

**FILED**

**January 9, 2009**

released at 3:00 p.m.

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

Benjamin, J., dissenting:

I respectfully dissent from the majority's decision to affirm the circuit court's rulings in this case. In affirming the underlying rulings, the majority relies on W.Va. Code § 17C-15-49, observing that this statute is "central to the trial court's ruling." Op. at \_\_\_\_\_. As therein noted, W.Va. Code § 17C-15-49 not only mandates that all occupants of motor vehicles on public highways wear safety belts, but also that the statute ". . . contains a provision limiting when and for what purpose evidence of violations of the safety belt law is admissible in court." *Id.* Specifically, the statute provides that a violation of the statute is not admissible as evidence of fault and is also not admissible in mitigation of damages. I conclude that the evidentiary direction of W.Va. Code § 17C-15-49 violates the Rule-Making Clause and the Separation of Powers Clause of the West Virginia Constitution.

The Separation of Powers Clause of the West Virginia Constitution 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 either of the others[.]" W.Va. Const. art. 5, § 1. The Separation of Powers Clause "is not merely a suggestion, it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279

S.E.2d 622 (1981). In considering the Separation of Powers Clause, this Court has not “hesitated to utilize the doctrine where we felt that there was a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government.” *Appalachian Power Co. v. PSC*, 170 W.Va. 757, 759, 296 S.E.2d 887, 889 (1982).

Pursuant to the Rule-Making Clause of the West Virginia Constitution, the Supreme Court of Appeals “shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law.” W.Va. Const. art. 8, § 3. “Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law.” Syl. Pt. 1, *Bennett v. Warner*, 179 W.Va. 742, 372 S.E.2d 920 (1988). In this regard, “[t]he West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence in circuit courts.” Syl. Pt. 7, in part, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994). Pursuant to the constitutional authority granted to this Court by the Rule-Making Clause, “a statute governing procedure [or evidentiary] matters in [civil or] criminal cases which conflicts with a rule promulgated by the Supreme Court would be a legislative invasion of the court’s rule-making powers.” *State v. Arbaugh*, 215 W.Va. 132, 138, 595 S.E.2d 289, 295 (2004) (Davis, J., dissenting) (quoting *People v. Hollis*, 670 P.2d 441, 442

(Colo. Ct. App. 1983)).

To the extent W.Va. Code § 17C-15-49 conflicts with this Court's Rules of Evidence, it is unconstitutional and must be invalidated. *West Virginia Div. of Highways v. Butler*, 205 W.Va. 146, 516 S.E.2d 769 (1999) (invalidating a statute that was in conflict with W.Va. R. Evid., Rule 702); *Mayhorn v. Logan Med. Found.*, 193 W.Va. 42, 454 S.E.2d 87 (1994) (invalidating a statute that was in conflict with W.Va. R. Evid., Rule 702); *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E.2d 728 (1994) (invalidating a statute that was in conflict with W.Va. R. Evid., Rule 702). Rule 402 of the West Virginia Rules of Evidence provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of West Virginia, by these rules, or by other rules adopted by the Supreme Court of Appeals. Evidence which is not relevant is not admissible.

The admissibility of evidence in civil trials is determined by our Rules of Evidence pursuant to our constitutional rule-making power. In attempting to determine what is and is not admissible in a civil trial, W.Va. Code § 17C-15-49 conflicts directly with Rule 402 of our Rules of Evidence. Consequently, it is in violation of the Separation of Powers Clause of the West Virginia Constitution and the Rule-Making Clause of the West Virginia Constitution. W.Va. Const. art. 5, § 1, art. 8, § 3. I conclude that the evidentiary provisions of W.Va.

Code § 17C-15-49 are unconstitutional.

Accordingly, I dissent from the majority opinion.