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Issue 5 *Issue 5, A Tribute to Franklin D. Cleckley: A Compendium of Essential Legal Principles From His Opinions as a Justice on the West Virginia Supreme Court of Appeals*

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Civil Procedure

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V. CIVIL PROCEDURE

A. Summary Judgment

The case of *Painter v. Peavy*[178] articulated the role of the circuit court in assessing evidence at the summary judgment stage. Justice Cleckley wrote that "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial."[179] It was also stressed in *Painter* that

> [s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.[180]

Justice Cleckley elaborated upon summary judgment in *Williams v. Precision Coil, Inc.*[181] by incorporating the "totality" doctrine into the formula:

> Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.[182]

Williams went on to articulate the shifting burden that takes place in summary judgment:

> If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1)

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178 451 S.E.2d 755 (W. Va. 1994).

179 *Id.* at Syl. Pt. 3.

180 *Id.* at Syl. Pt. 4.

181 459 S.E.2d 329 (W. Va. 1995).

182 *Id.* at Syl. Pt. 2.

> rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.[183]

In *Gentry v. Mangum*,[184] Justice Cleckley made further comments on summary judgment:

> Summary judgment is proper only if, in the context of the motion and any opposition to it, no genuine issue of material fact exists and the movant demonstrates entitlement to judgment as a matter of law. A party seeking summary judgment must make a preliminary showing that no genuine issue of material fact exists. Once the movant makes this showing, the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue. An expert's deposition or affidavit that is conclusory only is not sufficient to meet the burden on the party opposing the motion, although an affidavit or deposition containing an adequately supported opinion may suffice to raise a genuine issue of fact. An issue is "genuine" when the evidence relevant to it, viewed in the light most favorable to the party opposing the motion, is sufficiently open ended to permit a rational factfinder to resolve the issue in favor of either side.[185]

In *Powderidge Unit Owners Association v. Highland Properties, Ltd.*,[186] Justice Cleckley carved out an informal procedure for a party to resist a summary judgment motion, if discovery was not completed:

> An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. When a departure from the rule occurs, it should

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183 *Id.* at Syl. Pt. 3.

184 466 S.E.2d 171 (W. Va. 1995).

185 *Id.* at Syl. Pt. 2.

186 474 S.E.2d 872 (W. Va. 1996).

be made in written form and in a timely manner. The statement must be made, if not by affidavit, in some authoritative manner by the party under penalty of perjury or by written representations of counsel. At a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.[187]

B. Venue

The case of *State ex rel. Smith v. Maynard*[188] afforded the West Virginia Supreme Court of Appeals an opportunity to interpret the venue transfer provision in West Virginia Code section 56-1-1(b) and its relation to the doctrine of *forum non conveniens*. Justice Cleckley made clear that "[u]nder W. Va. Code, 56-1-1(b) (1986), the plaintiff's choice of forum is no longer the dominant factor that it was prior to the adoption of this section."[189] It was also held that "[b]y enacting W. Va. Code, 56-1-1(b) (1986), the legislature granted to the circuit courts of this State broader discretion than was permissible under the old rule of *forum non conveniens*."[190] The opinion further concluded that "[w]here W. Va. Code, 56-1-1(b) (1986), applies, its explicit provisions render inapplicable the doctrine of *forum non conveniens*. As a consequence, to the extent that the West Virginia doctrine of *forum non conveniens* has survived this new statutory enactment, it applies only where W. Va. Code, 56-1-1(b) (1986), does not apply."[191]

The decision in *Maynard* set out the broad outline of section 56-1-1(b) as follows:

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187 *Id.* at Syl. Pt. 1.

188 454 S.E.2d 46 (W. Va. 1994).

189 *Id.* at Syl. Pt. 6.

190 *Id.* at Syl. Pt. 5.

191 *Id.* at Syl. Pt. 4.

> If suit is brought in the county where the cause of action arose and if none of the defendants reside in that county, W. Va. Code, 56-1-1(b) (1986), permits a defendant to move the circuit court to transfer the case to a county wherein one or more of the defendants reside. For the circuit court to grant the motion, a defendant must demonstrate that the proposed county would better afford convenience to the parties litigant and the witnesses likely to be called, and that the ends of justice would be better served by such change.[192]

Justice Cleckley found that "W. Va. Code, 56-1-1(b) (1986), exclusively controls a transfer decision where its prerequisites have been met; namely, the forum selected is where the cause of action arose, and the defendant resides in another county and requests the case be transferred to that county."[193]

