IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1993 Term

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No. 21609

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LUCILLE C. CHESSER BY PEGGY C. HADLEY,
HER ATTORNEY-IN-FACT, AND BYRON ZIRKLE,
Plaintiffs Below, Appellants

v.

TIMOTHY HATHAWAY AND
KINGSVILLE WOOD PRODUCTS, INC.,
A CORPORATION,
Defendants Below, Appellees

_____

Appeal from the Circuit Court of Barbour County
Honorable John L. Waters, Judge
Civil Action No. 91-C-99

AFFIRMED, IN PART;
REVERSED, IN PART, AND REMANDED.

_____

Submitted: September 28, 1993
Filed: December 16, 1993

James C. West, Jr.
West & Jones
Clarksburg, West Virginia
Attorney for the Appellants

James A. McKowen
Hunt, Lees, Farrell & Kessler
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Attorney for the Appellees

This Opinion was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "'Where the language of a statute is plain and unambiguous, there is no basis for application of rules of statutory construction; but courts must apply the statute according to the legislative intent plainly expressed therein.' Syllabus, Point 1, Dunlap v. State Compensation Director, 149 W. Va. 266 [140 S.E.2d 448]." Syl. pt. 1, Farmers & Merchants Bank of Keyser v. Haden, 154 W. Va. 292, 175 S.E.2d 167 (1970).

2. "'"In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syllabus Point 5, Orr v. Crowder, 173 W. Va. 335, 315 S.E.2d 593 (1984).' Syl. pt. 1, Pinnacle Mining v. Duncan Aircraft Sales, 182 W. Va. 307, 387 S.E.2d 542 (1989)." Syl. pt. 4, Pote v. Jarrell, 186 W. Va. 369, 412 S.E.2d 770 (1991).

3. "'Punitive or exemplary damages are such as, in a proper case, a jury may allow against the defendant by way of punishment for wilfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff, over and above full compensation for all injuries directly or indirectly resulting from such wrong.' Syllabus Point 1, O'Brien v. Snodgrass, 123 W. Va. 483, 16 S.E.2d 621 (1941)." Syl. pt. 4, Harless v. First Nat'l Bank in Fairmont, 169 W. Va. 673, 289 S.E.2d 692 (1982).

Per Curiam:

This case is before this Court upon an appeal from the September 23, 1992, order of the Circuit Court of Barbour County, West Virginia. In that order the circuit court denied the appellants' motion to set aside the verdict and judgment entered thereon. The appellants are Lucille C. Chesser by Peggy C. Hadley, her attorney-in-fact and Byron Zirkle. The jury awarded the appellants $19,009.96 in damages that resulted from the appellees' negligent trespass onto the appellants' property and the subsequent damaging, destroying and cutting of timber upon the appellants' land. The appellees are Timothy Hathaway and Kingsville Wood Products, Inc., a corporation. We have before us the petition for appeal, all matters of record and the briefs of counsel. For the reasons stated below, the judgment of the circuit court is affirmed, in part, reversed, in part, and remanded.

I

The land involved in this timber trespass action is known as the W.T. George property, which consists of 397 acres. The property is located in Barbour County, West Virginia. The W.T. George property involves three adjoining tracts of land, the Dayton tract, the Sipe tract and the Gall tract. The Dayton and Sipe tracts are owned by the W.T. George heirs (hereinafter "the heirs") and John Mosesso. With respect to the Gall tract, one-fourth of it is owned by the heirs; and, the remaining three-fourths is owned by the plaintiffs below and the appellants herein, with Lucille Chesser owning one-half interest and Byron Zirkle owning one-quarter interest.

In the spring of 1990, the defendants below and the appellees herein entered into negotiations about timbering the W.T. George property. Mary Kelley, agent for the appellants, conducted the negotiations with the appellee, Timothy Hathaway. According to Ms. Kelley, she told Mr. Hathaway that the heirs were only interested in selling timber rights on the Dayton and Sipe tracts because the heirs only owned one-fourth interest in the Gall tract. Prior to timbering, Mr. Hathaway went to the assessor's office to look at the relevant tax maps and cards. Mr. Hathaway testified that according to this information, it appeared as though the Dayton, Sipe and Gall tracts were not separate tracts but rather one tract of land. Following his completion of this research, Gerald Fogg, who initially represented the heirs, gave Mr. Hathaway a list of all the heirs. Mr. Hathaway testified that at this time Mr. Fogg did not indicate that anyone, besides the heirs, had an interest in the W.T. George property. Furthermore, Mr. Hathaway testified that in May of 1990, he signed separate timber agreements with each of the heirs and there was nothing within these contracts that indicated that someone other than the heirs owned an interest in the property.

John Kefover, one of the heirs, and Joan Brown, Mr. Kefover's friend, met with Mr. Hathaway and Mr. Fogg. John Kefover and Joan Brown had lived on the W.T. George property for 20 years. Mr. Hathaway testified that prior to the commencement of the timbering, he walked the area to be timbered with Mr.

Kefover and Ms. Brown to make sure he had marked the boundaries correctly; and, during this inspection the trio went through the area that Mr. Hathaway later realized was the Gall tract.

However, Mr. Fogg testified and inferred that Mr. Hathaway was given notice of the fact that the heirs owned an undivided one-fourth interest in the Gall tract when he went to check the tax map cards, because the two deeds referred to on the tax cards recite the heirs' interest in the Gall tract.

Upon arriving at the property, the first thing Mr. Hathaway did was create a road for ingress and egress through the property. The crew then began timbering the property. At one point when the crew was timbering the Gall tract, Ms. Brown came to the job site and informed the crew that they were on the Gall tract and should not be there. Mr. Hathaway testified that this was the first indication to him that the heirs were not the sole owners of the Gall tract. Shortly thereafter, Peggy Hadley, Lucille Chesser's daughter, contacted Mr. Hathaway expressing concern that logging was being done on their land. The appellees continued to timber the property until they were served with an injunction and forced to stop in February of 1991. The appellees had cut down 922 trees from the Gall tract.

On at least two occasions, in the spring of 1991, the appellees offered to remove the timber that had been cut down, place it in a saw mill and have the money put in an escrow account. In December of 1991, the appellants informed the appellees that it was their desire for the timber to be removed. However, as Mr. Hathaway testified, at this point he did not believe the timber had any redeemable value due to the passage of time. He further testified that he was unable to remove the timber because he was not afforded enough time.

The jury heard the case on June 25, 1992, and June 27, 1992, and at the conclusion of all the evidence the trial court directed a verdict in favor of the appellants and against the appellees for the value of the timber which had been cut, with such value to be determined by the jury. The trial court instructed the jury that pursuant to W. Va. Code, 61-3-48a [1983], treble damages could be recovered only if the jury found that the appellees' act of entering upon the land and cutting timber was done with willful, wanton or malicious intent. Punitive damages were not considered because the trial court refused the appellants' instruction on punitive damages. In addition to the verdict form requiring the jury to fix the stumpage value of the Gall tract timber, the verdict form also contained a special interrogatory asking the jury: "Did the defendants, Timothy Hathaway and Kingsville Wood Products, Inc. know that the W.T. George heirs did not own 100% of the Gall Tract at the time they entered upon and cut timber on the Gall Tract?"

Ultimately, the jury found the stumpage value of the timber from the Gall tract to be $19,009.69; however, they responded to the special interrogatory by answering in the negative.

On September 23, 1992, the trial court denied the appellants' motion for a new trial. It is from the trial court's

order of September 23, 1992, that the appellants appeal to this Court.

II

The appellants raise three assignments of error on appeal: (1) the trial court erred in refusing to treble the damages in accordance with W. Va. Code, 61-3-48a [1983]; (2) the trial court erred in refusing to set aside the verdict and grant a new trial on the grounds that the jury's answer to the special interrogatory was contrary to the weight of the uncontroverted evidence; and, (3) the trial court erred in refusing to give appellants' proffered instruction number 3 on punitive damages. Furthermore, the appellees raise, as cross-assignments of error, that the trial court erred in refusing to allow the appellees to present evidence concerning the appellants' failure to mitigate damages; the trial court erred in refusing to give appellees' instruction number 7 on mitigation of damages; and finally, the trial court erred in denying appellees' motion to set aside the verdict and judgment, in part, and to grant a new trial in part.

The appellants' first contention is that the trial court erred in refusing to treble the damages in accordance with W. Va. Code, 61-3-48a [1983], which provides:

> Any person who enters upon the land or premises of another without written permission from the owner of the land or premises in order to cut, damage or carry away or cause to be cut, damaged or carried away, any timber, trees, logs, posts, fruit, nuts, growing plant or product of any growing plant, shall be liable to the owner in the amount of three times the value of the timber, trees, growing plants or products thereof, which shall be in addition to and notwithstanding any other penalties by law provided.

The appellants argue that the trial court was incorrect in instructing the jury that, pursuant to the above-mentioned Code provision, treble damages could be recovered only if the jury found that the appellees' act of entering upon the land and cutting timber was done with willful, wanton or malicious intent because the statute contains no language requiring that wilful, wanton and malicious intent as a prerequisite to the assessment of damages. The appellants further assert that a statute should be construed only where its language requires interpretation or may reasonably be considered ambiguous. The appellees assert that the trial court acted properly in interpreting the statute so strictly in that the statute is a penal statute compelling a strict construction.

It has been a well established point of law that: "'Where the language of a statute is plain and unambiguous, there is no basis for application of rules of statutory construction; but courts must apply the statute according to the legislative intent plainly expressed therein.' Syllabus, Point 1, Dunlap v. State Compensation Director, 149 W. Va. 266 [140 S.E.2d 448]."

Syl. pt. 1, Farmers & Merchants Bank of Keyser v. Haden, 154 W. Va. 292, 175 S.E.2d 167 (1970).

In this case, the language within the statute in question is clear and unambiguous. There is no language which invokes a duty upon one to establish intent. This Court is of the opinion that the trial court erred in instructing the jury that, pursuant to the above-mentioned Code provision, treble damages could be recovered only if the jury found that the appellees' act of entering upon the land and cutting timber was done with willful, wanton or malicious intent. The statute simply states that if a person enters onto another's land "without written permission" then he/she is "liable to the owner in the amount of three times the value of the timber." See W. Va. Code, 61-3-48a [1983].

Furthermore, the parties stipulated in the record that the appellees entered upon and cut timber on the Gall tract without the written or oral permission of the appellants. The appellants offered, but the trial judge refused, a jury instruction which stated in relevant part:

> The Court instructs the jury that the statutes of this State provide that any person who enters upon the land or premises of another without written permission from the owner of such land or premises in order to cut, damage or carry away or to cause to be cut, damaged or carried away any timber, trees, logs or posts, such person shall be liable to the owner of such land in the amount of three times the value of the timber[.]

This was the proper instruction that should have been given to the jury regarding the trespass and method of determining damages.

In syllabus point 5 of Jenrett v. Smith, 173 W. Va. 325, 315 S.E.2d 583 (1983) we recognized: "An instruction is proper if it is a correct statement of the law and if there is sufficient evidence offered at trial to support it." This was the proper instruction that should have been given because it was a correct statement of the applicable law in that it practically quoted the statute verbatim.

As a matter of law, based upon the parties' stipulation that the appellees did not receive written permission to cut the timber, the appellants are entitled to treble damages in the amount of $57,029.88. We remand this case to the trial court to enter an order awarding the appellants the treble damages set forth herein. The appellants' second point of contention is the trial court erred in refusing to set aside the verdict and grant a new trial on the grounds that the jury's answer to the special interrogatory was contrary to the weight of the uncontroverted evidence. The appellees contend that there was sufficient evidence to support the jury's finding. As mentioned earlier, the verdict form asked the jury whether the appellees knew that the heirs did not own 100% of the Gall tract

at the time they entered upon and cut timber upon the Gall tract; and, the jury responded in the negative.

This Court, in syllabus point 4 of Pote v. Jarrell, 186 W. Va. 369, 412 S.E.2d 770 (1991), recognized that:

> '"In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syllabus Point 5, Orr v. Crowder, 173 W. Va. 335, 315 S.E.2d 593 (1984).' Syl. pt. 1, Pinnacle Mining v. Duncan Aircraft Sales, 182 W. Va. 307, 387 S.E.2d 542 (1989).

From the transcript, it is obvious that the question as to whether Mr. Hathaway knew that the heirs did not exclusively own the Gall tract during the time the appellees were timbering was a hotly-contested issue. Mr. Hathaway's testimony, regarding the fact that he was unaware of a divided interest in the Gall tract, has been previously discussed in this opinion. Ms. Kelley and Mr. Fogg testified on behalf of the appellants that the appellees should have known that the heirs had only a fractional interest in the Gall tract, because of discussions they had with Mr. Hathaway. Moreover, the appellants contend that the appellees would have discovered this information had they conducted a title search.

The issues in this case were properly before the jury, sufficient evidence was presented, and the jury, after weighing the evidence, found that the appellees did not know, at the time they entered upon and cut timber upon the Gall tract, that the heirs were not the exclusive owners of the Gall tract. We reiterate the fact that whether the appellees acted intentionally is irrelevant because the damages are imputed due to the appellees' violation of W. Va. Code, 61-3-48a [1983] (i.e., their failure to acquire written permission to enter and cut timber upon the land).

With this argument in mind, the appellants' final point of contention is that the trial court erred in refusing to give appellants' proferred jury instruction regarding punitive damages.

More specifically, the appellants argue that the trial court was incorrect in forbidding the appellants from recovering both statutory treble damages and common law punitive damages. The appellees disagree.

