Civil Procedure

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CIVIL PROCEDURE
I. PRETRIAL PROCEDURE


In Bell v. Inland Mutual Insurance Co., the West Virginia Supreme Court of Appeals consolidated two cases which presented a common issue on appeal from the Circuit Court of McDowell County. The supreme court was asked to decide whether a default judgment may be rendered against a party to an action as a sanction for noncompliance with an order compelling discovery under Rule 37(b) of the West Virginia Rules of Civil Procedure. In addition, the court was asked to determine the rate of prejudgment interest accruing on amounts awarded prior to the enactment of West Virginia Code section 56-8-13.

The action against Inland Mutual Insurance Company arose after the appellee, Bell, fell from the back of a truck driven by the son of the insured party. Bell brought suit. The driver, a New Jersey resident, and the driver's insured father were properly served with process. After the defendant, driver failed to file a timely answer, the court awarded default judgment in favor of Bell and dismissed the insured father with prejudice from the action. The supreme court affirmed the dismissal.

Appellee Bell then filed suit against the insurance company pursuant to West Virginia Code section 17D-4-12(b)(2), alleging that the insurance company had acted in bad faith in denying the claim. Inland Mutual answered by denying liability beyond the policy limits and asserting additional defenses. Bell then served interrogatories on the insurance company to which the company failed to respond. The circuit court granted Bell's motion to compel, ordering compliance by a specified date. Inland Mutual ignored the order. In response, the court granted appellee Bell a default judgment in the amount of $78,491.85 plus interest and costs. Inland Mutual appealed from the circuit court's refusal to set aside the default judgment.

The second case consolidated in this opinion arose from a similar set of factual circumstances. Mr. Justice purchased fire insurance from the appellant, Camden Fire Insurance Company, to insure property owned by his son. Several years later following the destruction of the property, the insured party sought to collect under the policy. In response, Camden Fire asked for a declaratory judgment to determine whether the claimant had an insurable interest. Justice answered, counter-claimed for compensatory and punitive damages, and joined the insurance brokerage firm which sold the insurance as a third-party defendant.

As in Bell, the claimant served interrogatories on the insurance company which

3 W. VA. CODE § 17D-4-12(b)(2) (Supp. 1985) provides in relevant part that "[a] 'motor vehicle liability policy' . . . [s]hall insure the person named therein and any other person, as insured, using any such vehicle or vehicles with the express or implied permission of such named insured. . . ."
were unanswered. Justice then made a motion to compel Camden Fire to answer. The court granted the motion and entered an order setting a deadline for the insurance company to comply with discovery. When Camden Fire did not respond, Justice was granted a default judgment and the insurance broker was dismissed from the suit. Following a writ of inquiry to determine the issue of damages and motion by the appellee under Rule 15(b) of the West Virginia Rules of Civil Procedure to increase the amount of punitive damages demanded, the court awarded $361,276.16 from which Camden Fire appealed.

The first issue the court addressed was whether a default judgment could be rendered as a sanction against a litigant for failing to comply with an order compelling discovery. Rule 37(b) provides an array of penalties that the court may impose. In the cases consolidated in Bell, the circuit court chose the harshest sanctions under Rule 37(b)(2)(C) providing for entry of default judgment against a non-complying party. Prior to this case, the West Virginia Supreme Court of Appeals had addressed the issue of discovery sanctions only in Chandos, Inc. v. Samson. In Bell, the court looked to federal case law decisions interpreting Rule 37 of the Federal Rules of Civil Procedure in reaching its holding.

In Chandos, the circuit court entered default judgment under Rule 37(d) against the defendant, a patient in a mental hospital, for failure to appear at the designated time for his deposition. On appeal, the court vacated the default judgment since the plaintiff was under a disability and not properly represented. The supreme court,
recognizing the harshness of the penalty, stated that such a sanction may be imposed only where the conduct of the litigant is willful.  

As in Chandos, the federal courts have recognized that the failure of a party to comply with an order compelling discovery will not require the application of Rule 37 sanctions. However, willfulness, bad faith, or fault of the disobedient party will support such penalties. Furthermore, where the conduct is deliberate or counsel has been grossly negligent in his professional capacity, Rule 37(b) sanctions have been upheld in federal practice. In upholding 37(b) penalties, the United States Supreme Court has outlined the purpose stating:

Preclusionary orders ensure that a party will not be able to profit from its own failure to comply. Rule 37 strictures are also specific deterrents and, like civil contempt, they seek to secure compliance with the particular order at hand. Finally, although the most drastic sanctions may not be imposed as 'mere penalties,' courts are free to consider the general deterrent effect their orders may have on the instant case and on other litigation, provided that the party on whom they are imposed is, in some sense, at fault.

