

No. 31944

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

---

CHARLESTON

---

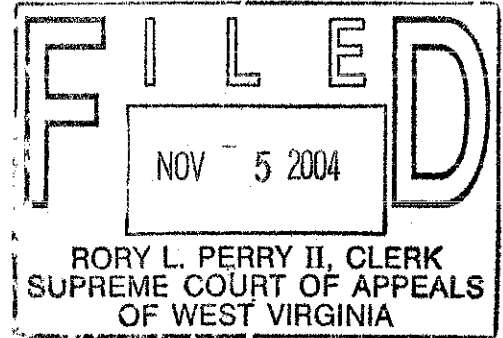
SHIRLEY CROCK and  
GRACE WASHINGTON,

Petitioners/Appellants,

v.

HARRISON COUNTY BOARD OF EDUCATION,

Respondent/Appellee.



---

BRIEF  
ON BEHALF OF APPELLANTS  
SHIRLEY CROCK AND GRACE WASHINGTON

---

Kathleen Abate  
West Virginia Bar #60  
COHEN, ABATE & COHEN, L.C.  
Attorneys at Law  
114 High Street  
P.O. Box 846  
Morgantown, WV 26507-0846

Counsel for Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES .....	ii
I. KIND OF PROCEEDING AND NATURE OF THE RULING OF THE LOWER TRIBUNAL .....	1
II. STATEMENT OF FACTS .....	2
III. ASSIGNMENT OF ERRORS .....	4
A. THE CIRCUIT COURT ERRED IN GRANTING THE HARRISON COUNTY BOARD OF EDUCATION’S RULE 60 MOTION .....	4
B. THE CIRCUIT COURT OF HARRISON COUNTY ERRED IN ITS ANALYSIS AND INTERPRETATION OF <i>WINES v. JEFFERSON COUNTY BOARD OF EDUCATION</i> , 213 W.VA. 379, 582 S.E.2D 826 (2003) .....	4
C. THE CIRCUIT COURT OF HARRISON COUNTY ERRED IN FAILING TO AWARD REASONABLE ATTORNEY FEES PURSUANT TO WEST VIRGINIA CODE § 18-29-8 .....	4
D. THE CIRCUIT COURT OF HARRISON COUNTY ERRED IN DETERMINING THAT WEST VIRGINIA CODE § 18A-2-11 IS MORE SPECIFIC THAN WEST VIRGINIA CODE § 18-29-8 .....	4
IV. POINTS AND AUTHORITIES .....	4
A. IN GRANTING THE BOARD’S RULE 60(B) MOTION BASED UPON A LEGAL MISTAKE, THE CIRCUIT COURT ABUSED ITS DISCRETION .....	4
B. THE CIRCUIT COURT ERRED IN ITS ANALYSIS AND APPLICATION OF THE DECISION IN <i>WINES V. JEFFERSON COUNTY BOARD OF EDUCATION</i> , 213 W.VA. 379, 582 S.E.2D 826 (2003) .....	9
C. THE CIRCUIT COURT ERRED IN FAILING TO AWARD REASONABLE ATTORNEY FEES PURSUANT TO WEST VIRGINIA CODE § 18-29-8 .....	12
1. INTRODUCTION .....	12

2.	THE STATUTES PROVIDING FOR ATTORNEY FEES IN CASES ARISING OUT OF GRIEVANCES OF COUNTY SCHOOL BOARD EMPLOYEES APPEAR INCONSISTENT ON THEIR FACE .....	14
3.	WHEN TWO CONFLICTING STATUTES CANNOT BE HARMONIZED, THE LATER STATUTE IS GIVEN CONTROLLING EFFECT .....	16
4.	BECAUSE THE TERM "REASONABLE ATTORNEY'S FEES" IS SPECIFIC AND UNAMBIGUOUS, W.VA. CODE §18-29-8 SHOULD BE APPLIED AND ENFORCED AS WRITTEN .....	18
5.	THE CIRCUIT COURT'S INTERPRETATION CREATES CONFLICTS BETWEEN STATUTES .....	20
V.	CONCLUSION .....	21

TABLE OF AUTHORITIES

Page

STATUTES:

West Virginia Code §5-11-13 .....	19
West Virginia Code §18-1-1 .....	15
West Virginia Code §18A-1-1 .....	15
West Virginia Code §18A-1-2 .....	11
West Virginia Code §18A-2-11 .....	1, 2, 3, 9, 10, 12, 13, 14, 15, 16, 18, 20, 21
West Virginia Code §18-4-7a .....	15
West Virginia Code §18A-4-8 .....	15, 16
West Virginia Code §18A-4-8(a) .....	15
West Virginia Code §18-28-8 .....	16, 18, 20
West Virginia Code §18-29-1 .....	2, 11, 13, 15, 20
West Virginia Code §18-29-8 .....	1, 2, 4, 7, 10, 11, 12, 13, 14, 15, 16, 18, 20, 21
West Virginia Code §18-29-9 .....	15
West Virginia Code §21-5-6 .....	19
West Virginia Code §21-5C-8 .....	19
West Virginia Code §29-6A-1 .....	11, 12
West Virginia Code §29-6A-10 .....	12
West Virginia Code §46A-5-104 .....	19

COURT DECISIONS:

Aetna Casualty and Surety v. Pitrolo 176 W.Va. 190, 342 S.E.2d 156 (1986) .....	19
Assessment of Kanawha Valley Bank 144 W.Va. 346, 109 S.E.2d 649 (1959) .....	10
Bailey v. Norfolk and Western Ry. Co. 206 W.Va. 654, 527 S.E.2d 516, Syl. Pt. 9 (1999) .....	17
Blum v. Stenson 465 U.S. 886, 104 S.Ct. 1541 (1984) .....	19
Board of Education v. County Court of Tyler County 77 W.Va. 523, 82 S.E.2d 870 (1916) .....	17
Carolina Clipper, Inc. v. Axe 902 F. Supp.680 (E.D.Va. 1995) .....	10
Chesser v. Hathaway 190 W.Va. 594, 439 S.E.2d 459 (1993) .....	19
Coffman v. West Virginia DMV 209 W.Va. 736, 551 S.E.2d 658 (2001) .....	7
Delapp v. Delapp 213 W.Va. 757, 584 S.E.2d 899 (2003) .....	6
Downing v. Ashley 193 W.Va. 77, 454 S.E.2d 371 (1994) .....	6, 8
Ewing v. Board of Educ. of County of Summers 202 W.Va. 228, 503 S.E.2d 541 (1998) .....	20
Farley v. Board of Educ. of Mingo County 179 W.Va. 152, 365 S.E.2d 816 (1988) .....	13
Hamilton Watch Co. v. Atlas 156 W.Va. 52, 190 S.E.2d 779 (1972) .....	6
Hensley v. Eckerhart 461 U.S. 424, 103 S.Ct. 1933 (1983) .....	19

COURT DECISIONS (Continued):

Hustead v. Ashland Oil Co. 197 W.Va. 55, 475 S.E.2d 55 (1996) .....	6, 7
Johnson v. Nedeff 192 W.Va. 260, 452 S.E.2d 63 (1994) .....	5, 8
Keen v. Maxey 193 W.Va. 423, 456 S.E.2d 550 (1995) .....	19
Kopelman and Associates, LC v. Collins 196 W.Va. 489, 473 S.E.2d 910 (1996) .....	19
Maikotter v. University of West Virginia Board of Trustees/West Virginia University 206 W.Va. 691, 527 S.E.2d 802 (1999) .....	10, 11
Mallamo v. Town of Rivesville 197 W.Va. 616, 477 S.E.2d 525 (1996) .....	19
Maxey v. McDowell County Board of Education 212 W.Va. 668, 575 S.E.2d 778 (2002) .....	10, 11
Morgan v. Pizzino 163 W.Va. 454, 256 S.E.2d 592 (1979) .....	13
Parker v. Summers County Board of Education 185 W.Va. 313, 406 S.E.2d 744 (1991) .....	10
Powderidge Unit Owners Association v. Highland Properties, Ltd. 196 W.Va. 692, 474 S.E.2d 872 (1996) .....	8
Putnam County Board of Education v. Andrews 198 W.Va. 403, 481 S.E.2d 498 (1996) .....	10
Smith v. Board of Education of Logan County 176 W.Va. 65, 341 S.E.2d 685 (1985) .....	10
Snider v. West Virginia Dept. of Commerce 190 W.Va. 642, 441 S.E.2d 363 (1994) .....	12
Stamper v. Kanawha Co. Bd. of Ed. 191 W.Va. 297, 445 S.E.2d 238 (1994) .....	18

COURT DECISIONS (Continued):

State ex rel. Aaron v. King  
 199 W.Va. 533, 485 S.E.2d 702 (1997) ..... 7

State ex rel Chafin v. Mingo County  
 189 W.Va. 680, 434 S.E.2d 40 (1993) ..... 19

State ex rel. Pinson v. Varney  
 142 W.Va. 105, 96 S.E.2d 72 (1956) ..... 17

State v. Davidson  
 209 W.Va. 303, 547 S.E.2d 241 (2001) ..... 9

State v. Elder  
 152 W.Va. 571, 165 S.E.2d 108 (1968) ..... 19

State v. Ivey  
 196 W.Va. 571, 474 S.E.2d 501 (1996) ..... 19

State v. Snyder  
 64 W.Va. 659, 63 S.E.2d 385 (1908) ..... 17

Statler v. Dodson  
 195 W.Va. 646, 466 S.E.2d 497 (1995) ..... 19

University of West Virginia Board of Trustees ex rel. West Virginia University v. Graf  
 205 W.Va. 118, 516 S.E.2d 741 (1998) (per curiam) ..... 10

Walker v. Doe  
 210 W.Va. 490, 558 S.E.2d 290 (2001) ..... 9, 10

Weimer-Goodwin v. Board of Education of Upshur County  
 179 W.Va. 423, 369 S.E.2d 726 (1988) ..... 10

Wines v. Jefferson County Board of Education  
 213 W.Va. 379, 582 S.E.2d 826 (2003) ..... 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 21

Wood County Bd. of Educ. v. Peggy Smith et al.  
 202 W.Va. 117, 502 S.E.2d 214 (1998) ..... 17

Woods v. Guerra  
 187 W.Va. 487, 419 S.E.2d 900 (1992) ..... 5

Zirkle v. Zirkle  
 208 W.Va. 374, 540 S.E.2d 591 (2000) ..... 6, 8, 9

GRIEVANCE BOARD DECISIONS:

Harrison County Board of Education v. Constance Buffey  
Civil Action No. 01-C-213-1 (February 2004) ..... 6

No. 31944

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

---

CHARLESTON

---

SHIRLEY CROCK and  
GRACE WASHINGTON,

Petitioners/Appellants,

v.

HARRISON COUNTY BOARD OF EDUCATION,

Respondent/Appellee.

**BRIEF ON BEHALF OF APPELLANTS**  
**SHIRLEY CROCK AND GRACE WASHINGTON**

**I. KIND OF PROCEEDING AND NATURE OF**  
**THE RULING OF THE LOWER TRIBUNAL**

Shirley Crock and Grace Washington, the Appellants, are employees of the Harrison County Board of Education [hereinafter: the Board or HCBOE]. After successfully litigating an appeal of a grievance against their employer, Ms. Crock and Ms. Washington filed a petition for attorney fees. Initially, by Order dated July 30, 2002, the Circuit Court of Harrison County awarded Ms. Crock and Ms. Washington reasonable attorney fees pursuant to West Virginia Code § 18-29-8. Upon the Harrison County Board's "Motion For Relief From Order", the Circuit Court, on February 6, 2004, reversed its earlier decision and awarded attorney fees as limited by West Virginia Code § 18A-2-11.

The first of the two primary issues presented in this case is whether the Circuit Court of Harrison County erred as a matter of law in granting the school board's Rule 60 motion. The circuit court found that the Board's motion was filed within a year of its earlier order and, therefore, the court could, pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure, correct a mistake of law.