In syllabus point 4 of Harless v. First Nat'l Bank in Fairmont, 169 W. Va. 673, 289 S.E.2d 692 (1982), we discussed the nature of punitive damages:

> 'Punitive or exemplary damages are such as, in a proper case, a jury may allow against the defendant by way of punishment for wilfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff, over and above full compensation for all injuries directly or indirectly resulting from such wrong.' Syllabus Point 1, O'Brien v. Snodgrass, 123 W. Va. 483, 16 S.E.2d 621 (1941).

There is no evidence within the record supporting the appellants' contention that the appellees acted maliciously, willfully or wantonly when entering upon the Gall tract and extracting the timber. Moreover, the jury found that the appellees were unaware of the fact that the heirs were not the exclusive owners of the Gall tract at the time of the entry upon the Gall tract and the cutting of the timber.

We should note that other jurisdictions have held that the law does not permit appellants to recover both punitive and treble damages for the same trespass to timber. See Baker v. Ramirez, 235 Cal. Rptr. 857 (1987); Stoner v. Houston, 582 S.W.2d 28 (Ark. 1979); Johnson v. Tyler, 277 N.W.2d 617 (Iowa 1979); and, Johnson v. Jensen, 446 N.W.2d 664 (Minn. 1989).

However, it is not necessary to resolve this issue in this case because we are of the opinion that the trial court was correct in refusing to instruct the jury regarding punitive damages in light of the fact that the evidence was insufficient to support such an instruction. See TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457, 419 S.E.2d 870 (1992).

On the appellees' cross-assignments of error, they argue that the trial court erred in refusing to allow the appellees to present evidence concerning the appellants' failure to mitigate damages; the trial court further erred in refusing to give appellees' instruction number 7 regarding mitigation of damages; and finally, the trial court erred in denying the appellees' motion to set aside the verdict and the judgment, in part, and to grant a new trial, in part. Simply put, their cross-assignments of error relate to a mitigation of damages issue.

Specifically, the appellees argue that the appellants should not be entitled to recover for any losses which could have been avoided by allowing the appellees, within a reasonable period of time, to collect the timber, market it and put the proceeds in an escrow account.

The appellants respond by arguing that the appellees' argument on the issue of mitigation of damages is unfounded. The appellants assert that the relevant statute, W. Va. Code, 61-3-48a [1983], states that an owner of timber is injured and subsequently damaged when there is an entry on the property without written permission and the timber is cut, carried away or damaged. Thus, the appellants argue there was nothing the appellants did or could have done that would have affected their entitlement to damages, because there was entry without written

permission and the damages for the cut timber were fixed by the stumpage value.

In West Virginia, we have recognized that one generally has a duty to mitigate damages: "As a general rule a person whose property is endangered or injured must use reasonable care to mitigate the damages; but such person is only required to protect himself from the injurious consequence of the wrongful act by the exercise of ordinary effort and care and moderate expense." Hardman Trucking, Inc. v. Poling Trucking Co. Inc., 176 W. Va. 575, 579, 346 S.E.2d 551, 555 (1986), citing Oresta v. Romano Bros., Inc., 137 W. Va. 633, 650, 73 S.E.2d 622, 632 (1952).

Once Ms. Brown and Ms. Hadley became aware that the appellees may be timbering on the appellants' property, they expressed concern to Mr. Hathaway. Mr. Hathaway continued to timber the property, and ultimately the appellants were forced to serve the appellees with an injunction. It is obvious that the appellants reasonably tried to protect their property from injurious consequences, therefore, we believe the appellants expended the ordinary effort and care to protect their property as required in Hardman.

Based upon the foregoing, the decision of the Circuit Court of Barbour County is affirmed, in part, reversed, in part, and remanded.

Affirmed, in part;
reversed, in part,
and remanded.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1993 Term

_____

No. 21565

_____

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

JOSEPH J. WILLIAMS,
Defendant Below, Appellant

_____

Appeal from the Circuit Court of Berkeley County
Honorable Patrick G. Henry III, Judge
Civil Action No. 91-F-100

AFFIRMED

Submitted: September 21, 1993
Filed: December 16, 1993
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1993 Term

No. 21609

LUCILLE C. CHESSER BY PEGGY C. HADLEY,
HER ATTORNEY-IN-FACT, AND BYRON ZIRKLE,
Plaintiffs Below, Appellants

v.

TIMOTHY HATHAWAY AND
KINGSVILLE WOOD PRODUCTS, INC.,
A CORPORATION,
Defendants Below, Appellees

Appeal from the Circuit Court of Barbour County
Honorable John L. Waters, Judge
Civil Action No. 91-C-99

AFFIRMED, IN PART;
REVERSED, IN PART, AND REMANDED.

Submitted: September 28, 1993
Filed: December 16, 1993

James C. West, Jr.
West & Jones
Clarksburg, West Virginia

Attorney for the Appellants

James A. McKowen
Hunt, Lees, Farrell & Kessler
Charleston, West Virginia
Attorney for the Appellees

This Opinion was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "'Where the language of a statute is plain and unambiguous, there is no basis for application of rules of statutory construction; but courts must apply the statute according to the legislative intent plainly expressed therein.' Syllabus, Point 1, Dunlap v. State Compensation Director, 149 W. Va. 266 [140 S.E.2d 448]." Syl. pt. 1, Farmers & Merchants Bank of Keyser v. Haden, 154 W. Va. 292, 175 S.E.2d 167 (1970).

2. "'"In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syllabus Point 5, Orr v. Crowder, 173 W. Va. 335, 315 S.E.2d 593 (1984).' Syl. pt. 1, Pinnacle Mining v. Duncan Aircraft Sales, 182 W. Va. 307, 387 S.E.2d 542 (1989)." Syl. pt. 4, Pote v. Jarrell, 186 W. Va. 369, 412 S.E.2d 770 (1991).

3. "'Punitive or exemplary damages are such as, in a proper case, a jury may allow against the defendant by way of punishment for wilfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff, over and above full compensation for all injuries directly or indirectly resulting from such wrong.' Syllabus Point 1, O'Brien v. Snodgrass, 123 W. Va. 483, 16 S.E.2d 621 (1941)." Syl. pt. 4, Harless v. First Nat'l Bank in Fairmont, 169 W. Va. 673, 289 S.E.2d 692 (1982).

Per Curiam:

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I

The land involved in this timber trespass action is known as the W.T. George property, which consists of 397 acres. The property is located in Barbour County, West Virginia. The W.T. George property involves three adjoining tracts of land, the Dayton tract, the Sipe tract and the Gall tract. The Dayton and Sipe tracts are owned by the W.T. George heirs (hereinafter "the heirs") and John Mosesso. With respect to the Gall tract, one-fourth of it is owned by the heirs; and, the remaining three-fourths is owned by the plaintiffs below and the appellants herein, with Lucille Chesser owning one-half interest and Byron Zirkle owning one-quarter interest.

In the spring of 1990, the defendants below and the appellees herein entered into negotiations about timbering the W.T. George property. Mary Kelley, agent for the appellants, conducted the negotiations with the appellee, Timothy Hathaway. According to Ms. Kelley, she told Mr. Hathaway that the heirs were only interested in selling timber rights on the Dayton and Sipe tracts because the heirs only owned one-fourth interest in the Gall tract. Prior to timbering, Mr. Hathaway went to the assessor's office to look at the relevant tax maps and cards. Mr. Hathaway testified that according to this information, it appeared as though the Dayton, Sipe and Gall tracts were not separate tracts but rather one tract of land. Following his completion of this research, Gerald Fogg, who initially represented the heirs, gave Mr. Hathaway a list of all the heirs. Mr. Hathaway testified that at this time Mr. Fogg did not indicate that anyone, besides the heirs, had an interest in the W.T. George property. Furthermore, Mr. Hathaway testified that in May of 1990, he signed separate timber agreements with each of the heirs and there was nothing within these contracts that indicated that someone other than the heirs owned an interest in the property.

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Kefover and Ms. Brown to make sure he had marked the boundaries correctly; and, during this inspection the trio went through the area that Mr. Hathaway later realized was the Gall tract.

However, Mr. Fogg testified and inferred that Mr. Hathaway was given notice of the fact that the heirs owned an undivided one-fourth interest in the Gall tract when he went to check the tax map cards, because the two deeds referred to on the tax cards recite the heirs' interest in the Gall tract.

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On at least two occasions, in the spring of 1991, the appellees offered to remove the timber that had been cut down, place it in a saw mill and have the money put in an escrow account. In December of 1991, the appellants informed the appellees that it was their desire for the timber to be removed. However, as Mr. Hathaway testified, at this point he did not believe the timber had any redeemable value due to the passage of time. He further testified that he was unable to remove the timber because he was not afforded enough time.

The jury heard the case on June 25, 1992, and June 27, 1992, and at the conclusion of all the evidence the trial court directed a verdict in favor of the appellants and against the appellees for the value of the timber which had been cut, with such value to be determined by the jury. The trial court instructed the jury that pursuant to W. Va. Code, 61-3-48a [1983], treble damages could be recovered only if the jury found that the appellees' act of entering upon the land and cutting timber was done with willful, wanton or malicious intent. Punitive damages were not considered because the trial court refused the appellants' instruction on punitive damages. In addition to the verdict form requiring the jury to fix the stumpage value of the Gall tract timber, the verdict form also contained a special interrogatory asking the jury: "Did the defendants, Timothy Hathaway and Kingsville Wood Products, Inc. know that the W.T. George heirs did not own 100% of the Gall Tract at the time they entered upon and cut timber on the Gall Tract?"

Ultimately, the jury found the stumpage value of the timber from the Gall tract to be $19,009.69; however, they responded to the special interrogatory by answering in the negative.

On September 23, 1992, the trial court denied the appellants' motion for a new trial. It is from the trial court's

order of September 23, 1992, that the appellants appeal to this Court.

II

The appellants raise three assignments of error on appeal: (1) the trial court erred in refusing to treble the damages in accordance with W. Va. Code, 61-3-48a [1983]; (2) the trial court erred in refusing to set aside the verdict and grant a new trial on the grounds that the jury's answer to the special interrogatory was contrary to the weight of the uncontroverted evidence; and, (3) the trial court erred in refusing to give appellants' proffered instruction number 3 on punitive damages. Furthermore, the appellees raise, as cross-assignments of error, that the trial court erred in refusing to allow the appellees to present evidence concerning the appellants' failure to mitigate damages; the trial court erred in refusing to give appellees' instruction number 7 on mitigation of damages; and finally, the trial court erred in denying appellees' motion to set aside the verdict and judgment, in part, and to grant a new trial in part.

The appellants' first contention is that the trial court erred in refusing to treble the damages in accordance with W. Va. Code, 61-3-48a [1983], which provides:

> Any person who enters upon the land or premises of another without written permission from the owner of the land or premises in order to cut, damage or carry away or cause to be cut, damaged or carried away, any timber, trees, logs, posts, fruit, nuts, growing plant or product of any growing plant, shall be liable to the owner in the amount of three times the value of the timber, trees, growing plants or products thereof, which shall be in addition to and notwithstanding any other penalties by law provided.

The appellants argue that the trial court was incorrect in instructing the jury that, pursuant to the above-mentioned Code provision, treble damages could be recovered only if the jury found that the appellees' act of entering upon the land and cutting timber was done with willful, wanton or malicious intent because the statute contains no language requiring that wilful, wanton and malicious intent as a prerequisite to the assessment of damages. The appellants further assert that a statute should be construed only where its language requires interpretation or may reasonably be considered ambiguous. The appellees assert that the trial court acted properly in interpreting the statute so strictly in that the statute is a penal statute compelling a strict construction.

It has been a well established point of law that: "'Where the language of a statute is plain and unambiguous, there is no basis for application of rules of statutory construction; but courts must apply the statute according to the legislative intent plainly expressed therein.' Syllabus, Point 1, Dunlap v. State Compensation Director, 149 W. Va. 266 [140 S.E.2d 448]."

Syl. pt. 1, Farmers & Merchants Bank of Keyser v. Haden, 154 W. Va. 292, 175 S.E.2d 167 (1970).

In this case, the language within the statute in question is clear and unambiguous. There is no language which invokes a duty upon one to establish intent. This Court is of the opinion that the trial court erred in instructing the jury that, pursuant to the above-mentioned Code provision, treble damages could be recovered only if the jury found that the appellees' act of entering upon the land and cutting timber was done with willful, wanton or malicious intent. The statute simply states that if a person enters onto another's land "without written permission" then he/she is "liable to the owner in the amount of three times the value of the timber." See W. Va. Code, 61-3-48a [1983].

Furthermore, the parties stipulated in the record that the appellees entered upon and cut timber on the Gall tract without the written or oral permission of the appellants. The appellants offered, but the trial judge refused, a jury instruction which stated in relevant part:

> The Court instructs the jury that the statutes of this State provide that any person who enters upon the land or premises of another without written permission from the owner of such land or premises in order to cut, damage or carry away or to cause to be cut, damaged or carried away any timber, trees, logs or posts, such person shall be liable to the owner of such land in the amount of three times the value of the timber[.]

This was the proper instruction that should have been given to the jury regarding the trespass and method of determining damages.

In syllabus point 5 of Jenrett v. Smith, 173 W. Va. 325, 315 S.E.2d 583 (1983) we recognized: "An instruction is proper if it is a correct statement of the law and if there is sufficient evidence offered at trial to support it." This was the proper instruction that should have been given because it was a correct statement of the applicable law in that it practically quoted the statute verbatim.

