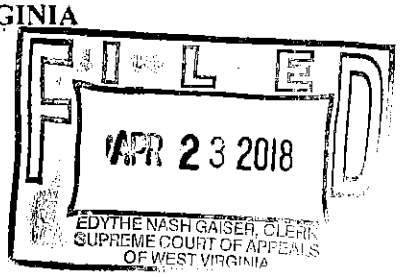
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA ex rel. DANITA LADANYE, ADMINISTRATRIX OF THE ESTATE OF JONATHAN S. LADANYE,

Petitioner,

v.

Docket No.: 18-0356
(Claims Commission Case No.: CC-15-2038)

WEST VIRGINIA LEGISLATIVE CLAIMS COMMISSION and WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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TREATISE

I. QUESTIONS PRESENTED

1. Whether W. Va. Code § 14-2-28(b) is unconstitutional in so far as it violates the separation of powers established by Article V, section 1 of the West Virginia Constitution and/or usurps the power conferred upon the Supreme Court of Appeals of West Virginia by Article VIII, section 3 of the West Virginia Constitution, which provides that the Supreme Court of Appeals shall have original jurisdiction of proceedings in certiorari.

2. Whether West Virginia law permits the imposition of comparative fault against a decedent when the defendant produces no evidence demonstrating that the decedent voluntarily exposed himself to a danger with full knowledge and appreciation of its existence and/or the defendant produces no evidence demonstrating that the decedent knows, or by due diligence should know, that the driver is not taking proper precaution.

3. Whether West Virginia law permits the imputation of the fault of a non-party, intoxicated driver to a decedent passenger when the defendant produces no evidence demonstrating that the decedent's conduct substantially encouraged or assisted the driver's alcohol or drug impairment.

4. Whether the West Virginia Rules of Evidence apply in proceedings before the Legislative Claims Commission.

5. Even if the West Virginia Rules of Evidence do not always apply in proceedings before the Legislative Claims Commission, then did the Commission err by permitting Respondent's liability expert to testify regarding hearsay statements contained in a criminal prosecution case file that Respondent failed to disclose as an exhibit?

6. Was the manner of the Commission's decision inadequate due to its erroneous factual findings and failure to follow the law of the State of West Virginia?

II. STATEMENT OF THE CASE

This case arises out of a single vehicle crash that occurred on February 17, 2014 in Monongalia County, West Virginia. The vehicle in which Petitioner's decedent, Jonathan S. Ladanye, was riding encountered and ramped over a snow pile along a bridge parapet wall on Interstate 79 and fell approximately 30 feet to the roadway below the bridge. Mr. Ladanye suffered fatal injuries as a result of the crash.

Petitioner filed her claim before the West Virginia Court of Claims[1] on December 9, 2015; Petitioner alleged that Respondent, West Virginia Department of Transportation, Division of Highways (hereinafter Petitioner's use of "Respondent" refers to West Virginia Department of Transportation, Division of Highways; Petitioner will refer to the West Virginia Legislative Claims Commission as "Commission" or "Claims Commission"), was negligent in its maintenance of the bridge due to its failure to timely remove the snow pile in line with the requirements imposed by Respondent's Snow Removal and Ice Control ("SRIC") chapter of its Maintenance Manual. Following discovery, a trial was set for and held on August 16, 2017 in Morgantown, West Virginia.

At the trial of Petitioner's claim, Petitioner introduced documentary evidence and elicited testimonial evidence regarding Respondent's SRIC policies prescribed by its Maintenance Manual. JA – 154-178. JA – 408-449. The Maintenance Manual provides four levels (Code Red, Code Yellow, Code Blue, and Code Green) of Operational Postures that each require differing levels of SRIC activities depending on which Operational Posture is in effect. Operational Postures are determined by designated individuals within each local maintenance organization; the locally determined Operational Posture is then reported on to the District

[1] While Petitioner's claim was pending, the Court of Claims was renamed the West Virginia Legislative Claims Commission. *See* W. Va. Code § 14-2-4.

Office, which then reports the locally determined Operational Posture on to the Transportation Management Center ("TMC") in Charleston. JA – 161-162. The TMC then produces spreadsheet documents listing the reported Operational Postures from each local maintenance organization throughout the state thus providing a snapshot of the roadway and weather conditions throughout the state at specific times. JA – 162.

The following operational postures are established by Chapter 5 of Respondent's Maintenance Manual:

> 1) Code Green:
> This would be a normal day-to-day operations code for the Department; planned and scheduled activities being accomplished.
>
> 2) Code Blue:
> This posture is one of anticipating imminent emergency conditions such as predicted snow or flooding. The advanced warning which allows for increasing the level of preparedness is intended to assure that appropriate steps have been taken to make the transitions to emergency operations as rapid and effective as possible. Spot treatments, laying back and cleanup operations for snow and ice removal are included under this code.
>
> 3) Code Yellow:
> This posture is affected when emergency conditions are activated to restore traffic to normal.
>
> It is expected that the nature and magnitude of the emergency under Code Yellow is such that it can be handled with normally assigned resources.

Code Red Operational Posture deals with State of Emergency conditions and is not applicable to this case. JA – 416.

Respondent's Maintenance Manual provides, in relevant part, "[i]mmediately upon traffic being restored to normal, all snow and ice stored where its presence constitutes a hazard along parapet walls, in gore areas protected by impact attenuators, and along guard rail in urban areas is to be removed." JA – 437-438. Respondent's designated employee, Maintenance Assistant

Larry Weaver, testified that snow pile conditions, such as the one at issue in this case, can be removed in both Code Green and Code Blue Operational Postures. JA – 173. Notwithstanding Respondent's local maintenance organization operating in Code Green or Code Blue Operational Postures for approximately 47 hours of the 3.5 days prior to the crash, Respondent did not remove the snow pile condition from the bridge. JA – 195-196, JA – 207-210. JA – 450.

Petitioner called First Sergeant William Yaskoweak of the Monongalia County Sheriff's Office, who performed an accident reconstruction when he responded to the underlying crash. JA – 102-153. First Sergeant Yaskoweak testified in regard to his reconstruction and opinions that the vehicle's impact of the ground caused fatal injuries to Mr. Ladanye and that if the snow pile had been previously removed, the vehicle in which Plaintiff's decedent was riding, would not have ramped over the parapet wall. JA – 118-119. JA – 126-127. JA – 131.