An issue left unresolved in *Maynard* was decided in *State ex rel. Riffle v. Ranson*.[194] *Riffle* held that "W. Va. Code, 56-1-1(b) (1986), is the exclusive authority for a discretionary transfer or change of venue and any other transfer or change of venue from one county to another within West Virginia that is not explicitly permitted by the statute is impermissible and forbidden."[195]

The issue of *forum non conveniens* presented itself in *Cannelton Industries, Inc. v. Aetna Casualty & Surety Co. of America*.[196] The central issue in that case was the interpretation to be given to a "service of suit" clause and the ability of a party to assert *forum non conveniens*, notwithstanding the service of suit clause. Justice Cleckley held that

> [t]he phrase in a service of suit clause stating the insurer "will submit to the jurisdiction of any Court of competent jurisdiction within the United States of America" does not restrict the insurer from bringing an action in another forum and from subsequently filing a *forum non conveniens* motion in a forum selected by the insured. Moreover, the phrase "and all matters arising hereunder shall be determined in accordance with the law and practice of

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192 *Id.* at Syl. Pt. 2.

193 *Id.* at Syl. Pt. 3.

194 464 S.E.2d 763 (W. Va. 1995).

195 *Id.* at Syl. Pt. 1.

196 460 S.E.2d 1 (W. Va. 1994).

> such Court" includes a determination in accordance with the doctrine of *forum non conveniens* if the doctrine is available to the court.[197]

C. Jury Selection

The case of *Michael ex rel. Estate of Michael v. Sabado*[198] necessitated two definitive principles involving jury *voir dire*. Justice Cleckley held that "[t]he official purposes of *voir dire* is to elicit information which will establish a basis for challenges for cause and to acquire information that will afford the parties an intelligent exercise of peremptory challenges. The means and methods that the trial judge uses to accomplish these purposes are within his discretion."[199] The opinion however cautioned that

> [a] trial court may not limit *voir dire* to the extent that the very purpose of *voir dire* has been substantially undermined or frustrated. Thus, a trial court may abuse its discretion if it so limits the *voir dire* that the litigants are unable to determine whether the jurors are statutorily qualified or free from bias."[200]

D. Jury Instructions

The issue of punitive damage instructions to a jury were addressed in *Michael ex rel. Estate of Michael v. Sabado.*[201] The opinion held that "[p]unitive damage instructions are legitimate only where there is evidence that a defendant acted with wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others to appear or where the legislature so authorizes."[202]

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197 *Id.* at Syl. Pt. 5.

198 453 S.E.2d 419 (W. Va. 1994).

199 *Id.* at Syl. Pt. 2.

200 *Id.* at Syl. Pt. 3.

201 453 S.E.2d 419 (W. Va. 1994).

202 *Id.* at 423 Syl. Pt. 7.

In *Barefoot v. Sundale Nursing Home*,[203] Justice Cleckley restricted the holding in a previous decision of the West Virginia Supreme Court of Appeals, which had held that it was *per se* reversible error for a court to fail to give requested special verdict forms whenever there were multiple causes of action against a defendant. *Barefoot* refused to extend the latter rule to asserted multiple theories of liability against a defendant. The decision in *Barefoot* noted initially that "[a]s a general rule, a trial court has considerable discretion in determining whether to give special verdicts and interrogatories to a jury unless it is mandated to do so by statute."[204] The opinion then held, "[t]o the extent that a *per se* reversible error rule was announced in *Orr v. Crowder* it should be limited to the specific facts stated and a further expansion of this rule is unwarranted."[205] Justice Cleckley went on to fashion a rule regarding multiple theories of liability:

> Although it would be preferable to give special verdict forms in multiple theory employment discrimination cases, which would remove doubt as to the jury's consideration of any alternative basis of liability that does not have adequate evidentiary support, the refusal to do so does not provide an independent basis for reversing an otherwise valid judgment.[206]

E. Motion for Reconsideration

James M.B. v. Carolyn M.[207] held that in making a motion for reconsideration, "Rule 59(e) of the West Virginia Rules of Civil Procedure provides the procedure for a party who seeks to change or revise a judgment entered as a result of a motion to dismiss or a motion for summary judgment."[208] The opinion also noted that

> [a] motion for reconsideration filed within ten days of judgment being entered suspends the finality of the judgment and makes the

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203 457 S.E.2d 152 (W. Va. 1995).

204 *Id.* at 157 Syl. Pt. 8.

205 *Id.* at 157 Syl. Pt. 10.

206 *Id.* at 157 Syl. Pt. 11.

207 456 S.E.2d 16 (W. Va. 1995).

208 *Id.* at 18 Syl. Pt. 4.