As a matter of law, based upon the parties' stipulation that the appellees did not receive written permission to cut the timber, the appellants are entitled to treble damages in the amount of $57,029.88. We remand this case to the trial court to enter an order awarding the appellants the treble damages set forth herein. The appellants' second point of contention is the trial court erred in refusing to set aside the verdict and grant a new trial on the grounds that the jury's answer to the special interrogatory was contrary to the weight of the uncontroverted evidence. The appellees contend that there was sufficient evidence to support the jury's finding. As mentioned earlier, the verdict form asked the jury whether the appellees knew that the heirs did not own 100% of the Gall tract

at the time they entered upon and cut timber upon the Gall tract; and, the jury responded in the negative.

This Court, in syllabus point 4 of Pote v. Jarrell, 186 W. Va. 369, 412 S.E.2d 770 (1991), recognized that:

> '"In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syllabus Point 5, Orr v. Crowder, 173 W. Va. 335, 315 S.E.2d 593 (1984).' Syl. pt. 1, Pinnacle Mining v. Duncan Aircraft Sales, 182 W. Va. 307, 387 S.E.2d 542 (1989).

From the transcript, it is obvious that the question as to whether Mr. Hathaway knew that the heirs did not exclusively own the Gall tract during the time the appellees were timbering was a hotly-contested issue. Mr. Hathaway's testimony, regarding the fact that he was unaware of a divided interest in the Gall tract, has been previously discussed in this opinion. Ms. Kelley and Mr. Fogg testified on behalf of the appellants that the appellees should have known that the heirs had only a fractional interest in the Gall tract, because of discussions they had with Mr. Hathaway. Moreover, the appellants contend that the appellees would have discovered this information had they conducted a title search.

The issues in this case were properly before the jury, sufficient evidence was presented, and the jury, after weighing the evidence, found that the appellees did not know, at the time they entered upon and cut timber upon the Gall tract, that the heirs were not the exclusive owners of the Gall tract. We reiterate the fact that whether the appellees acted intentionally is irrelevant because the damages are imputed due to the appellees' violation of W. Va. Code, 61-3-48a [1983] (i.e., their failure to acquire written permission to enter and cut timber upon the land).

With this argument in mind, the appellants' final point of contention is that the trial court erred in refusing to give appellants' proferred jury instruction regarding punitive damages.

More specifically, the appellants argue that the trial court was incorrect in forbidding the appellants from recovering both statutory treble damages and common law punitive damages. The appellees disagree.

In syllabus point 4 of Harless v. First Nat'l Bank in Fairmont, 169 W. Va. 673, 289 S.E.2d 692 (1982), we discussed the nature of punitive damages:

> 'Punitive or exemplary damages are such as, in a proper case, a jury may allow against the defendant by way of punishment for wilfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff, over and above full compensation for all injuries directly or indirectly resulting from such wrong.' Syllabus Point 1, O'Brien v. Snodgrass, 123 W. Va. 483, 16 S.E.2d 621 (1941).

There is no evidence within the record supporting the appellants' contention that the appellees acted maliciously, willfully or wantonly when entering upon the Gall tract and extracting the timber. Moreover, the jury found that the appellees were unaware of the fact that the heirs were not the exclusive owners of the Gall tract at the time of the entry upon the Gall tract and the cutting of the timber.

We should note that other jurisdictions have held that the law does not permit appellants to recover both punitive and treble damages for the same trespass to timber. See Baker v. Ramirez, 235 Cal. Rptr. 857 (1987); Stoner v. Houston, 582 S.W.2d 28 (Ark. 1979); Johnson v. Tyler, 277 N.W.2d 617 (Iowa 1979); and, Johnson v. Jensen, 446 N.W.2d 664 (Minn. 1989).

However, it is not necessary to resolve this issue in this case because we are of the opinion that the trial court was correct in refusing to instruct the jury regarding punitive damages in light of the fact that the evidence was insufficient to support such an instruction. See TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457, 419 S.E.2d 870 (1992).

On the appellees' cross-assignments of error, they argue that the trial court erred in refusing to allow the appellees to present evidence concerning the appellants' failure to mitigate damages; the trial court further erred in refusing to give appellees' instruction number 7 regarding mitigation of damages; and finally, the trial court erred in denying the appellees' motion to set aside the verdict and the judgment, in part, and to grant a new trial, in part. Simply put, their cross-assignments of error relate to a mitigation of damages issue.

Specifically, the appellees argue that the appellants should not be entitled to recover for any losses which could have been avoided by allowing the appellees, within a reasonable period of time, to collect the timber, market it and put the proceeds in an escrow account.

The appellants respond by arguing that the appellees' argument on the issue of mitigation of damages is unfounded. The appellants assert that the relevant statute, W. Va. Code, 61-3-48a [1983], states that an owner of timber is injured and subsequently damaged when there is an entry on the property without written permission and the timber is cut, carried away or damaged. Thus, the appellants argue there was nothing the appellants did or could have done that would have affected their entitlement to damages, because there was entry without written

permission and the damages for the cut timber were fixed by the stumpage value.

In West Virginia, we have recognized that one generally has a duty to mitigate damages: "As a general rule a person whose property is endangered or injured must use reasonable care to mitigate the damages; but such person is only required to protect himself from the injurious consequence of the wrongful act by the exercise of ordinary effort and care and moderate expense." Hardman Trucking, Inc. v. Poling Trucking Co. Inc., 176 W. Va. 575, 579, 346 S.E.2d 551, 555 (1986), citing Oresta v. Romano Bros., Inc., 137 W. Va. 633, 650, 73 S.E.2d 622, 632 (1952).

Once Ms. Brown and Ms. Hadley became aware that the appellees may be timbering on the appellants' property, they expressed concern to Mr. Hathaway. Mr. Hathaway continued to timber the property, and ultimately the appellants were forced to serve the appellees with an injunction. It is obvious that the appellants reasonably tried to protect their property from injurious consequences, therefore, we believe the appellants expended the ordinary effort and care to protect their property as required in Hardman.

Based upon the foregoing, the decision of the Circuit Court of Barbour County is affirmed, in part, reversed, in part, and remanded.

Affirmed, in part;
reversed, in part,
and remanded.

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Jacquelyn I. Custer
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Attorneys for the Appellee

This Opinion was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel." Syl. pt. 1, State v. Crouch, 178 W. Va. 221, 358 S.E.2d 782 (1987).

2. "It is a well-established rule of appellate review in this state that a trial court has wide discretion in regard to the admissibility of confessions and ordinarily this discretion will not be disturbed on review." Syl. pt. 2, State v. Vance, 162 W. Va. 467, 250 S.E.2d 146 (1978).

3. "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syl. pt. 3, State v. Vance, 162 W. Va. 467, 250 S.E.2d 146 (1978).

4. "Under the concerted action principle, a defendant who is present at the scene of a crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator." Syl. pt. 11, State v. Fortner, 182 W. Va. 345, 387 S.E.2d 812 (1989).

5. "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. pt. 1, State v. Starkey, 161 W. Va. 517, 244 S.E.2d 219 (1978).

6. "A confession or statement made by a suspect is admissible if it is freely and voluntarily made despite the fact that it is written by an arresting officer if the confession or statement is read, translated (if necessary), signed by the accused and admitted by him to be correct." Syl. pt. 2, State v. Nicholson, 174 W. Va. 573, 328 S.E.2d 180 (1985).

7. "Based on our decision in State v. Nicholson, 174 W. Va. 573, 328 S.E.2d 180 (1985), we decline to expand the Due Process Clause of the West Virginia Constitution, Article III, § 10, to encompass a duty that police electronically record the custodial interrogation of an accused." Syl. pt. 10, State v. Kilmer, No. 21504, ___ W. Va. ___, ___ S.E.2d ___ (December 10, 1993).

Per Curiam:

This case is before this Court upon an appeal from the September 20, 1991, order of the Circuit Court of Berkeley County, West Virginia. The appellant, Joseph J. Williams, was found guilty by a jury of four counts of breaking and entering. On October 28, 1991, the circuit court committed the appellant to the custody of the Department of Corrections for assignment to the Anthony Center, a center for youth offenders, for a period not to exceed two years. On appeal, the appellant asks that this Court reverse the order of the circuit court. This Court has before it the briefs of counsel and all matters of record. For the reasons stated below, the judgment of the circuit court is affirmed.

I

During the fall and winter of 1990, it is alleged that the appellant and his brother broke into and burglarized four buildings in Berkeley County which included a vo-tech center, a middle school, a flea market and a karate club. Two warrants were issued for the appellant's arrest; one warrant charged the appellant with the breaking and entering of the middle school and the second warrant charged the appellant with breaking and entering the flea market. The appellant was arrested on January 7, 1991, by a Morgan County Deputy Sheriff upon two Berkeley County warrants. Two Berkeley County Deputy Sheriffs were also present at the time of the appellant's arrest.

The appellant was then taken to the Morgan County magistrate for arraignment. While the officers and the appellant were waiting for the magistrate to arrive, the appellant was advised of his constitutional rights and he signed a waiver of those rights. Following his signing of the waiver, the appellant made a statement wherein he admitted only to being involved in the breaking and entering of the middle school. His statement was recorded in writing by Berkeley County Deputy Sheriff Shackelford.

On January 8, 1991, arrest warrants were obtained by the Martinsburg Police Department charging the appellant with breaking and entering a bakery thrift shop and the karate club. The appellant denied any participation in the crimes in a tape-recorded statement he gave to the Martinsburg City Police on January 11, 1991.

On January 9, 1991, Deputy Shackelford testified that he received a message that the appellant wanted to speak with the police. The appellant denied the fact that he wanted the police to come and talk with him regarding his case; rather, he claimed that he was calling the police to give them information on a break-in of a local church. Regardless, the appellant was advised of his rights, he signed a waiver and he gave a statement which again was reduced to writing by Deputy Shackelford. In this statement, the appellant admitted to being involved in the breaking and entering of the middle school, the flea market and the vo-tech school, even though he had yet to be charged with that crime. The appellant signed the statement.

The question regarding the admissibility of this statement was addressed by the trial court on September 18, 1991,

in a suppression hearing. The appellant testified that he was coerced and threatened into giving his January 9, 1991, statement. The appellant alleged that Deputy Shackelford threatened his mother and girlfriend, and he was coerced by the deputy who kept coaxing him with accusatory statements. The State maintained that the statement was voluntary.

The trial court, in ascertaining the admissibility of the appellant's statement, determined that the appellant initiated the conversation and the subsequent statement made by the appellant was freely and voluntarily made upon a knowing execution of a waiver of his Fifth and Sixth Amendment privileges. The statement was ruled admissible.

On September 20, 1991, a jury found the appellant guilty of four counts of breaking and entering the middle school, the vo-tech center, the flea market and the karate club. On that same day, the circuit court entered an order on the conviction, from which the appellant now appeals.

II

The appellant raises three issues on appeal: (1) The appellant's January 9, 1991, statement given to the police was improperly admitted into evidence in that it was taken in violation of his constitutional right against self-incrimination and his right to counsel; (2) The evidence was insufficient as a matter of law to sustain the appellant's conviction of breaking and entering into the karate club; (3) The Due Process Clause of the West Virginia Constitution was violated when the police failed to electronically tape record the dialogue which took place during the custodial interrogation of the appellant.

The appellant's first contention is that his constitutional right against self-incrimination was violated when the trial court improperly admitted the January 9, 1991, statement given by the appellant to the police. The appellant argues that, when he told the magistrate at his initial arraignment on January 7, 1991, that he would arrange for counsel and he would later advise the court as to who that would be, that communication was the equivalent to a request for an attorney. The appellant asserts that his subsequent statement of January 9, 1991, was a result of a police interrogation and violative of his constitutional rights.

The State does not refute the proposition that it is improper for the police to initiate any communication with the accused who is represented by counsel. The State, however, argues that this proposition is inapplicable to the case herein because it was the appellant who initiated the conversation with the police. In syllabus point 1 of State v. Crouch, 178 W. Va. 221, 358 S.E.2d 782 (1987), this Court set forth a two-part test for determining whether or not a recantation of a request for counsel was effective: "For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel."

In this case, the appellant admitted that he wanted to talk to law enforcement authorities. The appellant asserts,

however, that he wanted to talk with the sheriff regarding information he had on another crime that he read about in the "crime solver" section of the local newspaper. Deputy Shackelford testified that he was told by Deputy LeMaster that the appellant wanted to talk with them, and the two deputies subsequently went to see the appellant at the regional jail. As further attested to by Deputy Shackelford, the appellant then advised them that he wanted to make a statement because a co-defendant had made a statement and he wanted to be truthful as well. Deputy Shackelford further testified that the appellant was made aware of and he fully understood his rights, including his right to have an attorney present; and yet, after indicating he understood his rights, he signed a form waiving those rights prior to making the January 9, 1991, statement.

Clearly, this evidence demonstrates the appellant's initiative and willingness to have a discussion with the deputies absent the presence of counsel. The record is void of any evidence which would allude to the fact that the appellant's waiver of counsel was anything but a knowing and intelligent waiver.

In State v. Vance, 162 W. Va. 467, 250 S.E.2d 146 (1978), we addressed the purview of the trial court and the weight to be accorded to a trial court's decision regarding the voluntariness of a confession. In syllabus point 2 of Vance, we held, "It is a well-established rule of appellate review in this state that a trial court has wide discretion in regard to the admissibility of confessions and ordinarily this discretion will not be disturbed on review." We further held in syllabus point 3 of Vance that, "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence."

After a thorough review of the record and the applicable law, we are of the opinion that the trial court did not abuse its discretion in admitting the January 9, 1991, statement of the appellant in that the statement was freely and voluntarily made upon a knowing execution of a waiver of his Fifth and Sixth Amendment privileges.

