

COURT WATCH

A report prepared
for members of the
West Virginia
Chamber of Commerce
2019

IMPORTANT DECISIONS OF THE WEST VIRGINIA SUPREME COURT OF APPEALS



WEST VIRGINIA CHAMBER



2018-19 Review

Supreme Court of Appeals of West Virginia

Anna Dailey ■ Marc Williams ■ Tom Hurney

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WEST VIRGINIA CHAMBER

An Overview of WV Supreme Court of Appeals Decisions

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**Congratulations
Jim Dodrill
on Your Appointment as the
West Virginia Insurance
Commissioner**

Jim Dodrill

COURT WATCH



WEST VIRGINIA CHAMBER

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Judicial
Hellholes...Last
Year

West Virginia's Judicial climate
vastly improved in past three
years

Noted election of conservative
lawmakers

“Point of Light” for decision
rejecting Innovator Liability in
pharmaceutical cases



Tort Hellholes 2018-19

West Virginia on “Watch List” because it is one of nine states that lack an intermediate appellate court.

Controversy in the Court



When we last talked...


“The Desks Went Missing in
the Mountain State.”

Washington Post

Aug. 10, 2018

Supreme Court Controversy

- Excessive spending on renovations
- Personal use of court vehicles and property
- Payment of retired judges in excess of statutory limits
- Spend down of \$29M surplus
- Lack of policies and oversight over vehicle and property use



