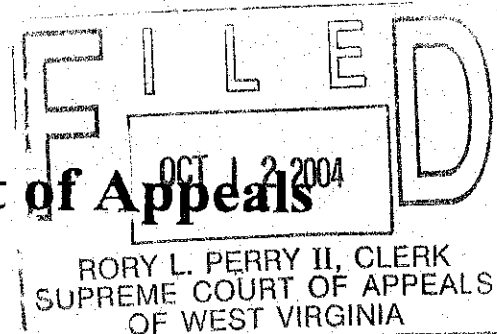


IN THE
West Virginia Supreme Court of Appeals



No. 31773

RITA MAE LOUK,

Plaintiff-Appellant,

v.

SERGE CORMIER, M.D.,

Defendant-Appellee.

**APPEAL FROM THE CIRCUIT COURT'S DENIAL OF
PLAINTIFF'S MOTION FOR A NEW TRIAL ON THE BASIS OF
THE UNCONSTITUTIONALITY OF THE NON-UNANIMOUS
VERDICT PROVISION OF THE WEST VIRGINIA MEDICAL PROFESSIONAL
LIABILITY ACT**

APPELLANT'S BRIEF

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KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

The proceeding below was a medical malpractice case by Rita Mae Louk against Serge Cormier, M.D. After a verdict was reached for the defendant, the plaintiff moved for a new trial, on the ground that the non-unanimous verdict provision of West Virginia's Medical Professional Liability Act was unconstitutional. Judge Alan Moats denied the motion, and the plaintiff now brings this appeal.

STATEMENT OF FACTS

On the recommendation of Dr. Cormier, Rita Louk underwent surgery on June 13, 2000. Dr. Cormier performed a hysterectomy and salpingo-oophorectomy, and Rita was discharged from the hospital four days later. Over the next several days, she became gravely ill, developing a fever, abdominal stress, constipation, bloating, and a tender abdomen. She went to the emergency room and was admitted to undergo exploratory surgery: that surgery revealed that the cause of these problems was a perforation of her cecum.

Rita filed a medical malpractice action in May 2002. The central issue was whether Dr. Cormier had perforated the cecum during the operation or whether it had spontaneously ruptured. After two days of trial, the case was submitted to the twelve-person jury prescribed by the Medical Professional Liability Act ("MPLA"). The judge instructed the jury that it did not need to reach a unanimous verdict, and the verdict came back non-unanimous.¹ Ten of the twelve jurors found for

¹ The full instruction was

Under the law of West Virginia that applies to this medical malpractice action, you should endeavor to reach a unanimous verdict. However, if you cannot reach a unanimous verdict, you should return a majority verdict of nine of the twelve members of the jury. The verdict shall bear the signatures of all jurors who have

Dr. Cormier. Rita filed a post-trial motion for a new trial, which Judge Moats denied. Rita then petitioned this Court for appeal.

ASSIGNMENTS OF ERROR

The court below erred by instructing the jury that a non-unanimous verdict could be reached, and by subsequently denying Plaintiff's motion for a new trial. The MPLA's non-unanimous verdict provision - W. Va. Code § 55-7B-6d - is unconstitutional because it is an encroachment on this Court's constitutional authority to regulate procedural matters in the trial courts of this state. This violates the separation of powers mandated by our state Constitution. In particular, this Court adopted Rule 48 of the West Virginia Rules of Civil Procedure, which, *inter alia*, codified this state's entrenched historical unanimity requirement and provided for an alternative to it. The MPLA non-unanimous verdict provision, being in conflict with that rule, is unconstitutional and therefore void.

concurrent in the verdict. The verdict shall be announced in open court, either by the jury foreperson or by any of the jurors concurring in the verdict.

POINTS AND AUTHORITIES

Cases

<i>Bennett v. Commonwealth Land Title Insurance Co.</i> , 372 S.E.2d 920 (1988)	6, 11
<i>Bledsoe v. Garcia</i> , 742 F.2d 1237 (10th Cir. 1984)	8, 10
<i>Colgrove v. Battin</i> , 413 U.S. 149 (1973)	9
<i>Daniel v. Charleston Area Medical Center</i> , 544 S.E.2d 905 (2001)	12
<i>Fox v. United States</i> , 417 F.2d 84 (5th Cir. 1969)	8, 9
<i>Grossheim v. Freightliner Corp.</i> , 974 F.2d 745 (6th Cir. 1992)	8, 10
<i>Kiser v. Caudill</i> , 599 S.E.2d 826 (2004)	8
<i>Masino v. Outboard Marine Corp.</i> , 652 F.2d 330 (3d Cir. 1981)	8, 9, 10
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<i>State ex rel. Affiliated Constr. Trades Found. v. Vieweg</i> , 520 S.E.2d 854 (1999)	5
<i>State ex rel. Leung v. Sanders</i> , 584 S.E.2d 203 (2003)	7, 8
<i>State ex rel. W. Va. Citizens Action-Group v. W. Va. Economic Development Comm.</i> , 580 S.E.2d 869 (2003)	5
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Treatises

