

IN THE
WEST VIRGINIA SUPREME COURT OF APPEALS

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 31773

RITA MAE LOUK,

Plaintiff-Appellant,

v.

SERGE CORMIER, M.D.,

Defendant-Appellee.

APPELLEE'S REPLY BRIEF

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I. Proceeding and Nature of the Ruling in the Lower Tribunal

This response of Appellee Serge Cormier, M.D. is filed in opposition to the Appellant's Brief that was filed by the Plaintiff below and Appellant herein, Rita May Louk, on October 12, 2004, and received by Appellee on October 14, 2004. The Appellant has taken appeal of an Order entered by the Circuit Court of Randolph County, Judge Alan Moats presiding by assignment, which was entered on December 19, 2003, denying the Appellant's Motion for New Trial. The sole basis for the Appeal is that the provision of the Medical Professional Liability Act, West Virginia Code § 55-7B-6d (2002), authorizing non-unanimous majority verdicts in medical malpractice actions filed after March 1, 2002, is unconstitutional. Judge Moats denied the Appellant's Motion for New Trial on December 19, 2003, before the Appellee herein had an opportunity to file his brief in opposition to the Motion for New Trial.

II. Statement of Facts

On May 22, 2002, the Plaintiff filed her complaint, containing allegations of medical negligence against Appellee Cormier. Appellee Cormier timely filed his answer to the Complaint on July 11, 2002.¹ The proceedings were delayed for several months after the first attorney representing the Appellant that filed the complaint was allowed to withdraw from the case due to doubts over the viability of the action, and the matter did not proceed until current counsel, Paul Harris, entered an appearance on or about January 10, 2003.

On December 2, 2003, the trial of this matter commenced, with the Honorable Alan D. Moats presiding over the trial by assignment of the West Virginia Supreme Court of Appeals, following the recusal of Randolph County Circuit Judge John L. Henning, Jr. The presentation of the evidence first by the Plaintiff, then by the Defendant, was completed on December 4, 2003, after which the Court read the jury charge and instructions of law to the jury, and counsel for the parties presented their closing arguments. As set forth in the Judgment Order entered by Judge Moats, a verdict was rendered by the jury after approximately ninety minutes of deliberation. The verdict form reflected that 10 of 12 jurors found in favor of Defendant Cormier, resulting in a verdict in favor of the Defendant. The Judgment Order was entered by Judge Moats on December 15, 2003.

¹ Dr. Cormier was not immediately served with the complaint after it was filed on May 22, 2002.

III. Response To Appellant's Assignment of Error

The Provision of West Virginia Code § 55-7B-6d of The Medical Professional Liability Act That Authorizes A Jury To Render A Non-Unanimous Majority Verdict In A Medical Malpractice Case Is Not Unconstitutional, And The Court Did Not Err In Instructing The Jury Consistent With the Statute. The Appellant Waived The Right To Challenge the Constitutionality Of West Virginia Code § 55-7B-6d. In The Alternative, The Appellant Failed To Establish Any Prejudice From Application Of The Statute That Would Warrant A New Trial.

POINTS AND AUTHORITIES

Cases

<i>Bennett v. Warner</i> , 179 W.Va. 742, 372 S.E.2d 920 (1988)	16
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IV. Discussion of Law

1. The Appellant Failed To Properly Preserve Her Objection And Constitutional Challenge To The Court's Instruction To The Jury That The Verdict Could Be Non-unanimous, Therefore Any Right To Challenge At This Stage Was Waived.

From a review of the portions of the record that were designated by the Appellant, the Appellant clearly failed to properly preserve any objection or challenge to the constitutionality of West Virginia Code § 55-7B-6d (2002), which authorized the trial court in this instance to instruct the jury that it could render its verdict against either party with the consent of at least 9 out of 12 members of the jury. Based on the record before the Court, it is clear that the first point in time that this objection or constitutional challenge was made was in the Plaintiff's Motion for New Trial, *after* the verdict was rendered. Under the law of West Virginia, the Appellant waived her right to challenge the constitutionality of the statute under these circumstances.