> judgment unripe for appeal. When the time for appeal is so extended, its full length begins to run from the date of entry of the order disposing of the motion.[209]

Justice Cleckley confronted the issue of a motion for reconsideration in *Powderidge Unit Owners Association v. Highland Properties, Ltd.*:[210]

> When a party filing a motion for reconsideration does not indicate under which West Virginia Rule of Civil Procedure it is filing the motion, the motion will be considered to be either a Rule 59(e) motion to alter or amend a judgment or a Rule 60(b) motion for relief from a judgment order. If the motion is filed within ten days of the circuit court's entry of judgment, the motion is treated as a motion to alter or amend under Rule 59(e). If the motion is filed outside the ten-day limit, it can only be addressed under Rule 60(b).[211]

F. Attorney Fees

Justice Cleckley found the opportunity in *State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection*[212] to address the issue of awarding attorney fees in the context of a mandamus proceeding. The opinion held initially that "[c]osts and attorney's fees may be awarded in mandamus proceedings involving public officials because citizens should not have to resort to lawsuits to force government officials to perform their legally prescribed nondiscretionary duties."[213] Justice Cleckley then limited the context for awarding attorney's fees in mandamus actions. The opinion held,

> [a]ttorney's fees may be awarded to a prevailing petitioner in a mandamus action in two general contexts: (1) where a public official has deliberately and knowingly refused to exercise a clear

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209 *Id.* at 18 Syl. Pt. 7.

210 474 S.E.2d 872 (W. Va. 1996).

211 *Id.* at 875-876 Syl. Pt. 2.

212 458 S.E.2d 88 (W. Va. 1995).

213 *Id.* at 89 Syl. Pt. 1.

> legal duty, and (2) where a public official has failed to exercise a clear legal duty, although the failure was not the result of a decision to knowingly disregard a legal command.[214]

The opinion clarified that an award of attorney's fees is appropriate where there is a showing of deliberate and knowing refusal by a public official to perform a duty: "[w]here a public official has deliberately and knowingly refused to exercise a clear legal duty, a presumption exists in favor of an award of attorney's fees; unless extraordinary circumstances indicate an award would be inappropriate, attorney's fees will be allowed."[215] A different standard was set out for awarding attorney's fees where a public official did not knowingly fail to perform a legal duty. In the latter context Justice Cleckley held,

> [w]here a public official has failed to exercise a clear legal duty, although the failure was not the result of a decision to knowingly disregard a legal command, there is no presumption in favor of an award of attorney's fees. Rather, the court will weigh the following factors to determine whether it would be fairer to leave the costs of litigation with the private litigant or impose them on the taxpayers: (a) the relative clarity by which the legal duty was established; (b) whether the ruling promoted the general public interest or merely protected the private interest of the petitioner or a small group of individuals; and (c) whether the petitioner has adequate financial resources such that petitioner can afford to protect his or her own interests in court and as between the government and petitioner.[216]

The final issue touched upon in *West Virginia Highlands Conservancy* concerned apportionment of attorney's fees:

> Apportionment of attorney's fees is appropriate where some of the claims and efforts of the claimant were unsuccessful. Where part of the attorney's fees sought was expended on discrete efforts that achieved no appreciable advantage in the litigation, or where the claim for attorney's fees rests partly on a result to which the

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214 *Id.* at Syl. Pt. 2.

215 *Id.* at Syl. Pt. 3.

216 *Id.* at Syl. Pt. 4.

> claimant made no significant contribution, a court may consider these circumstances and apportion the attorney's fees accordingly.[217]

The issue of attorney fees in divorce actions was addressed in *Banker v. Banker*:[218]

> In divorce actions, an award of attorney's fees rests initially within the sound discretion of the family law master and should not be disturbed on appeal absent an abuse of discretion. In determining whether to award attorney's fees, the family law master should consider a wide array of factors including the party's ability to pay his or her own fee, the beneficial results obtained by the attorney, the parties' respective financial conditions, the effect of the attorney's fees on each party's standard of living, the degree of fault of either party making the divorce action necessary, and the reasonableness of the attorney's fee request.[219]

Justice Cleckley made clear in *State ex rel. Roy Allen S. v. Stone*[220] that attorney fees could be awarded as a sanction in paternity actions. It was determined in the opinion that "[b]ecause a paternity action is in the nature of an equitable proceeding, and pursuant to Rule 11 of the West Virginia Rules of Civil Procedure, a circuit court has discretion to impose attorney's fees on litigants who bring vexatious and groundless lawsuits."[221]

The decision in *Kopelman and Associates, L.C. v. Collins*[222] required guidelines be set out for circuit courts in determining how to divide fees, when an attorney leaves a firm with a client of the firm and there is a recovery:

> Although the amount of time spent by each respective firm is an important consideration in a contingency fee case where lawyers

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217 *Id.* at Syl. Pt. 5.