The appellant's second point of contention is that the evidence was insufficient as a matter of law to sustain the appellant's conviction of breaking and entering into the karate club. The appellant argues that the State produced no evidence that Williams participated or conspired with the co-defendant, Daniel Clark, in the initial breaking and entering of the karate club building.

The State rebuts the appellant's contention by arguing that the appellant's conviction for breaking and entering the karate club is supported pursuant to the "concerted action" principle. This Court discussed the "concerted action" principle in State v. Fortner, 182 W. Va. 345, 387 S.E.2d 812 (1989), and we held in syllabus point 11 of that case that: "Under the concerted action principle, a defendant who is present at the scene of a crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator."

Co-defendant, Daniel Clark, testified that he had been responsible for the initial break-in of the karate club. The evidence shows, however, that shortly thereafter the appellant entered the karate club and participated in stealing property from within the club. As the State points out, the trial court properly instructed the jury on the breaking and entering charge and the "concerted action" principle.

In syllabus point 1 of State v. Starkey, 161 W. Va. 517, 244 S.E.2d 219 (1978), this Court established a standard of review to be utilized when reviewing a guilty verdict:

> In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

Therefore, when we apply this standard to the facts herein we are of the opinion that the there was sufficient evidence to support the jury's verdict of guilt, and thus the verdict is affirmed.

The appellant's final point of contention is that the Due Process Clause, article 3, § 10 of the West Virginia Constitution, was violated when the police failed to tape record the dialogue which took place during the custodial interrogation of the appellant.

We have addressed the merits, or lack thereof, of the electronic recordation system in State v. Nicholson, 174 W. Va. 573, 328 S.E.2d 180 (1985). We stated, in Nicholson, that to impose the requirement that an interrogating officer must officially record the suspect's statement would be logistically impractical, and unnecessary given the other protections afforded to suspects by our system and it would conflict with well established precedent. Accordingly, this Court held in syllabus 2 of Nicholson: "A confession or statement made by a suspect is admissible if it is freely and voluntarily made despite the fact that it is written by an arresting officer if the confession or statement is read, translated (if necessary), signed by the accused and admitted by him to be correct."

Moreover, this Court recently had occasion to readdress Nicholson in State v. Kilmer, No. 21504, ___ W. Va. ___, ___ S.E.2d ___ (December 10, 1993). We stated in syllabus point 10 of Kilmer: "Based on our decision in State v. Nicholson, 174 W. Va. 573, 328 S.E.2d 180 (1985), we decline to expand the Due Process Clause of the West Virginia Constitution, Article III, § 10, to encompass a duty that police electronically record the custodial interrogation of an accused."

Nicholson and Kilmer are directly on point in this

case. The appellant initiated the conversation with the police, Deputy Shackelford took the statement in longhand and the appellant signed the statement. Deputy Shackelford had no duty to electronically record the appellant's statement in light of Nicholson and Kilmer. Thus, there was no violation of the appellant's due process rights.

Based upon the foregoing, the judgment of the Circuit Court of Berkeley County is affirmed.

Affirmed. IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1993 Term

_____

No. 21546

_____

CAROLYN LISTON AND DALEY LISTON,
HUSBAND AND WIFE,
Plaintiffs Below, Appellees

v.

THE UNIVERSITY OF WEST VIRGINIA
BOARD OF TRUSTEES ON BEHALF OF
WEST VIRGINIA UNIVERSITY,
Defendant Below, Appellant

Appeal from the Circuit Court of Monongalia County
Honorable Robert B. Stone, Judge
Civil Action No. 91-C-255

AFFIRMED, IN PART,
REVERSED, IN PART,
AND REMANDED

Submitted: September 28, 1993
Filed: December 13, 1993

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1993 Term

_____

No. 21558

_____

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

THOMAS J. BLAIR, III,
Defendant Below, Appellant

Appeal from the Circuit Court of McDowell County
Honorable Booker T. Stephens, Judge
Civil Action Nos. AP-89-M-180; AP-89-M-181;
AP-89-M-182; AP-89-M-183; AP-89-M-184;
AP-89-M-185; AP-89-M-186

REVERSED

Submitted: September 21, 1993
Filed: December 14, 1993
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1993 Term

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1993 Term

No. 21565

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

JOSEPH J. WILLIAMS,
Defendant Below, Appellant

Appeal from the Circuit Court of Berkeley County
Honorable Patrick G. Henry III, Judge
Civil Action No. 91-F-100

AFFIRMED

Submitted: September 21, 1993
Filed: December 16, 1993

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Jacquelyn I. Custer
Assistant Attorney General
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Attorneys for the Appellee

This Opinion was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel." Syl. pt. 1, State v. Crouch, 178 W. Va. 221, 358 S.E.2d 782 (1987).

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4. "Under the concerted action principle, a defendant who is present at the scene of a crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator." Syl. pt. 11, State v. Fortner, 182 W. Va. 345, 387 S.E.2d 812 (1989).

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7. "Based on our decision in State v. Nicholson, 174 W. Va. 573, 328 S.E.2d 180 (1985), we decline to expand the Due Process Clause of the West Virginia Constitution, Article III, § 10, to encompass a duty that police electronically record the custodial interrogation of an accused." Syl. pt. 10, State v. Kilmer, No. 21504, ___ W. Va. ___, ___ S.E.2d ___ (December 10, 1993).

Per Curiam:

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I

During the fall and winter of 1990, it is alleged that the appellant and his brother broke into and burglarized four buildings in Berkeley County which included a vo-tech center, a middle school, a flea market and a karate club. Two warrants were issued for the appellant's arrest; one warrant charged the appellant with the breaking and entering of the middle school and the second warrant charged the appellant with breaking and entering the flea market. The appellant was arrested on January 7, 1991, by a Morgan County Deputy Sheriff upon two Berkeley County warrants. Two Berkeley County Deputy Sheriffs were also present at the time of the appellant's arrest.

The appellant was then taken to the Morgan County magistrate for arraignment. While the officers and the appellant were waiting for the magistrate to arrive, the appellant was advised of his constitutional rights and he signed a waiver of those rights. Following his signing of the waiver, the appellant made a statement wherein he admitted only to being involved in the breaking and entering of the middle school. His statement was recorded in writing by Berkeley County Deputy Sheriff Shackelford.

On January 8, 1991, arrest warrants were obtained by the Martinsburg Police Department charging the appellant with breaking and entering a bakery thrift shop and the karate club. The appellant denied any participation in the crimes in a tape-recorded statement he gave to the Martinsburg City Police on January 11, 1991.

On January 9, 1991, Deputy Shackelford testified that he received a message that the appellant wanted to speak with the police. The appellant denied the fact that he wanted the police to come and talk with him regarding his case; rather, he claimed that he was calling the police to give them information on a break-in of a local church. Regardless, the appellant was advised of his rights, he signed a waiver and he gave a statement which again was reduced to writing by Deputy Shackelford. In this statement, the appellant admitted to being involved in the breaking and entering of the middle school, the flea market and the vo-tech school, even though he had yet to be charged with that crime. The appellant signed the statement.

The question regarding the admissibility of this statement was addressed by the trial court on September 18, 1991,

in a suppression hearing. The appellant testified that he was coerced and threatened into giving his January 9, 1991, statement. The appellant alleged that Deputy Shackelford threatened his mother and girlfriend, and he was coerced by the deputy who kept coaxing him with accusatory statements. The State maintained that the statement was voluntary.

The trial court, in ascertaining the admissibility of the appellant's statement, determined that the appellant initiated the conversation and the subsequent statement made by the appellant was freely and voluntarily made upon a knowing execution of a waiver of his Fifth and Sixth Amendment privileges. The statement was ruled admissible.

On September 20, 1991, a jury found the appellant guilty of four counts of breaking and entering the middle school, the vo-tech center, the flea market and the karate club. On that same day, the circuit court entered an order on the conviction, from which the appellant now appeals.

II

The appellant raises three issues on appeal: (1) The appellant's January 9, 1991, statement given to the police was improperly admitted into evidence in that it was taken in violation of his constitutional right against self-incrimination and his right to counsel; (2) The evidence was insufficient as a matter of law to sustain the appellant's conviction of breaking and entering into the karate club; (3) The Due Process Clause of the West Virginia Constitution was violated when the police failed to electronically tape record the dialogue which took place during the custodial interrogation of the appellant.

The appellant's first contention is that his constitutional right against self-incrimination was violated when the trial court improperly admitted the January 9, 1991, statement given by the appellant to the police. The appellant argues that, when he told the magistrate at his initial arraignment on January 7, 1991, that he would arrange for counsel and he would later advise the court as to who that would be, that communication was the equivalent to a request for an attorney. The appellant asserts that his subsequent statement of January 9, 1991, was a result of a police interrogation and violative of his constitutional rights.

The State does not refute the proposition that it is improper for the police to initiate any communication with the accused who is represented by counsel. The State, however, argues that this proposition is inapplicable to the case herein because it was the appellant who initiated the conversation with the police. In syllabus point 1 of State v. Crouch, 178 W. Va. 221, 358 S.E.2d 782 (1987), this Court set forth a two-part test for determining whether or not a recantation of a request for counsel was effective: "For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel."

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Clearly, this evidence demonstrates the appellant's initiative and willingness to have a discussion with the deputies absent the presence of counsel. The record is void of any evidence which would allude to the fact that the appellant's waiver of counsel was anything but a knowing and intelligent waiver.

In State v. Vance, 162 W. Va. 467, 250 S.E.2d 146 (1978), we addressed the purview of the trial court and the weight to be accorded to a trial court's decision regarding the voluntariness of a confession. In syllabus point 2 of Vance, we held, "It is a well-established rule of appellate review in this state that a trial court has wide discretion in regard to the admissibility of confessions and ordinarily this discretion will not be disturbed on review." We further held in syllabus point 3 of Vance that, "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence."

After a thorough review of the record and the applicable law, we are of the opinion that the trial court did not abuse its discretion in admitting the January 9, 1991, statement of the appellant in that the statement was freely and voluntarily made upon a knowing execution of a waiver of his Fifth and Sixth Amendment privileges.

The appellant's second point of contention is that the evidence was insufficient as a matter of law to sustain the appellant's conviction of breaking and entering into the karate club. The appellant argues that the State produced no evidence that Williams participated or conspired with the co-defendant, Daniel Clark, in the initial breaking and entering of the karate club building.

The State rebuts the appellant's contention by arguing that the appellant's conviction for breaking and entering the karate club is supported pursuant to the "concerted action" principle. This Court discussed the "concerted action" principle in State v. Fortner, 182 W. Va. 345, 387 S.E.2d 812 (1989), and we held in syllabus point 11 of that case that: "Under the concerted action principle, a defendant who is present at the scene of a crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator."

Co-defendant, Daniel Clark, testified that he had been responsible for the initial break-in of the karate club. The evidence shows, however, that shortly thereafter the appellant entered the karate club and participated in stealing property from within the club. As the State points out, the trial court properly instructed the jury on the breaking and entering charge and the "concerted action" principle.

In syllabus point 1 of State v. Starkey, 161 W. Va. 517, 244 S.E.2d 219 (1978), this Court established a standard of review to be utilized when reviewing a guilty verdict:

> In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

Therefore, when we apply this standard to the facts herein we are of the opinion that the there was sufficient evidence to support the jury's verdict of guilt, and thus the verdict is affirmed.

The appellant's final point of contention is that the Due Process Clause, article 3, □ 10 of the West Virginia Constitution, was violated when the police failed to tape record the dialogue which took place during the custodial interrogation of the appellant.

We have addressed the merits, or lack thereof, of the electronic recordation system in State v. Nicholson, 174 W. Va. 573, 328 S.E.2d 180 (1985). We stated, in Nicholson, that to impose the requirement that an interrogating officer must officially record the suspect's statement would be logistically impractical, and unnecessary given the other protections afforded to suspects by our system and it would conflict with well established precedent. Accordingly, this Court held in syllabus 2 of Nicholson: "A confession or statement made by a suspect is admissible if it is freely and voluntarily made despite the fact that it is written by an arresting officer if the confession or statement is read, translated (if necessary), signed by the accused and admitted by him to be correct."

Moreover, this Court recently had occasion to readdress Nicholson in State v. Kilmer, No. 21504, ___ W. Va. ___, ___ S.E.2d ___ (December 10, 1993). We stated in syllabus point 10 of Kilmer: "Based on our decision in State v. Nicholson, 174 W. Va. 573, 328 S.E.2d 180 (1985), we decline to

expand the Due Process Clause of the West Virginia Constitution, Article III, § 10, to encompass a duty that police electronically record the custodial interrogation of an accused."

Nicholson and Kilmer are directly on point in this case. The appellant initiated the conversation with the police, Deputy Shackelford took the statement in longhand and the appellant signed the statement. Deputy Shackelford had no duty to electronically record the appellant's statement in light of Nicholson and Kilmer. Thus, there was no violation of the appellant's due process rights.

Based upon the foregoing, the judgment of the Circuit Court of Berkeley County is affirmed.

Affirmed.

No. 21560

TRANSAMERICA COMMERCIAL FINANCE CORPORATION,
A CORPORATION,
Plaintiff Below, Appellant

v.

BLUEVILLE BANK OF GRAFTON, A WEST
VIRGINIA BANKING INSTITUTION,
Defendant Below, Appellee

Appeal from the Circuit Court of Taylor County
Honorable John L. Waters, Judge
Civil Action No. 89-C-199

AFFIRMED

Submitted: September 28, 1993
Filed: December 14, 1993

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JUSTICE McHUGH delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "'Statutes in pari materia must be construed together and the legislative intention, as gathered from the whole of the enactments, must be given effect.' Point 3, Syllabus, State ex rel. Graney v. Sims, 144 W. Va. 72 [105 S.E.2d 886]." Syl. pt. 1, State ex rel. Slatton v. Boles, 147 W. Va. 674, 130 S.E.2d 192 (1963).