Where objections were not shown to have been made at the trial court level, and the matters of concern were not jurisdictional in nature, those objections should not be considered on appeal. *Estep v. Brewer*, 453 S.E.2d 345 (W.Va. 1994). See also *Shaffer v. Acme Limestone*, 206 W.Va. 333, 524 S.E.2d 688 (1999). To preserve an issue for appellate review, a party must articulate the objection or issue with "sufficient distinctiveness" to alert a Circuit Court to the nature of the claimed defect. *State v. Shrewsbury*, 213 W.Va. 327, 582 S.E.2d 774 (2003); *Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720 (1998). See also *Konchesky v. S. J. Groves and Sons Company*, 135 S.E.2d 299 (W.Va. 1964). In this regard, it has been held that a non-jurisdictional question raised on appeal had not been properly preserved at the trial court level when the objection was not raised by the Appellant until *after* the jury had

rendered a verdict. *West Virginia Department of Highways v. Delta Concrete Co.*, 165 W.Va. 398, 402, 268 S.E.2d 124, 127 (1980).

The Supreme Court of Appeals of West Virginia has held that a litigant “may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.” *Page v. Columbia Natural Resources, Inc.*, 198 W.Va. 378, 480 S.E.2d 817 (1996), Syllabus point 6 (citing Syllabus point 1 of *Maples v. West Virginia Department of Commerce*, 197 W.Va. 318, 475 S.E.2d 410 (1996)).

In West Virginia, a presumption favors the constitutionality of West Virginia Code § 55-7B-6d, as held in *Sale v. Goldman*, 208 W.Va. 186, 539 S.E.2d 446 (2000) at Syllabus Pt. 1:

1. “When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a Court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.” Syllabus point 3, *Willis v. O'Brien*, 151 W.Va. 628, 153 S.E.2d 178 (1967).

By the decision of *Sale*, this presumption was also reaffirmed in Syllabus point 2 as follows:

2. “The primary objective in construing a statute is to ascertain and give effect to the intent of the legislature.” Syllabus point 1, *Smith v. State Workmen’s Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975).

The sole issue raised in this appeal relates to the constitutionality of West Virginia Code § 55-7B-6d, and the Appellant failed to properly preserve the objection for appeal. In his opinion for the court in the case of *Whitlow v. Board of Education of Kanawha County*, 190 W.Va. 223, 438 S.E.2d 15 (1993), Justice Miller wrote that a constitutional question raised for the first time on appeal will only be addressed if it is a “controlling issue” in the resolution of the case. *Whitlow*, 190 W.Va. 223, 226, 438 S.E.2d 15, 19. In the matter

presently before the Court, the resolution of the constitutionality of West Virginia Code § 55-7B-6d is clearly not a “controlling issue.”

The Appellant raised no objection to the actual instruction given to the jury by the Court that tracked the language of West Virginia Code § 55-7B-6d.² Based on her brief, the Appellant has no objection to the requirement in the statute for a 12 person jury, and only challenges the constitutionality of the provision for the non-unanimous majority verdict of 9 out of 12 jurors. Although the Appellant does not criticize the wording of the instruction on non-unanimity, the last logical point in time for the Appellant to have challenged the constitutionality of this provision in the statute would have been prior to the point when Judge Moats read the instructions to the jury. However, there was never any objection to the non-unanimity provision in the instruction to the jury until the Appellant filed her Motion for New Trial. As with other potential trial errors, the Supreme Court of Appeals of West Virginia has held that objections to instructions must also be made in a timely fashion, prior to arguments to the jury. See *Keese v. General Refuse Service, Inc.*, 2004 WL 1472010 (W.Va., June 29, 2004), Syllabus point 10. The general rule on this subject was succinctly stated by Justice Davis in her opinion for this Court in *Tracy v. Cottrell*, 206 W.Va. 363, 524 S.E.2d 879 (1999):

Before reaching the merits of the parties’ contentions, it is necessary to review the applicable law. Typically, this Court refuses to consider instructional error on appeal unless an objection was made at trial.

² The following passage was included in the jury charge by Judge Moats:

Unanimity. 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 9 of the 12 members of the jury. The verdict shall bear the signatures of all jurors who have concurred 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.

As a general rule, no party may assign as error the giving of an instruction unless he objects thereto before the arguments to the jury are begun, stating distinctly as to the instruction the matter to which he objects and the grounds of his objection; and ordinarily only grounds thus assigned in the trial court will be considered on appeal of the case to this Court.

Syl. pt. 6, *State v. Davis*, 153 W.Va. 742, 172 S.E.2d 569 (1970). *Accord* W.Va. R. Civ. P. 51 (same); Syl pt. 1, *Roberts v. Powell*, 157 W.Va. 199, 207 S.E.2d 123 (1973) (“A party may only assign error to the giving of instructions if he objects thereto before arguments to the jury are begun stating distinctly the manner to which he objects and the grounds of his objection”).