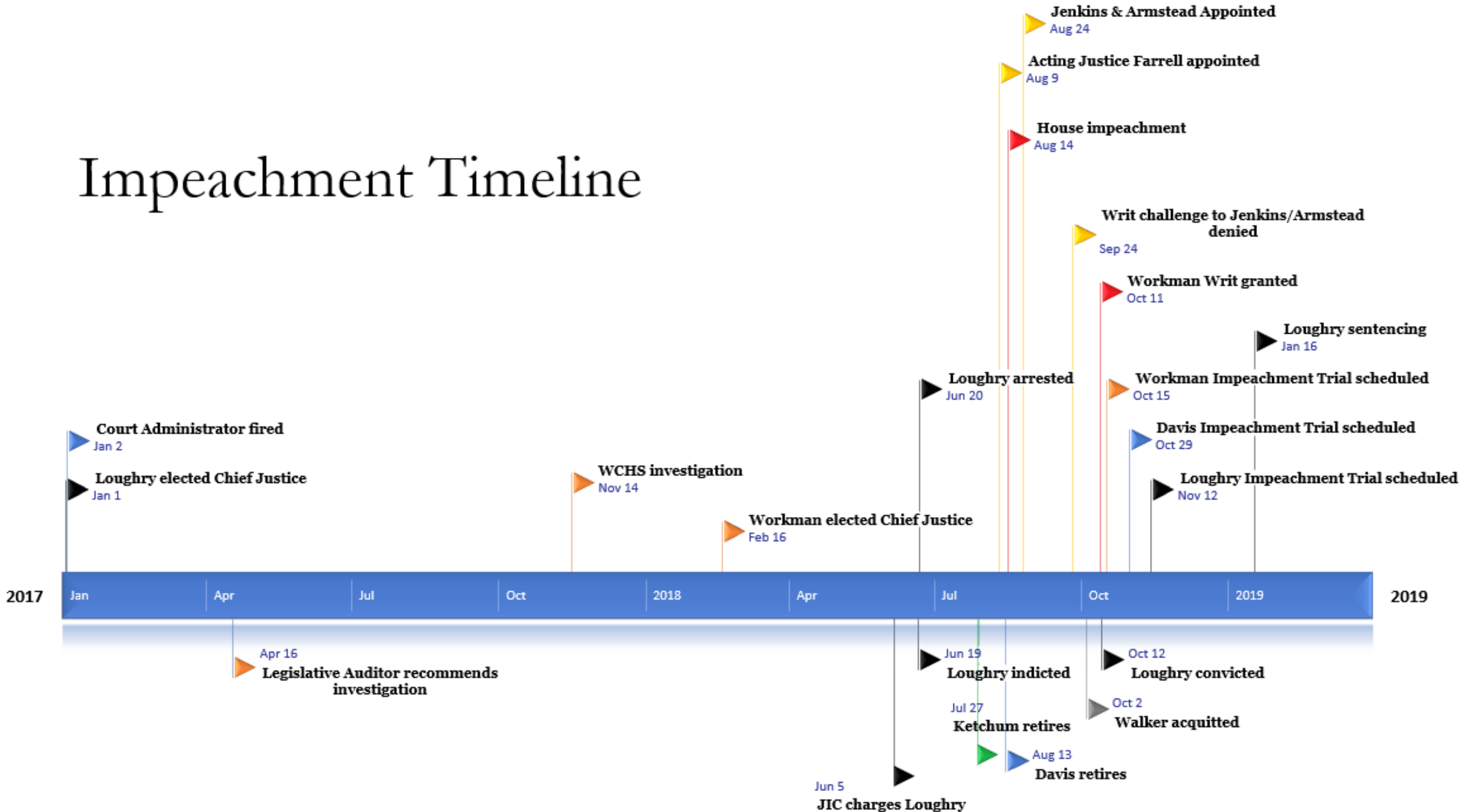
Three Justices
Leave the
Court

June 5/19 : Justice Loughry
charged by Judicial Ethics
Commission/Indicted

July 27: Justice Ketchum
retires

Aug. 13: Justice Davis retires

Impeachment Timeline





New Court...

Ketchum & Davis Seats

- Appointed until Election
- Evan Jenkins
- Tim Armstead

Loughry Seat

- Judge Farrell appointed Chief Justice

Nov. 2018 Nonpartisan Election

- Ketchum & Davis seats

House Impeaches Four Justices.

13 Aug.

2 Oct.

Justice Walker Acquitted



Oct. 11: State ex rel.
Workman v. Carmichael

West Virginia Code § 51-9-10 (1991) **violates the Separation of Powers Clause** of Article V, § 1 of the West Virginia Constitution, **insofar as that statute seeks to regulate judicial appointment matters that are regulated exclusively by this Court** pursuant to Article VIII, § 3 and § 8 of the West Virginia Constitution. Consequently, **W.Va. Code § 51-9-10, in its entirety, is unconstitutional and unenforceable.**

This Court has **exclusive authority and jurisdiction** under Article VIII, § 8 of the West Virginia Constitution and the rules promulgated thereunder, **to sanction a judicial officer for a violation of a Canon of the West Virginia Code of Judicial Conduct.** Therefore, **the Separation of Powers Clause** of Article V, § 1 of the West Virginia Constitution **prohibits the Court of Impeachment from prosecuting a judicial officer for an alleged violation of the Code of Judicial Conduct.**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SEPTEMBER 2018 TERM

No. 18-0816

FILED
October 11, 2018
released at 3:00 p.m.
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel. MARGARET L. WORKMAN,
Petitioner

v.

MITCH CARMICHAEL, as President of the Senate; DONNA J. BOLEY, as
President Pro Tempore of the Senate; RYAN FERNS, as Senate Majority Leader,
LEE CASSIS, Clerk of the Senate; and the WEST VIRGINIA SENATE,
Respondents

WRIT OF PROHIBITION GRANTED

Filed: October 11, 2018

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In addition, we have determined that the **failure to set out findings of fact, and to pass a resolution adopting the Articles of Impeachment violated due process principles**

The Writ of Prohibition is granted. The Clerk is hereby directed to issue the mandate contemporaneously forthwith.

Workman Order Voided Other Impeachment Trials.....

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on October 25, 2018, the following order was made and entered:

State of West Virginia ex rel. Margaret L. Workman,
Petitioner

vs.) No. 18-0816

Mitch Carmichael, President of the West Virginia Senate;
Donna J. Boley, President Pro Tempore of the West Virginia Senate;
Ryan Ferns, Majority Leader of the West Virginia Senate;
Lee Cassis, Clerk of the West Virginia Senate;
and the West Virginia Senate,
Respondents

ORDER

On October 12, 2018, retired Justice Robin DiPiero and Lonnie C. Simmons, DiTrapano, Barrett, filed a motion to expand the writ issued in this case to prohibit his impeachment trial.

Thereafter, on October 19, 2018, suspended Justice Allen H. Loughry II, by his counsel John A. Carr, John A. Carr Attorney at Law, PLLC, filed a motion to expand the writ issued in this case to prohibit his impeachment trial.