2. W. Va. Code, 47-8-2 [1986], which provides that no general partnership may carry on business in this state under any assumed name other than the names of the individuals owning the business unless those persons file in the office of the clerk of the county commission certain information, is to be construed in pari materia with W. Va. Code, 46-9-402(7) [1974], which specifies that it is sufficient to put the individual, partnership, or corporate names of the debtors on a financing statement whether or not it adds other trade names of the parties.

3. A partnership name must be filed in the manner required by W. Va. Code, 47-8-2 [1986] before it sufficiently shows the name of the debtor partnership on a financing statement under W. Va. Code, 46-9-402(7) [1974] since the two statutes are to be construed in pari materia. If the partnership name is not filed as required by W. Va. Code, 47-8-2 [1986], then the individual partners' names must be listed as the debtors on a financing statement whether or not trade names are added. However, a financing statement may be effective against other creditors even though it lists a partnership name which is not filed pursuant to W. Va. Code, 47-8-2 [1986] if it is not seriously misleading as provided by W. Va. Code, 46-9-402(8) [1974].

4. When there is an error in the debtors' names in the financing statement because of failure to comply with W. Va. Code, 47-8-2 [1986], it is necessary to determine whether or not the error is seriously misleading under W. Va. Code, 46-9-402(8) [1974] by determining whether or not a reasonably prudent creditor searching the filing index for the financing statement would be misled so as to be unable to locate the financing statement. Whether an error is seriously misleading is to be determined by the facts of each case.

McHugh, Justice:

This case is before this Court upon the appeal of Transamerica Commercial Finance Corporation (hereinafter "Transamerica") from the July 20, 1992 order of the Circuit Court of Taylor County which found that the security interest the appellee, the Blueville Bank of Grafton (hereainafter "Blueville Bank"), had in certain inventory has priority over the security interest that Transamerica has in the same inventory. The decision of the circuit court turned on whether the name Blueville Bank had listed as the debtor (M & M Lawn Service) was sufficient to notify Transamerica, who had listed the debtors as Bruce L. Miller, Phillip R. McDaniel d/b/a M & M Power Equipment, of a prior security interest held by Blueville Bank. For reasons set forth below, we affirm the circuit court's order.

I.

This case involves determining which party's secured interest in certain inventory has priority. There are four financing statements which are relevant to the priority issue. Below we have outlined the financing statements in chronological order from the date of filing.

Date

Secured Party

Debtor

Relevant
Property
Covered

May 22, 1987

Blueville Bank

Bruce L.
Miller and
Phillip R.
McDaniel, dba
M & M Lawn
Service, 501
N. Pike
Street,
Grafton,
Taylor, WV
26354-1217

Did not cover
the inventory

May 27, 1987

Blueville Bank

Bruce L.
Miller and
Phillip R.
McDaniel, DBA
M & M Lawn
Service, 501
N. Pike
Street,
Grafton,
Taylor, WV
26354-1217

Did not cover
the inventory

Oct. 5, 1987

Blueville Bank

M & M Lawn
Service, 501
N. Pike
Street,
Grafton,
Taylor, WV
26354-1217

Inventory

Oct. 19, 1987

Borg-Warner
Acceptance
Co.,
Transamerica's
predecessor

Bruce Miller &
Phillip
McDaniel,
d/b/a M & M
Power
Equipment, 501
N. Pike
Street,
Grafton, WV
26354

Inventory

The record before us is unclear as to when Transamerica took over the security interest from Borg-Warner. Therefore, in order to simplify the facts, we will refer only to Transamerica rather than to Borg-Warner.

Both Blueville Bank and Transamerica claim that their security interest in the inventory has priority. Bruce Miller and his wife, Sherry Miller, as individuals, filed a petition in bankruptcy before the United States Bankruptcy Court for the Northern District. During the bankruptcy proceeding Blueville Bank filed a "Motion for Relief From Automatic Stay" and requested that the bankruptcy court abandon certain property of the debtors which included the inventory in which Transamerica claims an interest.

Transamerica then filed a declaratory judgment action against Blueville Bank in the Circuit Court of Taylor County to have the court determine the rights of the parties to the inventory and to seek injunctive relief. The parties agreed to sell the inventory and put the proceeds in escrow pending the resolution of the dispute.

The circuit court ruled that Transamerica was not entitled to priority since Transamerica failed to give notification in writing to Blueville Bank that it was extending the purchase money security interest in the inventory to the debtors as was required by W. Va. Code, 46-9-312(3)(b) [1984]. The circuit court further concluded that the October 5, 1987 financing statement perfected Blueville Bank's security interest "even though it did not show the debtors individual names but did show a partnership name[.]" The circuit court further found that the name used by Blueville Bank on its October 5, 1987 financing statement (M & M Lawn Service) was "very similar and not seriously misleading" when compared to the name used by Transamerica (Bruce Miller and Phillip McDaniel, d/b/a M & M Power Equipment), and noted that neither M & M Power Equipment nor M & M Lawn Service was registered as fictitious names. The circuit court determined that Transamerica failed to act as a reasonably prudent creditor. It is from the circuit court's order which Transamerica appeals.

II.

The primary issue before us is whose security interest in the inventory has priority under the Uniform Commercial Code-Secured Transactions set forth in W. Va. Code, 46-9-101, et seq--Blueville Bank's or Transamerica's. The primary issue involves whether or not the debtors' names on one of the financing statements complied with the requirements of the Uniform Commercial Code-Secured Transactions. If the debtors' names were not proper, it must be determined whether the name listed was seriously misleading under W. Va. Code, 46-9-402(8) [1974]. This statute allows for minor errors in financing statements if the errors are not seriously misleading.

Therefore, in order to address the primary issue we need to make two inquiries. First, did Blueville Bank properly name the debtors on its October 5, 1987 financing statement in compliance with W. Va. Code, 46-9-402(7) [1974], and

second, if not, would a reasonably prudent creditor have found Blueville Bank's financing statement regarding the debtors?

At the outset we note that in most circumstances W. Va. Code, 46-9-312(5) [1984], in pertinent part, determines the priority of conflicting security interests:

> (5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities . . .) priority between conflicting security interests in the same collateral shall be determined according to the following rules:
>
> (a) Conflicting security interests rank according to priority in time of filing or perfection.

(emphasis added).

Transamerica contends that it had a purchase money security interest in the collateral. Therefore, its security interest in the inventory takes priority over Blueville Bank's security interest under W. Va. Code, 46-9-312(3) [1984], even though Blueville Bank filed its financing statement first. W. Va. Code, 46-9-312(3) [1984] states, in pertinent part:

> (3) A perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory . . . if:
>
> . . . .
>
> (b) The purchase money secured party gives notification in writing to the holder of the conflicting security interest if the holder had filed a financing statement covering the same types of inventory[.]

(emphasis added).

Blueville Bank, however, states that its security interest in the inventory has priority because Transamerica failed to notify Blueville Bank that it was taking a purchase money security interest in the inventory as W. Va. Code, 46-9-312(3)(b) [1984] requires. Therefore, under W. Va. Code, 46-9-312(5)(a) [1984] Blueville Bank's security interest has priority since it filed its financing statement first.

Transamerica states that it was not required to give notice to Blueville Bank because Blueville Bank's financing

statement only listed the debtors under a trade name, M & M Lawn Service, rather than the individual partner names contrary to the requirements of W. Va. Code, 47-8-2 [1986]. Transamerica argues that a reasonable searcher would not have found Blueville Bank's financing statement. Now we will address our two inquiries in light of the parties' contentions.

A.

First, did Blueville Bank properly name the debtor on its financing statement? W. Va. Code, 46-9-402(7) [1974] states, in pertinent part: "A financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or the names of partners." Blueville Bank argues that it did list the name of the partnership when it listed the debtor as M & M Lawn Service on its financing statement. Transamerica, however, argues that the name M & M Lawn Service was not registered as W. Va. Code, 47-8-2 [1986] requires, and that using only a trade name as the name of the debtors on a financing statement is not sufficient under W. Va. Code, 46-9-402(7) [1974].

W. Va. Code, 47-8-2 [1986] states, in pertinent part:

> No . . . general partnership may carry on, conduct or transact any business in this state under any assumed name, or under any designation, name or style, corporate or otherwise, other than the real name or names of the individual or individuals owning, conducting or transacting such business, unless that person or persons shall file in the office of the clerk of the county commission of the county in which such person or persons maintains his principal place of business, a certificate setting forth the name under which such business is, or is to be, conducted or transacted, and the true or real full name or names of the person or persons owning, conducting or transacting the same, with the home and post-office address or addresses of such person or persons.

(emphasis added). Therefore, under W. Va. Code, 47-8-2 [1986] a partnership cannot conduct any business under a name other than the names of the individuals who own or conduct the business unless the name is filed with the clerk of the county commission of the county in which the people maintain their principal place of business with the required information. See also McCulley v.

Blanchard, 113 W. Va. 770, 169 S.E. 746 (1933). Furthermore, it has generally been stated that "the debtor's trade name will not suffice to perfect the security interest[.]" 9 William D. Hawkland et al., Uniform Commercial Code Series § 9-402:04, at 525 (1991). See also 9 Ronald A. Anderson, Anderson on the Uniform Commercial Code § 9-402:51 (3d ed. 1985) and 2 Thomas M. Quinn, Quinn's Uniform Commercial Code Commentary and Law Digest, § 9-402[A][12] (2d ed. 1991).

However, the Uniform Commercial Code-Secured Transactions did not refer to or adopt W. Va. Code, 47-8-2 [1986]. Therefore, we must determine whether W. Va. Code, 47-8-2 [1986] applies to the Uniform Commercial Code-Secured Transactions.

It has been stated that "[s]tatutes which are not inconsistent with one another and which relate to the same subject matter are in pari materia." 17 Michie's Jurisprudence of Virginia and West Virginia § 40 at 320 (J.H. Vaughan et al. eds., 1979). Furthermore, in syllabus point 1 of State ex rel. Slatton v. Boles, 147 W. Va. 674, 130 S.E.2d 192 (1963) we stated: "'Statutes in pari materia must be construed together and the legislative intention, as gathered from the whole of the enactments, must be given effect.' Point 3, Syllabus, State ex rel. Graney v. Sims, 144 W. Va. 72 [105 S.E.2d 886]."

Accordingly, W. Va. Code, 47-8-2 [1986], which provides that no general partnership may carry on business in this state under any assumed name other than the names of the individuals owning the business unless those persons file in the office of the clerk of the county commission certain information, is to be construed in pari materia with W. Va. Code, 46-9-402(7) [1974], which specifies that it is sufficient to put the individual, partnership, or corporate names of the debtors on a financing statement whether or not it adds other trade names of the parties. The statutes prevent businesses from making up several names under which they conduct business without registering the names in order to commit fraud or confuse creditors. If W. Va. Code, 47-8-2 [1986] and 46-9-402(7) [1974] were not read together, then partners could list several different trade names and/or individual names as debtors on financing statements making it very difficult for subsequent creditors to locate the financing statements. This scenario would defeat the very purpose of the Uniform Commercial Code-Secured Transactions which was to provide a "simple and unified structure within which . . . financing transactions can go forward with less cost and greater certainty." See the Official Comment to W. Va. Code, 46-9-101 [1963].

Therefore, a partnership name must be filed in the manner required by W. Va. Code, 47-8-2 [1986] before it sufficiently shows the name of the debtor partnership on a financing statement under W. Va. Code, 46-9-402(7) [1974] since the two statutes are to be construed in pari materia. If the partnership name is not filed as required by W. Va. Code, 47-8-2 [1986], then the individual partners' names must be listed as the debtors on a financing statement whether or not trade names are added. However, a financing statement may be effective against

other creditors even though it lists a partnership name which is not filed pursuant to W. Va. Code, 47-8-2 [1986] if it is not seriously misleading as provided by W. Va. Code, 46-9-402(8) [1974].

In the case before us the circuit court noted that M & M Lawn Service was not registered as a trade name. Therefore, Blueville Bank should have listed the debtors' names as Bruce L. Miller and Phillip R. McDaniel on the financing statement which was filed on October 5, 1987. However, W. Va. Code, 46-9-402(8) [1974] states that "[a] financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading." This brings us to our second inquiry.

B.

Second, would a reasonably prudent creditor have found Blueville Bank's financing statement which was filed on October 5, 1987 even though the debtor's name was improper? One commentator noted the following:

> When there is a defect in the financing statement it is necessary to make the determination whether or not the defect is seriously misleading. If the defect is such that a person searching the filing index would be misled so as to be prevented from learning what property was subject to what security interest, the defect is classified as seriously misleading, and the consequence is that the filing is fatally defective and fails to perfect the security interest. If, however, the defect would not mislead the searcher of the filing index, the defect is not seriously misleading and is to be ignored. That is, the filing is held effective to perfect the security interest in spite of such defect.

Anderson, supra at § 9-402:46 at 483-84 (footnotes omitted). Furthermore, "[s]ince the criterion is whether the error was seriously misleading, it is necessary that the effect of a defect be determined on the basis of the facts of each case." Anderson, supra at § 9-402:46 at 484-85 (footnote omitted).