Consistent with the federal decisions in this area, the West Virginia Supreme Court of Appeals in Bell held that:

The striking of pleadings and the rendering of judgment by default . . . as sanctions under W. Va. R. Civ. P. 37(b) . . . may be imposed . . . where it has been established through an evidentiary hearing and in light of the full record . . . that the failure to comply has been due to willfulness, bad faith or fault of the disobedient party and not the inability to comply. . . .

The court held that default judgments are within the discretion of the court and will not be overturned on appeal unless this discretion has been abused by the trial court.

The court also set forth the parameters of the evidentiary hearing required before the imposition of Rule 37(b) sanctions placing the initial burden of establishing noncompliance on the party seeking such penalties. The burden then shifts to the other party to demonstrate compliance or circumstances which remove him from the purview of Rule 37(b).

In both cases before the court in Inland Mutual, the appellants contended that

\[\text{id. at 432, 146 S.E.2d at 840.}\]
\[\text{societe internationale pour participations industrielles et commerciales, s.a. v. rogers, 357 u.s. 197 (1958).}\]
\[\text{cine forty-second street theatre corp. v. allied artists pictures corp., 602 f.2d 1062 (2d cir. 1979).}\]
\[\text{id. at 1066 (citations omitted).}\]
\[\text{bell, 332 s.e.2d at 134.}\]
\[\text{id. at 132 (citing national hockey league v. metropolitan hockey club, 327 u.s. 639, 642 (1976)).}\]
they did not act willfully or in bad faith in failing to comply with the discovery orders. The primary defense of the parties was that they were not informed of such orders by legal counsel and, if they had been so informed, they would have answered the interrogatories. Furthermore, the appellants argued that they had meritorious defenses to the actions. The court, reasoning that a litigant is responsible for the counsel he chooses, held that penalties may be imposed under Rule 37(b) for counsel’s negligent or intentional conduct.

Both Inland Mutual and Camden Fire were provided with evidentiary hearings prior to the imposition of Rule 37(b) sanctions; however, counsel for Inland Mutual failed to sufficiently develop and preserve the record of the hearing. Inland Mutual also failed to make a Rule 60(b) motion and develop the record on the issue of the unanswered interrogatories.

In Inland Mutual, the insurance company asserted that it was improper for the jury to be instructed that they could award ten percent prejudgment interest. On February 23, 1978, a $35,000 judgment was granted against the driver of the truck, the son of the insured, from which the appellee fell. The trial court ordered postjudgment interest at a rate of six percent per annum. Bell then brought suit against the insurance company for payment on the judgment whereupon the court allowed the jury to consider prejudgment interest at a rate of ten percent. This judgment was already accruing postjudgment interest by previous order of the court at six percent.

Prior to 1981, West Virginia Code section 56-6-31 provided only for postjudgment, not prejudgment, interest at a rate of six percent. In 1981, the Legislature amended the statute to include both prejudgment and postjudgment interest at a rate of ten percent. The supreme court held that prior to the effective date of

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14 Id. at 135 (citing Link v. Wabash R.R. Co., 370 U.S. 626 (1962)).
15 Id. at 136.
16 W. VA. R. Civ. P. 60(b) provides in pertinent part:
On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or avoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.
17 Prior to amendment, W. VA. CODE § 56-6-31 (1966) provided that "[e]very judgment or decree for the payment of money, except where it is otherwise provided by law, shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not." At this time, the maximum legal rate of interest was six percent per annum pursuant to W. VA. CODE § 47-6-5(a) (1974).
18 W. VA. CODE § 56-6-31 (Supp. 1985) provides:
Except where it is otherwise provided by law, every judgment or decree for the payment of money entered by any court of this State shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not: Provided, that if the judgment or decree,
the amending legislation on July 5, 1981, interest should have been calculated at the statutory rate of six percent and thereafter at ten percent.19

Camden Fire asserted as error the amount of damages awarded. In his counterclaim, Justice requested $25,000 in punitive damages, but when the jury returned a judgment for $300,000, the court permitted Justice to alter his original demand to reflect the increased amount. Camden Fire contended that permitting the alteration of the demand after default judgment was error pursuant to Rule 54(c).20

The courts have tended to take varying positions as to whether damages awarded in a default judgment may exceed those damages demanded by a litigant. Such conflicting decisions arise from the particular court's view of the type of default judgment at issue. Default judgments have been classified as two types: those in which a party has failed to appear and those in which a litigant has appeared but failed to properly plead or defend the action.21

One view strictly construes Rule 54(c) so as to include all default judgments regardless of kind, type, or circumstances. Justice Brotherton, in his dissent in Inland on the issue of damages, took a similar position. According to this view, Rule 54(c) is to be strictly construed by its literal meaning. Therefore, the amount of default judgment damages awarded should not exceed the demand. The underlying theory generally espoused to support such a conclusion is based on the principle that a litigant should be able to decide from the demand in the pleadings whether to expend the resources to defend an action.22 An alternative interpretation of Rule 54(c) introduces an element of uncertainty as to the maximum amount of damages recoverable.