The respondents, by counsel, J. Mark Adkins, Floyd E. Boone, Jr., Richard R. Heath, Jr., and Lara Brandfass, Bowles Rice LLP, filed a response to the motion of retired Justice Robin J. Davis on October 22, 2018.

Furthermore, by operation of law, the motions are not necessary. “The general rule is that when a question has been definitively determined by this Court its decision is conclusive on parties, privies and courts . . . and it is regarded as the law of the case.” Syl. Pt. 1, in part, *Mullins v. Green*, 145 W.Va. 469, 115 S.E.2d 320 (1960). The opinion in *SER Workman v. Carmichael*, No. 18-0816, 2018 WL 4941057, (Oct. 11, 2018), is the law of this State.

Certiorari petition to
SCOTUS
Conference Oct. 1,
2019.

Senate and House seek review in the Supreme Court of the United States because **“a panel of acting justices of the Supreme Court of Appeals of West Virginia inserted itself into both the substance and procedure of a process that the West Virginia Constitution entrusts exclusively to the Legislative Branch.”** They argue that this **violated the Guarantee Clause**, Article IV, § 4 of the United States Constitution, which provides “[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”

Oct. 12: Justice Loughry
Convicted



Elizabeth Walker
elected Chief Justice.

October 29, 2018



Non Partisan Judicial Races



Supreme Court
of Appeals
November 2018
Non Partisan
Election

- Division 1 (Ketchum): 10
Candidates
- Division 2 (Davis): 10
Candidates

Justices Jenkins and Armstead Elected

Nov. 6, 2018

Justice Loughry Resigns

Nov. 9, 2018

Fall Term 2018 Cases

Abbreviated Fall 2018 Term

Week of October 22, 2018

Tuesday
10/23
2018

Sept. Oral Arguments
Continued



No arguments in
November

Wednesday
10/24
2018

Sine die Nov. 16, 2018

Thursday
10/25
2018

5 argument days in
October

Election Nov. 6, 2018

10/25
2018

All Day

*SER Blankenship
v. Sec. of State*

“**Sore Loser**” Rule:

“West Virginia Code § 3-5-23(a) (2018) prevents unsuccessful primary election candidates from subsequently running as nomination-certificate candidates in the general election.”



*Musick v.
University Park*

Public/private partnership dorms at WVU are not subject to property tax.

5-0. Opinion by Walker, joined by Justices Armstead, Jenkins, Workman and Farrell.

*Endicott v. City
of Oak Hill*

Affirms dismissal of suit against officer for accident caused by fleeing criminal during high speed chase.

“**We do not perceive how a jury could find Officer Jones was a substantial factor in causing the wreck** when the evidence shows Officer Jones was so far behind J.B. that, on a largely straight section of road, the officer did not see J.B.’s wreck and drove by the wreck without noticing it.”

Deference to PSC

Jefferson County Citizens for Economic Preservation v. PSC: PSC did not err “by finding that the Jefferson County Public Service District may ‘indefinitely delay’ a project to upgrade its sewer service.”

Ohio Valley Jobs Alliance v. PSC: Affirmed PSC order granting a siting permit to ESC Brooke County Power I, LLC “for construction and operation of a natural gas powered wholesale electric generating facility in Brooke County, West Virginia.”

*Pool v. Greater
Harrison County
Public Service
Comm'n*

When the Public Service Commission assesses whether a public service district that provides water and sewer utility services has “at least 4,500 customers,” as set forth in West Virginia Code §§ 16-13A-9(a)(2) [2018] and 24-2-4a(a) [2015], the Commission may count any one entity receiving combined water and sewer services as two separate customers – **that is, the entity may be counted as one customer of the water utility and as one customer of the sewer utility.**

Significant
Rehearing
Petitions
Denied

*WVIMB v.
VALIC*

Affirmed **Business Court arbitration award** for defense. Walker opinion/Davis concurrence
(WV Chamber Amicus)

*McNair v.
Johnson &
Johnson*

“Innovator Liability”

Loughry Opinion, dissents: Workman and Davis

*AMFM v.
Shanklin*

**Enforced arbitration agreement
in nursing home contract**

John Hutchison Appointed

December 12, 2018

Fills remainder of Justice Loughry's term until 2024

January 2019 Term

*SER Gallagher
Bassett Services v.
Webster*

“W. Va. Code § 23-2C-21(a) [2009] prohibits a cause of action by an **employee against a third-party administrator**, or any employee or agent of a third-party administrator, for workers’ compensation discrimination.”