Thus, we hold that when there is an error in the debtors' names in the financing statement because of failure to comply with W. Va. Code, 47-8-2 [1986], it is necessary to determine whether or not the error is seriously misleading under W. Va. Code, 46-9-402(8) [1974] by determining whether or not a reasonably prudent creditor searching the filing index for the financing statement would be misled so as to be unable to locate the financing statement. Whether an error is seriously

misleading is to be determined by the facts of each case.

In the case before us Blueville Bank had filed financing statements on three different dates. Blueville Bank filed financing statements on May 22, 1987 and May 27, 1987. Although these financing statements did not cover the inventory at issue in the case before us, they did properly list the debtors as Bruce L. Miller and Phillip R. McDaniel d/b/a M & M Lawn Service. Therefore, when Transamerica did its search using the names Bruce L. Miller and Phillip R. McDaniel it would have found the financing statements filed on May 22, 1987 and May 27, 1987 which also listed the trade name M & M Lawn Service. Therefore, Transamerica should have been aware of the M & M Lawn Service trade name. The trial court found and we agree that a reasonably prudent creditor would have investigated the trade name and discovered the financing statement filed on October 5, 1987, which covered the inventory and listed the debtors as M & M Lawn Service, especially since the financing statement listed an address for M & M Lawn Service which was exactly the same as the address Transamerica listed for M & M Power Company.

Accordingly, we hold that Transamerica as a reasonably prudent creditor had sufficient information to find the financing statement filed by Blueville Bank which improperly listed the debtors' names as M & M Lawn Service, since prior financing statements properly listed the debtors as Bruce L. Miller and Phillip R. McDaniel along with the trade name M & M Lawn Service.

We point out, however, that the particular facts in this case enabled us to hold that the financing statement filed by Blueville Bank, which improperly listed the debtors' names, was not seriously misleading. In the future, we strongly recommend that creditors take care to properly list the debtors' names, especially with the advent of computers. When using a computer the problems will be more difficult since there is often a limited number of characters which can be searched. Therefore, precision may be more controlling.

III.

Next, Transamerica contends that the circuit court committed reversible error in granting Blueville Bank a first priority security interest in collateral owned by Bruce L. Miller, an individual, where Blueville Bank's financing statement covering the collateral did not identify the individual but identified the debtors as a partnership. Blueville Bank points out that there is no evidence in the record before us which indicates that the inventory at issue in the case before us belonged to Bruce L. Miller, individually, and not to the partnership. We agree with Blueville Bank. Therefore, we decline to further address this issue.

IV.

Accordingly, we hold that listing the debtors' names as M & M Lawn Service was a minor error since it was not seriously misleading. Thus, Transamerica as a reasonably prudent creditor should have discovered the financing statement filed on October 5, 1987, and given notice to Blueville Bank in order for its purchase money security interest to have priority over

Blueville Bank's security interest. Therefore, we affirm the July 20, 1992 order of the Circuit Court of Taylor County.

Affirmed.

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JUSTICE McHUGH delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." Syl. pt. 1, State v. Flinn, 158 W. Va. 111, 208 S.E.2d 538 (1974).

2. "There is no satisfactory formula to decide if a statute is so vague as to violate the due process clauses of the State and Federal Constitutions. The basic requirements are that such a statute must be couched in such language so as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain if he has violated the offense provided and it may be couched in general language." Syl. pt. 1, State ex rel. Myers v. Wood, 154 W. Va. 431, 175 S.E.2d 637 (1970).

3. "Criminal statutes, which do not impinge upon First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by construing the statute in light of the conduct to which it is applied." Syl. pt. 3, State v. Flinn, 158 W. Va. 111, 208 S.E.2d 538 (1974).

4. W. Va. Code, 24-3-1 [1923] is unconstitutionally vague in violation of W. Va. Const. art. III, □□ 10 and 14 because the language "establish and maintain adequate and suitable facilities" and "perform such service . . . as shall be reasonable, safe and sufficient for the security and convenience of the public, and the safety and comfort of its employees" does not provide adequate standards for adjudication or set forth with sufficient definiteness the specific acts which are prohibited.

McHugh, Justice:

This case is before the Court upon the appeal of Thomas J. Blair from the June 5, 1992 order of the Circuit Court of McDowell County which stated that a jury found the appellant guilty on seven criminal misdemeanor warrants for violating W. Va. Code, 24-3-1 [1923]. The appellant was fined $500.00 and sentenced to serve ninety days home confinement on each count, to run concurrently. For reasons set forth below, we reverse the circuit court's order.

I

The appellant is the President of McDowell County Water Company (hereinafter the Water Company), a private corporation which is regulated by the Public Service Commission. The warrants brought against the appellant by customers of the Water Company charged that the appellant failed to "establish and maintain adequate and suitable facilities for customers, in violation of Chapter 24-3-1 of the West Virginia Code, with penalties being found under Chapter 24-4-1 of the West Virginia Code."

Initially, the case was tried before a magistrate without a jury. The magistrate found the appellant guilty on all seven charges, even though the appellant states that only five of the seven complaining witnesses appeared and testified before the magistrate. The appellant appealed the magistrate's decision to the circuit court which impaneled a jury to try all seven warrants.

The record before us indicates that the Water Company had serious financial problems. Evidently, the problems began in 1987 with the bankruptcy of the Olga Coal Company. The Olga Coal Company had pumped the water for the Water Company free of charge. Furthermore, the Water Company had filed for a rate increase in June of 1989; however, the Public Service Commission had put that on hold. Eventually, the Water Company was put into involuntary receivership in November of 1989. The appellant stated that he was financially unable to fix the problem since the banks would not lend him the money.

At trial the seven complaining witnesses testified that sometimes the water would not run at all, and if it did, it was oily and rusty. One witness complained that there were worms in the water. Another witness testified that there was debris in the water such as sticks. The witnesses all stated that the water was not safe to drink.

Wanda Mercer testified that she and Foster Munsey, both of whom owned stock in the Water Company, were responsible for the day-to-day operation of the Water Company. Ms. Mercer stated that she had received complaints about the water. She also stated that she would not drink the water.

The county sanitarian, Joseph Leffman, who works for the McDowell County Health Department, testified that he tested the water on three occasions in July of 1989 and found that the water had no chlorine. He stated that the water had an oily, rusty appearance.

Michael Lawson, an engineer from Beckley, testified that the appellant asked him for help with the water

company in 1985. Mr. Lawson volunteered to assess the system and stated that he was amazed by how well the company did with such old equipment. He also stated that the only way to take care of the problem would be to put a new system in which would cost two to three million dollars. Mr. Lawson testified that although the appellant appreciated the problem, there was nothing he could do about it.

II

We first address the appellant's contention that his convictions under W. Va. Code, 24-3-1 [1923] should be reversed on the ground that the statute is unconstitutionally vague. We agree with the appellant's contention.

W. Va. Code, 24-3-1 [1923] states, in pertinent part, that:

> [e]very public utility subject to this chapter shall establish and maintain adequate and suitable facilities, safety appliances or other suitable devices, and shall perform such service in respect thereto as shall be reasonable, safe and sufficient for the security and convenience of the public, and the safety and comfort of its employees, and in all respects just and fair, and without any unjust discrimination or preference.

The appellant's argument is that the above language in W. Va. Code, 24-3-1 [1923] does not provide adequate standards for adjudication or set forth with sufficient definiteness the specific acts which are prohibited. Therefore, he asserts that W. Va. Code, 24-3-1 [1923] is unconstitutionally vague which violates the West Virginia Constitution, art. III, □□ 10 and 14.

We have noted that the "vagueness standard is well settled[.]" State v. Less, 170 W. Va. 259, 263, 294 S.E.2d 62, 66 (1981). In syllabus point 1 of State v. Flinn, 158 W. Va. 111, 208 S.E.2d 538 (1974) we stated: "A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." See also State v. DeBerry, 185 W. Va. 512, 408 S.E.2d 91, cert. denied, ___ U.S. ___, 112 S. Ct. 592, 116 L. Ed. 2d 616 (1991), and State v. Less, supra. We have also noted that:

> [t]here is no satisfactory formula to decide if a statute is so vague as to violate the due process clauses of the State and Federal Constitutions. The basic requirements are that such a statute must be couched in such

> language so as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain if he has violated the offense provided and it may be couched in general language.

Syl. pt. 1, State ex rel. Myers v. Wood, 154 W. Va. 431, 175 S.E.2d 637 (1970). Furthermore, "[c]riminal statutes, which do not impinge upon First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by construing the statute in light of the conduct to which it is applied." Syl. pt. 3, State v. Flinn, supra.

In State v. Flinn, this Court found that the following definitions of delinquent child in W. Va. Code, 49-1-4 [1931] were unconstitutionally vague: "(7) associate with immoral or vicious persons;" and "(9) deport himself so as to wilfully injure or endanger the morals or health of himself or others." Id. at 129, 208 S.E.2d at 548. This Court found that the above phrases were so broad and subjective that "there [was] an inherent danger that a trial court could not keep purely subjective standards out of the consideration of juries." Id. at 130, 208 S.E.2d at 549.

Likewise, in the case before us the language in W. Va. Code, 24-3-1 [1923] is broad and subjective. What is "maintain[ing] adequate and suitable facilities"? What is "perform such service . . . as shall be reasonable, safe and sufficient for the security and convenience of the public, and the safety and comfort of its employees"? It would not be until after the trial before anyone would be able to answer the above questions, and the answer would depend on the jury's subjective interpretation of what is adequate or safe.

The State argues that by using statutory interpretation aids discussed in Flinn, 158 W. Va. at 125, 208 S.E.2d at 546, the general terms of the statute can be made permissibly certain. For instance, one can look to the "common understanding and practice" or to the "ordinary commercial knowledge." Id. However, we disagree with the State. W. Va. Code, 24-3-1 [1923] does not provide any standard by which the jury can determine what is safe and adequate water service, and the jury's subjective knowledge of "ordinary commercial knowledge" would vary. We agree that in the case before us the water conditions were not satisfactory; however, a statute cannot be constitutional in one case and unconstitutional in another. W. Va. Code, 24-3-1 [1923] potentially could be used to criminally penalize a water company for not providing a state-of-the-art water system.

Accordingly, we hold that W. Va. Code, 24-3-1 [1923] is unconstitutionally vague in violation of W. Va. Const. art. III, □□ 10 and 14 because the language "establish and maintain adequate and suitable facilities" and "perform such service . . . as shall be reasonable, safe and sufficient for the security and convenience of the public, and the safety and

comfort of its employees" does not provide adequate standards for adjudication or set forth with sufficient definiteness the specific acts which are prohibited.

III

The appellant raises several other assignments of error. However, in light of our resolution of the first issue it is not necessary for us to address the remaining assignments of error.

IV

Therefore, since W. Va. Code, 24-3-1 [1923] is unconstitutionally vague violating W. Va. Const. art. III, □□ 10 and 14, we reverse the jury verdict.

Reversed.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1993 Term

_____

No. 21536

_____

CHARLES STUART OXLEY,
Plaintiff Below, Appellant

v.

THE BOARD OF EDUCATION OF THE
COUNTY OF SUMMERS
Defendant Below, Appellee

_____

Appeal from the Circuit Court of Kanawha County
Honorable Patrick Casey, Judge
Civil Action No. 90-AA-154

REVERSED

_____

Submitted: September 22, 1993
Filed: December 14, 1993

J. W. Feuchtenberger
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Bluefield, West Virginia
Attorney for the Appellant

Kathryn Reed Bayless
Princeton, West Virginia
Attorney for the Appellee

This Opinion was delivered PER CURIAM.

SYLLABUS BY THE COURT

"'"In reviewing the judgment of the lower court this Court does not accord special weight to the lower court's conclusions of law, and will reverse the judgment below when it is based on an incorrect conclusion of law." Syllabus Point 1, Burks v. McNeel, 164 W. Va. 654, 264 S.E.2d 651 (1980). Syllabus, Bolton v. Bechtold, [178] W. Va. [556], 363 S.E.2d 241 (1987).' Syllabus Point 2, State ex rel. Dept. of Motor Vehicles v. Sanders, 184 W. Va. 55, 399 S.E.2d 455 (1990). " Syl. pt. 2, Davis v. W. Va. Dept. of Motor Vehicles, 187 W. Va 402, 419 S.E.2d 470 (1992).

Per Curiam:

This action is before this Court upon appeal of the April 15, 1992, decision of the Circuit Court of Kanawha County. In that order, the circuit court upheld the final decision of the West Virginia Education and State Employee Grievance Board which stated that the appellant, Charles Stuart Oxley, was not entitled to the position as principal at the Summers County Career Center because he did not possess the required secondary principal's certificate. On appeal, the appellant asks that this Court reverse the decision of the circuit court. For the reasons stated below, the decision of the Circuit Court of Kanawha County is reversed.

I

On July 25, 1989, the appellee, the Board of Education of the County of Summers, posted a notice of a job vacancy for "career center principal." The posting noted that the applicant must possess the requisite certification: (1) a principal's certificate grades 7-12; and (2) a vocational administrative certificate. Demetrius Tassos, the Superintendent of Schools for Summers County at the time, interviewed the applicants. The appellant possessed a vocational administrator's certificate and an elementary principal's certificate. The appellant, however, was eligible for his secondary principal's certificate but he had not yet completed the necessary paperwork to receive it.

Harold Bandy also desired the position, but he possessed only a principal's certificate. Prior to the posting of the vacant position, Mr. Bandy applied through the appellee and Mr. Tassos for a temporary permit as a vocational administrator from the West Virginia State Department of Education. The application for such permit was completed by Mr. Bandy and Mr. Tassos. Specifically, Mr. Tassos certified in the application that "in my judgment, the applicant [Mr. Bandy] is the best qualified person available; therefore, I recommend that he/she be granted a permit for the position to which he/she has been assigned." The application was signed and submitted on July 3, 1989. The circuit court and the parties herein agree that the circumstances surrounding the issuance of the permit are questionable.