Tracy, 206 W.Va. 363, 375-376, 524 S.E.2d 879, 891-892.

No cases have been decided by the Supreme Court of Appeals of West Virginia that are directly on point with the question presented by this case. Counsel for the Appellee performed an exhaustive search for similar decisions in other jurisdictions, resulting in the discovery of several cases involving situations analogous to the case at bar.

The Supreme Court of North Dakota has held that an attack on the constitutionality of a state statute permitting a verdict to be returned by five-sixths of a jury in an action for conversion of personal property could not be considered on appeal because the question had not been raised at trial. *Company A, First Regiment, North Dakota National Guard Training School v. Hughes*, 205 N.W. 722 (N.D. 1925).

The Court of Special Appeals of Maryland ruled that the constitutionality of a provision of the Maryland Consumer Protection Act that denied a right to a jury trial would not be reviewed because no request for a jury trial had ever been made at the trial level and the issue was not raised until the matter was appealed. *Smith v. Attorney General of Maryland*, 46 Md.App. 78, 94, 415 A.2d 651, 660 (Md.Ct.Spec.App. 1980).

The Supreme Court of Arkansas held that a constitutional claim assailing the Arkansas attorney's lien statute could not be raised on appeal because the appellant failed to raise the

constitutional claim until her motion for new trial, and the Court found that the question had not been properly preserved for appellate review. *Lee v. Daniel*, 350 Ark. 466, 91 S.W.3d 464 (Ark. 2002).

The Supreme Court of Missouri ruled that a constitutional question regarding the trial court's refusal to give certain individual instructions to the jury had not been properly preserved and would not be reviewed by the Supreme Court, in the case of *Hartzler v. Metropolitan St. Ry. Co.*, 117 S.W. 1124 (Mo. 1909). In the Court's opinion, it was noted that "[U]p to the moment of verdict and judgment, no constitutional guaranty was invoked by Defendant." *Id.* In support of the ruling that the constitutional question was not properly preserved, the Court in *Hartzler* observed that there had been numerous missed opportunities to preserve the constitutional question:

It becomes apparent, from an examination made of the record, that the constitutional question, in due course of orderly procedure below, could have been put on the case by the answer, or in the instructions, or in other timely ways, so as to save it. The motion for a new trial was not the first door open for the question to enter, and in our later decisions we have ruled that *a question of such gravity must be raised as soon as orderly procedure will allow*; and this in order that the trial court may be treated fairly, and the question get into the case under correct safeguards and earmarked as of substance and not mere color.

Hartzler, 117 S.W. 1124 (emphasis added).

In the recent case of *Cockrell v. Pearl River Valley Water Supply District*, 865 So.2d 357 (Miss. 2004), the Supreme Court of Mississippi held that an attack on the constitutionality of a provision of the Mississippi Tort Claims Act (MTCA) that provides that motorist claims are to be determined *without* a jury, had been waived because the motorist failed to raise the claim at the trial court level. Similarly, the Supreme Court of Mississippi held that a claimed violation of the separation of powers doctrine of the Mississippi Constitution (concerning process to initiate parental rights termination proceedings by

Mississippi DHS) was waived for failure to properly preserve the question at the trial court level. *In the Interest of V.R., G.R., and B.J.R. v. Dept. of Human Services for the State of Mississippi*, 725 So.2d 241 (Miss. 1998). See also *Colburn v. State*, 431 So.2d 1111, 1114 (Miss. 1983).

The Supreme Court of Nebraska has held that a claimed unconstitutional violation of the doctrine of separation of powers in the Nebraska Constitution (concerning issuance of a peremptory writ in a mandamus proceeding) could not be maintained because the argument was not properly presented to the lower court, even though the question involved a constitutional claim. *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002).

Ample authority exists for the rejection of this appeal simply on the basis of the failure of the appellant to properly preserve the question of constitutionality of West Virginia Code § 55-7B-6d prior to her motion for new trial. On this basis alone, the appeal should be rejected and the ruling of Judge Moats denying the motion for new trial should be affirmed.

2. West Virginia Code § 55-7B-6d Is Not In Direct Conflict With Any Existing Rule of Procedure Regarding Jury Verdicts, And Therefore Does Not Violate The Separation Of Powers Provision Of The West Virginia Constitution.