Action also barred by statute of limitations.

Smith v. Clark and Cabell Huntington Hospital

MPLA Defense verdict affirmed

Allowed defendant physician to testify he did not breach the standard of care. Not duplicative of retained expert.

Affirmed **exclusion of duplicative experts** by plaintiff.

Rejected plaintiff's **challenge to juror** who worked for laundry company at hospital.

Dissent (Workman/Hutchison): Court “excluded the testimony of a critical expert for the plaintiff and allowed a potential juror who had a longstanding and ongoing business relationship with defense counsel to remain on the jury panel...”

*Andrews v.
Antero Resources
Corp*

Affirmed MLP ruling that **mineral leases allowed use of the surface for fracking operations to remove oil and gas.**

Rejected property owners' argument "that a mineral owner does not have the right to extract natural gas using methods that were unanticipated when the operative severance deeds were executed, where those unanticipated methods are not necessary to the extraction of the minerals and substantially burden the surface."

*EQT Production
Co. v. Crowder*

Affirmed summary judgment for plaintiffs: Defendant **“trespassed to the extent it used the plaintiffs’ surface lands to conduct operations under neighboring mineral estates”** and \$190K jury award against EQT. New syllabus point:

A mineral owner or lessee has an implied right to use the surface of a tract in any way reasonable and necessary to the development of minerals underlying the tract. **However, a mineral owner or lessee does not have the right to use the surface to benefit mining or drilling operations on other lands, in the absence of an express agreement with the surface owner permitting those operations.**

*SER Vanderra
Resources, LLC
v. Hummel*

Orders **granting** summary judgment must contain sufficient findings of fact for appellate review but order **denying** summary judgment do not.

But a party who wants to seek a Writ of Prohibition against a denial **must ask for findings** in a denial order.

Because the order did not have findings, Court could not address.
Writ denied.

Last Year

*State ex rel. U-
Haul v. Tabit*

- Claim that environmental fee charge in car rental agreements was fraud and violation of consumer protection statute.
- Court recognized that *individualized facts are necessary* to prove plaintiffs' claims but found **certification required** under *In re Rezulin* if there is **one common issue**.
- Compare to more stringent approach in *State ex rel Erie Insurance v. Nibert*.
- Conflicts between Memorandum Decisions?
- **What is trend in approach to class actions?**

*State ex rel
WVU
Hospitals, Inc., et
al v. Gaujot*

Class action over medical records charges certified by circuit court; Supreme Court **reverses denial of motion to de-certify** class.

1. Circuit courts must **carefully examine commonality** requirement in WVRCP 23(a) consistent with the more conservative analysis applied by SCOTUS in *Wal-Mart Stores, Inc. v. Dukes*
2. Where necessary, **circuit courts can consider the merits** of the action in deciding class certification, following *Comcast Corp. v. Behrend*.

Opinion signals **closer alignment between WV Rule 23 and Federal Rule 23** and the ability for lower courts to consider and rely upon federal class decisions.

*Certegy Check
Services, et al v.
Fuller*

Supreme Court **vacated denial of motion to compel arbitration.**

“When a circuit court **denies** a motion to compel arbitration, the circuit court’s order **must contain the requisite findings of fact and conclusions of law that form the basis of its decision.**”

Amoruso v. Commerce and Industry Insurance Co

Affirms default judgment in case where summons and complaint were properly served.

Court rejected challenge that wrong defendant was sued and served.

Inaction by party significant: “[Defendant] could have raised his contentions that he was not the appropriate party by asserting it as a defense or by moving to dismiss the case. Amoruso did neither....”

Dissent by Workman and Hutchison focused on defendant’s *pro se* status and suit against wrong party.

*Dailey v. RJM
Holdings, LLC*

Reversed summary judgment finding **factual issues about joint venture and veil piercing claims.**

Important discussion of joint venture and veil piercing and evidence necessary to support arguments.