The second issue before this court involves a question of statutory construction. It is a matter of first impression which effects all school employees whose grievances are heard pursuant to West Virginia Code § 18-29-1 *et seq.* In this case, this Court is being asked to reconcile two conflicting statutes: West Virginia Code § 18-29-8 which allows for "reasonable attorney fees" and West Virginia Code § 18A-2-11 which contains a proviso limiting attorney fees to \$2,000.00. Below, the circuit court relied on this Court's decision in *Wines v. Jefferson County Board of Education*, 213 W.Va. 379, 582 S.E.2d 826 (2003) and principles of statutory construction to conclude that the limitation on attorney fees contained in W.Va. Code § 18A-2-11 (1985), the earlier statute, should be applied. In its discussion of statutory construction, the circuit court ruled that W.Va. Code § 18A-2-11 (1985) was more specific than W.Va. Code § 18-29-8 (1992) and, therefore, was controlling.

## **II. STATEMENT OF FACTS**

The relevant facts in this matter are generally uncontroverted. Ms. Crock and Ms. Washington filed a grievance pursuant to the procedure contained in West Virginia Code § 18-29-1 *et seq.*<sup>1</sup> Subsequently, their grievance was heard by the West Virginia Education and State

---

<sup>1</sup> Ms. Crock's and Ms. Washington's grievances involved a reduction in pay related to experience credit were filed on April 12, 1999.

Employees Grievance Board, (Docket No. 99-17-431, April 26, 1999), appealed to the circuit court of Harrison County (Civil Action No. 00-C-154-1, May 8, 2000) and then to the West Virginia Supreme Court of Appeals (No. 010407, February 5, 2001). Following a successful appeal, on March 25, 2002, attorney for the petitioners filed a Motion for Attorney Fees in the Circuit Court of Harrison County. In a ruling dated July 30, 2002, the circuit court ordered the Harrison County Board of Education to pay the petitioners attorney fees and costs in the amount of \$20,418.70.

This Order was not appealed. However, on June 3, 2003 the Board filed a "Motion for Relief from Order" pursuant to Rule 60(a) and (b) of the West Virginia Rules of Civil Procedure. The Board asserted that the Order dated July 30, 2002 contained a clerical error and that new evidence had been discovered. The court recognized that there was no new evidence. But, given the decision in *Wines v. Jefferson County Board of Education*, 213 W.Va. 379, 582 S.E.2d 826 (2003), concluded its earlier decision was premised upon legal mistake. The court, applying what petitioners assert is a misreading and clear misapplication of *Wines* and the principles of statutory construction, reversed its earlier decision and ruled that the petitioners' attorney fees were limited by W.Va. Code § 18A-2-11 to "One Thousand Dollars (\$1,000.00) for the circuit court proceedings and One thousand Dollars (\$1,000.00) for proceedings before the West Virginia Supreme Court of Appeals."<sup>2</sup>

It is from this Order that Ms. Crock and Ms. Washington now appeal.

---

<sup>2</sup> In footnote two the circuit court did acknowledge that attorney's fees initially requested are still reasonable, but subject to the cap contained in West Virginia Code § 18A-2-11.

### **III. ASSIGNMENT OF ERRORS**

- A. THE CIRCUIT COURT ERRED IN GRANTING THE HARRISON COUNTY BOARD OF EDUCATION'S RULE 60 MOTION.
- B. THE CIRCUIT COURT OF HARRISON COUNTY ERRED IN ITS ANALYSIS AND INTERPRETATION OF *WINES v. JEFFERSON COUNTY BOARD OF EDUCATION*, 213 W.VA. 379, 582 S.E.2D 826 (2003).
- C. THE CIRCUIT COURT OF HARRISON COUNTY ERRED IN FAILING TO AWARD REASONABLE ATTORNEY FEES PURSUANT TO WEST VIRGINIA CODE § 18-29-8.
- D. THE CIRCUIT COURT OF HARRISON COUNTY ERRED IN DETERMINING THAT WEST VIRGINIA CODE § 18A-2-11 IS MORE SPECIFIC THAN WEST VIRGINIA CODE § 18-29-8.

### **IV. POINTS AND AUTHORITIES**

#### **A. IN GRANTING THE BOARD'S RULE 60(b) MOTION BASED UPON A LEGAL MISTAKE, THE CIRCUIT COURT ABUSED ITS DISCRETION.**

In a Decision dated July 30, 2002, the circuit court ordered the Harrison County Board of Education to pay the appellants the amount of \$20,418.70 in attorney fees and costs. This Order was not appealed. On June 3, 2003 the Board filed a Motion for Relief from Order pursuant to Rule 60(a) and (b) of the West Virginia Rules of Civil Procedure, asserting that the original Order contained a clerical mistake and that new evidence had been discovered.

However, the Board's best argument for granting Rule 60 relief was not made by the Board. Because the Board's arguments were not sufficient for granting its Rule 60(b) Motion, the circuit court took it upon itself to articulate what the appellants assert to be an insufficient, but at least rational, basis for a Rule 60 Motion. The circuit court's conclusions can be summarized as follows: Because months after the time for appeal had lapsed, the West Virginia Supreme Court of Appeals issued a decision which the circuit court interprets as opposed to its holding in this case,

the circuit court finds its initial decision contained a mistake of law and should therefore be reconsidered. The appellants assert that this reason does not form a sufficient basis for granting the Motion.

Looking first at the reasoning set forth by the Board, it is clear that Rule 60(a) is not applicable in this situation. Rule 60(a) provides relief from judgement in the event of a clerical error made through oversight or omission which are part of the record and is not intended to adversely affect the rights of parties or alter the substance of the order, judgement or record beyond what was intended.<sup>3</sup> *Johnson v. Nedeff*, 192 W.Va. 260, 452 S.E.2d 63 (1994). In *Woods v. Guerra*, 187 W.Va. 487, 419 S.E.2d 900 (1992) this Court ruled that it is inappropriate to use Rule 60(a) to "correct" an order where the substance of the order is changed by the amendment.

