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

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I. **Civil Procedure**


Actions brought in state court under the Federal Employer's Liability Act, 45 U.S.C. sections 51 through 60, are not subject to the common law principal of forum non-conveniens or similar state statutes on removal.

The petitioners were 103 employees of Norfolk & Western Railway Company, a Virginia corporation. All of the plaintiffs allegedly sustained traumatic injuries or hearing injuries while working for the defendant in and out of West Virginia. Although the situs of the various injuries is not known, none of the plaintiffs contended that they had been exposed to any of the injuries in Brooke County, West Virginia, where the action was filed. Additionally, none of the witnesses or experts resided in Brooke County, West Virginia. Defendant moved to dismiss the action on the grounds of forum non-conveniens. The Brooke County Circuit Court held that the motion...
to dismiss would not be granted to those class of plaintiffs who resided in West Virginia, but granted the motion with respect to those in which the plaintiffs were not residents of West Virginia. The trial court also denied the defendant’s motion under West Virginia Code chapter 56, article 9, section 1 (1939) to transfer to the circuit court of the counties in which the West Virginia plaintiffs were residents. The trial court on motion of the parties certified to the West Virginia Supreme Court of Appeals the following question: Are the common law principals of forum non-conveniens or similar state statutes on removal applicable to actions under the Federal Employer’s Liability Act?

The West Virginia Supreme Court of Appeals answered that these statutes are not applicable. The court held that federal law does not require the court to recognize or reject the common law principle of forum non-conveniens. The court further noted that there are no applicable statutes, that West Virginia’s strong open court policy and the strong policy favoring the plaintiff’s choice of forum in a case brought in state courts under the act mandated that neither the common law principals of forum non-conveniens nor similar state statutes on removal apply.

Gregory Vincent Smith

II. COMMERCIAL LAW


When the plaintiffs executed a Promissory Note and Security Agreement in favor of defendant Finance One, the preprinted contract contained, on the reverse side, clause number fourteen, which provided as follows:

Waiver of Homestead & Exemption Rights

To the extent permitted by law, I hereby waive and transfer to lender any homestead or other exemption rights granted to me under applicable law.
The Orlandos defaulted on the loan and were the subject of non-judicial collection activities. Finance One made no attempt to judicially enforce the waiver clause.

The Orlandos, in this class action, alleged that the waiver clause was unconscionable and that its inclusion in the loan contract was an unfair and deceptive practice employed by the defendant.

The West Virginia Supreme Court of Appeals, per Justice Brother-ton, agreed that the waiver clause created a likelihood of confusion or of misunderstanding and thus constituted an unfair commercial practice. However, since the defendant made no attempt to enforce the clause against the Orlandos or any other members of the class who executed similar agreements, the West Virginia Supreme Court of Appeals agreed that clause created the apparent protection of the legal rights of the parties "to the extent permitted by law." Again, because the defendant made no attempt to enforce the clause, the Orlandos suffered no "ascertainable" loss of money and property as a result of its inclusion in the loan contract.

Thus, the court denied the plaintiffs' request for a statutory penalty against the defendant for violation of the West Virginia Consumer Credit and Protection Act.

Matthew Victor


In 1975, the appellee built a three-bedroom house near Martinsburg, West Virginia and sold it. The purchasers resold the house some three and one-half years later to the appellants, and the appellee acted as the real estate agent. Soon after, heavy rains caused flooding throughout much of the house, resulting in substantial damage. Various efforts on the part of the appellants to repair the damage were to no avail because of "how and where the house was constructed."

The West Virginia Supreme Court of Appeals, per Justice McGraw, held that a builder has under a common law duty to exercise reasonable care and skill in the construction of a building,
and a subsequent homeowner can maintain an action against a builder for negligence resulting in latent defects which the subsequent purchaser was unable to discover prior to purchase.

Moreover, implied warranties of habitability and fitness for use as a family home may be extended to second and subsequent purchasers for a reasonable length of time after construction, but such warranties are limited to latent defects which are not discoverable by the subsequent purchasers through reasonable inspection and which become manifest only after purchase.

In so holding West Virginia aligned itself with a growing number of jurisdictions which have extended implied warranties to subsequent home purchasers.

Justice Neely dissented.

*Matthew Victor*


In this case of first impression, the West Virginia Supreme Court of Appeals was presented, on appeal, with a complicated set of facts.

Mr. Kizer managed the A & P store in Beckley, West Virginia. When A & P substantially withdrew its operations from the state in 1982, Mr. Kizer decided to take over the store. To accomplish that goal, he entered into an agreement with a wholesaler of grocery products for the southeastern states (appellee). Under the agreement, appellee subleased the store to Mr. Kizer, sold him the store equipment for $200,000, and provided him with approximately $187,000 in additional inventory. In exchange, Mr. Kizer gave appellee a promissory note for approximately $387,000 plus interest, secured by a security interest in the present and after-acquired inventory. Appellee perfected its lien against the store’s collateral.

Appellants, twelve companies supplying wholesale products to grocery stores, delivered the goods to Mr. Kizer’s store on open account credit extended to the store. None of appellants obtained
purchase money security interests in the inventory supplied by them.

When Mr. Kizer’s business failed, he transferred all of his rights in the store to appellee in return for his release from any liability on the $387,000 note, the rent on the store and on an additional $54,000 unsecured, open account owed appellee.

Appellee, assuming ownership of the store with Mr. Kizer as a manager, advised the appellants that it assumed no liability to third parties and, having realized on its security interest in the store’s assets, would not pay any invoices for deliveries before March 31, 1988, the date appellee took ownership.

Appellants sued Mr. Kizer for the unpaid accounts and sued appellee under a theory of unjust enrichment.

The West Virginia Supreme Court of Appeals, per Justice Neely, held that the applicable provisions of the Uniform Commercial Code exempted transfers in settlement or realization of a lien or other security interest because an unsecured creditor of the transferrer is not prejudiced by a transfer of assets that satisfies the security interest of a transferee who already has priority over the unsecured creditor. Since the payment of the $54,000 “open account” debt was secured by the security interest in the inventory, the entire transfer was “in settlement of a security interest” and was excepted from the bulk transfer requirement of ten days prior notice to appellant unsecured creditors.