*SER Universal
Underwriters Ins.
Co. v. Wilson*

Insured's son was **not covered** because he was **not named in the excess policy**.

No ambiguity in policy so doctrine of “reasonable expectations” did not apply.

Narrow exception where “reliable and relevant evidence, extrinsic to the insurance contract, casts a reasonable doubt as to whether coverage was provided by an otherwise unambiguous policy” **did not exist**.

Proper to exclude evidence where a party previously denied it existed.

Workman dissent.

Vanderpool, et al v. Hunt

A county sheriff's department and its officers are state entities for purposes of the Maxwell Governmental Access to Financial Records Act.

No private right of action under Maxwell Governmental Access to Financial Records Act.


*Michael v.
Consolidation
Coal*

Certified Question from US Court of Appeals in wrongful death case arising from 1968 Farmington Mine Disaster

Fraudulent concealment not a basis to extend statute of limitations for wrongful death statute in effect in 1968

Declined to apply decisions allowing extension of time under wrongful death statute retroactively

Suggests tolling doctrines for wrongful death will be strictly construed



Right
to Work
-
“Round 2”

Round 1- 2017 Court dissolves Bailey’s injunction & remands

2/19 Bailey ignores what Court said & permanently enjoins 2016 RTW law

Round 2 – Court stays Bailey’s injunction while appeal is pending

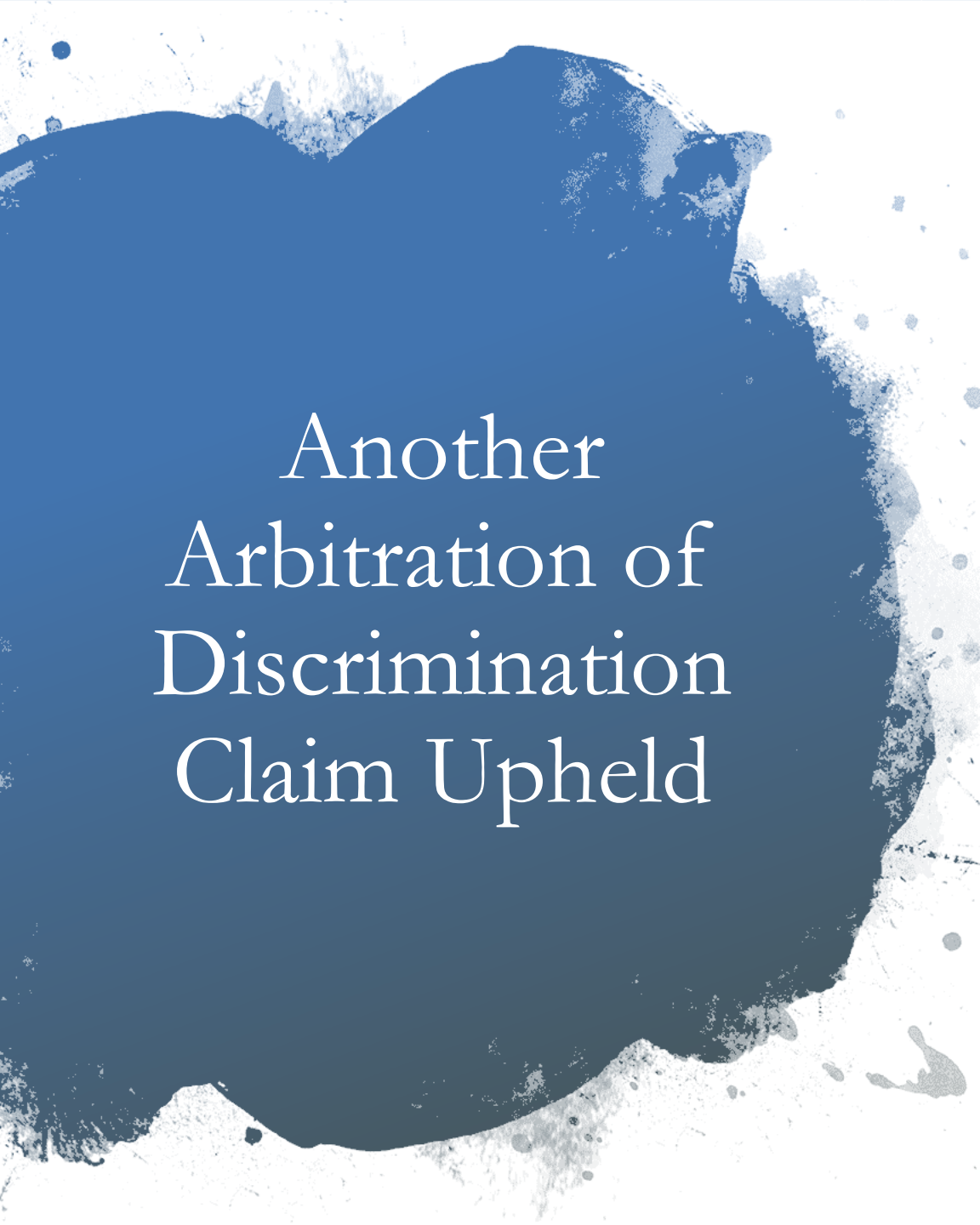
Briefs filed, including amici from WV & US Chambers & WVMA