The Board's second argument was based on an assertion of newly discovered evidence. Rule 60(b) provides that an Order may be set aside for several reasons, including newly discovered evidence or mistake. The rule, in pertinent part, states:

(b) *Mistakes; inadvertence; excusable neglect; unavoidable cause; newly discovered evidence; fraud, etc.* - On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable 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)...or (6) any other reason justifying relief from the operation of the judgment.

---

<sup>3</sup> Rule 60(a) of the West Virginia Rules of Civil Procedure provides:  
(a) *Clerical mistakes.*- Clerical mistakes in judgements, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

The Board's argument that there was newly discovered evidence is clearly without basis. Not only did it not exist, no one set forth any new facts as a basis for an argument such evidence may exist. Upon receiving the Motion, the circuit court, apparently concerned about the inconsistency between its ruling in *Harrison County Board of Education v. Constance Buffey*, Civil Action No. 01-C-213-1 (February 2004) and this matter, relied on this Court's decision in *Zirkle v. Zirkle*, 208 W.Va. 374, 540 S.E.2d 591 (2000) (per curiam) and chose to view Respondent's Motion as a Rule 60(b) Motion brought on the basis of a "legal mistake." Memorandum Opinion, p. 7-8.

The appellants recognize that Rule 60 is remedial in nature and should be liberally construed to accomplish justice, in as much courts favor adjudication of cases on their merits. *Hamilton Watch Co. v. Atlas*, 156 W.Va. 52, 190 S.E.2d 779 (1972). Thus, it is most often applied to situations, where, in contrast to this case, the facts were not fully litigated, *i.e.*, where the court has granted default or summary judgement. *See, e.g. Delapp v. Delapp*, 213 W.Va. 757, 584 S.E.2d 899 (2003). But no matter how liberal the construction, this rule does not bestow upon the party that does not prevail *carte blanche* to ignore the rules governing time for appeals and principles relevant to retroactive application of law. In this instance, the circuit court has abused its discretion by: (1) misapplying the law set forth in *Wines*; (2) by retroactively applying the law; and (3) by ignoring the parameters set forth by this Court when granting a Rule 60(b) motion based upon mistake of law.

One of the purposes of Rule 60(b) is to provide a mechanism for instituting a collateral attack on a final judgement in a civil action when certain extraordinary circumstances are present. *Hustead v. Ashland Oil Co.*, 197 W.Va. 55, 475 S.E.2d 55 (1996). In *Downing v. Ashley*, 193

W.Va. 77, 454 S.E.2d 371 (1994), the Court sets forth the requirements for proceeding under Rule 60(b):

In order to obtain relief from a final judgment, order or proceeding through an independent action, the independent action must contain the following elements: (1) the final judgment, order or proceeding from which relief is sought must be one that, in equity and good conscience, should not be enforced; (2) the party seeking relief should have a good defense to the cause of action upon which the final judgement, order or proceeding is based; (3) there must have been fraud, accident or mistake that prevented the party seeking relief from obtaining the benefit of his defense; (4) there must be absence of fault or negligence on the part of the party seeking relief; and (5) there must be no adequate legal remedy.

193 W.Va. at 80. Where such extraordinary circumstances are absent, a collateral attack is inappropriate for attempting to defeat a final judgement. *See, Coffman v. West Virginia DMV*, 209 W.Va. 736, 551 S.E.2d 658 (2001); *Hustead ex rel Atkins v. Ashland Oil, Inc.* 197 W.Va. 55, 475 S.E.2d 55 (1996). Here, there are no extraordinary circumstances. Because this Court has stated that the requirements must be met, the requirements are mandatory. *See, e.g., State ex rel. Aaron v. King*, 199 W.Va. 533, 485 S.E.2d 702 (1997). The Board has not met these mandatory requirements.

One of the requirements is that a party seeking relief is required to have a good defense. The "defense" of the Board is a an argument that this Court has ruled on the issue of attorney fees received pursuant to West Virginia Code § 18-29-8 and seeks to have retroactive application of what it believes to be the holding in that case. But, *Wines* did not discuss, let alone resolve, the conflict between the statutes at issue in this matter. Therefore, there is no legal basis or reason that good conscience demands the reopening of this case. And, even if the circuit court and the Board are correct in their interpretation of *Wines*, seeking retroactive application of that decision does

not promote the principles of “equity” or “good faith”. Next, there was no fraud, accident or mistake that prevented the Board from “obtaining the benefit of [its] defense.” And finally, the Board had a remedy at law, *i.e.*, appeal of the circuit court decision, and chose not to exercise that right. To the extent that the Board failed to exercise that right, the Board, the party seeking relief, was negligent. The factors set forth in *Downing* are not met in this instance and the Rule 60 (b) Motion granted on the grounds not argued by the Board should be reversed.

Second, Rule 60(b) motions should not be used as an excuse to relitigate matters fully litigated below or as a substitute for an appeal. The Board fully litigated the matter and had the opportunity to file an appeal, but failed to do so. *See, Johnson v. Nedeff*, 192 W.Va. 260, 452 S.E.2d 63 (1994). Motions under subsection (b) that seek to relitigate legal issues heard at the underlying proceeding are without merit. *Powderidge Unit Owners Association v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996). The Board should not be allowed to relitigate a matter where all the evidence was heard, there were no extraordinary circumstances, the law as understood at that time was followed, a final order entered and an appeal had not been filed.

Finally, the circuit court erred when it employed the notion of “legal mistake” to retroactively misapply the principles set forth by this Court in *Wines*. Here, there was no legal mistake constituting extraordinary circumstances. In applying the concept of legal mistake as a basis for a Rule 60(b) motion, the circuit court relied on *Zirkle v. Zirkle*, 208 W.Va. 374, 540 S.E.2d 591 (2000) (per curiam) which held that a Rule 60(b) Motion is appropriate to correct a mistake in law. This matter differs from *Zirkle* in two major respects. First, the error in *Zirkle* was a mistake in the application of clear, long standing statutory provisions. As the court noted,

in *Zirkle* the legislature had clearly established the standard for review and the circuit court applied the wrong standard. In contrast, the issue before the circuit court in *Crock and Washington* involves construing conflicting statutory provisions and is a matter of first impression now before this Court. There was no transgression of any clear legal principle. Second, the nature of the case was a child custody matter where the court has continuing jurisdiction.