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Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., <i>Litigation Handbook on West Virginia Rules of Civil Procedure</i> (Juris Publishing 2002).....	7
Marlyn E. Lugar & Lee Silverstein, <i>West Virginia Rules of Civil Procedure</i> (Michie 1960)	6
<i>Michie's Jurisprudence of Virginia and West Virginia</i> vol. 19, § 7, 667 (LexisNexis 2003).....	7

DISCUSSION OF LAW

Separation of powers is one of our government's most fundamental precepts.

“The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others[.]”

– *West Virginia Constitution, Article V, § 1.*

It is unquestioned that separation of powers is a concept intrinsic both to our state and federal governments. The Separation of Powers Clause of Article V, § 1, *supra*, “is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed.” *State ex rel. W. Va. Citizens Action Group v. W. Va. Economic Development Comm.*, 580 S.E.2d 869, 877 (2003) As Justice Davis has noted,

The Separation of Powers Clause is not self-executing. Standing alone the doctrine has no force or effect. The Separation of Powers Clause is given life by each branch of government working exclusively within its constitutional domain and not encroaching upon the legitimate powers of any other branch of government. This is the essence and longevity of the doctrine.

State ex rel. Affiliated Constr. Trades Found. v. Vieweg, 520 S.E.2d 854, 869 (1999) (concurring opinion).

Our state’s formula for the judiciary is found in Article VIII. Some of the courts’ “legitimate powers” are those found in § 3. Among them, “The court shall have the power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law.”

Power to create rules regarding trial “process, practice and procedure” is thus vested in the Supreme Court of Appeals, and such rules have primary force. This Court has held, “under Article VIII, Section 8 [and Section 3] of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of

Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them." *Bennett v. Commonwealth Land Title Insurance Co.*, 372 S.E.2d 920, syl. pt. 2 (1988) (modification in original).

Rule 48 – which requires a unanimous verdict unless the parties stipulate otherwise – is this Court’s exercise of its constitutional power to regulate procedural matters in our state’s trial courts.

Rule 48 of the West Virginia Rules of Civil Procedure states, “The parties may stipulate that the jury shall consist of any number fewer than six or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.” The rule explicitly provides an alternative to the traditional unanimous verdict. The obvious *implicit* meaning is that a unanimous verdict is the norm for civil trials.

Evidence of this presumption of a unanimity requirement is found in multiple sources. In Lugar and Silberstein’s seminal treatise on West Virginia’s newly adopted rules of civil procedure, the authors discussed Rule 48. Marlyn E. Lugar & Lee Silverstein, *West Virginia Rules of Civil Procedure* 364 (Michie 1960). They examined the question whether “the right of unanimous verdict” could be waived, given the constitutional right to trial by jury. They concluded, “Since the parties may waive jury trial altogether by failing to demand it, Rules 38 (d) and 39 (b), it would seem, *a fortiori*, that they can demand jury trial but waive *the requirement of unanimity*.” *Id.* (emphasis added). The mandatory nature of the unanimity requirement is apparent.

The analysis of the rule in *Michie’s Jurisprudence* also presents the rule in terms of a general mandate:

The assent of all the jurors is essential to a valid verdict. The Virginia Constitution and the Virginia Rules of Criminal Practice and Procedure both require the verdict in criminal prosecutions to be unanimous. The West Virginia Rules of Civil Procedure, however, provide that, if the parties so stipulate, a finding of a stated majority of the jurors will be taken as the verdict or finding of the jury.

Michie's Jurisprudence of Virginia and West Virginia vol. 19, § 7, 667 (LexisNexis 2003). The general rule is the requirement of unanimity, which the parties may modify if they so stipulate.²

Two other points also demonstrate that the meaning of Rule 48 is obvious. First, there is a notable absence of cases construing it. There simply has not been occasion to interpret it because it is an established part of this state's trial procedure. The second and related point is that trial courts consistently instruct that civil trial verdicts must be unanimous and routinely work from that presumption.³ This shows the elemental nature of the rule: unanimous verdicts simply have been and continue to be the law of this state. While this requirement spent its formative years as a common-law practice, it has matured as a rule issued by this Court under its constitutional authority.