*Rent-A-Center, Inc.
v. Ellis*

Arbitration clause in employment agreement enforced in a Workers' Comp discrimination case

Reversed order finding delegation clause unconscionable and refusing to enforce the arbitration agreement

Court enforces delegation clause in arbitration case in an employment context



Another
Arbitration of
Discrimination
Claim Upheld

Employee Resource Group v. Collins

- Collins filed sexual harassment case against her employer ERG after her discharge
- Collins had applied on-line & **executed arbitration agreement digitally** for job in KY
- Lower court **refused to refer case to arbitration due to digital signature**
- KY law recognizes validity of **digital** signatures; thus **Collins' electronic signature was binding on her**



Employer May Rely on Medical Opinion

Woods v. Jefferds Corporation

Woods applied for job and identified prosthetic leg as disability needing accommodation (lifting & no steel-toed boot) that Jefferds agreed to, but employer sent for physical evaluation.

Employer refused to hire relying solely on **medical opinion** that Woods was **unable to perform essential job functions** of squatting or climbing ladders; Woods disagreed, arguing he could do job - filed disability discrimination case; MSJ granted

Court (Hutchison 2/28/19) said **no duty to second-guess a reasonable independent medical opinion** that employee not physically qualified for a position especially as Woods did not id any other accommodations

On the Docket – Fall 2019

Sept. 4: Rule 20 Arguments

Marwan F. Saleh, M.D. v. Angie Damron, et al., No. 18-1112 – Certified Questions from The United States District Court For the Southern District Of West Virginia:

A. Does West Virginia recognize a cause of action for pre-conception torts, that is an action brought by or on behalf of a person for injuries alleged to have resulted from negligent acts or omissions which occurred prior to the person's conception?

B. Does the term "person" as used in the West Virginia Wrongful Death Statute (W. Va. Code §§ 55-7-5 and 55-7-6) and interpreted in the Supreme Court of Appeals of West Virginia's opinion in *Farley v. Sartin*, 195 W. Va. 671, 466 S.E.2d 522 (1995), encompass an ectopic embryo/fetus?

September 4: Rule 20 Arguments

- *SER Primecare Medical of West Virginia, Inc. v. Faircloth*: Writ challenge to circuit court's denial of motion to dismiss for **failure to provide Notice of Claim and Certificate of Merit** and finding that **suicide watch protocols are within common knowledge of jurors** (meaning no expert is required).
- *McElroy Coal Company vs. Gary L. Dobbs*: Consolidated cases concerning whether **option to purchase** relates to a certain tract of property.

Sept. 9: Rule 19 Argument

SER Jaguar Land Rover Limited v. Honorable Charles King: Writ of Prohibition against **discovery sanction award for plaintiffs**, arguing plaintiff changed argument and defendant did not violate court order as required by Rule 37. Plaintiff accuses defense of intentional discovery abuse and ethics violations.

Sept. 11 (at Marshall University) : Rule 20

Division of Justice and Community Service et al. vs. Fairmont State University. Petitioners appeal Circuit Court order reversing the denial of Fairmont State's application to provide semester-long law enforcement training academy for its students majoring in criminal justice.