218 474 S.E.2d 465 (W.Va. 1996).

219 *Id.* at Syl. Pt. 4.

220 474 S.E.2d 554 (W.Va. 1996).

221 *Id.* at Syl. Pt. 4.

222 473 S.E.2d 910 (W.Va. 1996).

> employed by one firm leave that firm and take a client with them and no contract exists governing how the fees are to be divided, a circuit court also must consider retrospectively upon the conclusion of the case: (1) the relative risks assumed by each firm; (2) the frequency and complexity of any difficulties encountered by each firm; (3) the proportion of funds invested and other contributions made by each firm; (4) the quality of representation; (5) the degree of skill needed to achieve success; (6) the result of each firm's efforts; (7) the reason the client changed firms; (8) the viability of the claim at transfer; and (9) the amount of recovery realized. This list is not exhaustive, and a circuit court may consider other factors as warranted by the circumstances in addition to awarding out-of-pocket expenses. In making its determination, however, a circuit court must make clear on the record its reasons for awarding a certain amount. Such a determination rests in the sound discretion of the circuit court, and it will not be disturbed unless the circuit court abused its discretion.[223]

G. *Motion in Limine*

The case of *Tennant v. Marion Health Care Foundation, Inc.*[224] required the West Virginia Supreme Court of Appeals to consider what limitations were imposed upon a trial court in deciding whether to modify a prior motion in limine order:

> Once a trial judge rules on a motion in limine, that ruling becomes the law of the case unless modified by a subsequent ruling of the court. A trial court is vested with the exclusive authority to determine when and to what extent an in limine order is to be modified.[225]

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223 *Id.* at Syl. Pt. 2.

224 459 S.E.2d 374 (W. Va. 1995).

225 *Id.* at Syl. Pt. 4.

H. Judgment on the Pleadings

In *Kopelman and Associates, L.C. v. Collins*,[226] Justice Cleckley focused on establishing guidelines when a motion for judgment on the pleadings is converted to a summary judgment motion:

> When a motion for judgment on the pleadings under Rule 12(c) of the West Virginia Rules of Civil Procedure is converted into a motion for summary judgment, the requirements of Rule 56 of the West Virginia Rules of Civil Procedure become operable. Under these circumstances, a circuit court is required to give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. In this way, no litigant will be taken by surprise by the conversion. The absence of formal notice will be excused only when it is harmless or the parties were otherwise apprised of the conversion. Once the proceeding becomes one for summary judgment, the moving party's burden changes and the moving party is obliged to demonstrate that there exists no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[227]

I. Motion to Dismiss

In *Harrison v. Davis*,[228] Justice Cleckley reinforced the liberal policy behind the *Rules of Civil Procedure*. The opinion specifically addressed that policy in the context of a motion to dismiss for failing to state a claim:

> The West Virginia Rules of Civil Procedure should be construed liberally to promote justice. Consistent with this liberal approach, a circuit court may look beyond the technical nomenclature of the complaint when ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure to reach the substance of the parties' positions. This approach is particularly proper where the plaintiff attempts orally to explain the allegations

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226 473 S.E.2d 910 (W. Va. 1996).

227 *Id.* at Syl. Pt. 1.

228 478 S.E.2d 104 (W. Va. 1996).

> of the complaint because such explanations may constitute an admission against the plaintiff.[229]

The *Harrison* opinion went a step further. It created a procedure for a plaintiff to use in an effort to avoid a motion to dismiss:

> Where a plaintiff opposes a motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and claims that discovery would enable him or her to oppose such a motion, the plaintiff may request a continuance for further discovery pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure. In order to obtain such a discovery continuance, a plaintiff must, at a minimum, (1) articulate some plausible basis for the plaintiff's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the plaintiff; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.[230]

J. Dismissal for Failing to Prosecute

The case of *Dimon v. Mansy*[231] examined dismissal of an action for failure to prosecute:

> Before a court may dismiss an action under Rule 41(b), notice and an opportunity to be heard must be given to all parties of record. To the extent that *Brent v. Board of Trustees of Davis & Elkins College*, 173 W. Va. 36, 311 S.E.2d 153 (1983), and any of our previous holdings differ with this ruling, they are expressly overruled.[232]

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229 *Id.* at Syl. Pt. 1.