The fact of a unanimity requirement in Rule 48 is also evidenced by the interpretations of its federal counterpart in the Federal Rules of Civil Procedure ("FRCP"), which have similarly concluded that verdict unanimity is implicit in the rule. West Virginia's Rules of Civil Procedure were patterned from the federal rules, and analysis of the latter is standard persuasive authority in interpreting the former. For example, in *State ex rel. Leung v. Sanders*, when analyzing the timing requirements of the rules regarding filing a third-party complaint, this Court cited the advisory committee notes of the federal rule. 584 S.E.2d 203 (2003). The Court then explained, "We have

² The *Litigation Handbook on West Virginia Rules of Civil Procedure*, unfortunately, does not provide any insight on this issue, but only cites *Masino v. Outboard Marine Corp.*, 652 F.2d 330 (3d Cir. 1981) and *Weiser v. Chrysler Motors Corp.*, 69 F.R.D. 97 (E.D.N.Y. 1975), discussed *infra*, in a footnote. Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 48, 844 (Juris Publishing 2002).

³ E.g., *McDaniel v. Kleiss*, 480 S.E.2d 170 (1996). "It is also recognized that *the very nature of the deliberative process, which requires the jurors to arrive at a unanimous verdict*, must of necessity require accommodation of individual views." *Id.* at 174 (discussing the rule against impeaching the jury verdict).

noted that "because the West Virginia Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, we often refer to interpretations of the Federal Rules when discussing our own rules." *Leung*, 584 S.E.2d at n. 3. (quoting *Keplinger v. Virginia Elec. & Power Co.*, 537 S.E.2d 632, 641 n.13 (2000)).⁴

Our original Rule 48 tracked the federal rule's language exactly, with its reference to twelve jurors instead of the current six. All four of the Circuit Courts of Appeal that have examined this issue have concluded that a unanimity requirement is implicit in the federal Rule 48. *Fox v. United States*, 417 F.2d 84 (5th Cir. 1969) (condemnation of quantities of drugs pursuant to the Food, Drug and Cosmetic Act); *Masino v. Outboard Marine Corp.*, 652 F.2d 330 (3d Cir. 1981) (personal injury case); *Bledsoe v. Garcia*, 742 F.2d 1237 (10th Cir. 1984) (§ 1983 action); *Grossheim v. Freightliner Corp.*, 974 F.2d 745 (6th Cir. 1992) (personal injury case).⁵

In *Fox*, the Fifth Circuit's analysis was straightforward: "Unless otherwise stipulated, the verdict in a civil case must be the unanimous verdict of twelve jurors. *Fed.R.Civ.P. 48.*" 417 F.2d at 89. Since one of the jurors had indicated that he had not voted for the government, the court found there was no unanimity, and it reversed and remanded the case. *Id.*

In *Masino*, the district court determined that, in a diversity case, the federal unanimity requirement of FRCP 48 should be applied instead of Pennsylvania's "five-sixths majority verdict rule." The court found that "[t]he long-standing commitment to unanimous jury verdicts in the

⁴ See also *Kiser v. Caudill*, 599 S.E.2d 826 (2004): "Traditionally, this Court has utilized decisions of the federal courts when interpreting and applying our Rules of Civil Procedure." In that case the Court adopted the federal courts' "sham affidavit" rule for use in Rule 56 summary judgment analysis.

⁵ *Contra Weiser v. Chrysler Motors Corp.*, 69 F.R.D. 97 (E.D.N.Y. 1975) (district court upheld local rule allowing a majority verdict of ten from a twelve-person jury). See n. 6, *infra*.

federal courts has been recognized in *Rule 48 of the Federal Rules of Civil Procedure* Implicit in the rule is that unless otherwise stipulated by the parties, a jury verdict in the federal courts must be unanimous” and that “[t]he ‘plain meaning’ of Rule 48 is that in the absence of a stipulation by the parties, a jury verdict must be unanimous in federal courts. *Masino*, 88 F.R.D. 251, 253, 255 (E.D. Pa. 1980) (citing *Fox*, *supra*, at 255).⁶ The Third Circuit agreed with this: “The federal unanimity requirement is implicit in *Fed.R.Civ.P. 48*[.]” *Masino*, 652 F.2d 330, 332 n. 2.

The *Masino* district court also explained the rule’s language.