Petitioner also called Kevin T. Beachy, a transportation engineering and highway maintenance operations expert from Allegany County, Maryland. Mr. Beachy opined, *inter alia*, that Respondent violated its own SRIC rules, and that if Respondent had followed its SRIC rules, the snow pile condition would not have been on the I-79 bridge at the time of the crash. JA – 209-210. Mr. Beachy further testified that Respondent's failure to follow its SRIC policies was evidenced by SRIC activities it performed in the days leading up to the crash, including removing snow from a nearby state maintained park and ride parking lot located off of Interstate 79 on February 16, 2014. JA – 210-213. JA – 218. Such SRIC actions are completely at odds with Chapter 5 of Respondent's Maintenance Manual, which states, in relevant part, "[a]s soon as practical, after securing from a snowstorm, personnel and equipment will be assigned to such tasks as the clean-up of bridges, rail crossings, sidewalks, and state maintained parking areas and entrances." JA – 440. Much in line with First Sergeant Yaskoweak's testimony about the snow pile permitting the vehicle to ramp over the bridge parapet, Mr. Beachy provided insight into the

engineering principles behind why the snow pile nullified the safety function of the bridge parapet. JA – 219. Mr. Beachy further testified in regard to Federal Highway Administration literature on snow removal and ice control protocols that identifies bridge parapets and railings as "Most Serious Ranked Hazards" due to the risk of ramping crashes. JA – 220-227.

In its defense, Respondent called Jerry G. Pigman, who was permitted to testify regarding SRIC issues over Petitioner's objection to the scope of Mr. Pigman's anticipated testimony based on his lack of experience with SRIC activities; Mr. Pigman testified concerning the reasonableness of Respondent's SRIC efforts in the days leading up to the fatal crash. JA – 280-290. JA – 304-309. Mr. Pigman apparently never received or reviewed a copy of the TMC-produced road and weather condition reports prior to trial, which report operational postures determined by Respondent's local maintenance organizations. JA – 325. Mr. Pigman simply took the position that these documents produced by Respondent and the operational postures identified therein did not matter and that Respondent's other documents that he relied upon supported his opinion that February 19, 2014 (two days after the fatal crash) was Respondent's first opportunity to remove the snow pile at issue. JA – 329-330. During Mr. Pigman's testimony, the Commission overruled Petitioner's objection and permitted Mr. Pigman to testify about hearsay witness statements contained in a criminal prosecution case file regarding the crash as well as the events leading up to the crash. Respondent did not disclose such criminal prosecution case file, or the materials contained within, as an exhibit prior to trial. JA – 294-300. Moreover, the hearsay statements were not of a nature that a highway safety engineer would reasonably rely upon them. The admission of these statements flies in the face of both the Commission's order regarding pretrial disclosures and the West Virginia Rules of Evidence.[2]

[2] To the extent that Rules of Practice and Procedure of the Commission do not require the strict application of the West Virginia Rules of Evidence, the Court of Claims case law following the enactment

Respondent also called its employee, Larry Weaver. JA – 370-399. Mr. Weaver paralleled Mr. Pigman's testimony stating that SRIC decisions were being made on the ground and that the operational postures are simply guidelines. JA – 381. Mr. Weaver acknowledged that Respondent had notice of the hazardous snow pile condition prior to the crash complained of in Petitioner's claim. JA – 393.

Following the trial, the Claims Commission ordered that the parties file findings of fact and conclusions of law within 60 days from their receipt of the hearing transcript and responses thereto 30 days later. JA – 399. Petitioner submitted her approximately 30 page *Claimant's Proposed Findings of Fact and Conclusions of Law* on November 22, 2017, which detailed the evidence presented and the relevant law. JA – 19-49. Respondent submitted its untimely proposed findings of fact and conclusions of law on November 30, 2017; therein, Respondent took the position that "the sole and proximate cause of the accident was the negligence of [James] Coffman" who was convicted of DUI causing death as a result of his blood alcohol content that was recorded following the underlying crash. JA – 50-54. Respondent further stated that

> [t]here is no contention on the part of the DOH that Mr. Ladanye did anything to cause the accident, however, in consideration of the comparative negligence involved, one must considerer [sic] the negligence of the deceased, as it is negligence to be a passenger in an automobile driven by an impaired driver and Mr. Coffman, at the BAC level he had, was obviously impaired. These issues of comparative negligence have been addressed many times in cases before this body, so there is no need to outline the law of comparative negligence.

JA – 50-51.

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of the Rules of Practice and Procedure have cited to the West Virginia Rules of Evidence when barring hearsay statements. *See Nelson v. Div. of Highways*, 25 Ct. Cl. 44 (2003).

The Claims Commission issued its opinion denying Petitioner's claim on February 27, 2018; simply put, the Commission ignored the facts of the case and the laws of the State of West Virginia. JA – 15-18. The opinion is riddled with factual findings that are unsubstantiated by the record and legal conclusions that are unsupported by the case law of the State of West Virginia. Perhaps most egregious was the Commission's following statement:

> The Commission is also of the opinion that there were circumstances surrounding this accident which would have made a recovery by the Claimant difficult. Claimant's decedent must be held responsible for his own actions by consenting to ride in the vehicle that was being operated by James Coffman, whose conduct was the approximate [sic] cause of the accident in question.

JA – 18.

Amazingly, the Commission reached this conclusion without giving any consideration to the following: 1) Respondent explicitly conceded that Mr. Ladanye did nothing to cause the crash; 2) the law of West Virginia precludes the Commission from concluding that Mr. Ladanye was comparatively negligent, based on the evidence presented at trial; 3) the law of West Virginia precludes the Commission from concluding that Mr. Ladanye assumed or incurred the risk by voluntarily exposing himself to a danger with full knowledge and appreciation of its existence, based on the evidence presented at trial; and 4) the law of West Virginia precludes the Commission from imputing the intoxicated driver's negligence to Mr. Ladanye, based on the evidence presented at trial.