230 *Id.* at Syl. Pt. 6.

231 479 S.E.2d 339 (W. Va. 1996).

232 *Id.* at Syl. Pt. 2.

The opinion then set out a detailed procedure for trial courts to follow in determining whether to dismiss an action for failure to prosecute:

> In carrying out the notice and opportunity to be heard requirements, before a case may be dismissed under Rule 41(b), the following guidelines should be followed: First, when a circuit court is contemplating dismissing an action under Rule 41(b), the court must first send a notice of its intent to do so to all counsel of record and to any parties who have appeared and do not have counsel of record. The notice shall inform that unless the plaintiff shall file and duly serve a motion within fifteen days of the date of the notice, alleging good cause why the action should not be dismissed, then such action will be dismissed, and that such action also will be dismissed unless plaintiff shall request such motion be heard or request a determination without a hearing. Second, any party opposing such motion shall serve upon the court and the opposing counsel a response to such motion within fifteen days of the service of such motion, or appear and resist such motion if it be sooner set for hearing. Third, if no motion is made opposing dismissal, or if a motion is made and is not set for hearing by either party, the court may decide the issue upon the existing record after expiration of the time for serving a motion and any reply. If the motion is made, the court shall decide the motion promptly after the hearing. Fourth, the plaintiff bears the burden of going forward with evidence as to good cause for not dismissing the action; if the plaintiff does come forward with good cause, the burden then shifts to the defendant to show substantial prejudice to it in allowing the case to proceed; if the defendant does show substantial prejudice, then the burden of production shifts to the plaintiff to establish that the proffered good cause outweighs the prejudice to the defendant. Fifth, the court, in weighing the evidence of good cause and substantial prejudice, should also consider (1) the actual amount of time involved in the dormancy of the case, (2) whether the plaintiff made any inquiries to his or her counsel about the status of the case during the period of dormancy, and (3) other relevant factors bearing on good cause and substantial prejudice. Sixth, if a motion opposing dismissal has been served, the court shall make written findings, and issue a written order which, if adverse to the plaintiff, shall be appealable to this Court as a final order; if the order is adverse to the defendant, an appeal on the matter may only be taken in conjunction with the final judgment order terminating the

> case from the docket. If no motion opposing dismissal has been served, the order need only state the ground for dismissal under Rule 41(b). Seventh, if the plaintiff does not prosecute an appeal of an adverse decision to this Court within the period of time provided by our rules and statutes, the plaintiff may proceed under Rule 41(b)'s three-term rule to seek reinstatement of the case by the circuit court – with the time running from the date the circuit court issued its adverse order. Eighth, should a plaintiff seek reinstatement under Rule 41(b), the burden of going forward with the evidence and the burden of persuasion shall be the same as if the plaintiff had responded to the court's initial notice, and a ruling on reinstatement shall be appealable as previously provided by our rule.[233]

K. Sanctions

The case of *Bartles v. Hinkle*[234] permitted Justice Cleckley to fully address sanctions:

> Although Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not formally require any particular procedure, before issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct.[235]

Justice Cleckley then fashioned guidelines for trial courts to follow in considering sanctions:

> In formulating the appropriate sanction, a court shall be guided by

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233 *Id.* at Syl. Pt. 3.

234 472 S.E.2d 827 (W. Va. 1996).

235 *Id.* at Syl. Pt. 1.

> equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.[236]

VI. DOMESTIC RELATIONS

A. Domestic Violence

In a forceful and committed tone, Justice Cleckley wrote in the case of *In re Browning*[237] that "[d]omestic violence cases are among those that our courts must give priority status. In W. Va. Code, 48-2A-1, et seq., the West Virginia Legislature took steps to ensure that these cases are handled both effectively and efficiently by law enforcement agencies and the judicial system."[238] The *Browning* opinion set out guidelines for courts to follow in issuing domestic violence protective orders, when a court may be disqualified from addressing the matter:

> Magistrates are statutorily required to provide an individual with any assistance necessary to complete a petition for a protective order. Once the petition is completed, the magistrate must file the petition and, upon a showing of sufficient facts, issue a protective order. If a magistrate believes that she or he is disqualified from handling the matter, the magistrate must examine carefully whether the rule of necessity applies. Under no circumstances should a victim of abuse be turned away from a magistrate or a circuit judge without ensuring the victim will receive prompt attention by another magistrate or judge.[239]

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236 *Id.* at Syl. Pt. 2.

237 452 S.E.2d 34 (W. Va. 1994).

238 *Id.* at Syl. Pt. 6.

239 *Id.* at Syl. Pt. 7.