted, the court applies a discovery rule. In considering whether a latent injury from a traumatic event tolls the statute of limitations where a noticeable injury did in fact occur, the court attempted to balance the rationales for the statute of limitations with plaintiff's interest. Noting that considerable time elapses between the filing of a suit and the trial which should enable the plaintiff to discover the full extent of his injuries, the court held that the statute of limitations is not tolled by the discovery of a latent injury resulting from a traumatic event when a noticeable personal injury was sustained.

Susan Robinson

HICKMAN v. GROVES, 358 S.E.2d 810 (W. Va. 1987).

Statute of Limitations - Product Liability Actions

On certified question from the Circuit Court of Wood County, the court discussed the issue of when the statute of limitations begins to run in products liability actions.

Prior to this case, the court held that the statute of limitations in products liability actions accrues from the date of the injury. Noting that the discovery rule had been adopted in medical and legal malpractice actions, this court now extends the discovery rule to products liability actions. Further, the court determined that a plaintiff has "discovered" the cause of action when he is aware or by the exercise of reasonable diligence should be aware: (1) That he has been injured; (2) the identity of the maker of the product; and (3) that the product had a causal relation to his injury.

The court declined to establish a further requirement that the plaintiff know the product was defective as a result of the conduct of its manufacturer, noting that this knowledge is often not established until after the verdict.

The court also discussed whether a plaintiff may amend his complaint to add a third-party defendant after the statute of limitations has run. The court held that under Rule 15(a) of the West Virginia Rules of Civil Procedure, such an amendment would be granted where

the amended complaint was based on the same occurrence as the original complaint and where no prejudice would result because the third party was already actively defending the case.

Susan Robinson

WALKER v. WALKER, 350 S.E.2d 547 (W. Va. 1986).

Wrongful Death

This is an appeal from a lower court decision which awarded the entire proceeds of a wrongful death settlement to one of the decedent's children, excluding all others. The West Virginia Supreme Court of Appeals was required to determine whether the lower court erred in not ordering an equitable distribution of the settlement among all of the children.

Applying W. VA. CODE § 55-7-6 (Supp. 1986), the court held that the trial judge has discretion in directing the distribution of the damages. Although lack of financial dependency on the deceased parent does not preclude recovery, the court may consider loss of income as a factor in apportioning the award. The loss of services, the close relationship shared by the minor child and his father, and the dependency of a child on the decedent are also legitimate criteria to be considered in apportioning an award among eligible beneficiaries. The evidence showed little or no relationship between the decedent and his other children. Moreover, the only person who stood to benefit from the income and services of his father, had he lived, was the child who received the award. Based on these facts, the court found no abuse of discretion by the lower court.

Susan Robinson

GILLESPIE v. ELKINS SOUTHERN BAPTIST CHURCH, 350 S.E.2d 715 (W. Va. 1986).

Wrongful Discharge

This case involved a suit filed by a pastor alleging wrongful discharge and civil conspiracy against certain individuals. Directed verdicts were entered in favor of the individuals on the conspiracy charge, and a jury verdict was rendered in favor of the pastor on the wrongful discharge claim.

The court addressed the issues of: (1) Whether jurisdiction of civil court is proper where the controversy surrounds the wrongful discharge of a pastor; (2) whether the pastor had been wrongfully discharged; and (3) whether a cross-assignment of error may be made when an appeal of the entry of the directed verdict was not made within the normal eight-month period.

Finding that the internal conflict resolution mechanisms of the church structure had been exhausted and the right to be protected is a property or contractual right, the court held that the trial court had jurisdiction. The court noted that an action may arise when the discharge is contrary to public policy or when it violates a promise of job security. The court held that analysis of either of these theories would require the courts to go beyond neutral principles of law, and thus the court held that without some compelling reasons, its inquiry would be limited to whether the church met and whether it acted to terminate the pastor's services.

Furthermore, the pastor attempted to challenge the directed verdict against the individuals on cross-assignment. The court held that where the claims were based on distinct and unconnected grounds and two different judgments were entered, the court was not required to review the directed verdict under Rule 10(f) because the individuals involved were not parties to this appeal.

Susan Robinson

XVI. WILLS AND ESTATES

SEIFERT v. SANDERS, 358 S.E.2d 775 (W. Va. 1987).

Life Estates

The primary issue addressed by the court in this case was whether a joint and mutual will (1) devised the testator's real and personal property in fee simple to the survivor, or (2) provided a life estate in the real and personal property to the survivor. The court also considered whether the power to dispose of the property was limited to an inter vivos conveyance or whether it could properly be disposed of by will. Further, the court addressed the question of whether the holographic will in question was valid.

The court held that when a joint and mutual will devises all real and personal property to the survivor to take and hold as his sole and entire property, the survivor receives a fee simple estate. This is true even where the will provides for disposition of the property not disposed of by the survivor.

The court further held that the absolute power of disposal includes conveyance by will as well as by inter vivos conveyance. The court reasoned that a holographic will is valid if it is wholly in the testator's handwriting, is signed, and evidences testamentary intent. Testamentary dispositions of property do not require exact wording. Thus, the words "when I am done with the farm it is Harley's to take it and do whatever is best [sic] to do," established this requirement.

Susan Robinson