The majority of the court in Inland Mutual took a broader position consistent with several leading federal court decisions.23 The reasoning of these opinions considered the hearing on the issue of damages as limited to the same extent as a trial

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19 Bell, 332 S.E.2d at 138.
20 W. Va. R. Civ. P. 54(c) states that:
A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.
23 See Trans World Airlines, Inc. v. Hughes, 449 F.2d 51 (2d Cir. 1971); Peitzman v. City of Illmo, 141 F.2d 956 (8th Cir.), cert. denied, 323 U.S. 718 (1944).
on the merits. Therefore, amendments, if allowed at trial, would be appropriate in a proceeding to determine damages. The court, agreeing with the reasoning of Trans World Airlines, Inc. v. Hughes, held that Rule 54(c) is not applicable where a party fails to comply with a discovery order and default judgment is imposed pursuant to Rule 37(b) and the defaulting party appears as to the issue of damages. Thus, the circuit court’s decision to permit the appellee to increase his demand for judgment was proper.

II. ATTORNEY FEES


The West Virginia Supreme Court of Appeals considered the issue of awarding attorney fees and costs to the prevailing litigant in actions brought in bad faith between private parties in Daily Gazette Co. v. Canady. The court held that, where an attorney’s conduct has been “vexatious, wanton, or oppressive” in asserting a claim or defense and he can make no argument in good faith to support his position, the attorney may be held liable for subsequent attorney fees and costs arising from his actions. This exception previously had been recognized by the court in the context of extraordinary judicial proceedings.

In this case, the Daily Gazette Company, a newspaper publisher against whom a defamation suit was brought, sought a writ of mandamus for reconsideration of its motion for attorney fees and costs following the dismissal of the action. The circuit court rejected this request based upon an absence of authority for such an award. The Daily Gazette Company argued that no such authority was necessary in that there existed in the court an inherent power to award attorney fees where counsel had acted in bad faith.

Under what is commonly recognized in federal courts as the “American Rule,” each party to an action is responsible for his own attorney fees absent a statute,

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24 Peitzman, 141 F.2d at 962.
25 Hughes, 449 F.2d 51.
26 Bell, 332 S.E.2d at 140.
28 [A] court may order payment by an attorney to a prevailing party reasonable attorney fees and costs incurred as a result of his or her vexatious, wanton or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law.

Id. at 266.
30 The record reflected insufficient evidence of vexatious, oppressive, or wanton conduct upon which to make a decision as to the proper award. The West Virginia Supreme Court of Appeals granted the writ of mandamus to determine whether the award of costs and attorney fees would be proper based on the evidence. Daily Gazette, 332 S.E.2d at 266.
contractual agreement, or court rule stating otherwise. This principle generally has been recognized by the West Virginia courts. A number of judicially created exceptions to this rule have been fashioned by both state and federal courts as part of their equity jurisdiction. Daily Gazette is representative of one such theory, sometimes characterized as the "conduct" theory, in which the federal courts, if warranted, would award attorney fees to the prevailing party as a result of opposing counsel's bad faith, vexatious, or oppressive conduct. The majority carefully considered and followed the line of decisions of United States Supreme Court in reaching the holding in Daily Gazette.

In Alyeska Pipeline Service Co. v. Wilderness Society, the United States Supreme Court considered attorney fees in the context of litigation protesting the awarding of construction permits for the trans-Alaska oil pipeline. The Court of Appeals for the District of Columbia held that the respondents were entitled to attorney fees under a "private attorney general" theory. The Supreme Court reversed, holding that such a ruling was a major inroad into the American Rule and one properly within congressional, not judicial, power. Although the Court rejected the "private attorney general" theory, it did recognize the conduct exception allowing the award of attorney fees as within the inherent power of courts although this exception was not applicable to Alyeska.