Based on the apparent deficiencies in the Commission's opinion, Petitioner filed her *Claimant's Motion to Alter or Amend Findings, Conclusions and Judgment* on March 6, 2018. JA – 3-14. Claimant's motion was denied by order on March 13, 2018 on the basis that "no new issues or newly-discovered evidence [were] presented in Claimant's Motion" that required an appeal or new hearing. JA – 1-2. Notwithstanding the Commission entering its order on March

13, 2018, Petitioner did not receive the order until it was emailed to her counsel on March 29, 2018 by staff of the Legislative Claims Commission.

Petitioner now comes to this Court requesting that this Court review the judgment of the inferior tribunal Claims Commission. While Petitioner certainly takes issue with the outcome based on the evidence presented and applicable law, Petitioner further takes issue with the manner in which the Commission's decision was reached. As such, Petitioner requests that this Court review the record that was before the Commission as well as the applicable law, determining that the Commission failed to follow the law of the State of West Virginia and made clearly erroneous factual findings, remanding this case to the Commission with specific instructions that a new opinion be entered in Petitioner's favor.

III. SUMMARY OF ARGUMENT

In reaching its decision, the Legislative Claims Commission failed to follow the law of the State of West Virginia and made factual findings that are clearly erroneous, not supported by the record. Under the West Virginia Constitution and this Court's precedent, a writ of certiorari is a proper mechanism by which a party may seek this Court's review of the manner in which an inferior tribunal, including the Legislative Claims Commission, reached its decision. This Court's review of such decision by writ of certiorari is appropriate notwithstanding the Legislature's recent attempt to rob this Court of its jurisdiction to review decisions made by the Legislative Claims Commission. In short, the Legislature's recent statutory modifications are unconstitutional and thus the decisions made by the Legislative Claims Commission remain subject to this Court's original jurisdiction review.

In Petitioner's wrongful death claim against the Division of Highways, the Commission failed to consider the law related to the defenses of comparative contributory negligence and imputation of the fault of another. Instead, the Claims Commission simply concluded, without

any of the evidence required to support such determination, that Petitioner's decedent must be held responsible for riding in a vehicle with an intoxicated person. Additionally, the Commission made clearly erroneous factual findings based upon rank hearsay contained within an undisclosed exhibit, made clearly erroneous factual findings that stand in stark contrast to the evidence presented at trial, and made clearly erroneous factual findings that are simply not based in reality.

Petitioner has grave concerns with the manner in which the Commission reached its decision in her case. Because of these concerns, Petitioner filed her *Motion to Alter or Amend Findings, Conclusions and Judgment*; however, such motion was summarily denied without further consideration of the myriad of legal and factual deficiencies raised in her motion. As such, Petitioner now respectfully requests that this Court grant her petition and carefully consider the record below to determine whether or not the manner in which the Claims Commission reached its decision was appropriate. Petitioner maintains that upon careful review, this Court will discover that the Commission made clearly erroneous factual findings and ignored the law of the State of West Virginia. If this Court so determines, then Petitioner requests that this Court reverse the opinion issued by the inferior tribunal and issue instructions to the inferior tribunal that it enter an opinion in Petitioner's favor consistent with the law of the State of West Virginia and the record before the Commission.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for oral argument under Rule 20(a)(1) of the West Virginia Rules of Appellate Procedure. While some of the questions presented by Petitioner fall within the purview of Rule 19 of the West Virginia Rules of Appellate Procedure, 1) the constitutionality of W. Va. Code § 14-2-28(b) is both an issue of first impression and involves constitutional questions regarding a statute enacted by the Legislature and 2) whether or not the West Virginia

Rules of Evidence apply in claims pending before the Legislative Claims Commission appears to be an issue of first impression for this Court. As such, Petitioner requests that the case be set for a Rule 20 oral argument and further requests that this Court issue a full opinion addressing the issues presented herein.

V. ARGUMENT

A. This Court has original jurisdiction to review the judgment of the Legislative Claims Commission, which is an inferior tribunal. To the extent that the Legislature sought to limit judicial review of Legislative Claims Commission decisions by a recent statute, such statute is unconstitutional.

This Court has jurisdiction to the review the judgement of the Legislative Claims Commission, which is an inferior tribunal. *See State ex rel. Smith v. West Virginia Crime Victims Compensation Fund, et al.*, 232 W. Va. 728, 753 S.E.2d 886 (2013), n.1 (quoting Syl. Pt. 1, *Foster Foundation v. Gainer*, 228 W. Va. 99, 717 S.E.2d 883 (2011) (" 'A writ of certiorari will lie from an inferior tribunal, acting in a judicial or quasi-judicial capacity, where substantial rights are alleged to have been violated and where there is no other statutory right of review given.' Syllabus point 4, in part, *North v. Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977).")). *Foster Foundation*, 228 W. Va. at 105-06, 717 S.E.2d at 889-90. (quoting *G.M. McCrossin, Inc.*, 177 W. Va. at 541 n. 3, 355 S.E.2d at 33 n. 3) ("[T]his Court obviously may review decisions of the court of claims under the original jurisdiction granted by article VIII, section 2[3] of our Constitution, through proceedings in mandamus, prohibition, or certiorari. . . . **Review in this fashion is necessary because the court of claims is not a judicial body, but an entity created by and otherwise accountable only to the Legislature, and judicial recourse**

[3] Based on Petitioner's review of this Court's opinion in *G.M. McCrossin, Inc.*, Petitioner believes that this Court's reference to article VIII, section 2 of the West Virginia Constitution is a typographical error. Section 3 of article VIII of the West Virginia Constitution, not section 2 of article VIII, is the section of the West Virginia Constitution that provides this Court original jurisdiction over proceedings in certiorari.

must be available to protect the basic principles of separation of powers.") (footnote not contained in original) (emphasis added).