Even if the circuit court's application and interpretation of *Wines* was correct, using *Wines*, which was not decided until over eight months after the initial circuit court decision, to reverse its decision is, in effect, giving *Wines* retroactive application. The court correctly applied the law as it believed existed on July 30, 2002. Because retroactivity of case law is permitted only under very limited circumstances, the court's retroactive application of *Wines* should be reversed. *See, e.g., State v. Davidson*, 209 W.Va. 303, 547 S.E.2d 241 (2001); *Walker v. Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001).

In this matter, there was no mistake. The circuit court applied the law as it believed existed on July 30, 2002. In granting the Board's 60(b) Motion, the circuit court applied dubious "precedent" and allowed the Board to relitigate an issue that should have been appealed.

**B. THE CIRCUIT COURT ERRED IN ITS ANALYSIS AND APPLICATION OF THE DECISION IN *WINES V. JEFFERSON COUNTY BOARD OF EDUCATION*, 213 W.VA. 379, 582 S.E.2D 826 (2003).**

The circuit court used *Wines v. Jefferson County Board of Education*, 213 W.Va. 379, 582 S.E.2d 826 (2003) as precedent to reverse its decision granting the petitioners reasonable attorney fees pursuant to West Virginia Code § 18-29-8. The circuit court concluded: "In light of the *Wines* decision, the Court has reconsidered its July 30, 2002 Order awarding attorney fees pursuant to W. Va. Code § 18A-29-8." In footnote two, the circuit court explained that because the attorney

fees granted in *Wines* were based upon West Virginia Code § 18A-2-11, it believed that the provisions of § 18A-2-11 should be applied to all education grievance cases.

But, as a matter of law, the *Wines* decision can not be used as precedent for the resolution of the question now before the Court. It is well established that a question of law not brought before the court can not be considered as decided in subsequent cases involving the same question. Furthermore, statements not necessary to the decision are mere dicta and do not have precedential value. *See, e.g., Carolina Clipper, Inc. v. Axe*, 902 F. Supp. 680 (E.D.Va. 1995); *Walker v. Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001); *In re Assessment of Kanawha Valley Bank*, 144 W.Va. 346, 109 S.E.2d 649 (1959). As the circuit court itself noted, the issue of attorney fees was not raised by the appellant in *Wines*. And, it is uncontroverted that in *Wines*, the apparent conflict of statutes, the issue before this court, was not raised, addressed or decided.

In order to fully appreciate the problems inherent in the circuit court's reasoning in regards to the application of *Wines*, it is instructive to review pages ten through twelve of its Memorandum Opinion. The Memorandum declares that the court researched the issue and cites seven cases.<sup>4</sup> None of those cases supports the court's conclusions. The court acknowledges that only five of these cases were decided after the 1992 amendments (*Weimer-Goodwin*, *Smith* and *Parker* were pre-1992 cases). Of the five post 1992 cases, there are two (*Graf* and *Andrews*)

---

<sup>4</sup> *Wines v. Jefferson County Board of Education*, 213 W.Va. 379, 582 S.E.2d 826 (2003); *Parker v. Summers County Board of Education*, 185 W.Va. 313, 406 S.E.2d 744 (1991); *Weimer-Goodwin v. Board of Education of Upshur County*, 179 W.Va. 423, 369 S.E.2d 726 (1988); *Smith v. Board of Education of Logan County*, 176 W.Va. 65, 341 S.E.2d 685 (1985); *Putnam County Board of Education v. Andrews*, 198 W.Va. 403, 481 S.E.2d 498 (1996); *University of West Virginia Board of Trustees ex rel. West Virginia University v. Graf*, 205 W.Va. 118, 516 S.E.2d 741 (1998) (per curiam); *Maikotter v. University of West Virginia Board of Trustees/West Virginia University*, 206 W.Va. 691, 527 S.E.2d 802 (1999); and *Maxey v. McDowell County Board of Education*, 212 W.Va. 668, 575 S.E.2d 778 (2002).

where no attorney fees were awarded for reasons unrelated to this case (the grievant did not prevail or statutory immunity). In two of the remaining three cases, this Court awarded attorney fees pursuant to West Virginia Code § 18-29-8. The circuit court's comments on these cases illustrate its misinformed and misguided analysis.<sup>5</sup> The court speculates that "perhaps" the reason attorney fees were granted pursuant to §18-29-8 in *Maikotter* was the statute does not apply to county board employees.<sup>6</sup> A reading of West Virginia Code § 18-29-1 and § 29-6A-1 clearly indicates that § 18-29-8 applies almost exclusively to county board employees while West Virginia Code § 29-6A-1 covers higher education and other state employees. In discussing *Maxey v. McDowell County Board of Education*, 212 W.Va. 668, 575 S.E.2d 778 (2002), the circuit court dismisses the holding by declaring it is unclear whether the reference to "the limited attorney fees prescribed in West Virginia Code" was an inadvertent reference to West Virginia Code § 18A-2-11. The circuit court found that it could not reconcile *Maxey* with *Wines*, but that because *Wines* was more recent, the court concluded it was constrained in its award of attorney fees to the limits contained in West Virginia Code § 18A-2-11.

---

<sup>5</sup> Further evidence of a lack of understanding of legislation affecting school boards and their employees is demonstrated by the court noting that "upon second thought and after performing further research" that the provisions of West Virginia Code § 18A-1-2 (1969) repeals "the provisions of any articles ...of the Code of West Virginia , one thousand nine hundred thirty-one, as amended, which are inconsistent with the provisions of this chapter [Chapter 18A]". The 1969 statutory amendment have no relevance to this current case. In 1969, neither West Virginia Code § 18-29-1 nor the 1992 amendments were in existence. Counsel for the appellants does not mean these arguments to be in any manner disrespectful to the Circuit Court of Harrison County which she holds in high regard. It has been her experience, however, that new law clerks may not initially grasp the complexities of employment issues in administrative law, issues which are not often encountered in the general practice of law.