Shortly after Alyeska, the Supreme Court was asked to decide whether attorney fees could be assessed against counsel who had abused the judicial process in Roadway Express, Inc. v. Piper. In Roadway Express, respondents failed to comply with orders related to discovery and the filing of briefs. Although the decision ultimately was based on the interpretation of the Civil Rights statutes, Justice McGraw cited with approval the part of the opinion which stated that counsel fees may be assessed against a party for litigation in bad faith as well as for abuse of the judicial process. These circumstances fall within the inherent power of the court to award attorney fees. Daily Gazette expressly stated that Roadway Express is consistent with prior holdings of the West Virginia Supreme Court of Appeals.

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12 See Nelson, 300 S.E.2d at 91.
13 See Alyeska, 421 U.S. at 258-259; Robinson v. Ritchie, 646 F.2d 147 (4th Cir. 1971); 5A MICHEE'S JURISPRUDENCE Costs § 3 (1976).
14 Alyeska, 421 U.S. 240.
15 Under such a theory, attorney fees may be awarded where a civil action is brought against an agency or official of the United States seeking enforcement of the law by the government. The individual litigant bringing the suit is said to be functioning as a private attorney general. Id. at 263.
16 Id. at 258-59.
18 Daily Gazette, 332 S.E.2d at 264 (citing Roadway Express, 447 U.S. at 766). The Supreme Court stated: "[t]he power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against at party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes."
The inherent power of the court is a widely acknowledged concept recognized by West Virginia's highest court in many different contexts. The court has previously stated that the inherent power of a court includes whatever is reasonably necessary and within its jurisdictional powers in administering justice. In this case, the court agreed with the position of the Daily Gazette Company that the award of attorney fees against counsel who has acted in bad faith is within this inherent power.

The court also briefly addressed the issue of frivolous claims. The court explicitly rejected the Daily Gazette Company's contention that a frivolous claim or defense is sufficient in itself to support a finding of bad faith. Such a claim generally is more indicative of incompetent counsel. The opinion further stated that as the frivolousness of a claim increases so does the likelihood of improper purpose in bringing the litigation.

Finally, the court attempted to provide some guidance for determining what constitutes bad faith by pointing to relevant provisions of the Code of Professional Responsibility and the Rules of Civil Procedure. The Code of Professional Responsibility provides that a lawyer has a concurrent duty to both the client and the legal system and, at times, these obligations may conflict to a certain extent. The court recognized that a degree of uncertainty exists in the law; however, change should be based on good faith arguments. These provisions, while not explicitly providing for the award of attorney fees, do help resolve the conflict between zealous representation and the lawyer's obligation to the administration of justice in delineating those actions which constitute bad faith.

The award of attorney fees is a controversial area presenting many issues for consideration. In *Daily Gazette*, the West Virginia Supreme Court of Appeals has clearly established the course it is to follow.

III. *Pro Se* Representation


The West Virginia Supreme Court of Appeals upheld a litigant's fundamental right to self-representation in a civil proceeding in *Blair v. Maynard*. In *Blair*,

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39 *Daily Gazette*, 332 S.E.2d at 266.
41 *Daily Gazette*, 332 S.E.2d at 266.
42 *Model Code of Professional Responsibility* EC 7-1 (1979) states: "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations."
43 *Model Code of Professional Responsibility* EC 7-4 (1979) states that: "conduct is within the bounds of the law, . . . if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law."
44 *See Nelson*, 300 S.E.2d at 92.
the plaintiff, acting as her own counsel, brought a civil action in the Circuit Court of Mingo County. In her opening statement, Blair commented on the potential for a directed verdict in the ensuing trial. She also made improper remarks concerning witnesses and other statements which the jury would not be permitted to hear. Upon the motion of the defendant, the circuit court granted a mistrial based on Blair's comments to the jury in her opening statement. Furthermore, the circuit court held, in light of the complexities of the case and in fairness to both litigants, that Blair must be represented by legal counsel before the trial would proceed. From this ruling, Blair sought a writ of mandamus compelling the court to allow her to continue pro se in the action. The supreme court granted the writ.46

The respondent, circuit court Judge Maynard, took the position that permitting the petitioner to proceed pro se would cause more mistrials, thereby creating additional expense for the defendant in the litigation of the matter. The petitioner cited economic reasons for her desire to proceed as her own counsel.