The court also held that a security interest generally continued in “identifiable proceeds” from the sale or exchange of the collateral. Since, unless otherwise agreed, a secured party has on default the right to the possession of the collateral, appellee had a security interest in the proceeds as well.

A secured party may retain collateral in satisfaction of the secured debt, and the only parties who may object are a debtor who has paid sixty percent of the purchase price of a consumer good or other secured parties who notify the primary secured party of their interests. Because appellants were general unsecured creditors, they had no right to object to appellee’s retention of the collateral in satisfaction of the debt.
In rejecting the appellants' unjust enrichment claim, the court held that despite its harsh appearance, the unsatisfied creditors (the appellants herein) could have protected themselves either by demanding cash payments for their goods or by taking a purchase money security interest in the goods they delivered.

Matthew Victor

III. CONSTITUTIONAL LAW


Every person has a first amendment right to question or challenge the authority of a police officer.

A city police officer in the process of issuing a traffic citation was approached by the petitioner, the owner of a shopping center parking lot where the officer had stopped an offending driver.

Petitioner asked the officer to issue his ticket in another location, as he felt the officer was driving away his business. After warning petitioner to cease obstructing him in the process of issuing the traffic citation, and in the face of petitioner's persistence that the officer get off his property, petitioner was arrested for obstructing an officer.

Petitioner was convicted in magistrate court, and the Circuit Court of Wood County denied his motion for dismissal. The petitioner contended that enforcement of West Virginia Code chapter 61, article 5, section 7 (1931) under the facts of his case was an unconstitutional infringement of his right to free speech as guaranteed by the first amendment to the United States Constitution.

The court agreed, holding that every person has a clear first amendment right to question or challenge the authority of a police officer, but that this right does not encompass fighting words, opprobrious language, or forcible or other illegal hinderance.

Gregory Vincent Smith

A defendant charged by a municipal warrant for an offense that carries a mandatory jail sentence has a right to a jury trial in municipal court.

The defendant was charged in a city warrant with driving under the influence of alcohol. The defendant requested a jury trial in municipal court, and the motion was removed to the Circuit Court of Marion County for the requested jury trial.

By certified question, the West Virginia Supreme Court of Appeals was asked whether the defendant had the right to a jury trial in a municipal court for an offense carrying a mandatory jail sentence where a municipality does not provide jury trials, but rather removes such cases to the circuit court. The West Virginia Supreme Court of Appeals responded yes. The right to a jury trial is accorded to both felons and misdemeanants when any potential period of incarceration is involved.

Gregory Vincent Smith

IV. Corporations


Where the shareholders in a close corporation each hold fifty percent of the corporation’s outstanding stock, one shareholder cannot attempt to invoke the buy-out provision which permits only majority shareholders in a corporation to force a buy-out of the majority shareholders’ stock.

As unsuccessful corporation’s shareholders, Young and Vankirk, were hopelessly deadlocked in its management. Young, as a fifty percent shareholder, invoked the buy-out provisions to force a buy-out of Vankirk’s stock in the enterprise.

The West Virginia Supreme Court of Appeals, per Justice Brothersorton, found neither of the stockholders to be properly characterized as a majority shareholder. While the court found it unfortunate that
the applicable legislation did not foresee a situation of an equal division of shares in a closely held corporation, the court abstained from rewriting the statutory language so as to provide relief for equal shareholders or from interpreting statutory language in a manner inconsistent with the plain meaning of the words.

The proposed forced buy-out was thus denied.

Matthew Victor

V. CRIMINAL LAW/PROCEDURE


The prosecution of a single conspiracy as more than one conspiracy merely because two separate substantive crimes have been committed is a violative of the double jeopardy clause of the fifth amendment to the United States Constitution.

The defendant was convicted in the Circuit Court of Pendleton County of breaking and entering, grand larceny, conspiracy to commit grand larceny, and conspiracy to commit breaking and entering. All of the charges stemmed from an incident where the defendant was implicated by an indicted co-conspirator as the driver of a car she used in the process of breaking into her parents’ store.

Although a number of issues were presented to the West Virginia Supreme Court of Appeals, the most important was the question of whether an agreement by a defendant to a conspiracy to commit one or more substantive crimes subjects him to being charged with multiple conspiracy crimes.

The West Virginia Supreme Court of Appeals held that if there is more than one agreement involved, multiple conspiracy convictions can be lawfully obtained. The court noted that the federal appeals courts have evolved a number of factors under a totality of circumstances rule to find if one or two separate conspiracies exist for double jeopardy purposes. Normally, the considerations are 1) time, 2) persons acting as co-conspirators, 3) the statutory offenses charged, 4) the overt act charged, 5) and the places where the events alleged as part of the conspiracy took place. The key is to find if
there is one agreement to commit two crimes or more than one agreement each with a separate object; therefore, the defendant’s conviction of two conspiracies constituted a violation of the double jeopardy clause of the fifth amendment to the United States Constitution.

Gregory Vincent Smith


An expert may testify as to the alleged victim behavior consistent with rape trauma syndrome; however, the expert cannot give an opinion, expressly or implicitly, as to whether the alleged victim was raped.

In a second degree rape case, the West Virginia Supreme Court of Appeals considered a distinction between an expert’s testimony that an alleged victim had exhibited post-rape behavior consistent with rape trauma syndrome and the expert’s opinion which bolstered the alleged victim’s credibility indicating that she was indeed raped.

The witness, qualified as an expert, testified that the alleged rape victim displayed behavior consistent with someone who had been sexually assaulted. She concluded that the victim was “still traumatized by this experience.”