A presumption of constitutionality of a statute is a time honored maxim of West Virginia law. In cases involving the separation of powers doctrine of the state constitution, this presumption is no less important, as set forth in Syl. Point 1 of *State ex rel. Blankenship v. Richardson*, 196 W.Va. 726, 474 S.E.2d 906 (1996):

1. “ ” “In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative, and executive branches. [*W.Va. Const. Art. V, § 1*]. Every reasonable construction must be resorted to by the courts in order

to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.” Syl. Pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965).’ Syl. Pt. 2, *West Virginia Public Employees Retirement System v. Dodd*, 183 W.Va. 544, 396 S.E.2d 725 (1990).” Syl. Pt. 1, *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 408 S.E.2d 634 (1991).

In his opinion for the Court, Justice McHugh noted that while it is the duty of the Supreme Court to determine the constitutionality of legislation, it is improper for the Court to “sit as a superlegislature, commissioned to pass upon the political, social, economic, or scientific merits of statutes pertaining to proper subjects of legislation. *Boyd v. Merritt*, 177 W.Va. 472, 474, 352 S.E.2d 106, 108 (1986). It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation.” 196 W.Va. 726, 731, 474 S.E.2d 906, 911.

In her brief, the appellant cites *Bennett v. Warner*, 179 W.Va. 742, 372 S.E.2d 920 (1988). Syl. Pt. 1 and 2, which are indeed relevant to the case presently before the Court, state as follows:

1. Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice and procedure, which shall have the force and effect of law.

2. “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.” Syl. Pt. 1, *Sterns Brothers, Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977).

(emphasis added).

In *Bennett*, the Supreme Court of Appeals found that a statute requiring the completion of juror qualification forms did not violate the separation of powers or the Court’s authority to

establish rules of procedure. In the Court's opinion, Justice Darrell V. McGraw, Jr. made the following observation:

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.

179 W.Va. 742, 745, 372 S.E.2d 920, 923 (emphasis added).

In the decision of *Frazier v. Meadows*, 193 W.Va. 20, 454 S.E.2d 65 (1994), Justice Cleckley, in his opinion for the Court, observed that the line of cases that included *Bennett v. Warner* and *Sterns Brothers, Inc. v. McClure* clarified where the line should be drawn for statutory law in the area of the administration of the state's judicial system. As noted in footnote 8 of the opinion by Justice Cleckley, "[t]he important point culled from these various cases is that statutory provisions are preceded only if there is a *direct* conflict." *Frazier*, 193 W.Va. 20, 25, 454 S.E.2d 65, 70 (1994). In a decision parallel to *Bennett v. Warner*, the Supreme Court of Appeals in *State ex rel. Kenamond v. Warmuth*, 179 W.Va. 230, 366 S.E.2d 738 (1988), found that a venue statute that predated the 1960 promulgation of the West Virginia Rules of Civil Procedure was not invalidated when the rules took effect, noting that "none of the provisions of the West Virginia Rules of Civil Procedure now attempt to modify the venue of actions in our circuit courts, and those limitations existing before promulgation of those rules should continue in existence." 179 W.Va. 230, 232, 366 S.E.2d 738, 740. In the opinion of the Court in *Kenamond*, Justice Darrell V. McGraw, Jr. again found no direct conflict between the venue statute and any specific rule of civil procedure.

In the decision of *State ex rel. Weirton Medical Center v. Mazzone*, 214 W.Va. 146, 587 S.E.2d 122 (2002), the Court revisited the issue of the statutory requirement for a

“mandatory status conference” to resolve the necessity for expert testimony in medical malpractice cases. Syl. Pt. 3 of the decision is pertinent to the case presently before the Court:

3. The provisions of the Medical Professional Liability Act, West Virginia Code §§ 55-7B-1 to-11 (1986), governed actions falling within its parameters, subject to this Court’s powers 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.