The West Virginia Constitution, article III, section 17, provides for access to the courts by every person.47 This right of access cannot be denied merely because litigants have not retained attorneys to represent them. The West Virginia supreme court previously had recognized the right to proceed pro se in civil actions but had not identified the source from which it emanates.48 In Blair v. Maynard, the court, citing article III, section 17 of the West Virginia Constitution as the basis for its decision, held that the right of individuals to represent themselves in civil litigation is a fundamental right not unreasonably or arbitrarily deniable to a litigant.49

Although characterized as a fundamental right, the court placed some limits on the extent of self-representation. This right cannot be exercised so as to conflict with the responsibility of the trial court to provide a fair proceeding to both parties.50 It is deniable where it is clearly evident from the record that the intent of the pro se litigant is to "obstruct the administration of justice."51 The trial judge must consider the interest of all litigants in an action in which a party chooses to proceed as his own counsel. The court stated that a trial judge should not act in the role of attorney for the self-represented party, but should protect the rights of the pro se litigant from omission through unfamiliarity with procedural rules and evidentiary requirements.52 The court found that the petitioner's remarks in her opening statement constituted excusable error and were not grounds for a mistrial.

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46 The petitioner also requested that the respondent judge be removed; however, the supreme court denied the request after finding nothing to support such action. Id. at 397 n.7.
47 W. Va. Const. art III, § 17 provides in pertinent part: "The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law. . . ."
49 Blair, 324 S.E.2d at 395.
50 Id. at 395.
51 Id. at 396.
52 Id. at 396.
In federal courts, the right of self-representation is statutorily provided for and exists in both civil and criminal cases. West Virginia has recognized the right to counsel in criminal proceedings under article III, section 14 of the West Virginia Constitution as including the parallel right to self-representation. In Blair, the court stated that, although deriving from a different constitutional provision, the right to proceed pro se in a civil matter stands on "equal footing" with the right to self-representation in a criminal proceeding.

IV. JURIES


In Barker v. Benefit Trust Life Insurance Co., the West Virginia Supreme Court of Appeals held that a party who has been granted a jury trial pursuant to Rules 38 or 39(b) of the West Virginia Rules of Civil Procedure has a right to an impartial and unbiased jury. To secure this right, the parties are entitled to voir dire and peremptory challenges of prospective jurors. This right exists even where the court has procedurally initiated the jury trial.

The controversy in Barker arose following nonpayment of medical insurance expenses by Benefit Trust Life Insurance Company. The plaintiff, Barker, brought suit in the Circuit Court of Braxton County seeking both compensatory and punitive damages against the insurance company. On the scheduled trial date, neither the company's representative nor its counsel appeared at the designated time when the court convened. The trial court, after inquiry and under the belief that the insurance company's representative did not intend to appear, granted the plaintiff's motions for default judgment and to impanel a jury to consider the issue of damages. Subsequently, Barker waived voir dire and the court impaneled the first twelve jurors.

53 28 U.S.C. § 1654 (1982) provides: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

54 W. Va. Const. art. III, § 14 provides in pertinent part: "In all such trials, the accused . . . shall have the assistance of counsel. . . ."

55 Blair, 324 S.E.2d at 394 (citing State v. Blosser, 158 W. Va. 164, 207 S.E.2d 186 (1974)).

56 Blair, 324 S.E.2d at 395.


58 W. Va. R. Civ. P. 38(b) states:

Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

59 W. Va. R. Civ. P. 39(b) provides:

Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court upon notion or request made not later than the placing of the action on the trial calendar shall, or of its own initiative may at any time, order a trial by jury of any or all such issues.
instructing them that liability was not an issue in the case and that they were to return the following day to consider the issue of damages.

Shortly thereafter, the insurance company's counsel arrived and moved that the default judgment be set aside and further requested a jury trial on the merits of the case. The court, in its discretion, granted the motion setting aside the default judgment. The next day, the court informed the previously impaneled jurors that the default judgment had been set aside and instructed them that they were to consider both the issues of liability and damages. Benefit Trust appealed, claiming that it was denied the right to participate in the jury selection process through voir dire and peremptory challenges of the prospective jurors.

The West Virginia Constitution66 and Rule 38(a)61 guarantee the right to a jury trial. A trial by jury may be requested under three different methods.62 First, the request may be made in writing any time following the commencement of the action but no later than ten days after the service of the last pleading as provided in Rule 38(b). This demand for trial by jury may be stated in the complaint or answer. Second, under Rule 39(b), a party may request a jury trial at any time prior to the placement of the action on the trial calendar. Finally, Rule 39(b) allows a court, on its own initiative, to order at any time a jury trial of any such issues triable by a jury.63

The right to a trial by jury carries with it the fundamental requirement that the selected jury be impartial and unbiased so as to insure a fair trial to the litigants.64 This is accomplished by allowing the parties voir dire and peremptory challenges. Voir dire permits the examining party to determine the jurors' backgrounds and knowledge on matters which may demonstrate reason for disqualifications, and is provided for both by statute65 and by rule. Rule 47, which sets forth the procedure for voir dire examination, allows either the judge or the party's counsel to question prospective jurors. If the court conducts voir dire, the parties to the

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66W. VA. CONST. art. III, § 13 provides in pertinent part: "In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interests and costs, the right of trial by jury, if required by either party, shall be preserved. . . ."