Petitioner anticipates that Respondent will assert that her instant petition is barred by W. Va. Code §§ 14-2-27, 14-2-28. W. Va. Code § 14-2-27 provides that "[a]ny final determination against the claimant on any claim presented as provided in this article shall forever bar an further claim in the commission arising out of the rejected claim." W. Va. Code § 14-2-28 provides

> (a) It is the policy of the Legislature to make no appropriation to pay any claims against the state, cognizable by the commission, unless the claim has first been passed upon by the commission.
>
> (b) Because a decision of the commission is a recommendation to the Legislature based upon a finding of moral obligation, and the enactment process of passage of legislation authorizing payments of claims recommended by the commission is at legislative discretion, no right of appeal exists to findings and award recommendations of the West Virginia Legislative Claims Commission and they are not subject to judicial review.

W. Va. Code § 14-2-27 is inapplicable to the instant matter as Petitioner seeks original jurisdiction review of the inferior tribunal's decision. Petitioner appreciates that W.Va. Code § 14-2-27 precludes her from reasserting another claim before the Legislative Claims Commission in relationship to the death of her son on February 17, 2014.

To the extent that W. Va. Code § 14-2-28(b) was enacted following what appears to be this Court's last review of a petition for writ of certiorari, *State ex rel. Smith,* 232 W. Va. 728, 753 S.E.2d 886 (2013), regarding an order of the West Virginia Court of Claims, the constitutionality of such recently enacted provision has never been tested. As is mentioned above, the West Virginia Constitution provides, in relevant part, that "[t]he supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition, and certiorari." W. Va. Const. art. VIII, § 3. Moreover, the West Virginia Constitution further provides, in relevant part, that "[t]he legislative, executive, and judicial departments shall be

separate and distinct, so that neither shall exercise the powers properly belonging to the others[.]" W. Va. Const. art. V, § 1. Accordingly, the Legislature's attempt to preclude judicial review of findings and recommendations made by the Legislative Claims Commission is unconstitutional as it seeks to preclude this Court from exercising original jurisdiction review of decisions made by the Legislative Claims Commission and further interferes with the separation of powers established by the West Virginia Constitution. The Legislature's attempt to rob this Court of jurisdiction is unconstitutional and should be deemed as such by this Court prior to its consideration of the manner in which the inferior tribunal reached its decision.

B. Standard of Review

A writ of certiorari is not a matter of right, but rather, of discretion. *See State ex rel. Smith,* 232 W. Va. at 730-31, 753 S.E.2d at 888-89. "The scope of review under the common law writ of certiorari is very narrow. It does not involve an inquiry into the intrinsic correctness of the decision of the tribunal below, but only into the manner in which the decision was reached." *Id.* (quoting Syl Pt. 3, *Foster,* 228 W. Va. at 101, 717 S.E.2d at 885).

When reviewing questions of law, this Court must apply its *de novo* standard of review. *See State ex rel. Smith,* 232 W. Va. at 731, 753 S.E.2d at 889. This Court has previously indicated that a circuit court must apply a *de novo* standard of review when reviewing both law and fact in a writ of certiorari proceeding arising under W. Va. Code § 53-3-1, *et seq.*[4] *State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corp.,* 223 W. Va. 146, 154, 672 S.E.2d 282, 290 (2008). As article VIII, § 3 of the West Virginia Constitution permits this Court to exercise original jurisdiction and review the Commission's decision, Petitioner maintains that

[4] W. Va. Code §53-3-1 provides "[j]urisdiction of writs of certiorari (**except such as may be issued from the Supreme Court of Appeals**, or a judge thereof in vacation) shall be in the circuit court of the county in which the record or proceeding is, to which the writ relates. Any such writ may be awarded either by the circuit court or by the judge thereof in vacation." (emphasis added).

this Court's review of both the facts and law are subject to a *de novo*, plenary standard of review.[5]

C. Respondent failed to present evidence warranting the assessment of comparative fault to Mr. Ladanye and/or warranting the driver's fault being imputed to Mr. Ladanye. The Claims Commission utterly failed to follow the law of the State of West Virginia.

Rule 8(c) of the West Virginia Rules of Civil Procedure requires that a party affirmatively plead an affirmative defense such as contributory negligence or assumption of risk.[6] As with any affirmative defense, "the burden of proving contributory negligence is on the defendant." *Mullens v. Virginian Ry. Co.*, 94 W. Va. 601, 119 S.E. 852 (1923). *See also Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 897 (1979) ("The requirements of proximate cause have not been altered by the new rule. Consequently, before any party is entitled to recover, it must be shown that the negligence of the defendant was the proximate cause of the accident and subsequent injuries. The same is true of contributory fault or negligence. Before it can be counted against a plaintiff, it must be found to be the proximate cause of his injuries.").

The Commission's statement that "Claimant's decedent must be held responsible for his own actions by consenting to ride in the vehicle driven by James Coffman, whose conduct was the approximate [sic] cause of the accident in question" is nonsensical and without legal support. Respondent stated unequivocally that it did not assert the Mr. Ladanye did anything to cause the

[5] Regardless of whether the proper standard of review for the Commission's findings of fact is *de novo* or clearly erroneous, Petitioner maintains that the Commission's opinion must be vacated due to the egregiousness of the findings of fact reached by the Commission.

[6] The West Virginia Rules of Civil Procedure apply in cases pending before the Claims Commission unless the West Virginia Court of Claims Rules of Practice and Procedure are to the contrary. *See* Rule 18 of the West Virginia Court of Claims Rules of Practice and Procedure. As the recent statutory amendments related to the Legislative Claims Commission do not address the West Virginia Court of Claims Rules of Practice and Procedure, and the Claims Commission cited to such Rules in its order entered on March 13, 2018, presumably the Rules of Practice and Procedure still govern cases pending before the Claims Commission.

crash. Notwithstanding, Respondent contends that Mr. Ladanye was necessarily comparatively negligence by virtue of his riding in a car with an intoxicated person, and that the law is so crystal clear on the issue that there is no need to brief the issue. That position is simply not true or supported by law. The Commission failed to consider the law of the State as it relates to the lack of evidence presented by Respondent.

1. Before comparative fault may be assessed against a passenger, the defendant must provide evidence demonstrating that the passenger knew, or by due diligence should have known, that the driver was not taking proper precautions and/or was intoxicated.

There is a long line of case law from this Court concerning the impact of contributory negligence principles on a passenger who knows or should know that his driver is not exercising proper precautions but fails to protest and/or leave the vehicle.