On numerous occasions, the Supreme Court of Appeals has reviewed various sections of the Medical Professional Liability Act, West Virginia Code § 55-7B-1 *et seq.* (1986), in the context of the Court’s authority to promulgate rules for West Virginia Courts related to process, practice and procedure. On the one hand, the Appellant correctly pointed out that in the decision of *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.2d 87 (1994), the Supreme Court of Appeals found that West Virginia Code § 55-7B-7 (setting forth the criteria for expert witnesses in medical malpractice cases) was in conflict with Rule 702 of the West Virginia Rules of Evidence. However, there have been numerous decisions by this Court holding that other sections of the Medical Professional Liability Act were not in direct conflict with the authority of this Court to regulate matters related to practice and procedure within West Virginia courts. For example, Justice Davis noted in her lucid and constructive concurring opinion to *Daniel v. CAMC*, 209 W.Va. 203, 544 S.E.2d 905 (2001), that West Virginia Code § 55-7B-6(a) was not in direct conflict, but actually supplemented Rule 16(b) of the West Virginia Rules of Civil Procedure relating to scheduling conferences. As concisely summarized by Justice Davis in footnote 2 of her concurring opinion, several decisions of this Court have approved sections of the MPLA “which touched upon procedural matters that fell under the direct constitutional supervisory area of this Court.” 209 W.Va. 203, 207, 544 S.E.2d 905, 909. In footnote 2, Justice Davis cited *Robinson v. CAMC*, 186

W.Va. 720, 414 S.E.2d 877 (1991) (upholding the non-economic damages cap of West Virginia Code § 55-7B-8); *McGraw v. St. Joseph's Hospital*, 200 W.Va. 114, 488 S.E.2d 389 (1997) (trial court discretion to require expert testimony in medical malpractice cases, per West Virginia Code § 55-7B-7); and *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997) (upholding the maximum 10 year limitation for medical malpractice cases irrespective of the "discovery rule," per West Virginia Code § 55-7B-4(a)).

As noted by Justice Maynard, writing for the majority in *Hicks v. Ghaphery*, 212 W.Va. 327, 571 S.E.2d 317 (2002), "medical malpractice cases are unique and have their own set of rules of evidence, practice and procedure as set forth in the MPLA . . ." 212 W.Va. at 339, 571 S.E.2d at 329. In that decision, Justice Maynard noted that it was appropriate to "carve out a narrow exception to the Dead Man's Statute which limits its applicability to medical malpractice cases." *Id.* In *Hicks*, the Court invoked its rule making authority to carve out this narrow exception for medical malpractice cases.

In the context of these cases, the Court must decide whether West Virginia Code § 55-7B-6d invades the province of the direct constitutional supervisory authority of this Court to regulate practice and procedure within the state Courts, or merely supplements and "fills in the interstices" of Rule 48 of the West Virginia Rules of Civil Procedure.

Consider first the authority of the legislature to enact West Virginia Code 55-7B-6d, authorizing verdicts in medical malpractice cases by at least 9 of 12 jurors. Although the Supreme Court of Appeals has the paramount authority to fashion a rule which requires unanimity across the board in all types of cases, the legislature is not precluded to act on this subject when the judiciary has not acted, as observed by Justice Lively many decades ago:

At common law, unanimity of a verdict was required in both civil and criminal cases, and volume I of Brickwood's Sackett's Instructions, § 264, says that it is a

requirement under the constitutions of most of the states of the union. Whether the requirement is wise or not (and there has been criticism of it), we are bound by the common law, *unless changed by our constitution or statutes* (Const. art. 8, § 21), and there has been no change by either.

Emery v. Monongahela West Penn Public Service Co., 163 S.E. 620, at 625 (W.Va. 1932) (emphasis added), *modified on other grounds by Robertson v. Hobson*, 171 S.E. 745 (1933).

In her brief, the Appellant devoted enormous energy to the proposition that unanimity is so “implicit” in Rule 48 of the Federal Rules of Civil Procedure that this Court should also conclude that unanimity is equally implicit in Rule 48 of the West Virginia Rules of Civil Procedure. First, the Appellant has conceded that neither Rule 48 of the West Virginia Rules of Civil Procedure, nor its federal counterpart, are *explicit* about unanimity. Second, a close side-by-side comparison of the West Virginia and Federal counterparts of Rule 48 reveals that the two rules are not “analogous” as suggested by the Appellant, and are vastly different:

FRCP 48	<p>Rule 48. Number of jurors – Participation in verdict. 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 size to fewer than six members. (Amended by order adopted April 30, 1991, effective December 1, 1991.)</p>
WVRCP 48	<p>Rule 48. Juries of less than six; majority verdict. 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. (Amended by order adopted February 19, 1998, effective April 6, 1998.)</p>

Comparing the two rules, the differences could not be more clear. Federal Rule 48 clearly mandates that district courts “shall” seat a jury of six to twelve members, and allows for parties to stipulate to non-unanimity. On the other hand, West Virginia Rule 48 does not contain any mandate to our trial courts. To the contrary, WVRCP 48 simply enables “the

parties” to stipulate to juries less than six or to non-unanimity. While it is arguable that unanimity is implicit in Federal Rule 48, the same cannot be said for West Virginia Rule 48.