<sup>6</sup> In fact, *Maikotter* is a higher education case and West Virginia Code § 18-29-1 no longer applies to higher education.

Disregard for the clear language contained in case law, speculation and reading between the lines does not establish legal precedent. The circuit court's reliance on *Wines* to deny reasonable attorney fees as established by the court is clearly misplaced.

**C. THE CIRCUIT COURT ERRED IN FAILING TO AWARD REASONABLE ATTORNEY FEES PURSUANT TO WEST VIRGINIA CODE § 18-29-8.**

1. INTRODUCTION

The interpretation and application of West Virginia Code § 18-29-8 significantly impacts county school board employees. To determine the relationship of West Virginia Code § 18A-2-11 to § 18-29-8, it is necessary to apply the rules of statutory construction. Where two statutory provisions apply to the facts before a court, a court must, if reasonably possible, harmonize the statutes. The primary object when construing the statute is to ascertain and give effect to the intention of the legislature. *See, e.g., Snider v. West Virginia Dept. of Commerce*, 190 W.Va. 642, 441 S.E.2d 363 (1994). The problems associated with attempting to determine “the mind of the legislature” in this matter are reflected by the variety of arguments and the cases cited to support the propositions set forth by the parties. This process is made particularly murky by the patchwork history of the relevant statutory provisions and occluded by irrelevant arguments.<sup>7</sup>

---

<sup>7</sup> For example, the Harrison County Board makes the argument that West Virginia Code § 29-6A-1 is analogous and there is a cap on attorney fees in that code section. The statutes are not analogous in that the statutory language of West Virginia Code § 29-6A-10 differs considerably from the language of West Virginia Code § 18-29-8. The former clearly contains a cap, the latter refers to “reasonable attorney fees.” The Board makes other arguments concerning veterans’ statutes. The purported purpose behind the veterans’ law is to protect the veteran. There is a built in presumption that the veteran’s administration will protect the interest of the veteran. The law states that the veteran can not be charged for legal services. This often results in family members or friends paying the attorney at the early stages of administrative appeals.

The first step in the process of statutory construction is to determine whether the statutes are in conflict. If the conflict can not be reconciled, the Court must determine how the rules of statutory construction should be applied. The application of those rules becomes much like the child's game of scissors, rock, paper. Instead of determining that paper covers rock and rock crushes scissors, the parties are asking the Court to determine whether the principle that the "last statutory enactment prevails" trumps the principle of the "specific controls the general." Unlike states such as Colorado whose statutes prioritize the application of these rules, West Virginia law offers little, if any, guidance as to which principle controls.

However, in addition to basic principles of statutory construction, there are three factors which form a part of this particular analysis. The first is the question of whether West Virginia Code § 18A-2-11 is more specific than West Virginia Code § 18-29-8. The second is the principle that statutes affecting school employees must be construed in light most favorable to the employee. *Farley v. Board of Educ. of Mingo County*, 179 W.Va. 152, 365 S.E.2d 816 (1988); *Morgan v. Pizzino*, 163 W.Va. 454, 256 S.E.2d 592 (1979). The third is the legislative intent expressed in West Virginia Code § 18-29-1.

The underlying impetus for the creation of the grievance procedure set forth in W.Va. Code § 18-29-1 is fairness for school employees. Many of these grievances involve work place conditions and assignments, not finances. County school boards often appear with their attorney at Level II and III grievance hearings (where the grievance evaluator is a school administrator) and bring an attorney to virtually all level IV hearings. Beyond Level IV an unrepresented employee has little hope of pursuing her grievance. Knowing that there is no financial stake (and therefore money to pay an attorney) and that West Virginia teachers who are among the lowest paid school

teachers in the nation do not have the financial means to redress their grievances, school boards could flagrantly violate rules governing posting, transfer, and student numbers with impunity. Without the financial ability to have legal representation, the process becomes inherently unfair. Stacking the deck against teachers is not only unfair, but contrary to public policy stated in statute.

2. THE STATUTES PROVIDING FOR ATTORNEY FEES IN CASES ARISING OUT OF GRIEVANCES BROUGHT BY EMPLOYEES OF COUNTY SCHOOL BOARDS APPEAR INCONSISTENT ON THEIR FACE.

This case involves a conflict between two statutes: West Virginia Code § 18A-2-11 and West Virginia Code § 18-29-8. The history of the relevant legislation is key to resolving this conflict. In 1981 legislature adopted West Virginia Code § 18A-2-11 to govern disputes between county school boards and their employees. It provided a grievance procedure and limited attorney fees for the successful grievant. Specifically the statute states:

In case of dispute or controversy between the county board assignment, grievance, salary, termination of contract, job classification, or any similar matter, the employee shall be entitled to the payment of attorney fees and court reporter costs as hereinafter provided. . .

If, after such a hearing, the employee institutes any proceeding in a circuit court against the board, based upon such dispute or controversy, and shall substantially prevail, the boards shall be liable to the employee, upon final judgment or order, for court costs, and for reasonable attorney's fees, to be set by the court, for representing the employee in the hearing before the board, in the circuit court, and in the supreme court of appeals, and shall be further liable to the employee for the charges, if any, for any court reporter's costs incurred during the hearing before the board: Provided, that in no event shall such attorney's fees be awarded in excess of a total of five hundred dollars for the board hearing and circuit court proceedings nor an additional five hundred dollars for supreme court proceedings: Provided, however, that the requirements of this section shall not be construed to limit the school employee's right to recover reasonable attorney's fees in a

mandamus proceeding brought under section eight [§ 18A-4-8], article four, chapter eighteen-A of this Code.

W.Va. Code § 18A-2-11.

In 1985, the legislature created the West Virginia Education Employees Grievance Board and a statewide administrative grievance process for education employees, W.Va. Code §18-29-1, *et seq.*<sup>8</sup> Initially, the only reference to expenses in the context of the grievance procedure was: "Any expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such expenses."<sup>9</sup> W.Va. Code § 18-29-8 (1985).