> Under the laws of this state, the driver of an automobile owes to an invited guest reasonable care for his safety; but the guest must exercise ordinary care for his own safety, and when he knows, or by due diligence should know, that the driver is not taking proper precautions, it becomes the duty of the guest to remonstrate; and failure to do so bars his right to damages in case of injury.

Price v. Halstead, 177 W. Va. 592, 596, 355 S.E.2d 380, 385 (1987). (note that a footnote appeared at the end of this passage stating "[t]his syllabus point, as it relates to the passenger's contributory negligence, has been modified by *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979), where we adopted a rule of comparative contributory negligence.")

The same principle regarding the contributory negligence of a passenger as a result of passenger's failure to protest his driver's imprudent driving was previously applied in the context of a driver's intoxication.

> Where an invited guest in an automobile knows, or in the circumstances should know that the driver of the automobile, at the time of his driving, engages in drinking intoxicating liquor to an extent likely to affect the manner of driving, and the guest voluntarily continues a passenger after having had reasonable opportunity to leave the automobile, he is guilty of contributory negligence, and is denied any right of recovery as to his injuries

> resulting from the negligence of the driver fairly attributed to the drinking of the driver.

Hutchinson v. Mitchell, 143 W. Va. 280, 285, 101 S.E.2d 73, 76 (1957) (quoting *Hart v. Gwinn,* 142 W. Va. 259, 95 S.E.2d 248 (1956) (illustrating evidence necessary to support a contributory negligence defense asserted against a guest passenger; it must again be noted that the absolute contributory negligence principles barring recovery have since been replaced with comparative contributory negligence principles).

Based on these guest-passenger cases, it is clear that a contributory negligence defense is only appropriate when proper evidence is proffered by the party asserting such defense. Similarly, in the context of a guest passenger's potential liability to an injured third party, specific evidence has been required before liability can be assessed against the guest passenger. In *Price*, this Court held that a passenger of a vehicle may be found liable to a third party for injuries caused by the intoxication of the driver of the vehicle in which he is a passenger, if two conditions are satisfied: "(1) the driver was operating his vehicle under the influence of alcohol or drugs which proximately caused the accident resulting in the third party's injuries, and (2) the passenger's conduct substantially encouraged or assisted the driver's alcohol or drug impairment." *Price v. Halstead,* 177 W. Va. 592, 600, 355 S.E.2d 380, 389 (1987). This Court subsequently gave further consideration to the issue of fault being assessed to a guest passenger in a case where a deceased minor's estate sued several defendants, including a fellow minor driver and an alcohol vendor that allegedly sold alcohol to the deceased minor, which the deceased minor and the fellow minor driver consumed and were both intoxicated by at the time of the underlying automobile crash:

> Logic dictates that where the passenger is the injured party and sues a commercial vendor for negligently providing intoxicating beverages to the driver, the vendor should be able to assert that the passenger was contributorily negligent in substantially assisting, encouraging, or contributing to the driver's intoxication. Thus, if [the deceased minor passenger] would have been liable to a third party injured in the accident under *Price*, he may be held

> contributorily negligent with respect to the [defendant vendor] in the action below.

Anderson v. Moulder, 183 W. Va. 77, 87, 394 S.E.2d 61, 71 (1990).

The record of the instant claim is completely void of any evidence demonstrating that Mr. Ladanye knew or should have known that the driver of the vehicle failed to take proper precautions or was intoxicated. Moreover, Respondent produced no evidence demonstrating that Mr. Ladanye's conduct substantially assisted, encouraged, or contributed towards the driver's alcohol impairment. Respondent failed to present any evidence, much less carry its burden, supporting its affirmative defense (assuming it was properly raised) of comparative contributory negligence. For example, in *Price*, there was evidence that the defendant-passenger was actively engaged in providing alcohol and marijuana to the driver; accordingly, the defendant-passenger's potential liability to the injured third party was premised upon his conduct substantially assisting and encouraging the driver's impairment by such substances. Such evidence is simply not present in the instant case; as such, it is evident that the Claims Commission failed to follow the law of the State of West Virginia, and instead, simply reached a conclusory determination that Mr. Ladanye must also "be held responsible for his own actions by consenting to ride in the vehicle driven by James Coffman, whose conduct was the approximate [sic] cause of the accident in question."

It is not necessary to address the issue of assumption of risk in its own section herein; however, to the extent that assumption of risk principles are somewhat related to contributory negligence principles, it is important to note that no evidence was presented by Respondent in the inferior tribunal that would support such an affirmative defense. "The doctrine of assumed or incurred risk is based upon the existence of a factual situation in which the act of the defendant alone creates the danger and causes the injury and the plaintiff voluntarily exposes himself to the

danger with full knowledge and appreciation of its existence." *Farmer v. Knight,* 207 W. Va. 716, 720, 536 S.E.2d 140, 144 (2000) (quoting *Hollen v. Linger,* 151 W. Va. 255, 263, 151 S.E.2d 330, 335 (1966)). Just the same as the comparative contributory negligence issue discussed above, Respondent failed to present any evidence demonstrating that Mr. Ladanye voluntarily exposed himself to a danger with full knowledge and appreciation of its existence.

2. Before a driver's fault can be imputed to a passenger, it must be demonstrated that the driver and passenger were engaged in a joint enterprise or that the passenger exercised control over the driver.

This Court's precedent concerning imputed negligence is clear and is distinct from this Court's precedent regarding comparative contributory negligence: "[i]n the absence of a joint enterprise, the negligence of the driver of a motor vehicle cannot be imputed to the guest passenger in the vehicle." *Blackburn v. Smith,* 164 W. Va. 354, 264 S.E.2d 158 (1980) (quoting Syl. pt. 7, *Frampton v. Consolidated Bus Lines,* 134 W.Va. 815, 62 S.E.2d 126 (1950)). This is paralleled in previous opinions issued by the Commission's predecessor entity, the West Virginia Court of Claims, which have looked to guiding precedent from this Court when dealing with the imputation of contributory negligence: "the negligence of [a] driver of a vehicle cannot be imputed to the passenger therein, when the passenger is free from personal negligence and has no control over the driver." *Ambrosone, et al. v. Dept. of Highways,* 11 Ct. Cl. 221 (1977). (citing *C.H. Gilmer v. C.C. Janutolo, et al.,*116 W. Va. 500, 182 S.E.2d 572 (1935); *Pierce's Ex'x v. Baltimore & O.R. Co.,* 99 W. Va. 313, 128 S.E. 832 (1925)). *See also Sipple v. Div. of Highways,* 24 Ct. Cl. 116 (2002) (injured passenger husband recovered full measure of his damages despite driver wife receiving no award as a result of her negligence being equal to, or greater than, the negligence of the Division of Highways).