Until the Supreme Court of Appeals of West Virginia rewrites Rule 48 to mandate juror unanimity across the board, West Virginia Code § 55-7B-6d does not violate the constitutional prerogative of the judiciary to promulgate rules for practice and procedure in West Virginia Courts. Until this Court revises Rule 48 to mandate unanimity in all cases, West Virginia Code § 55-7B-6d does not violate the separation of powers doctrine of Article VIII, Section 3 of the West Virginia Constitution. As a result, the trial court’s denial of the motion for new trial should be affirmed.

3. The Trial Court’s Denial of the Motion for New Trial Should Be Affirmed Because The Appellant’s Claim of Prejudice Is Speculative.

In her brief, the Appellant fails to provide any explanation as to how the majority verdict provision of the statute was prejudicial to her cause. However, it can reasonably be assumed that the Appellant would argue that if the non-unanimity provision had not been applied, either (1) she would have been the beneficiary of a mistrial due to a deadlocked jury, or (2) that the 10 jurors persuaded to find for the defense after only 90 minutes of deliberation would have miraculously reversed their positions, having been persuaded to do so by the 2 holdouts. In the last paragraph of *Masino v. Outboard Marine Corp.*, 88 F.R.D. 251 (1980), cited by the Appellant in her brief, the Third Circuit Court of Appeals held that the impact of application of a state majority jury verdict rule was harmless error and the claim of prejudice was “simply too speculative.” In that case, it was held that the District Court was justified in applying the federal unanimity rule rather than the state rule requiring a five-sixths majority, because it was a matter of federal rather than state procedural law. However, the Third Circuit Court of Appeals in *Masino* also found that the appellants could not show prejudice

because the verdict for the defense turned out to be unanimous. The Third Circuit Court of Appeals pointed out that for the Plaintiff to have prevailed, one must assume that “all but one of the jurors could have initially favored their side but that the requirement of unanimity eventually caused all the jurors to accede to the views of the lone holdout . . .”. Although the verdict in the case at bar was not unanimous, it is equally speculative for the Appellant to argue that the jury would not have returned a unanimous verdict *if it had been instructed that unanimity was mandatory*. In this case, it is most likely that if the jury had been instructed that unanimity was mandatory, the jury would have continued to deliberate beyond 90 minutes, and the 2 holdouts more likely than not would have been convinced to find in favor of the defense, along with the 10 members already so convinced. Under these circumstances, the most likely scenario would not have been a verdict for the plaintiff or a deadlocked jury, but rather, a unanimous defense verdict by which the 2 holdouts were eventually convinced of the infinite wisdom of the “supermajority.” Therefore, the speculation inherent in the Appellant’s implicit argument of prejudice warrants a holding in favor of the Appellee.

V. Relief Prayed For

The statute at issue, West Virginia Code §55-7B-6d does not violate the West Virginia Constitution, and the Appellant’s claim was not properly preserved for appeal. The Circuit Court of Randolph County, Judge Moats presiding, acted properly by instructing the jury, consistent with the statute, that it should endeavor to reach a unanimous verdict, but would be authorized to render a verdict with the consent of at least nine of the twelve members of the jury. In the alternative, the suggestion of any prejudice to the Appellant is too speculative to warrant a new trial. For the foregoing reasons, Appellee Serge Comier, M.D. respectfully requests that this Honorable Court hold that West Virginia Code §55-7B-6d is not

unconstitutional, that the ruling of Judge Moats which denied the Motion for New Trial be affirmed, and further rule that the Appeal be rejected and denied.

Respectfully submitted,



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**IN THE
WEST VIRGINIA SUPREME COURT OF APPEALS**

No. 31773

RITA MAE LOUK,

Plaintiff-Appellant,

v.


SERGE CORMIER, M.D.,

Defendant-Appellee.

CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that on the 28th day of October, 2004, the foregoing "**Appellee's Reply Brief**" was served by depositing a true and exact copy thereof in the United States mail, postage pre-paid, addressed to the following counsel of record:

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