That same year, West Virginia Code §18A-2-11 was amended to raise the statutory cap from \$500 to \$1,000 for a circuit court proceeding and from \$500 to \$1,000 for Supreme Court proceedings. It now provides:

If an employee shall appeal to a circuit court an adverse decision of either a county board of education or of a hearing examiner rendered in a grievance or other proceeding pursuant to provisions of chapters eighteen and eighteen-a [§§ 18-1-1 *et seq.* and 18A-1-1 *et seq.*] of this code and such person shall substantially prevail, the adverse party or parties shall be liable to such employee, upon final judgment or order, for court costs, and for reasonable attorney's fees, to be set by the court, for representing such employee in all administrative hearings and before the circuit court and the supreme court of appeals, and shall be further liable to such employee for any court reporter's costs incurred during any such administrative hearings or court proceedings: Provided, That in no event shall such attorney's fees be awarded in excess of a total of one thousand dollars for the administrative hearings and circuit court proceedings nor an additional one thousand dollars for supreme court proceedings: Provided, however, That the requirements of this

---

<sup>8</sup> The jurisdiction of the Grievance Board was widened to include state employees and was renamed the West Virginia Education and State Employees Grievance Board in 1988.

<sup>9</sup> W.Va. Code §18A-4-7a, §18A-4-8a and §18-29-9 specifically allow an employee to file mandamus actions and entitles employees who prevail to attorney fees and court costs.

section shall not be construed to limit the school employee's right to recover reasonable attorney's fees in a mandamus proceedings brought under section eight [§ 18A-4-8], article four, chapter eighteen-a of this code.

Then, in 1992, W.Va. Code § 18-28-8 was amended by adding the following language relating to costs incurred in the appeal of Level IV grievance decisions:

In the event an employee or employer appeals an adverse level four decision to the circuit court or an adverse circuit court decision to the supreme court, and the employee substantially prevails upon such appeal, the employee or the organization representing the employee is entitled to recover court costs and *reasonable attorney fees, to be set by the court*, from the employer. (emphasis added)

Prior to this time the statutes differed as to whether attorney fees could be requested for work performed at levels one through three of the grievance procedure. But, given the limitations on fees, the difference was, as a practical matter, inconsequential. The 1992 amendments created a significant difference between the statutes. Under § 18A-2-11, there is a strict limit on the amount of attorney's fees that could be recovered in the appeal process. In contrast, under West Virginia Code § 18-29-8 the courts were granted the authority to decide fees.

3. WHEN TWO CONFLICTING STATUTES CANNOT BE HARMONIZED, THE LATER STATUTE IS GIVEN CONTROLLING EFFECT.

The general rule for interpreting conflicting statutory enactments is that courts should attempt to harmonize them, if possible:

A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended that statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

*Bailey v. Norfolk and Western Ry. Co.*, 206 W.Va. 654, 527 S.E.2d 516, Syl. Pt. 9 (1999) citing *State v. Snyder*, 64 W.Va. 659, 63 S.E.2d 385 (1908).

But, harmonizing two conflicting statutes is not always possible. For example, in *State ex rel. Pinson v. Varney*, 142 W.Va. 105, 96 S.E.2d 72 (1956) this Court was asked to resolve a dispute relating to the election of a school board member. Statutes regulating those elections are contained in both Chapter 18, the Education section of the state code, and in Chapter 3, the Elections section. Unable to resolve the conflict between the two statutes, this Court held that the later passed statute must be given precedence.

If several statutory provisions cannot be harmonized, controlling effect must be given to the last enactment of the Legislature. . . .  
“And when two distinct statutes stand in *pari materia*, and sections there of are in irreconcilable conflict, that section must prevail which can properly be considered the last expression of the law making power . . .”. *Board of Education v. County Court of Tyler County*, 77 W.Va. 523, 82 S.E.2d 870 (1916).

142 W.Va. at 109.

This Court has applied the rule of statutory construction articulated in *Pinson* in several subsequent cases. The reasoning in *Pinson* has been used to resolve conflicts in state superintendent of schools’ opinions relating to reduction in force of school service personnel. In *Wood County Bd. of Educ. v. Peggy Smith et al.*, 202 W.Va. 117, 502 S.E.2d 214 (1998) the Court found: “It is now *well settled fundamental law* that when two statutes conflict, the general rule is that the statute last in time prevails as the most recent expression of the legislative will prevail.” (Emphasis added).

Similarly, in *State ex rel. DHHR v. Pub. Emp. Ret. Sys.*, 183 W.Va. 39, 393 S.E.2d 677 (1990) a conflict between provisions of the state Public Employee’s Retirement System enacted in

1961 (a ban on execution or attachment) and the 1986 Family Obligations Enforcement Act (a procedure for withholding income for child support payment) was resolved by giving full force and effect to the last statutory enactment. Again, in *Stamper v. Kanawha Co. Bd. of Ed.*, 191 W.Va. 297, 445 S.E.2d 238 (1994) controlling effect was given to the last statutory enactment (the 1986 Governmental Tort Claims and Insurance Act, permitted liability claims against government entities, conflicted with a 1965 statute limiting the liability of landowners).

The *Pinson* rationale should now be applied to the case at bar. That is, this Court should follow the “well settled fundamental law that when two statutes conflict, the general rule is that the statute last in time prevails as the most recent expression of the legislative will.” Because the W.Va. Code § 18A-2-11 statute cannot be harmonized with W.Va. Code § 18-29-8 the later statute, § 18-29-8 should control.

4. BECAUSE THE TERM “REASONABLE ATTORNEY’S FEES” IS SPECIFIC AND UNAMBIGUOUS, W.VA. CODE §18-29-8 SHOULD BE APPLIED AND ENFORCED AS WRITTEN.

The circuit court has reasoned that the statutory language of W.Va. Code § 18A-2-11 is more specific than the language of W.Va. Code § 18-28-8 and, therefore, the limitations contained in § 18A-2-11 should be favored. However, W.Va. Code § 18A-2-11 may be different, but it is not more specific.