The *Price* case discussed above also addressed imputed fault; the third-party injured person sought to hold the passenger liable for the negligence of the driver of the vehicle in which

the passenger was riding. This Court held that "it appears that the passengers and the driver embarked on a common purpose, that of drinking and joy riding. This, however, would not be the type of endeavor that would give rise to a joint enterprise." *Price v. Halstead,* 177 W. Va. 592, 355 S.E.2d 380 (1987). As such, the *Price* Court declined to impute the driver's fault to the passenger, and instead, as is discussed above, determined that the passenger could be found comparatively negligent by virtue of his substantially encouraging or assisting the driver's alcohol or drug impairment which proximately caused the accident that caused injuries to the third party.

There is simply no such evidence in the instant case; accordingly, the precedent established by this Court does not support the driver's fault being imputed to Mr. Ladanye. As the law of this State and the record below do not support comparative fault being assessed to Mr. Ladanye or the driver's negligence being imputed to Mr. Ladanye, the only appropriate defense that should have been considered by the Commission is Respondent's position that it was not negligent.

D. The West Virginia Rules of Evidence should apply to proceedings pending before the Legislative Claims Commission; without those rules, the Commission is free to selectively apply the West Virginia Rules of Evidence. Such selective application of the Rules of Evidence calls into question the fundamental issue of the manner in which the Commission reaches its decisions.

Rule 7(b) of the Rules of Practice and Procedure of the West Virginia Court of Claims provides that "[t]he Court shall not be bound by the usual common law or statutory rules of evidence. The Court may accept and weigh, in accordance with its evidential value, any information that will assist the Court in determining the factual basis of the claim." *See also* W. Va. Code § 14-2-15.

Notwithstanding the freedom granted to the Commission, its predecessor entity's case law, has selectively applied the West Virginia Rules of Evidence to bar hearsay statements offered against the State. *See Nelson v. Div. of Highways,* 25 Ct. Cl. 44 (2003) (applying Rule 801(c) of the West Virginia Rules of Evidence to bar an out of court statement made by a courtesy patrol driver; "[t]o allow such statements to be introduced into evidence would be unfair to the respondent.") Although the Legislature conferred power to the Claims Commission, specifically indicating that the Commission is not limited by normal statutory rules of evidence, this Court should find that the Commission is, nonetheless, bound by the West Virginia Rules of Evidence. As an inferior tribunal from which there is no other right to appeal, the Claims Commission is subject to this Court's review of the manner in which it reaches its decisions on writ of certiorari. *See State ex rel. Smith,* 232 W. Va. 728, 731, 753 S.E.2d 886, 889 (2013). *See also Foster Foundation v. Gainer,* 228 W. Va. 99, 717 S.E.2d 883 (2011). Without the Commission having an obligation to follow the Rules of Evidence, the public will have no confidence in the decisions reached by the Commission or the manner in which those decisions are reached.

E. Notwithstanding past instances of the West Virginia Court of Claims following the West Virginia Rules of Evidence to bar proffered hearsay statements, the Legislative Claims Commission overruled Petitioner's timely objection to the admission of hearsay statements contained within a criminal prosecutor's case file that was not disclosed as an exhibit by Respondent.

Even if this Court should disagree with Petitioner's position that the statutory freedom granted to the Commission regarding the rules it must follow should be struck down, this Court is Constitutionally permitted, through a writ of certiorari, to review the Commission's opinion and order denying plaintiff's post-opinion motion to determine error and how such error should be corrected. *Foster Foundation,* 228 W. Va. at 105-06, 717 S.E.2d at 889-90. (quoting *G.M. McCrossin, Inc.,* 177 W. Va. at 541 n. 3, 355 S.E.2d at 33 n. 3) ("[T]his Court obviously may

review decisions of the court of claims under the original jurisdiction granted by article VIII, section 2 of our Constitution, through proceedings in mandamus, prohibition, or certiorari. . . . Review in this fashion is necessary because the court of claims is not a judicial body, but an entity created by and otherwise accountable only to the Legislature, and judicial recourse must be available to protect the basic principles of separation of powers.").

The Commission's admission of and factual findings related to the hearsay witness statements contained within the undisclosed criminal prosecutor's case file are clearly wrong. On the first level, the hearsay statements offered in the testimony of Jerry Pigman were textbook hearsay statements introduced for the truth of the matter asserted for which there is no hearsay exception. To the extent that Respondent asserts that the statements are not hearsay because Mr. Pigman is an expert, such position is incorrect. Rule 703 provides that

> [a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the [factfinder] only if their probative value in helping the [factfinder] evaluate the opinion substantially outweighs their prejudicial effect.

W. Va. R. Evid. 703.

In its consideration of Rule 703 of the West Virginia Rules of Evidence, this Court has previously held

> that an expert witness may testify about fact he/she **reasonably relied** upon to form his/her opinion though such facts would otherwise be inadmissible as hearsay if the trial court determines that the probative value of allowing such testimony to aid the [factfinder's] evaluation of the expert's opinion substantially outweighs its prejudicial effect. **If a trial court admits such testimony . . . the otherwise inadmissible factual evidence is not being admitted to establish the truth thereof** but is solely for the

> limited purpose of informing the [factfinder] of the basis for the expert's opinion.

Doe v. Wal-Mart Stores, Inc., 210 W. Va. 664, 676-77, 558 S.E.2d 663, 675-76 (2001). (emphasis added).