61 W. VA. R. CIV. P. 38(a) states: "The right of trial by jury as declared by the Constitution or statutes of the State shall be preserved to the parties inviolate."


63 The discretionary authority of a court to initiate a jury trial under W. VA. R. CIV. P. 39(b) is much more liberal than under the federal counterpart. Fed. R. CIV. P. 39(b) provides:

Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

See Bennett v. General Accident Fire & Life Assurance Corp., 149 W. Va. 92, 138 S.E.2d 719 (1964) (no time limit in which the judge must initiate the jury trial under subdivision (b)).

64 Thornton v. CAMC, 305 S.E.2d 316, 319 (W. Va. 1983).

65 W. VA. CODE § 56-6-12 (1966).
action must be provided an opportunity for further supplemental examination. The scope of *voir dire* is within the discretion of the court. As the West Virginia Supreme Court of Appeals has previously stated, it is reversible error not to allow peremptory challenges to a party to litigation. A meaningful *voir dire* is necessary to assure that an impartial and unbiased jury is obtained by a litigant.

In *Barker*, the setting aside of the default judgment and the granting of the motion for trial by jury under Rule 39(b) after the commencement of the proceedings were discretionary on the part of the court. Both parties to the action had failed to properly request a jury trial pursuant to Rule 38 and, as a result, had waived this right under Rule 38(d). The opinion pointed out that the trial court appeared to withhold *voir dire* and peremptory challenges as sanctions against appellant’s counsel for tardiness in his arrival.

The court held that, although the appellant originally waived its right to a trial by jury under Rule 38(d), the initiation of a jury trial by the court, pursuant to Rule 39(b), entitled the appellant to *voir dire* and peremptory challenges, a right which the insurance company did not waive and which the circuit court erred in denying. Regardless of whether the jury trial is established by Rule 38 or Rule 39(b), the parties to an action are entitled to *voir dire* and peremptory challenges to assure an impartial and unbiased jury.

### V. LIMITATION OF ACTIONS


In *Preiser v. MacQueen*, West Virginia’s highest court clarified the application of the statute of limitations under a Rule 41(b) dismissal for nonpayment of accrued court costs in an action for malicious prosecution and abuse of process. The case before the court arose as a result of libel suits filed in 1970 and 1971.

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66 W. VA. R. Civ. P. 47(a) provides:
The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

67 *Thornton*, 305 S.E.2d at 319.


69 W. VA. R. Civ. P. 38(d) provides in pertinent part: “Subject to the provisions of Rule 39(b), the failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury.”

70 “[T]he defendant in failing to appear for trial at the time set on the day set, has by its negligence placed itself in the position where it cannot legitimately object to the trial of the case by the jury that has been impaneled to try the case. . . .” *Barker*, 324 S.E.2d at 151 (quoting the Circuit Court of Braxton County).

by petitioner Preiser, an attorney, on behalf of three Charleston police officers against the Daily Gazette Company, a West Virginia newspaper publisher. The Daily Gazette Company had printed a series of articles alleging misconduct on the part of the officers. Five separate libel suits were filed. All of the suits were ultimately dismissed: one in 1973, following the death of one plaintiff, and the other four in 1979, with leave to reinstate, for nonpayment of accrued court costs. The actions were not reinstated.

The Daily Gazette Company commenced an action in the Circuit Court of Kanawha County in 1981 against Preiser seeking $25,000 in damages for malicious prosecution and abuse of process arising from the previously dismissed libel suits. Attorney Preiser answered, alleging that the statute of limitations on the bringing of such an action had run and moved to dismiss. The circuit court denied the motion whereupon Preiser sought a writ of prohibition from the supreme court to prevent the case from proceeding. The trial judge was directed to show cause why such relief should not be granted and the Daily Gazette Company was allowed to intervene.

In an action for malicious prosecution, the supreme court has clearly delineated the necessary elements arising from the prior prosecution to include malice, an absence of reasonable or probable cause, and termination in favor of the defendant. Such an action must be brought within one year following the accrual of the right to bring the action. The statute of limitations begins to run when the action from which the malicious prosecution charge arises is terminated. In Preiser, the libel suits were dismissed in 1979, but with leave to reinstate. At issue was whether the statute of limitations began to run upon the filing of the order of dismissal or at the expiration of the allowable time for reinstatement.