Ultimately, Mr. Tassos recommended Mr. Bandy for the position, and on August 10, 1989, the appellee hired Mr. Bandy to be the new career center principal.

On August 22, 1989, the appellant filed a grievance. The appellant contended that he was the more qualified individual for the position, and thus, the appellee's decision to hire Mr. Bandy was in violation of W. Va. Code, 18A-4-8b(a) [1990]. However, the appellant's grievance was denied at every stage of the grievance process.

On April 15, 1992, the circuit court affirmed the decision of the Level IV hearing examiner and held that the appellant failed to meet the posted job requirements at the time the appellee selected Mr. Bandy. It is from the circuit court's order dated April 15, 1992, that the appellant appeals to this Court.

However, it should be noted that on September 13, 1991, Mr. Tassos resigned as superintendent. Shortly thereafter, the new superintendent recommended that the appellee post an administrative vacancy at the career center. Following the posting, the appellant was hired as principal of the career center.

II

The appellant's primary point of contention is that the circuit court erred in upholding the decision of the Level IV hearing examiner in light of the reliable, probative and substantial evidence on the whole record.

This case before us is unusual in that the parties' request for relief is practically identical. Specifically, the appellee joins the appellant in asking this Court to reverse the order of the circuit court. We concur with the parties, and therefore reverse the decision of the circuit court.

At oral argument before this Court, the parties acknowledged and agreed that problems existed in the selection process. In his brief, the appellant, who is now the principal of the career center, argues that it was obvious that the job posting was not a bona fide posting in that Mr. Tassos had recommended a permit and selected Mr. Bandy for the position approximately three weeks prior to the posting. Accordingly, the appellant asserts that the selection of Mr. Bandy should have been set aside as violative of W. Va. Code, 18A-4-8b(a) [1990], and the position should have been readvertised and reselected.

The appellee, in its brief, states that the appellee did not become aware of the circumstances surrounding the permit application until 1991, more than one year after the initiation of the grievance proceedings. The appellee maintains that had the Board been aware of the fact that Mr. Tassos had made inaccurate statements, or more pointedly, certified Mr. Bandy as the most qualified applicant prior to the position being posted, it would have proceeded differently. We commend the appellee for being forthright.

Similarly, the Level IV hearing examiner found, in his decision on August 31, 1990, that the propriety of Mr. Tassos' representations on Mr. Bandy's permit application could be perceived as questionable. However, the hearing examiner concluded that the appellant did not, at the time of the posting, possess the requisite certification therefore making him ineligible for the position. The circuit court adopted the findings of fact and conclusions of law of the hearing examiner and held that the representations made by Mr. Tassos on behalf of Mr. Bandy for his permit application could be perceived as questionable; nevertheless, the appellant failed to meet the job requirements as posted.

In syllabus point 2 of Davis v. W. Va. Dept. of Motor Vehicles, 187 W. Va. 402, 419 S.E.2d 470 (1992), we addressed the weight to be accorded to conclusions of the lower court:

> '"In reviewing the judgment of the lower court this Court does not

> accord special weight to the lower court's conclusions of law, and will reverse the judgment below when it is based on an incorrect conclusion of law." Syllabus Point 1, Burks v. McNeel, 164 W. Va. 654, 264 S.E.2d 651 (1980). Syllabus, Bolton v. Bechtold, [178] W. Va. [556], 363 S.E.2d 241 (1987).' Syllabus Point 2, State ex rel. Dept. of Motor Vehicles v. Sanders, 184 W. Va. 55, 399 S.E.2d 455 (1990).

After a thorough review of the record, and arguments of counsel, we are of the opinion that the trial court erred in adopting the conclusion of the hearing examiner. There was obviously, as recognized by both parties, error in the selection process. Therefore, we reverse the decision of the circuit court and find that the appellee erred in not initially giving the position to the most qualified individual pursuant to W. Va. Code, 18A-4-8b(a) [1990]. We further hold that the appellant is entitled to continue to maintain the position as principal of the career center.

Based upon the foregoing reasons, the decision of the Circuit Court of Kanawha County is reversed.

Reversed.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1993 Term

_____

No. 21531

_____

IN THE MATTER OF: MAGISTRATE M. L. TWYMAN,
MAGISTRATE FOR MARION COUNTY

_____

Disciplinary Proceeding

COMPLAINT DISMISSED

_____

Submitted: October 5, 1993
Filed: November 1, 1993

Charles R. Garten
Charleston, West Virginia
Attorney for Judicial Investigation Commission

David R. Janes
Fairmont, West Virginia
Attorney for Magistrate M. L. Twyman

This Opinion was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Under Rule III(C)(2) [1992 Supp.] of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding 'must be proved by clear and convincing evidence.'" Syl. pt. 4, In Re Pauley, 173 W. Va. 228, 314 S.E.2d 391 (1983).

2. "The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings." Syl. pt. 1, West Virginia Judicial Inquiry Com'n v. Dostert, 165 W. Va. 233, 271 S.E.2d 427 (1980).

Per Curiam:

This matter is before this Court upon review of the judicial disciplinary proceeding initiated against M. L. Twyman, Magistrate for Marion County, West Virginia. The Judicial Investigation Commission ("the Commission") filed a complaint, with the West Virginia Judicial Hearing Board ("the Board") against Magistrate Twyman and charged her with violating Canon 3A(1) and (5) and Canon 3B(1) and (2) of the Judicial Code of Ethics. Following a hearing on the matter, the Board recommended to this Court that the complaint against Magistrate Twyman be dismissed. We adopt the recommendation of the Board. For the reasons stated below, we hereby order that the complaint against Magistrate Twyman be dismissed.

I

Normally, Marion County has four magistrates, however, from April of 1990, through November of 1991, Marion County operated with only three magistrates. The fourth magistrate at that time, Ronald Crislip, was absent from his office during this time period, and he later passed away in April of 1991. The three remaining magistrates then became overloaded with the backlog created by the absence of Mr. Crislip.

The charges against Magistrate Twyman arose from an incident in which Raymond McIntire obtained a warrant for brandishing and assault against Byron Dunsler, in the Marion County Magistrate Court on November 3, 1991. The case of State of West Virginia ex rel. Raymond McIntire v. Byron Dunsler was assigned to Magistrate Twyman.

In magistrate court, criminal cases must be conducted within 120 days of the issuance of a warrant if the defendant is in custody or the defendant makes a motion for a speedy trial, or the case may be dismissed. Otherwise, a misdemeanor case must be commenced within one year from issuance of the warrant unless good cause exists for delay. See State ex rel. Stiltner v. Harshbarger, 170 W. Va. 739, 296 S.E.2d 861 (1982).

In November of 1991, Mr. McIntire contacted the Marion County Magistrate Court and was advised that the complaint had been served and a hearing date would be scheduled for December of 1991. On two other occasions Mr. McIntire contacted the magistrate court in order to find out the actual day of the hearing, and on each occasion, the hearing had been rescheduled for January of 1992, and then for May of 1992. The hearing was rescheduled a third time when Tammy Newhouse, the Magistrate Assistant for Magistrate Twyman, spoke with defense attorney, Ross Maruka, and he informed her that he could not be present for the hearing scheduled on May 19, 1992. The matter was continued, but notices of the continuance were not sent to the respective parties.

On September 9, 1992, a hearing was held before Magistrate Twyman with Mr. Maruka appearing on behalf of the defendant, Mr. Dunsler, and Assistant Prosecuting Attorney, Penny Hartman, appearing on behalf of the State. Mr. Maruka filed a motion to dismiss because the case had not been heard within 120 days. There was no objection made by the assistant prosecuting

attorney, therefore, Magistrate Twyman dismissed the case. Following the hearing, Mr. McIntire was informed that his complaint had been dismissed.

On September 12, 1992, Mr. McIntire filed a complaint against Magistrate Twyman with the Commission. After reviewing the complaint, the Commission followed through with an investigation and found probable cause existed for the Commission to file a complaint with the Board. Accordingly, on January 12, 1993, the Commission filed a complaint against Magistrate Twyman charging her with violating Canon 3(A)(1) and (5) and 3B(1) and (2) of the Judicial Code of Ethics, which provides:

> The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:
>
> A. Adjudicative Responsibilities. (1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism . . . . (5) A judge should dispose promptly of the business of the court . . . .
>
> B. Administrative Responsibilities. (1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials . . . . (2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

On May 21, 1993, a hearing was held before the Board regarding the charges against Magistrate Twyman. On July 6, 1993, the Board submitted its findings of fact, conclusions of law and proposed disposition for review by this Court. The Board concluded and ultimately recommended that due to the overload in the Marion County Magistrate Court, Magistrate Twyman did not violate the above-mentioned Judicial Code of Ethics, and therefore, the complaint against Magistrate Twyman should be dismissed.

II

With respect to the handling of complaints against magistrates, this Court set forth the requisite standard of proof initially in syllabus point 4 of In Re Pauley, 173 W. Va. 228, 314 S.E.2d 391 (1983): "Under Rule III(C)(2) [1992 Supp.] of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding 'must be proved by clear and convincing evidence.'"

Upon review, this Court is required to make an independent evaluation of the Board's findings and recommendations as stated in syllabus point 1 of West Virginia Judicial Inquiry Com'n v. Dostert, 165 W. Va. 233, 271 S.E.2d 427 (1980): "The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings."

In the case before us, Magistrate Twyman is in essence charged with failing to diligently carry out her judicial and administrative duties. However, we are of the opinion that the delay which occurred in the case styled State ex rel. Raymond McIntire v. Byron Dunsler was justified in that the evidence presented supports Magistrate Twyman's contention that the Marion County Magistrate Office was faced with an unusually heavy workload due to the absence of the county's fourth magistrate.

The Commission contends that because Magistrate Twyman failed to promptly dispose of this criminal action, Mr. McIntire never had an opportunity to "have his day in court." As mentioned earlier, in magistrate court under certain circumstances criminal cases are to be heard within 120 days from the issuance of a warrant. However, as asserted by counsel for Magistrate Twyman, the general limit for hearing a criminal matter is one year from the issuance of the warrant unless good cause exists for delay. See Stiltner, supra. Mr. McIntire obtained his criminal warrant on November 4, 1991, and the hearing pertaining to this warrant was scheduled and heard on September 9, 1992, within the one-year limit per Stiltner. Therefore, Magistrate Twyman acted within the allotted time period mandated by West Virginia law.

We do not condone dilatory behavior on the part of judicial officers. However, we are of the opinion that due to the overload in the Marion County Magistrate Court at the time, the delay which occurred in the case of State of West Virginia ex rel. Raymond McIntire v. Byron Dunsler, was not intentional. Furthermore, the assistant prosecuting attorney did not object to the dismissal even though more time remained before the lapse of the one-year period. Magistrate Twyman testified that had the State objected to the motion, citing good cause for the delay, then the case would have gone to trial.

This Court has independently evaluated the record in this case and heard oral arguments from the respective parties. For the reasons stated herein, we believe that the record is void of clear and convincing evidence to support the charges raised in the Commission's complaint against Magistrate Twyman, and therefore, we accept the recommendation of the

Judicial Hearing Board to dismiss the complaint against Magistrate Twyman.

Complaint Dismissed.

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JUSTICE MILLER delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "'"Future damages are those sums awarded to an injured party for, among other things: (1) Residuals or future effects of an injury which have reduced the capability of an individual to function as a whole man; (2) future pain and suffering; (3) loss or impairment of earning capacity; and (4) future medical expenses." Syllabus Point 10, Jordan v. Bero, [158] W. Va. [28,] 210 S.E.2d 618 (1974).' Syl. Pt. 2, Flannery v. United States, 171 W.Va. 27, 297 S.E.2d 433 (1982)." Syllabus Point 2, Adkins v. Foster, 187 W. Va. 730, 421 S.E.2d 271 (1992).

2. Where a plaintiff wishes to quantify the loss of earning capacity by placing a monetary value on it, there must be established through expert testimony the existence of a permanent injury, its vocational effect on the plaintiff's work capacity, and an economic calculation of the monetary loss over the plaintiff's work-life expectancy reduced to a present day value.

3. "The loss of enjoyment of life resulting from a permanent injury is part of the general measurement of damages flowing from the permanent injury and is not subject to an economic calculation." Syllabus Point 4, Wilt v. Buracker, ___ W.Va. ___, ___ S.E.2d ___ (No. 21708 12/13/93).

4. "'"Rule 59(a), [West Virginia Rules of Civil Procedure], provides that a new trial may be granted to any of the parties on all or part of the issues, and in a case where the question of liability has been resolved in favor of the plaintiff leaving only the issue of damages, the verdict of the jury may be set aside and a new trial granted on the single issue of damages." Syl. Pt. 4, Richmond v. Campbell, 148 W. Va. 595, 136 S.E.2d 877 (1964).' Syllabus Point 3, Gebhart v. Smith, 187 W. Va. 515, 420 S.E.2d 275 (1992)." Syllabus Point 9, Wilt v. Buracker, ___ W.Va. ___, ___ S.E.2d ___ (No. 21708 12/13/93).