Arthur Patton v. County of Berkeley, et al.: Petitioner appeals dismissal of case arguing as “an issue of first impression,” whether “county level law enforcement agencies constitute ‘government agencies’ for the purposes of W.Va. Code § 55-17-3.” Also challenges Circuit Judge's refusal to recuse based on family relationship with prosecutor.



Supreme Court of Appeals of West Virginia **2021?**



May 12, 2020

- **Majority of WV Supreme Court will be decided** during May primary - 8 months from now
- **3 Open Seats** in Non-partisan election
Seats held by Workman, Hutchison & Armstead
- **2 Twelve Year Terms & 1 Four Year Term**
- Winners on 5/12/20 take office 12/31/2020
- 5 candidates filed as of 8/1/19

Potential Candidates for 5/12/20 Primary

Tim Armstead * 131,296
Joanna Tabit, Charleston* 111,915
James Douglas, Charleston* 47,609
John Hutchison, Beckley* appt'd
by Gov. Justice
William Schwartz, Charleston*
18,281
Bill Wooton, Beckley* 84,641
Denise Renee Smith 70,394
Jeff Kessler, Wheeling 60,077
Chris Wilkes, Martinsburg 66,037
Mark Hunt, Charleston 60,03
Robert Hatfield, Madison 39,155
Robert Frank, Lewisburg* 29,751
William S. Thompson, Madison
29,613
Jeff Woods, Hurricane 24,378
Jim O'Brien, Wheeling 28,766

* They applied for seat filled by John Hutchison
Means they have filed pre-election papers for 5/12/20
election
Numbers are votes they received in prior state-wide election
for WV Supreme Court races

Brendan Long, Scott Depot* 20,443
Hiram Lewis, Clay 20,303
Brenden Long, Scott Depot 20,443
Robert Carlton, Charleston* 17,964
Mark Sorsaia, Hurricane*
Harry Taylor, Charleston*
Joseph Wallace, Elkins*
Rusty Webb, Charleston*
Louis Palmer, Charleston*
Jim Rowe, Lewisburg *
Bradley Crouser, Charleston*
Lee Feinberg, Charleston*
Gregory Chiartis, Charleston*
Darrell McGraw, former AG 94,538
Bob Bastress, WVU Professor
Charles Trump, Chair Senate Judiciary

- Beth Walker won with 162,245 votes in field of 5
- Evan Jenkins won a field of 10 with 182,133
- Tim Armstead won a different field of 10 with 131,296



Some Thoughts

Issues from Last Year ...

3-2

Adopt *Daubert* standard

- *Harris v. CSX*: Limited expert inquiry
- Rewrite WVRE 702: Not just “novel”
- Follow *Kumho Tire*: Scrutinize all experts

Class Actions

- Harmonize with federal practice

Class Actions

Gaujot Opinion signals **closer alignment between WV Rule 23 and Federal Rule 23** as courts must **carefully examine commonality** requirement in WVRCP 23(a) consistent with *Wal-Mart Stores, Inc. v. Dukes* and **can consider the merits** of the action in deciding class certification following *Comcast Corp. v. Behrend*.

Expert Witnesses

Rule 702. Testimony by Expert Witnesses

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

In addition to the requirements in subsection (a), expert testimony based on a **novel scientific theory**, principle, methodology, or procedure is admissible only if:

- (1) the testimony is based on **sufficient facts or data**;
- (2) the testimony is the product of **reliable principles and methods**; and
- (3) the expert has **reliably applied** the principles and methods to the facts of the case.

COMMENT ON RULE 702

Rule 702 is a modified version of its federal counterpart. The revised rule applies existing case law that requires expert testimony *based upon novel scientific theories* to be evaluated by the trial court exercising its "gatekeeper" function. See Syllabus point 2, *Harris v. CSX Transportation*, 232 W.Va. 617, 753 S.E.2d 275 (2013).



Arbitration

- Decisions **continue trend of enforcing valid arbitration agreements** under the Federal and State Arbitration Acts
- Includes business as well as consumer and nursing home arbitration agreements
- Clear direction to Circuit Courts



The May 2020 Election
is Important.



Thanks

Anna Dailey ■ Marc Williams ■ Tom Hurney

Dinsmore

 **NELSON
MULLINS**

**JACKSON
KELLY** PLLC