The court reviewed several important decisions from other jurisdictions, concluding that expert testimony on rape trauma syndrome should not be admissible to show whether or not the victim was, in fact, raped. Permitting an expert to conclude that because an alleged victim suffers from rape trauma syndrome, such person was indeed raped creates a danger of the expert vouching too much for victim’s credibility and supplying verisimilitude for her on the initial issue of whether the defendant raped her. The jury might place too much emphasis on the testimony of the witness because of his or her status as an expert.

The witness’s statement that the alleged victim was “still traumatized by this experience” contained an implicit conclusion that she had been raped and, as such, constituted reversible error.

Matthew Victor

West Virginia follows twenty-one jurisdictions in admitting bite-mark evidence for positive identification purposes.

Since the reliability of bite-mark evidence as a means of positive identification is established in forensic dentistry, a court can take judicial notice of such reliability without conducting an "in camera hearing" on the same.

Several hours after a restaurant robbery, the establishment's assistant manager found a wet paper towel in the restaurant's trash can. The paper towel appeared to have been chewed. Meanwhile, through further investigation, the defendant was located and arrested for the robbery. At the trial level, the court authorized casts of the defendant's teeth to be made for comparison with the teeth marks on the paper towel.

The state's forensic expert concluded at trial that the bite-mark pattern in the towel was that of defendant's teeth to the exclusion of "all other individuals."

The West Virginia Supreme Court of Appeals accepted the invitation of other states and held that where a qualified expert was involved, bite-mark evidence was admissible for positive identification purposes. In so doing, the court followed a more liberal test which holds that a scientific expert's testimony is admissible if shown to involve relevant and sufficiently established scientific tests which assist the trier of fact to understand the evidence, even if such tests and the underlying scientific principles are not yet generally accepted in the particular scientific field.

Since reliability of bite-mark evidence as a means of positive identification is established in forensic dentistry, trial courts can approve of that acceptance by taking judicial notice thereof without conducting an "in camera hearing" on the same.

Matthew Victor

The West Virginia Supreme Court of Appeals, per Chief Justice McHugh, declared three important holdings in the area of criminal procedure:

1) Before a trial court conditions its recommendations for parole upon the defendant’s payment of a statutory fine, costs and attorney’s fees, the trial court must consider the financial resources of the defendant, his ability to pay and the nature of the burden that the payment of such costs will impose upon the defendant.

2) During a preliminary hearing held for the purpose of determining probable cause for an arrest or search, the trial court is not required to disclose the identity of a confidential credible informant, provided that it would impose an unreasonable burden on one of the parties or on a witness to require that the informant’s identity be disclosed at the hearing.

3) Even though the prosecuting attorney participated in the investigation of the defendant and actually was present at his arrest, if the prosecutor’s interest does not go beyond his/her dedication to the case, the defendant has no right to have a special prosecutor appointed.

Matthew Victor


A confession of an accomplice which inculpates the accused is presumptively unreliable.

Where the accomplice is unavailable for cross-examination, the admission of the confession, absent sufficient independent indicia of reliability to rebut the presumption of unreliability, violates the sixth amendment right of confrontation.

The police investigation of two shootings in Pineville, W. Va., led to the arrest of Russell Reed and to the charge that the defendant Mullens had hired Reed to kill her husband.

At the defendant’s trial, the state called Reed to the stand. Reed, however, invoked the fifth amendment privilege against self-incrimination and refused to testify, despite repeated warnings from the bench. The state proceeded, then, to question Reed from a statement he had given to the police in which he admitted his guilt and implicated the defendant. The defendant argued that Reed’s invocation of the fifth amendment effectively denied her of her sixth amendment right of confrontation.
The West Virginia Supreme Court of Appeals, per Justice Brotherton, held that when a person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.

The court observed, however, that the confrontation errors, although constitutional violations, did not automatically warrant reversal. In remanding the case to determine the circumstances of Reed's confession, the court listed specific factors to be taken into account:

1) whether Reed's statement was spontaneous or a result of custodial police questioning;
2) whether the statement was thoroughly and unambiguously adverse to the defendant's penal interest; and
3) whether the statement was corroborated by other evidence presented at trial, including physical evidence.

Matthew Victor


Defendant Moore, arrested on November 19, 1985 upon a fugitive-from-justice warrant issued by a Clay County, W. Va. magistrate, was charged with a sexual battery committed in Pasco County, Fla.

On February 21, 1986, ninety-four days after the original arrest, the defendant was re-arrested pursuant to the governor's warrant of extradition. On that day the Circuit Court of Clay County directed the defendant to make application for a writ of habeas corpus. At the subsequent hearing on March 21, 1986, the circuit court concluded that defendant was entitled to release from custody because, based on the evidence presented, he was not within the demanding state at the time of the alleged offense.

On July 13, 1987, West Virginia's Governor issued an extradition warrant for the arrest of Moore upon the request of the Governor of Florida. Moore contended that the resolution of his March 21, 1986 hearing constituted res judicata as to any later governor's war-
rant for extradition arising from the same acts and allegations.

The West Virginia Supreme Court of Appeals, per Justice Brotherton, disagreed. The court held that where a criminal prosecution is halted due to lack of evidence showing presence in the demanding state, res judicata should not operate to bar a subsequent extradition proceeding if at some later date the demanding state can produce such evidence.

The court did not elaborate on any new evidence concerning the defendant’s presence in Florida at the time of the alleged offense.

Matthew Victor

VI. EMPLOYMENT LAW


The employer has a duty to hold employment grievance hearings at the worksite unless otherwise agreed by parties.

The aggrieved employee has the right to use, free of charge, the employer’s copy machine for the purpose of copying the grievance documents and the transcript of the employment grievance hearing.

In this first-impression mandamus action, petitioners McCall and Blankenship requested that the West Virginia Supreme Court of Appeals direct the employer/respondent to hold grievance hearings at the petitioners’ worksite rather than in Charleston, where the Department of Health is located.

The West Virginia Supreme Court of Appeals, per Justice Brotherton, held that the petitioners had a clear right and the respondent a legal duty to hold the hearing at the worksite unless it was determined and agreed by the parties that the hearing should be held elsewhere.