The original libel cases from which the action for malicious prosecution and abuse of process arose were dismissed for nonpayment of accrued court costs pursuant to rule 41(b). This Rule provides the potential for reinstatement of the action within three terms following its dismissal. The Daily Gazette Company argued

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77 The action dismissed on April 20, 1973 is not at issue in this case in that the Daily Gazette Company consented to the dismissal. Id. at 2 n.1.
73 W. Va. Code § 53-1-1 (1981) provides that: "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." See D. Olson, Modern Civil Practice in West Virginia § 11.7 (1984).
75 Preiser, No. 16620, slip op. at 4 (citing Porter, 50 W. Va. 581, 40 S.E. 459).
76 Id. at 6 (concurring in the language of Annot., 87 A.L.R.2d 1047, 1059 (1963)).
77 W. Va. R. Civ. P. 41(b) provides in pertinent part:
Any court in which is pending an action wherein for more than two years there has been no order or proceeding but to continue it, or wherein the plaintiff is delinquent in the payment of accrued court costs, may, in its discretion, order such action to be struck from its...
that the statute of limitations began to run following the expiration of the three terms in which reinstatement was possible. Preiser contended that the tolling of the statute of limitations should be measured commencing with the filing of the court's dismissal order. The court, agreeing with the Daily Gazette Company's argument, held that, where an action is dismissed under Rule 41(b), any ensuing action for malicious prosecution must be brought within one year following the expiration of three terms of court during which the plaintiff may reinstate the action. Therefore, the action for malicious prosecution by Daily Gazette was commenced in a timely manner.

In reaching this holding, the court considered the point of termination of the action in the context of West Virginia Code section 56-8-13. This code section provides that, when an action has been dismissed and then reinstated, the reinstatement will be treated as a continuation of the prior proceeding such that the dismissal order previously entered has no effect. If the plaintiffs in the original libel suits had chosen to reinstate, it would have been treated as a continuance of the prior suits and not as the filing of new actions. The court concluded that the action would be terminated and the statute of limitations would commence to run at the end of the additional three terms for reinstatement provided under Rule 41(b).

The court distinguished this case from Allen v. Burdette in which the plaintiff brought suit for malicious prosecution following an involuntary bankruptcy proceeding where he was found not to be bankrupt. In Allen, the plaintiff argued that the statute of limitations did not commence to run until the expiration of the time for filing a petition for rehearing or appeal. The court disagreed with this reasoning, holding that the statute of limitations was to be measured from the time judgment was entered in the involuntary bankruptcy. In Allen, an appeal was to be treated as a new action, while in Preiser, a reinstatement would have been a continuation of the prior proceeding. Therefore, the statute of limitation would be applied differently in the two cases.

The Daily Gazette Company's allegation of abuse of process has had limited application in West Virginia courts. Abuse of process arises from the willful or
intentional misuse or misapplication of lawful process to accomplish wrongful objectives unintended by that process. This to be differentiated from malicious prosecution because abuse of process does not involve unjustified issue of process but contemplates improper use of process after it has already issued. In *Preiser*, the court held that an abuse of process claim must also be brought within one year. The court concluded that the time begins to run at the termination of the acts alleged to be the abuse and not the termination of the action itself. With the dismissal of the libel action in August, 1979, and no subsequent activity in the case, the statute of limitations commenced at this point. Therefore, the abuse of process claim filed on July 14, 1981, by the Daily Gazette Company was barred by the statute of limitations.

VI. DISCOVERY


The West Virginia Supreme Court of Appeals considered the discovery of evidence abroad by a state litigant in *Gebr. Eickhoff Maschinenfabrik v. Starcher*. At issue, was whether this discovery must be in compliance with the Rules of Civil Procedure or the Multilateral Convention on the Taking of Evidence Abroad. The court held that, in an attempt to maintain international comity, the dictates of the Convention first must be followed and, if such efforts were unsuccessful, the application of West Virginia Rules would be possible to protect state interests.

In this case, Casini's arm was severed in a longwall mining operation following which he filed an action in the Circuit Court of Monongalia County seeking damages from Consolidated Coal Company. Subsequently, he amended his pleadings to assert a claim against Eickhoff Corporation, the American subsidiary of Gebr. Eickhoff, for manufacturing and design defects in the machinery. Ten months later, Consolidated Coal filed a third-party complaint against Gebr. Eickhoff, a West German corporation.