The most likely reason why Rule 48 is not explicit in requiring unanimous verdicts is because the draftsmen of the Rules probably never thought it necessary to codify the unanimity requirement. As Justice Douglas has stated, “The unanimous jury has been so embedded in our legal history that no one would question its constitutional position and thus there was never any need to codify it.” *Johnson v. Louisiana*, 406 U.S. 356, 382 n.1, 92 S. Ct. 1629, 1644 n.1, 32 L. Ed. 2d 152 (1972) (dissenting opinion).

88 F.R.D. at n. 4.

⁶ The district court specifically rejected the reasoning of *Weiser*, *supra* n. 5, which held that there was no longer any federal procedural rule requiring unanimity in federal courts, relying on *Colgrove v. Battin*, 413 U.S. 149 (1973), which held that the rule did not require a twelve-person jury. The *Masino* court held

We cannot accept *Wieser*’s broad reading of the *Colgrove* case. The Supreme Court in *Colgrove* only addressed the narrow issue of whether district courts could provide in their local rules for a six-man jury in civil cases. The Court was not presented with the question of whether there must be unanimous agreement among jurors in order to render a verdict in federal civil trials. The Justices in no way intimated that unanimous jury verdicts, which have been utilized in federal courts for almost 200 years, are not required by the Federal Rules of Civil Procedure. We do not believe that *Colgrove* can be read as an abandonment of the long-held federal rule requiring unanimous verdicts.

88 F.R.D. at 255.

The next circuit court case was *Bledsoe, supra*. The appellants had raised the argument made in *Weiser*, and the Tenth Circuit noted that it had been rejected in *Masino*. The Tenth Circuit found no error in the trial court's unanimity instruction.

Finally, the Sixth Circuit also held that federal law requires a unanimous verdict. *Grossheim*, 974 F.2d 745, 752-753. The district court had granted a mistrial after it found, after polling and interview, that one juror "genuinely disagreed" with the verdict. *Grossheim*, 974 F.2d at 753. The district court judge examined FRCP 48.

The reasoning implicit in the rule becomes clear when one reviews that rule: "The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury," which would give the clear impression that if there is no stipulation, there must be unanimity, that the unanimity requirement may only be relieved by stipulation.

Grossheim, 974 F.2d at 750. He also looked at the Third Circuit's statement in *Masino*, that "the federal unanimity requirement is implicit" in the rule, and then concluded, "So it appears that the federal rule of unanimity is rather implicit without having been stated per se." *Grossheim*, 974 F.2d at 750-751.

Federal Practice and Procedure also noted that the rule had a unanimity presumption. Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* vol. 9A, § 2492, n. 13 (2d ed., West 1995). The authors also state that federal rule's 1991 language change, if anything, strengthened that presumption – that a verdict must be unanimous in the absence of a stipulation by the parties.⁷ *Id.*

⁷ In 1991, the federal rule was amended to reflect local district court rules, which had generally adopted a six-person jury. The amended rule reads

The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the

**West Virginia Code § 55-7B-6d – which allows a non-unanimous verdict –
conflicts with Rule 48 and is therefore unconstitutional.**

Section 6d provides, *inter alia*,

Notwithstanding any other provision of this code, the jury in any trial of an action for medical professional liability shall consist of twelve members. The judge shall instruct the jury that they should endeavor to reach a unanimous verdict but, if they cannot reach a unanimous verdict, they may return a majority verdict of nine of the twelve members of the jury. The judge shall accept and record any verdict by nine members of the jury. . . .

While the legislature has extensive powers, there is a duty both on it and on this Court to avoid violations of the separation of power mandated by our constitution. As discussed above, the Court has plenary power to enact rules related to procedural matters in the state's trial courts. Legislation is not, of course, rendered unconstitutional merely because it touches on a subject that is governed by one of these rules. Instead, a particular law is only unconstitutional when it is in direct conflict with a rule, or when the legislature clearly intrudes into the Court's province.

An example of this power interplay is found in *Bennett, supra*. In that case this Court examined the jury qualification forms requirement then found in West Virginia Code § 52-1-7. After asserting its authority to enact procedural rules, the Court concluded that

This Court's rule regarding jury selection, W. Va. T.C.R. XII, does not, however, address the matter of juror qualification forms. Therefore, until this Court promulgates such a rule, the Legislature is not disabled from filling in the interstices, and we see no reason to invalidate the statutory requirements in question.

Id. at 923.

The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in sized to fewer than six members.