The court also stated that the grievant should have access to the employer’s equipment for purposes of preparing grievance docu-
ments, subject to the reasonable rules of the employer governing the use of such equipment. A responsible representative of the employer should provide a requesting party with a copy of the certified transcript of a grievance hearing.

In this particular case the court found no reason why the respondent could not copy the certified transcript on the employer's equipment, free of charge.

Matthew Victor

VII. Evidence


The West Virginia Supreme Court of Appeals, in this determination-of-the-beneficiaries case, reaffirmed its previous holding that a judgment from a court lacking subject-matter jurisdiction is a nullity, and as such, cannot be admitted into evidence to prove the facts contained therein.

The ancient document rule is still a viable hearsay exception. Therefore, statements in a document in existence twenty years or more, the authenticity of which is established, are admissible. The court, however, qualified that statement by holding that one document itself or its contents cannot be suspicious with regard to genuineness and reliability.

The court also affirmed the viability of the vital statistics exception to the hearsay rule by noting that such exception pertained to those facts or events contained in a report which the public official had a duty to record. Thus a certified copy of a certificate issued by the state registrar of vital statistics or any part thereof shall be considered for all purposes the same as the original and shall be prima facie evidence of the facts stated.

In discussing the operation and applicability of the Dead Man's Act, the court pointed to a concurrence of three general conditions which must be met in order to bar the admissibility of a witness's testimony:
1) the testimony must relate to a personal transaction with a deceased or insane person;
2) the witness must be a party to the suit or interested in its outcome; and
3) the testimony must be against the deceased's personal representative, heir at law, or beneficiaries, or the assignee or committee of an insane person.

The court also observed that where an attorney who no longer represents the interested party retains a fee interest in the outcome of the litigation, his testimony on behalf of his former client which involves a personal transaction with the deceased barred by the Dead Man's Act.

In addressing the family history and pedigree exception to the hearsay rule, the court observed that at common law, such an exception could be achieved in a twofold manner: by general reputation evidence or by specific extrajudicial statements from family members who were unavailable at trial, provided that there was no apparent motive for the declarant to misrepresent the facts. It is not necessary that the declarant be related to the family so as to be in possession of accurate information concerning the matter declared.

Matthew Victor

VIII. FAMILY LAW


A professional degree earned during a marriage is not "marital property" subject to equitable distribution.

The West Virginia Supreme Court of Appeals herein introduced the concept of reimbursement alimony into West Virginia law.

The Circuit Court of Kanawha County entered a final order dissolving the parties' marriage. Appellant Rebecca Hoak argued that her husband's medical degree was a right or interest acquired during their four-year marriage, and that she should share in the increased earning capacity he will achieve as a result of her financial and other contributions. She therefore alleged that the circuit court erred in its failure to hold that her husband's license to practice medicine was marital property subject to equitable distribution.
The West Virginia Supreme Court of Appeals affirmed the circuit court’s holding that a professional degree earned during a marriage is not property that is subject to equitable distribution, a view shared by the majority of jurisdictions.

The court also introduced into the state’s body of law the concept of reimbursement alimony, but declined to draw any bright line rules as to the computing of such an award. Instead, the court stated that if the circuit court finds that a party made financial contributions to a spouse’s education with the expectation of the education bringing him or her a higher standard of living, then the court should try to make a fair and reasonable award based upon whatever method it deemed appropriate.

Gregory Vincent Smith


A parental improvement period must be allowed before parental rights can be terminated unless there are compelling circumstances to justify its denial.

The West Virginia Department of Human Services (DHS) took emergency custody of the five minor children of Mary W. and her husband J. B. W. The DHS petition to terminate the parties parental rights alleged that the husband sexually abused and assaulted his seventeen-year-old daughter and that he was a habitual physical abuser of his children. The petition also alleged the wife failed to protect the children from her husband’s abuse.

At the final hearing, both parties requested parental improvement periods. The court denied the requested improvement periods and terminated both parties parental rights.

The West Virginia Supreme Court of Appeals reversed, holding that the state’s interest in the welfare of children favors the preservation, not the severance, of family bonds, but that the state also has a clear interest in protecting the children from abuse and neglect by parents. This dual state interest is reflected in the statute which permits a party to move for an improvement period. The courts
must allow the requested improvement period unless "compelling circumstances" justify its denial.

The court noted that the failure to grant the improvement period requested by Mary W. was due in large part to the circuit court's finding that she knowingly allowed her husband to commit the abuse but the record clearly did not support this finding. Additionally, the court found that no consideration had been given to granting an improvement period without the children being returned to the home. The Supreme Court of Appeals found that the court below erroneously appeared to believe it had to return the children to the home during any granted improvement period.

Thus, the court held that unless some "compelling circumstances" justify its denial, the moving parent must be granted an improvement period although such period may be granted without the children being in the home.

Gregory Vincent Smith


Circuit courts have the authority to grant joint custody of minor children in a divorce order after finding that both parties so agree, that the parties can cooperate sufficiently so as to make the joint custody feasible, and that it would promote the welfare of the children.

The Family Law Master incorporated a joint custody agreement into his recommendations to the Circuit Court of Berkley County. The circuit court certified the following question to the West Virginia Supreme Court of Appeals: Does a circuit court have the statutory authority to provide for the joint custody of a minor child in a divorce action?

The West Virginia Supreme Court of Appeals stated that the principal has long been established that the welfare of a minor child is the polar star by which the courts should be guided, and that the courts presume it is in the best interest of the child to be placed with the primary care-taker if fit. But, where the parties to a divorce
ask for joint custody and submit to the court a joint parenting agreement specifying each party’s powers, rights, responsibilities, and ways of resolving disputes, joint custody must be investigated. The court specified that the

circuit court shall inquire into the parties’ ability to agree and cooperate and make findings as to the agreement’s promotion of the welfare of the children in order to grant the requested joint custody.

Gregory Vincent Smith


When seeking modification of a foreign child support decree, the better result is obtained by filing under the Uniform Reciprocal Enforcement of Support Act.