Pursuant to the West Virginia Rules of Civil Procedure, Consolidated served interrogatories on Gebr. Eickhoff. Gebr. Eickhoff objected to these interrogatories claiming they were inconsistent with the terms of the Hague Evidence Convention. Consolidated made a motion to compel discovery. Shortly thereafter, Consolidated served a second set of interrogatories, a motion to compel production of witnesses for deposition, and a request for production of documents. Gebr. Eickhoff again objected. The circuit court, finding sufficient minimum contacts, entered an order subjecting the West German Corporation to its personal jurisdiction. By pretrial

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15 *Preiser*, No. 16620, slip op. at 16 n.9 (citing Annot., 1 A.L.R.3d 953 (1965)).
16 *Id.* at 18.
order, Judge Starcher ruled that the West Virginia Rules of Civil Procedure, with certain specific exceptions, were to apply to all discovery in the case. From this pretrial order, petitioners Gebr. Eickhoff and Eickhoff Corporation sought a writ of mandamus compelling Judge Starcher to vacate the order. The supreme court granted the writ.

It was the petitioners' primary contention that evidence obtained abroad must be taken exclusively in compliance with the Hague Evidence Convention. The Multilateral Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, to which both the United States and the Federal Republic of Germany are signatories, was drafted in an attempt to establish procedures to standardize the discovery of evidence as between common law and civil law countries. The Convention outlined a three part procedure for obtaining evidence paralleling the procedure set forth in Rule 28(b) of the Federal Rules of Civil Procedure.

"W. Va. R. Civ. P. 28(b) provides for the following procedure in securing depositions abroad: In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States or of this State, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the State under these rules.

* The pretrial order entered December 10, 1984, provided, in addition to complying with the W. Va. R. Civ. P. as to discovery, that:
  (a) All interrogatories, requests for production of documents, and depositions upon written interrogatory . . . shall be propounded not only in English but also in German;
  (b) All depositions of officers, employees, and agents of Gebr. Eickhoff shall be taken pursuant to Notice between January 3 and February 11, 1985. In the event that any officer, employee, or agent . . . is unable or unwilling to be deposed within the Republic of West Germany, then such person shall be deposed outside the borders . . . at a location to be mutually agreed upon by counsel for Consolidated and Gebr. Eickhoff;
  (c) In the event that Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH fails or refuses to make discovery as required by the West Virginia Rules of Civil Procedure, except as modified herein, evidence proffered at trial by Gebr. Eickhoff of the subjects about which discovery is sought shall be precluded."


* Fed. R. Civ. P. 28(b) sets forth the procedure in language virtually identical to that of W. Va. R. Civ. P. 28(b), excluding references to the state.
The supreme court examined a wide range of considerations deciding that the Convention procedures were to be discretionary on the part of the court. Prior cases, nationwide from both federal and state courts, have been unanimous in interpreting the language and intent of the Convention as nonexclusive in obtaining evidence from abroad.\textsuperscript{92}

Courts have been less consistent in their acceptance of Gebr. Eickhoff's second argument. Gebr. Eickhoff contended that, even if the Convention did not apply exclusively in obtaining evidence, international comity dictates that the Convention procedures be utilized prior to applying the discovery rules of United States courts. State courts have unanimously agreed with this argument but federal courts have been divided on the issue.\textsuperscript{93} The majority in \textit{Gebr. Eickhoff} concluded that a court's perspective in this area is a product of its broad views on international comity and cooperation among nations.\textsuperscript{94}

In \textit{Gebr. Eickhoff}, the West Virginia court indicated that preference must be given to the forum court having personal jurisdiction in order to protect the interest of the state and its population where prejudice and inconsistencies could result from application of the foreign act.\textsuperscript{95} In this case, procedures under the Hague Evidence Convention should have been applied at the outset to preserve the principle of international comity. If such attempts proved unsuccessful, the court then should resort to state rules to avoid impasse.\textsuperscript{96} In dictum, the opinion notes that although the procedures, as outlined in the discovery order, may ultimately contain the most effective discovery method, the uniform procedures of the Convention must first be attempted.\textsuperscript{97}

\textit{Bradley R. Oldaker}

\textsuperscript{92} \textit{Gebr. Eickhoff}, 328 S.E.2d at 497.
\textsuperscript{93} \textit{Id.} at 501.
\textsuperscript{94} \textit{Id.} at 504-05.
\textsuperscript{95} \textit{Id.} at 505.
\textsuperscript{96} \textit{Id.} at 505-06.
\textsuperscript{97} \textit{Id.} at 506.