It is evident that Respondent's desperate attempt to admit inadmissible hearsay through the mouth of its expert was inappropriate and nothing more than an "attempt to bypass many of the other rules and get inadmissible evidence before the [factfinder] improperly." *See* Louis J. Palmer, Jr., et al., Handbook on Evidence for West Virginia Lawyers, § 703.04 (6th ed. 2015). Mr. Pigman is a traffic safety engineer; criminal prosecution case file witness statements are not things that traffic safety engineers reasonably rely upon in reaching their opinions. Moreover, even if Mr. Pigman was correctly permitted to testify about the hearsay statements, those statements should not have been admitted to prove the truth of the matter asserted under *Doe*. As a result, the Commission's findings of fact premised upon such testimony are clearly erroneous.

In addition to the hearsay concerns discussed above, the hearsay statements contained within the criminal prosecution case file should not have been considered by the Commission as the criminal prosecution case file, and the hearsay statements contained therein, were not disclosed as an exhibit by Respondent in advance of trial.[7]

[7] Respondent failed to file a pretrial information statement required by the Commission in its Scheduling Order dated August 28, 2016; however, Respondent's counsel emailed its exhibit list to Claimant's counsel on July 18, 2017; therein, Respondent's counsel did not identify the criminal investigation file or the hearsay witness statements discussed herein.

F. Several factual findings made by the Legislative Claims Commission are wholly unsubstantiated by the record. Such findings cast doubt on the manner in which the Commission reached its decision. When coupled with the legal errors enumerated above, Petitioner asserts that substantial rights have been violated, and she is without another statutory right of review. This Court should carefully review the record and analysis of the Commission, and subsequently vacate the Commission's prior order with instructions that the Commission enter a new opinion in favor of Petitioner.

The Commission committed errors in the manner it reached its decision that extend beyond its failure to follow the laws of the State of West Virginia. Indeed, the Commission made factual findings that are without any evidentiary support and stand in stark contrast to the evidence presented at the trial of Petitioner's wrongful death claim. Such factual findings further cast doubt on the manner in which the Commission reached its decision thus making this Court's review by writ of certiorari even more critical. Due to the number of factual errors contained in the Commission's opinion issued on February 27, 2018, Petitioner will address each, in order, below.

First, the Commission determined that

> [t]he evidence presented at the hearing of this claim on August 16, 2017 established that Mr. Ladanye, along with James Cochran [sic] and Jonathan Stopiak, were out drinking beer at some bars located on High Street in Morgantown, West Virginia. When they decided to return home, Mr. Ladanye and Mr. Cochran [sic] argued about who should drive them home. Apparently, Mr. Cochran [sic] won the argument. Thereafter, the subject's vehicle was observed on the Westover entrance ramp traveling at a high rate of speed when it began to spin completing three three hundred and sixty degree rotations before coming to a complete stop. Thereafter, the vehicle started moving again, began fishtailing and went over the parapet on the Westover Bridge landing on Fairmont Road below. At the time of the accident, the weather conditions were listed by the investigating police officer as "sleet, hail and freezing rain" and the road conditions were listed as "snow."

JA – 16.

There was no eyewitness testimony offered by either party concerning what happened on the night of the fatal crash prior to vehicle overtopping the bridge parapet and falling to the ground below. The only "evidence" related to James Coffman's driving under the influence was a certified copy of the criminal charges brought against him, Mr. Coffman's guilty plea to driving under the influence causing death, and the order sentencing Mr. Coffman to jail. JA – 267-268. As is discussed above, Respondent attempted to have its traffic engineer expert, Jerry G. Pigman, testify concerning alleged witness accounts contained within the criminal prosecution case file; however, the witnesses were never identified by Respondent and never called to testify in line with their out of court statements. Moreover, Respondent did not call the investigating police officer who wrote the State of West Virginia Uniform Traffic Crash Report related to the underlying crash to testify at trial; in fact, much like the witnesses listed in the criminal prosecution case file, Respondent never identified the investigating police officer, Sergeant J.R. Morgan of the Westover Police Department.

To make matters worse, the Commission reached its above findings while totally ignoring evidence presented by Petitioner. In regard to the weather conditions around the time of the crash, Petitioner called First Sergeant William Yaskoweak of the Monongalia County Sheriff's Department, who served as the accident reconstructionist at the scene of the crash on February 17, 2014. First Sergeant Yaskoweak testified that he arrived on the scene approximately 45 minutes after the crash and that the weather conditions that night caused him no difficulty driving to the scene of the crash. JA – 129-130. JA – 137-138. JA – 146. Furthermore, in contrast to the "Sleet, Hail, or Freezing Rain" and "Snow" boxes checked on the crash report completed by Sergeant Morgan, First Sergeant Yaskoweak testified from memory and based upon police photographs from the scene of the crash that whatever snow and slush was present at the scene was actually to the side of the road, way off the roadway. *Id.*

Amazingly, the Commission simply ignored First Sergeant Yaskoweak's testimony and the photographs that he used to explain his testimony. Instead, the Commission relied upon hearsay statements contained in an undisclosed exhibit that Respondent's liability expert claims to have relied upon, even though Respondent's liability expert acknowledged that he was not testifying as an accident reconstructionist, and hearsay statements contained within the investigating officer's crash report.

Second, the Commission determined that

> Jerry S. [sic] Pigman, an expert witness for the Respondent testified that the Respondent's primary responsibility to the public, when snow is on the highway, is to keep the travel lanes open and to the extent possible, clear. Only after the roadway surface conditions are safe for the driving public to travel without concern for their safety, should the Department [sic] of Highway's resources be used to clear snow from parapet walls. The "operational parameters [sic]" relied upon by the Claimant to support her contention that snow should have been removed from the Westover Bridge parapet prior to the accident are determined by the Department [sic] of Highways Officials in Charleston, West Virginia and are derived from reports received from the field/division offices. These operational parameters [sic] provide a general idea of roadway conditions within the state. Actual decisions regarding snow removal protocol for a particular location are made locally by the Department [sic] of Highways employees who are actively working in the affected area. This snow removal activity and local assessment of road conditions are documented on Department [sic] of Highways form MM-77. These forms provide the best evidence of road conditions for the location at issue here and reveal that in the five days leading up to the day of the accident, temperatures were near or below freezing, with flurries to heavy snow each day. Application of road treatment chemicals and plowing operations continued throughout this time in an effort to keep the main travel lanes passable. As a result, road conditions on the travel portions of the highway during the relevant time were not clear and safe for travel sufficient to allow the Department [sic] of Highways personnel to begin clean-up efforts along the Westover Bridge parapet wall.