W.Va. Code § 18-29-8 employs the term reasonable attorney fees as set by the Court. The term “reasonable attorney’s fees” is a legal term of art that has clear and specific meaning. It is not ambiguous. Not only is it defined in the treatise, *Words and Phrases*, the appropriate criteria and the boundaries of that term of art have been refined in several United States Supreme Court

decisions.<sup>10</sup> This Court has also defined the factors a court must use in determining what constitutes a reasonable attorney fee. *See, Aetna Casualty and Surety v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986); *Kopelman and Associates, LC v. Collins*, 196 W.Va. 489, 473 S.E.2d 910 (1996); *Statler v. Dodson*, 195 W.Va. 646, 466 S.E.2d 497 (1995); and *State ex rel Chafin v. Mingo County*, 189 W.Va. 680, 434 S.E.2d 40 (1993).

The use of the phrase “reasonable attorney fees” in the Rules of Professional Conduct for the lawyers permitted to practice law in this state attests to the fact that the phrase has a common and generally understood meaning.<sup>11</sup> And, this meaning is incorporated into several statutes which provide for reasonable attorney fees. These include: West Virginia Code § 5-11-13 (West Virginia Human Rights Act), West Virginia Code § 46A-5-104 (the West Virginia Consumer Protection and Credit Act), West Virginia Code § 21-5C-8 (the Minimum Wage and Maximum Hour Act), and West Virginia Code § 21-5-6 (West Virginia Wage Payment and Collection Act).

With this extensive authority, there is little debate as to the meaning of “reasonable attorney’s fees” as “set by the Court”. “Where the language of a statute is clear and without ambiguity, the plain meaning is to be accepted . . . .” *State v. Ivey*, 196 W.Va. 571, 474 S.E.2d 501 (1996) quoting *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). *See, e.g., Mallamo v. Town of Rivesville*, 197 W.Va. 616, 477 S.E.2d 525 (1996); *Keen v. Maxey*, 193 W.Va. 423, 456 S.E.2d 550 (1995); *Chesser v. Hathaway*, 190 W.Va. 594, 439 S.E.2d 459 (1993).

---

<sup>10</sup> *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983); *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 (1984)

<sup>11</sup> The Rules of Professional Conduct, adopted June 30, 1988, Rule 1.5 defines reasonable attorney’s fees.

The meaning of reasonable attorney fees is clear and the statute must be applied and enforced as written. If the term reasonable attorney fees is interpreted otherwise, West Virginia Code § 18-29-8 would be in conflict with not only other statutes, but with well established case law. Because the circuit court's interpretation of W.Va. Code § 18-29-8 leads to a result contrary to the accepted definition of reasonable attorney fees and the statute's plain meaning, the court's decision should be reversed.

5. THE CIRCUIT COURT'S INTERPRETATION CREATES CONFLICTS BETWEEN STATUTES.

The purpose of the principles statutory interpretation is to harmonize apparently conflicting statutes. But here, the circuit courts attempts to resolve inconsistencies, creates further conflict. Under § 18A-2-11 a grievant is entitled to request attorney fees for **all** administrative hearings. This contrasts with West Virginia Code § 18-29-8 which disallows fees for proceedings in levels one through three of the grievance procedure. If the later statute, W.Va. Code § 18-28-8, does not preempt the earlier statute, W.Va. Code § 18A-2-11, confusion and conflicting statutory provisions will result.

Furthermore, the circuit court's interpretation is not consistent with public policy. In *Ewing v. Board of Educ. of County of Summers*, 202 W.Va. 228, 503 S.E.2d 541 (1998) it was held that an individual adversely affected by a decision involving hiring, promotion transfer, seniority or any other matter covered by West Virginia Code Chapter 18-A may obtain relief in one of two ways: by filing a grievance pursuant to West Virginia Code § 18-29-1 *et seq.* or a writ of mandamus. Differing attorney fees would discourage use of the grievance procedure. Favoring one forum over another by providing reasonable attorney fees in one forum and not another would frustrate the legislative scheme of promoting an administrative structure for the resolution of

grievances. If the grievance procedure is to remain a viable alternative for all education employee grievances, the filing of mandamus proceedings can not be favored by allowing the incentive of reasonable attorney fees only in mandamus actions.

#### V. CONCLUSION

The Circuit Court of Harrison County erred in failing to award the petitioners Ms. Crock and Ms. Washington reasonable attorney fees as provided in West Virginia Code § 18-29-8. Instead it limited the attorney fees to the amounts specified in West Virginia Code § 18A-2-11. This error is predicated on a misapplication of the rules of statutory construction as well as this Court's decision in *Wines v. Jefferson County Board of Education*, 213 W.Va. 379, 582 S.E.2d 826 (2003).

For the reasons stated above the appellants ask that this Court reverse the circuit court's order dated February 6, 2003, reinstate the circuit court's order dated July 30, 2002 and award them costs and attorney fees reasonable and necessary to prosecute this appeal.

Dated: November 3, 2004

RESPECTFULLY SUBMITTED,  
Shirley Crock and  
Grace Washington  
Petitioners/Appellants  
By Counsel.




Kathleen Abate, Esq.  
W.VA. Bar No. 60  
Cohen, Abate & Cohen, L.C.  
P.O. Box 846  
Morgantown, WV 26555-0846  
Counsel for Petitioners/Appellants

CERTIFICATE OF SERVICE

I, Kathleen Abate, hereby certify that I served the foregoing "Brief on Behalf of Appellants Shirley Crock and Grace Washington" upon the parties by mailing a true copy thereof, by United States Mail, postage pre-paid, this 4<sup>th</sup> day of November, 2004, in an envelope addressed as follows:

Nancy W. Brown (W.Va. State Bar #5717)  
Amy M. Smith (W.Va. State Bar #6454)  
Bank One Center, Sixth Floor  
P.O. Box 2190  
Clarksburg, WV 26302-2190

  
Kathleen Abate