Petitioner-mother, a nine-year resident of West Virginia, filed for modification of a California child support order in the Circuit Court of Cabell County. Respondent-father, a California resident, was served with process during a visit to West Virginia (he remains a California resident). The respondent’s answer alleged that the West Virginia court lacked jurisdiction and that the forum was inconvenient. The circuit court dismissed the petition on the basis of lack of jurisdiction. Petitioner-mother appealed, raising the issue of whether a West Virginia court has jurisdiction to modify a foreign child support decree where respondent-father is a resident of another state.

The West Virginia Supreme Court of Appeals stated that the respondent had established sufficient contact with West Virginia to make jurisdiction equitable but noted that the question of subject matter jurisdiction remained. The court held that West Virginia adheres to the traditional lex loci delicti theory of conflicts of law, and thus the law of California (the state of the original decree) would apply. In reviewing California law, the court found that the California courts permit the modification of a foreign support decree in its courts. Consequently, a strict application of California law
would allow petitioner to Consequently, a strict application of California law would allow petitioner to maintain her action for modification in West Virginia. But the court found that in this case the forum was not convenient for maintaining the action and that a more equitable and efficient approach would be to proceed under the Uniform Reciprocal Enforcement of Support Act (URESA). The court dismissed the petitioner’s appeal without prejudice, noting that it should be refiled under the provisions of URESA.

Gregory Vincent Smith

IX. Insurance


In a suit for recovery under provisions of a motor vehicle liability policy, aspects of the insurance contract ordinarily will be construed according to the laws of the state where the policy was issued and the risk insured.

The defendant was the named insured under a motor vehicle policy issued to her in Pennsylvania, where she was a resident. While operating her vehicle in Wheeling, West Virginia, she was involved in a two car accident, and a non-contact incident with a “John Doe” unknown motorist was the stated cause of the accident.

The parties certified to the West Virginia Supreme Court of Appeals the question of whether the enforceability of the physical contact clause in the insurance contract should be determined under West Virginia or Pennsylvania law.

Although the policy expressly required physical contact with an uninsured motor vehicle, Pennsylvania has held that such requirements are contrary to public policy. However, the West Virginia Code requires physical contact in order to recover under the uninsured motorist coverage.

The court held that, in a suit to recover under a motor vehicle liability policy, provisions in the contract will ordinarily be construed according to the law of the state where the policy was issued.

Gregory Vincent Smith

Where the designation of beneficiaries of a life insurance policy or other death benefits is ambiguous, declarations of the insured are admissible as evidence of his intent.

Decedent designated that his death benefits should be paid fifty percent to his wife and fifty percent to his “children.” Decedent had three children from his first marriage and three step-children from his second marriage. Upon decedent’s death, one of his natural children objected to the proposed six-way distribution.

On appeal of this interpleader action from a final order of the Circuit Court of Randolph County, the West Virginia Supreme Court of Appeals found that the trial court’s holding that as a matter of law, the term “children” does not include step-children was reversible error.

The high court held that proffered extrinsic evidence as to the decedent’s intent as to the use of the term “children” should be admitted to resolve any ambiguity and reversed and remanded the action for a new trial.

Gregory Vincent Smith


There is no duty to defend or pay for, damages caused by the sexual misconduct of an insured, where the liability insurance policy contains an “intentional injury” exclusion.

A school teacher had pleaded guilty to two counts of sexual abuse for sexual actions involving one of his students. The student’s parents filed a civil action against the teacher and the board of education. The insurance company filed a declaratory judgment action against the teacher, the board, the student, and his parents to determine both its obligation to defend the teacher and its duty to afford coverage for any judgment. The trial court certified to the West Virginia Supreme Court of Appeals the following question:
Does an insurance company which provides general liability insurance that contains an "intentional injury" exclusion have a duty to defend and to pay any judgment on behalf of a public school teacher who had sexual contacts with one of his minor students?

The West Virginia Supreme Court of Appeals held that insurer had no duty to defend or pay. In its analysis, the court pointed out some general principles: the duty of an insurer to defend is generally broader than its obligation to provide coverage, and if some, but not all, of the claims against the insured fall within the coverage of a liability policy, the insurer must defend all claims. The court noted that the insured’s right to a defense will not be lost unless inescapably necessary, but that a liability insurer need not defend the insured if the alleged conduct is entirely foreign to the risk contracted.

The court noted that the majority of jurisdictions that have ruled on these issues has held that an objective test is to be used in analyzing an intentional injury exclusion in a liability insurance policy. These jurisdictions have held that the insured must both act and also intend to cause some kind of injury. Importantly, however, the intent to cause injury will be inferred as a matter of law in a sexual misconduct liability insurance case. Thus, West Virginia now follows the majority rule in its holding that, where a liability insurance policy contains an "intentional injury" exclusion, there is neither a duty to defend nor a duty to pay in an action for damages allegedly caused by the insured’s sexual misconduct.

_Gregory Vincent Smith_

X. Legal Ethics

_Consider Committee On Legal Ethics v. Triplett_, No. 18396 (October 26, 1988).

The United States Department of Labor’s system of awarding attorneys’ fees in black lung cases is in violation of the due process clause of the fifth amendment to the United States Constitution.

An attorney is not guilty of professional misconduct for failure to follow an unconstitutional law.
The Committee on Legal Ethics recommended a six month suspension of the respondent's license to practice law for his failure to obtain Department of Labor approval of a contingent fee arrangement allowing himself twenty-five percent of accrued benefits collected on behalf of his clients in black lung actions.

The question presented to the West Virginia Supreme Court of Appeals was whether the federal limits on attorneys' fees in black lung cases was violative of the due process clause of the fifth amendment to the Constitution of the United States by its constructive denial of claimant's access to legal counsel.

In an extremely clear analysis, the court held the regulation of attorney fees in black lung cases by the Department of Labor worked to effectively deny black lung claimant's necessary access to legal counsel and was thus clearly and unambiguously in violation of the due process clause of the fifth amendment to the United States Constitution.