JA – 16-17.

Again, the Commission ignored the evidence presented by Petitioner and simply followed its interpretation of Respondent's case. In doing so, however, the Commission made factual findings that are not substantiated by the record. For example, the factual finding that Respondent's operational postures are determined in Charleston is simply untrue and is contrary to the evidence presented at trial. Mr. Weaver, Respondent's designated witness, explained that each local maintenance group (in this case, "I-77 Morgantown") reports underlying road and weather condition data (including operational postures) to its respective district office, and then the district office forwards such information on to the TMC in Charleston. The TMC then compiles the data, originally reported from employees at various locations throughout each district in the State, into a spreadsheet document. JA – 161-162. As such, the factual finding that the "operational parameters [sic]" are determined in Charleston is clearly erroneous and flies in the face of the evidence presented at trial.

Additionally, the Commission's determination that MM-77s are the best evidence of weather conditions is unbelievable and unsupported by the record. Respondent's Maintenance Manual, which Mr. Weaver testified must be followed and each operation must be performed in the approved manner if the snow removal and ice control program is to be effective, establishes operational postures and states that the purpose is to describe conditions which will dictate certain operational postures for the various Division of Highways organizations with regard to emergency situations. Simply put, Chapter 5 of Respondent's Maintenance Manual establishes roadway maintenance procedures related to Snow Removal and Ice Control Operations. The factual findings made by the Commission, which simply ignore the operational postures defined by Respondent's own documents, are clearly erroneous and render the policies and procedures established by Respondent meaningless and worth nothing more than the paper upon which they are printed.

Third, the Commission determined that

> [i]t is also important to note that Mr. Pigman testified without contradiction that parapets, such as the one at issue here, are designed to withstand impact angles of no greater than twenty degrees. In an accident where the approach angle of the vehicle to the parapet was greater than twenty degrees such as here, where the approach was approximately forty degrees, the vehicle could still jump the parapet or break through it even without snow being present.

JA – 17.

The Commission's above determination is unsupported by requisite opinion testimony. Mr. Pigman did not offer an opinion to a reasonable degree of engineering probability that the parapet at issue would have failed even if the hazardous snow pile condition had been timely removed by Respondent's snow removal and ice control efforts. Notwithstanding Mr. Pigman's claim "that approach angles in excess of 20 degrees are going to compromise the effectiveness of a barrier wall dry or snow covered," Mr. Pigman did not opine that the vehicle would have still left the bridge deck had it encountered the parapet wall at a forty degree angle after the snow pile condition had been cleaned from alongside the parapet wall. JA – 369. Without such an opinion, the Commission's findings concerning what the vehicle could have done are nothing more than speculation, are clearly erroneous, and directly at odds with First Sergeant Yaskoweak's opinion that the car would not have proceeded over the parapet wall if the snow had been removed prior to the crash. JA – 131.

Fourth, the Commission determined that Respondent was in "snow removal mode" until February 19, 2014 and, as a result, could not remedy the known snow pile hazard until that date. JA – 18. Although this "snow mode" concept was advanced by Respondent at trial, it is not contained in Respondent's Maintenance Manual that governs snow removal and ice control

operations.[8] JA – 408. A fact, by definition, is "a piece of information presented as having objective reality." *See* https://www.meriam-webster.com/dictionary/fact. The Commission's factual finding is not based on objective reality; it is made up. Respondent's Maintenance Manual is a document that exists, is applicable to the instant case, and does not address "snow mode," instead, it prescribes a system of operational postures that dictate what snow removal and ice control operations should be performed at various times. The Commission's findings are clearly erroneous and not based in reality.

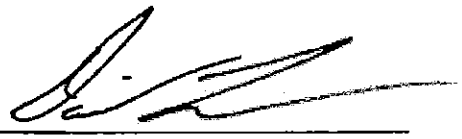
VI. CONCLUSION

Contrary to the Commission's assertion in its order, the law of the State of West Virginia has not been adhered to by the Commission. Indeed, the Commission failed to follow the law of West Virginia and ignored the evidence presented to it at trial. As such, Petitioner questions the manner in which the Commission reached its decision. Petitioner prays that this Court grant her petition for writ of certiorari, carefully considering the manner in which the Commission reached its decision, and subsequently vacating the opinion of the Claims Commission, providing the Claims Commission with instructions to enter a new opinion consistent with the relief requested by Petitioner. Petitioner further requests all other relief this Court deems just and proper.

[8]Mr. Weaver, Respondent's designated witness, testified at his deposition that he was not aware of any directives or other guiding principles applicable to this case other than Respondent's Maintenance Manual. Weaver 30(b)(7) Dep. 46:6-24, 47:1-7. Petitioner filed Mr. Weaver's Rule 30(b)(7) deposition transcript with the Claims Commission following the trial of her claim.

Danita Ladanye, Administratrix of the Estate of Jonathan S. Ladanye

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel. DANITA LADANYE, ADMINISTRATRIX OF THE ESTATE OF JONATHAN S. LADANYE,

Petitioner,

v. **Docket No.: _____**
(Claims Commission Case No.: CC-15-2038)

WEST VIRGINIA LEGISLATIVE CLAIMS COMMISSION and WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS,

Respondents.

CERTIFICATE OF SERVICE

I, DAVID B. LUNSFORD, counsel for Claimant Danita Ladanye, Administratrix of the Estate of Jonathan S. Ladanye, do hereby certify that I have caused to be served **PETITION FOR WRIT OF CERTIORARI** and **JOINT APPENDIX**, both filed on this day, by depositing the same into the United States Mail, First Class, postage pre-paid, this 23rd day of April 2018, addressed to the following:

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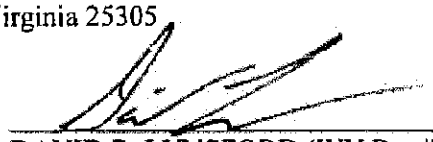

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