On a more related note is *Daniel v. Charleston Area Medical Center*, 544 S.E.2d 905 (2001). In that case, this Court interpreted a provision of the MPLA (§ 55-7B-6(a)) to require that, once a court determined that expert testimony would be required, a court must allow a reasonable period of time for the party to retain an expert witness, notwithstanding a prior Rule 16(b) deadline for disclosing experts. *Daniel*, 544 S.E.2d 908. Justice Davis wrote a concurring opinion to explicitly reconcile the statutory requirements with WVRCP 16 and to provide "additional guidance in understanding and applying the holding." *Id.* at 909 (joined by J. Maynard). In footnote 2, Justice Davis also raised the question whether the statute at issue "offends the constitutional authority of this Court to regulate procedural matters in the trial courts of this State" She concluded – in that case – that the procedural rules there at issue "[were] not in conflict with Rule 16(b), but rather they supplement the rule." *Id.* at n. 2.

Two other cases are representative of the flip side – when the legislature has transgressed upon the Court's authority. First, *Stern Bros., Inc. v. McClure*, 236 S.E.2d 222 (1977). *Stern Bros.* involved the procedures to be used for appointing a substitute judge after a trial judge has been disqualified. Although prior statutes purported to deal with the issue, the Court had since that time enacted a rule on the issue. The Court reiterated the basis for its rulemaking authority and noted that the statutory procedures were ineffective and "cumbersome at best." *Id.* at 574. The Court then concluded,

The administrative rule promulgated by this Court now controls the procedure for selection of a temporary judge where a disqualification exists as to a circuit court judge. Under Article VIII, Section 8 of the West Virginia Constitution, it operates to supercede the existing statutory provisions found in W. Va. Code, 51-2-9 and -10, and W. Va. Code, 56-9-2, insofar as they relate to the selection of special judges or the assignment of the case to another circuit judge when a circuit judge is disqualified.

Our Rule 48 was amended in 1998 to reflect the language change from twelve jurors to six.

Id. at 575.

The second illustrative case is *Mayhorn v. Logan Medical Foundation*, 454 S.E.2d 87 (1994). In *Mayhorn*, the cross-assignment of error involved the MPLA's § 55-7B-7, "which outlines the qualifications of an expert in a medical malpractice case." *Id.* at 94. The Court found that West Virginia Rule of Evidence 702 was instead the proper authority to determine expert witness qualifications.

This Court has complete authority to determine an expert's qualifications pursuant to its constitutional rule-making authority. . . . Accordingly, we hold that Rule 702 of the West Virginia Rules of Evidence is the paramount authority for determining whether or not an expert is qualified to give an opinion. Therefore, to the extent that *Gilman v. Choi*, 185 W. Va. 177, 406 S.E.2d 200 (1990) indicates that the legislature may by statute determine when an expert is qualified to state an opinion, it is overruled.

Id. at 94.

This Court has recently even more specifically discussed the interplay between its rules and the MPLA, in *West Virginia ex rel. Weirton Medical Center v. Muzzone*, 587 S.E.2d 122 (2002).

There the Court held, *inter alia*, that

the provisions of the Medical Professional Liability Act, W. Va. Code §§ 55-7B-1 to -11, govern actions falling within its parameters, *subject to this Court's power to promulgate rules for all cases and proceedings, including rules of practice and procedure, pursuant to Article VIII, Section 3 of the West Virginia Constitution.*

Id. at 128 (emphasis added).

In this case, § 55-7B-6d does conflict with Rule 48. The subsection clearly states that in medical malpractice cases, the jury's verdict does not have to be unanimous – a majority verdict of nine of the twelve will suffice. This is directly contrary to the unanimity requirement implicit in Rule 48, as discussed above. The appellee argued in his response to the petition for appeal that the section does not conflict with the rule but instead only expresses an "additional option[]" that *may* be

stipulated to by the parties” This, of course, begs the question – an option to *what*? The default – the “what” – is a unanimous verdict, implicit in the rule’s language, obvious from local commentary and practice, and obvious from interpretations of the analogous federal rule.

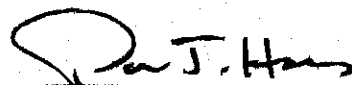
By instructing the jury that it could reach a verdict in contradiction to that required by Rule 48, the court below erred, and the Plaintiff is entitled to a new trial. The court’s denial of the Plaintiff’s motion for a new trial was thus also erroneous.

RELIEF PRAYED FOR

Plaintiff requests that this Court find West Virginia Code § 55-7B-6d unconstitutional and reverse the lower court and remand with directions for a new trial.

Dated this 12th day of October 2004.

Plaintiff,
by counsel,



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CERTIFICATE OF SERVICE

I, Paul J. Harris, counsel for appellant, hereby certify a true and exact copy of *Appellant's Brief* was served via U.S. mail, first class, postage prepaid, this 12th day of October 2004, to counsel of record for appellee as follows:

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