The court stated that an unconstitutional laws is void and that respondent could not be charged with an offense created by a void law, thus holding that the attorney was therefore not guilty of any ethical violations.

Gregory Vincent Smith


The West Virginia Supreme Court of Appeals may review attorney disciplinary charges for which the committee on legal ethics does not recommend discipline.

A lawyer's personal attacks upon judges or other court officials is not protected speech if it is knowingly false or made with reckless disregard for the truth.

Statements made by lawyers that are outside of any community concern and designed to ridicule the legal system do not enjoy first amendment protection.

The respondent lawyer made statements to the press that were critical of two circuit court judges. He also was photographed dressed
in military fatigues and armed with facsimile bow, arrow, knife, rifle and ammunition, saying, “Just like Rambo I’ll defend against the judges alone if necessary.” Ethics complaints were filed against the attorney, and hearings were held on the various charges before a sub-committee of the hearing panel of the State Committee on Legal Ethics. The sub-committee and the full committee recommended a six month suspension of the respondent’s license to practice law for the various ethics violations.

The respondent had been charged with conduct prejudicial to the administration of justice as a result of his comments. After a lengthy analysis, the West Virginia Supreme Court of Appeals held that the free speech clause of the first amendment protects a lawyer for his criticism of the legal system and its judges, but the protection is not absolute. Statements that are knowingly false or made with a reckless disregard for the truth are not protected, nor are statements that are “outside of the community concern” and meant only to ridicule the legal system. The court remanded the charges relating to various statements by the attorney for further development in light of its articulated standard noting its authority to regulate and supervise the practice of law.

Additionally, the respondent had been charged with filing a frivolous and harassing complaint, which charge was dismissed by the hearing panel.

The court addressed the breadth of its authority to review disciplinary charges that had been dismissed by the hearing panel and restated its inherent power to supervise the practice of law in West Virginia. The court noted that its delegating power to the Committee on Legal Ethics did not divest it of the inherent power to have the final word on the subject of the practice of law in this state. The court thus also remanded this second count for reconsideration.

Gregory Vincent Smith


Attorney disciplinary proceedings may be instituted by a review of proceedings in other jurisdictions.
The Committee on Legal Ethics of the West Virginia State Bar instituted proceedings to annul the license to practice law of an attorney formerly admitted to practice in this state.

The only evidence presented by the committee consisted entirely of a certified copy of an Oklahoma court’s judgment and sentencing order wherein an Oklahoma lawyer resigned from the practice of law after being charged with two counts of embezzlement and one count of possession of a controlled substance.

The West Virginia Supreme Court of Appeals held that where there was no response by the attorney or any rebuttal of the Committee’s charges, the Committee satisfied its burden of proof.

Gregory Vincent Smith

XI. LOCAL GOVERNMENT/PUBLIC OFFICIALS


The position of assistant prosecuting attorney is an appointed public office and persons holding this office are prohibited from serving as a member of any county board of education.

The respondent was a part-time assistant county prosecutor. He filed as a candidate for election to the McDowell County Board of Education, indicating that he would not resign his position as assistant prosecuting attorney if elected. The Supreme Court of Appeals was asked to issue a Writ of Mandamus to compel the Board of Ballot Commissioners to omit respondent’s name from the ballot. The court responded by granting the writ.

The court concluded that the office of assistant prosecuting attorney was a “public office” within the meaning of West Virginia Code chapter 18, article 5, section 1A (1976), rendering the respondent ineligible to serve as a member of the county board of education.

Gregory Vincent Smith

A condition to conduct an election contest is afforded only through the constitution or statutory provisions. Where no manner has been provided to contest a public question election, the courts are without power to hear the issues.

The county commission ordered a special election in an action seeking to adjoin the certification of the results of a municipal incorporation election pursuant to a petition to incorporate Cross Lanes, an unincorporated area of Kanawha County. After the defeat of the petition, numerous objections were raised as to the integrity of the election. After taking evidence, the county commission declared that the alleged irregularities had no effect on the outcome, and the petition was defeated.

The formal certification of the election results was delayed by a demand for a recount. The recount changed only one vote, and the county commission then declared the defeat of the petition. Before the commission could make its formal certification, the petitioners filed a civil action in the Circuit Court of Kanawha County, seeking to set aside the results of the election.

The respondents filed a motion to dismiss on the grounds that the circuit courts do not have jurisdiction to conduct an election contest or to nullify a public question election. The Supreme Court of Appeals agreed. Noting that this is not an issue of first impression, the court held that jurisdiction to conduct an election contest is afforded only through the constitution or statutory provisions. Where no manner has been provided by the Legislature to contest a public question election, the courts are without power to hear such contests. The court held that this is a matter for the Legislature and that it, not the courts, must provide the remedies for such controversies.

Gregory Vincent Smith

A magistrate must resign his office upon becoming a candidate for another office unless it is a "judicial office."

The plaintiff, a Marion County magistrate, filed as a candidate for the office of Circuit Clerk of Marion County. Shortly thereafter, he was advised by the Administrative Director of the West Virginia Supreme Court of Appeals that he must resign his magistrate position in order to seek the office of circuit clerk.

In this case of first impression, the court, per Justice Brotherton, stated that a circuit clerk is not a judicial officer because the clerk does not exercise judicial power. Although the clerk is part of the judicial branch of government, he is not the kind of judicial officer contemplated by the legislative language. Only justices, judges and magistrates are included in the term "judicial officers."

Because a circuit clerk is not a judicial officer, plaintiff was required to resign from his magistrate position.

Matthew Victor


Claims pursuant to 42 U.S.C. section 1983 are personal injury actions governed by state two-year statute of limitations.

Plaintiff was arrested by police officers from the Corporations of Harpers Ferry and Bolivar, Jefferson County, West Virginia on August 8, 1983, and charged with drunk driving, assault and battery, and obstruction of an officer. On August 6, 1985, plaintiff filed a 42 U.S.C. section 1983 action charging defendant with the use of excessive force, assault and battery, malicious prosecution, false arrest, false imprisonment, abuse of process, defamation and gross negligence.

The West Virginia Supreme Court of Appeals, in this case of first impression, determined that all claims filed in West Virginia
pursuant to 42 U.S.C. section 1983 are personal injury actions governed by the two-year statute of limitations.

The plaintiff’s claim was allowed, and the case was remanded for proceedings consistent with the court’s opinion.

Matthew Victor


A petition to initiate a fire service fee for county volunteer fire departments required the signature of ten percent of the registered voters only in the part of the county that would have to pay the fee, not ten percent of the voters of the entire county.

On a certified question from the Marion County Circuit Court, the West Virginia Supreme Court of Appeals was asked to interpret the ambiguity found in West Virginia Code chapter 7, article 17, section 12 (1984) concerning whether an ordinance imposing a fire service fee can be initiated by a petition signed by ten percent of the voters in the affected part of the county, or whether must it must be signed ten percent of the registered voters of the entire county.

The court held that the Legislature found it desirable for county governments to provide fire protection and that the structure of the Code was deliberately designed to make simple the initiation of a fire service fee. The court held a petition to initiate a fire service fee for the benefit of county volunteer fire departments requires only the signature of ten percent of the voters in the affected area.

Gregory Vincent Smith


Police civil service promotion rules that base seniority points upon "years of in-grade service" are invalid.

Appellants, two City of Wheeling police officers, tested for promotion to the rank of sergeant with other competing officers. The
Police Civil Service Commission (PCSC) initially calculated seniority points in the promotion process based on years of service within the police department. Thus, it was determined that appellant Jacobs had the highest overall score and that appellant Habursky had the second highest overall score. Shortly thereafter, the PCSC recalculated the appellant seniority points, substituting years of in-grade service for the years of total service category. Using the new "in-grade" calculation, the PCSC issued a revised eligibility list for promotion to the one position of sergeant. Appellant Jacobs now had the second highest score instead of the first, and appellant Habursky had the fifth highest score instead of the second. The recalculation of scores was in line with the long-standing policy of the PCSC to calculate seniority based upon years of in-grade service as opposed to total years of service.

The West Virginia Supreme Court of Appeals held that basing seniority points for promotion upon "years of in-grade service" is invalid because it is too restrictive and conflicts with West Virginia Code chapter 8, article 14, section 17 (1969). Noting that the PCSC and the circuit court have relied upon a long standing interpretation that is wrong, the court reversed the circuit court's affirming of the final order of the PCSC.

Gregory Vincent Smith

XII. Property


A tenant in a federally subsidized low-income housing project owned and operated by the defendant enjoyed a month-to-month rental tenancy agreement. However, during the night of June 3, 1986, she was awakened from sleep and beaten by her live-in companion. Following her brief hospitalization and her assailant's arrest, she was evicted by the defendant for an alleged violation of the terms of the lease by allowing the disturbance to occur.
The West Virginia Supreme Court of Appeals concluded that an isolated incident did not amount to a serious violation of a material term of the lease. While the court, in its per curiam opinion, noted that "it is easy for a public housing project to become a violent, dangerous slum," one incident of boisterous behavior beyond the control of the lessee is not sufficient to justify the termination of a valuable contractual right.

Matthew Victor


Simply obtaining a lease of mineral rights to an area does not confer valid existing rights upon an operator within the meaning of the Surface Mining Control and Reclamation Act.

The defendant has operated the Smoot Mine since 1983. The residents of the area objected to the modification of the permit allowing new openings to the underground mine because the openings were within 100 feet of a public road and 300 feet of occupied dwellings. The defendant claimed that under the Legislative Rules filed by West Virginia Department of Energy, a person passes valid existing rights if he can demonstrate that the coal is immediately adjacent to an ongoing mining operation which existed on August 3, 1977 and is needed to make the operation economically viable as a whole.

Interpreting the meaning of "valid existing rights" under the West Virginia regulations and the definition of "operation," the West Virginia Supreme Court of Appeals observed that the primary purpose of the mining statute is to expand the regulatory program involving surface mining and to protect the public and the environment from the adverse effects of surface mining operations.

Justice McGraw, speaking for the unanimous court, held that valid existing rights must involve more than a mere expectation of conducting coal mining. Simply obtaining a lease of mineral rights to an area does not confer valid existing rights upon an operation within the meaning of the Surface Mining Control and Reclamation Act.
Act. Therefore, for the defendant to have valid existing rights under the Act, the operator must have completed, by August 3, 1977, its portion of the application process for all the necessary state and federal permits to conduct surface mining in an area contiguous to the proposed operations.

Since the court construed any exceptions to the statutes narrowly, the modification of permit was denied.

*Matthew Victor*


Retaliation may be asserted as a defense to a summary eviction proceeding if the landlord’s conduct is in retaliation for the tenant’s exercise of a right incidental to the tenancy.

In this case of first impression, the West Virginia Supreme Court of Appeals considered two important issues: 1) whether a residential tenant who is sued for possession of rental property may assert retaliation by the landlord as a defense, and 2) whether the retaliation motive must relate to the tenant’s exercise of a right incidental to the tenancy.

A coal miner alleged an eviction in retaliation for his participation in a selective strike against his employer/landlord. The final disposition of the case went against the plaintiff since his allegation of the retaliatory eviction did not relate to the tenant’s activities incidental to tenancy, and the first amendment rights of speech and association were unrelated to the tenant’s property interests and, as such, were not protected under a retaliatory eviction defense.

The court nevertheless held that retaliation may be asserted as a defense to a summary eviction proceeding if the landlord’s conduct is in retaliation for the tenant’s exercise of a right incidental to the tenancy. Thus, a tenant should not be punished for claiming the benefits afforded by health and safety statutes passed for his protection. His rights to organize, to protect collective rights, and to
press complaints against landlord via oral communications/petitions were held to bear a relationship to some legitimate aspects of the tenancy.

Matthew Victor


This case overruled the holding of Syllabus Point 9 in _Pearson v. Dodd_, 221 S.E.2d 171 (W. Va. 1975) insofar as it precludes a land owner or other party in interest to real property from bringing suit to set aside the tax sale of property based on a constitutionally defective notice.

In 1978, the plaintiffs executed a Deed of Trust to purchase 23.681 acres in Jackson County. No taxes were paid by the plaintiffs in 1980. The county sheriff posted and published newspaper notice of tax delinquency, and a second notice announced that the land would be offered for sale at public auction in October of 1981. There being no bids, the sheriff purchased the tract for the state. The tract was unredeemed for the statutory eighteen month period and the deputy commissioner forfeited the delinquent lands and sold the tract to defendant Duke for $50 at auction.

The plaintiffs filed suit to set aside the tax deed in the Circuit Court of Jackson County. The court entered summary judgment for the defendant.

On appeal, the issue before the West Virginia Supreme Court of Appeals was whether a property owner or mortgagee can be deprived of his property interest without an adequate notice prior to a sheriff’s sale.

In analyzing a number of recent United States Supreme Court decisions, the court found that there are certain due process requirements for notice in the tax sale of real property. Thus, where parties having an interest in the property can reasonably be identified, due process requires that such party be provided notice by mail or other means certain to ensure an adequate notice. In so doing, the court overruled its prior holding of Syllabus Point 9 of
Parsons insofar as it would preclude a land owner or other party having an interest in real property from bringing suit to set aside the tax sale or property based on a constitutionally defective notice.

Gregory Vincent Smith

XIII. School Law


Once a county board of education pays additional compensation to certain teachers, it must pay the same amount of additional compensation to other teachers performing "like assignments and duties."

Prejudgment interest on back pay is recoverable against a county board of education in a grievance claim based on a misinterpretation of a statute regarding compensation.

An attorney's gratuitous representation of a client does not prevent an award of reasonable attorney's fees.

The appellant, an itinerant general music teacher and choral director, performed in the school years 1979-80 through 1985-86 various non-instructional duties outside the scheduled hours of the regular school day for which she received no additional compensation.

By contrast, the string and band instrument teachers were paid additional compensation for substantially the same extracurricular activities in their respective fields.

The appellant claimed to have been qualified to receive the same amount of salary supplement as the string and band instrument teachers.

The West Virginia Supreme Court of Appeals held that teachers performing "like assignments and duties" were entitled to additional uniform compensation and ordered the board to pay the appellant the salary supplement in addition to prejudgment interest.
While the appellant was represented gratuitously by her husband in the administrative and circuit court proceedings, such representation did not preclude a reasonable attorney’s fees award. However, the attorney must submit to the circuit court an itemized attorney-fee bill and demonstrate its reasonableness before the award is made.

Matthew Victor


A county board of education must post statutory notice of vacancy, and the principal of a school in which such vacancy occurred is without authority to assign another teacher to that vacancy.

In these two opinions, decided within one month of each other, the West Virginia Supreme Court of Appeals held that when a vacancy occurs in a teaching position at a public school, the county board of education must post a notice of such vacancy, and the principal of the school in which the vacancy occurs is without authority to assign another teacher to the vacancy.

Thus the Rose court stated that the board was without authority to assign Mrs. Black, a seventh grade geography teacher at Park Junior High School, Raleigh County, to the ninth grade history position without previously posting the notice of vacancy. Appellant Rose, in possession of proper certification, a master’s degree and more seniority than Mrs. Black, applied for the position only to learn that the position had already been assigned to Mrs. Black.

The Rose court further stated that a county board of education must make promotions and decisions to fill vacancies on the basis of individual qualifications.

Matthew Victor
XIV. STATE GOVERNMENT


The secretary of state is vested with broad authority, after consultation with the state’s election commission, to promulgate rules and regulations, but he is not required to implement the election commission’s suggestions.

The respondent requested the West Virginia Supreme Court of Appeals to issue a writ of mandamus against respondent Ken Hechler in his capacity as Secretary of State to compel him to implement proposed amendments that were recommended by the State Election Commission. These amendments would require 1) temporary election workers be paid no more than five dollars per hour with a limit of thirty-five dollars per day, 2) committees be limited to one temporary worker per precinct on election day, and 3) committees be limited to one worker per precinct on the days prior to the election. The respondent denied that he had a duty to implement the proposed amendments.

The Supreme Court of Appeals held that there was not a clear legal duty on the part of the Secretary of State to promulgate regulations that were proposed by the State Election Commission. Noting that the Secretary of State is vested with broad authority after consultation with the election commission to promulgate rules and regulations in order to carry out the policies of the Legislature, the court held that there was no clear duty for the Secretary of State to be required to promulgate the rules recommended by the State Election Commission. The requested writ was denied.

Gregory Vincent Smith

XV. STATUTORY INTERPRETATION


No statute enacted by the Legislature may embrace more than one object, and the object of the statute must be expressed in the title.
The Circuit Court of Kanawha County entered an order to compel the executive director of the West Virginia Board of Medicine to issue a permanent medical license to Enrique C. Mata, M.D., pursuant to West Virginia Code chapter 30, article 14, section 8A (1987). In response, the Board petitioned the West Virginia Supreme Court of Appeals for a writ of prohibition contending that the legislative act that contained the cited Code provision was defectively titled and, thus, in violation of article 6, section 30 of the West Virginia Constitution.

The West Virginia Supreme Court of Appeals agreed and awarded the writ. The court held that the clear objective of article 6, section 30 (which reads in part "no act hereafter passed, shall embrace more than one subject, and that shall be expressed in the title") is to protect against enactment of laws where objects are placed into the bills that are not stated in its title. The court held that the constitutional requirements of one object and subject in the title were designed to give notice of the contents of an act and to prevent any surreptitious insertion in the body of an act. The court further held that the test is whether the title imparts enough information to one interested in the subject to cause him to read the act.

*Gregory Vincent Smith*