Miller, Justice:

This is an appeal from a jury verdict and final order of the Circuit Court of Monongalia County dated August 13, 1992, in favor of the appellees and plaintiffs below, Carolyn Liston and Daley Liston. Carolyn Liston suffered an injury to her right arm and elbow when she slipped and fell on standing water in a building owned and maintained by the appellant and defendant below, The University of West Virginia Board of Trustees. The jury awarded, inter alia, general damages for Mrs. Liston's loss of earning capacity and her loss of enjoyment of life (hedonic damages). The defendant appeals on the basis that (1) the plaintiffs failed to prove any loss of earning capacity, and (2) the plaintiffs' expert testimony concerning hedonic damages was inadmissible. We agree with the defendant's latter contention.

I.
LOSS OF EARNING CAPACITY

At trial, the defendant sought to preclude testimony from the plaintiffs' economic expert concerning Mrs. Liston's loss of earning capacity on the basis that no "reasonably certain" evidence of loss of earning capacity had been presented by the plaintiffs. The defendant points to the testimony of Dr. Gregg O'Malley, Mrs. Liston's treating physician, who testified by way of a video deposition that he had no way to predict, to a reasonable degree of medical certainty, whether Mrs. Liston would be able to continue performing the functions of her employment into the future.

On the other hand, Dr. O'Malley testified that Mrs. Liston suffered a permanent 17 percent whole-person impairment as a result of the injury. He also stated that Mrs. Liston's injury required surgery to repair the damage, and that two metal pins had to be placed in her arm. He was not certain whether those pins would have to be replaced in the future, or whether Mrs. Liston's injury would require further surgical procedures.

At trial, the plaintiffs also presented the expert testimony of Cathy Johnson, a vocational and rehabilitation counselor. She testified that she specialized in evaluating injured persons from a vocational perspective in regard to the impact of injuries upon an individual's ability to work. Ms. Johnson testified that after reviewing Dr. O'Malley's medical reports and deposition, she concluded that Mrs. Liston could not find any employment due to the restrictions resultant from her injury.

The plaintiffs then presented the expert testimony of Daniel Selby, an economist, who testified that, based upon Ms. Johnson's evaluation, Mrs. Liston's loss of earning capacity equaled between $79,973 and $156,851.

The defendant neglects to address the evidence provided by Ms. Johnson to the jury. Instead, the defendant argues that

because Dr. O'Malley could not state, to a reasonable degree of medical certainty, that Mrs. Liston could not continue working, no reasonably certain evidence was offered to support Mr. Selby's economic calculations. Clearly, however, this assertion overlooks the value of Ms. Johnson's expert testimony.

In Adkins v. Foster, 187 W. Va. 730, 733, 421 S.E.2d 271, 274 (1992), we stated the necessary elements of proof regarding future damages, including the loss of future earning capacity: "[I]mpairment of earning capacity is a proper element of recovery when two elements have been proven: permanent injury and reasonable degree of certainty of the damages." Citing Jordan v. Bero, 158 W. Va. 28, 52, 210 S.E.2d 618, 634 (1974). The foregoing elements of proof are reflected in Syllabus Points 1 and 2 of Adkins:

> "1. 'The permanency or future effect of any injury must be proven with reasonable certainty in order to permit a jury to award an injured party future damages.' Syl. Pt. 9, Jordan v. Bero, 158 W.Va. 28, 210 S.E.2d 618 (1974).
>
> "2. '"Future damages are those sums awarded to an injured party for, among other things: (1) Residuals or future effects of an injury which have reduced the capability of an individual to function as a whole man; (2) future pain and suffering; (3) loss or impairment of earning capacity; and (4) future medical expenses." Syllabus Point 10, Jordan v. Bero, [158] W. Va. [28,] 210 S.E.2d 618 (1974).' Syl. Pt. 2, Flannery v. United States, 171 W.Va. 27, 297 S.E.2d 433 (1982)."

We went on to quote the following from Jordan v. Bero, 158 W. Va. at 57, 210 S.E.2d at 637: "'[W]here the permanent injury is proven, reasonable inferences based upon sufficient evidence are all that is necessary to carry the question to the jury for its consideration.'" 187 W. Va. at 733, 421 S.E.2d at 274. The question in the case at bar does not concern Mrs. Liston's substantive right to receive a monetary award for loss of earning capacity as a result of a permanent personal injury. We have recognized such a right in the foregoing cases. What is at issue herein is the type of proof that can be offered to quantify the amount of loss of earning capacity.

Here, Mrs. Liston's doctor testified to her degree of permanent disability. He could not state with certainty whether this would limit her job opportunities or cause a loss of earnings. However, the plaintiff's vocational expert, after performing her own tests in the vocational area, was able to state that the plaintiff's earning capacity had been severely

diminished because of her injury. There is no question that other jurisdictions have recognized that a vocational expert may be used to prove loss of earning capacity.

The vocational assessment was reviewed by an economist, Mr. Selby, who then calculated the dollar amount of diminished earning capacity over Mrs. Liston's work-life expectancy. Neither Ms. Johnson's nor Mr. Selby's qualifications nor their underlying methodology was attacked by the defense. We find that the proof from Mrs. Liston's experts in this case was relevant and reliable to support her monetary claim for loss of earning capacity under Rule 702 of the West Virginia Rules of Evidence.

This case is not like the situation in Adkins v. Foster, supra, where the plaintiff suffered a cervical strain and exacerbation of her previous depression as a result of an automobile accident. The plaintiff had an orthopedist who testified that she had a permanent neck injury. A psychiatrist also testified that she had a permanent psychiatric disability. The plaintiff testified as to her rate of pay. Without any further expert evidence, the plaintiff's attorney calculated her rate of pay over her life expectancy and then divided this sum in half. He advised the jury that his calculation was the present value of her loss of earning capacity.

We concluded in Adkins that the type of calculation made by the attorney was improper and remanded the case for a retrial on the future economic loss arising from the loss of earning capacity. We did state, however: "We do not suggest that expert economic or vocational evidence is mandatory in every instance [to prove diminished earning capacity]." 187 W. Va. at 734, 421 S.E.2d at 275.

What emerges from our cases is that loss of earning capacity can be proved in two ways. The first step in either approach is that the plaintiff must establish that there exists a permanent injury which can be reasonably found to diminish earning capacity. The plaintiff may then rely on lay or the plaintiff's own testimony to acquaint the jury with the injury's impact on his or her job skills. When this is done, the jury may assess a general amount of damages for diminished earning capacity, as explained in United States v. Flannery, supra; Jordan v. Bero, supra; and Carrico v. West Virginia Central & Pacific Railway Co., 39 W. Va. 86, 19 S.E. 571 (1894).

Where a plaintiff wishes to quantify the loss of earning capacity by placing a monetary value on it, there must be established through expert testimony the existence of a permanent injury, its vocational effect on the plaintiff's work capacity, and an economic calculation of its monetary loss over the plaintiff's work-life expectancy reduced to a present day value.

In this case, the foregoing standards were followed in the calculation of the monetary amount of damages for loss of earning capacity. We find no error on this issue.

II.

HEDONIC DAMAGES

The other error alleged by the defendant concerns the trial court's admission of testimony by Mr. Selby regarding economic calculations for Mrs. Liston's loss of enjoyment of life. We recently addressed, at considerable length, the admissibility of such evidence in Wilt v. Buracker, ___ W.Va. ___, ___ S.E.2d ___ (No. 21708 12/13/93). In Syllabus Point 4 of Wilt, we determined that the loss of enjoyment of life cannot be made the subject of an economic calculation:

> "The loss of enjoyment of life resulting from a permanent injury is a part of the general measure of damages flowing from the permanent injury and is not subject to an economic calculation."

Clearly, then, the trial court erred when it admitted Mr. Selby's economic calculations concerning Mrs. Liston's damages for the loss of enjoyment of life.

III.

REMAND

In this case the jury verdict form did not itemize the damages, but listed only two separate categories therefor -- compensatory damages and general damages. The jury awarded compensatory damages in the amount of $5,888.43, and general damages, which included loss of enjoyment of life, in the amount of $121,859. The jury did not distinguish between the various elements within the two categories of general damages. Thus, we cannot separate out the award of damages for the loss of enjoyment of life in this case as we did in Wilt. There, we were able to offer the plaintiffs a remittitur for only the hedonic damages award because liability had been so clearly established and the damages assigned by the jury for the plaintiff's loss of enjoyment of life were itemized and specified in the jury verdict form.

In the case at bar, the jury tendered a verdict form assigning 100 percent negligence to the defendant. We find that there was conclusive evidence in the record to the effect that Mrs. Liston's injuries were the result of the defendant's negligence. As we stated in Syllabus Point 9 of Wilt:

> "'"Rule 59(a), [West Virginia Rules of Civil Procedure], provides that a new trial may be granted to any of the parties on all or part of the issues, and in a case where the question of liability has been resolved in favor of the plaintiff leaving only the issue of damages, the verdict of the jury may be set aside and a new trial granted

> on the single issue of damages." Syl. Pt. 4, Richmond v. Campbell, 148 W. Va. 595, 136 S.E.2d 877 (1964).' Syllabus Point 3, Gebhart v. Smith, 187 W. Va. 515, 420 S.E.2d 275 (1992)."

Because liability was conclusively proven and is not contested upon appeal, this case must only be retried on the issue of Mrs. Liston's damages. The plaintiffs shall have the option to retry the entire case, or, at their discretion, to try only the damages portion of the case.

IV.

CONCLUSION

Based upon the foregoing, the jury verdict and judgment order entered on August 13, 1992, by the Circuit Court of Monongalia County is affirmed, in part, and reversed, in part, and remanded for a new trial solely on the issue of damages, or, at the plaintiffs' discretion, for retrial of the entire matter.

Affirmed, in part;
reversed, in part;
and remanded.

September 1993 Term

No. 21536

CHARLES STUART OXLEY,
Plaintiff Below, Appellant

v.

THE BOARD OF EDUCATION OF THE
COUNTY OF SUMMERS
Defendant Below, Appellee

Appeal from the Circuit Court of Kanawha County
Honorable Patrick Casey, Judge
Civil Action No. 90-AA-154

REVERSED

Submitted: September 22, 1993
Filed: December 14, 1993

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This Opinion was delivered PER CURIAM.

SYLLABUS BY THE COURT

"'"In reviewing the judgment of the lower court this Court does not accord special weight to the lower court's conclusions of law, and will reverse the judgment below when it is based on an incorrect conclusion of law." Syllabus Point 1, Burks v. McNeel, 164 W. Va. 654, 264 S.E.2d 651 (1980). Syllabus, Bolton v. Bechtold, [178] W. Va. [556], 363 S.E.2d 241 (1987).' Syllabus Point 2, State ex rel. Dept. of Motor Vehicles v. Sanders, 184 W. Va. 55, 399 S.E.2d 455 (1990). " Syl. pt. 2, Davis v. W. Va. Dept. of Motor Vehicles, 187 W. Va 402, 419 S.E.2d 470 (1992).

Per Curiam:

This action is before this Court upon appeal of the April 15, 1992, decision of the Circuit Court of Kanawha County. In that order, the circuit court upheld the final decision of the West Virginia Education and State Employee Grievance Board which stated that the appellant, Charles Stuart Oxley, was not entitled to the position as principal at the Summers County Career Center because he did not possess the required secondary principal's certificate. On appeal, the appellant asks that this Court reverse the decision of the circuit court. For the reasons stated below, the decision of the Circuit Court of Kanawha County is reversed.

I

On July 25, 1989, the appellee, the Board of Education of the County of Summers, posted a notice of a job vacancy for "career center principal." The posting noted that the applicant must possess the requisite certification: (1) a principal's certificate grades 7-12; and (2) a vocational administrative certificate. Demetrius Tassos, the Superintendent of Schools for Summers County at the time, interviewed the applicants. The appellant possessed a vocational administrator's certificate and an elementary principal's certificate. The appellant, however, was eligible for his secondary principal's certificate but he had not yet completed the necessary paperwork to receive it.

Harold Bandy also desired the position, but he possessed only a principal's certificate. Prior to the posting of the vacant position, Mr. Bandy applied through the appellee and Mr. Tassos for a temporary permit as a vocational administrator from the West Virginia State Department of Education. The application for such permit was completed by Mr. Bandy and Mr. Tassos. Specifically, Mr. Tassos certified in the application that "in my judgment, the applicant [Mr. Bandy] is the best qualified person available; therefore, I recommend that he/she be granted a permit for the position to which he/she has been assigned." The application was signed and submitted on July 3, 1989. The circuit court and the parties herein agree that the circumstances surrounding the issuance of the permit are questionable.

Ultimately, Mr. Tassos recommended Mr. Bandy for the position, and on August 10, 1989, the appellee hired Mr. Bandy to be the new career center principal.

On August 22, 1989, the appellant filed a grievance. The appellant contended that he was the more qualified individual for the position, and thus, the appellee's decision to hire Mr. Bandy was in violation of W. Va. Code, 18A-4-8b(a) [1990]. However, the appellant's grievance was denied at every stage of the grievance process.

On April 15, 1992, the circuit court affirmed the decision of the Level IV hearing examiner and held that the appellant failed to meet the posted job requirements at the time the appellee selected Mr. Bandy. It is from the circuit court's order dated April 15, 1992, that the appellant appeals to this Court.

However, it should be noted that on September 13, 1991, Mr. Tassos resigned as superintendent. Shortly thereafter, the new superintendent recommended that the appellee post an administrative vacancy at the career center. Following the posting, the appellant was hired as principal of the career center.

II

The appellant's primary point of contention is that the circuit court erred in upholding the decision of the Level IV hearing examiner in light of the reliable, probative and substantial evidence on the whole record.

This case before us is unusual in that the parties' request for relief is practically identical. Specifically, the appellee joins the appellant in asking this Court to reverse the order of the circuit court. We concur with the parties, and therefore reverse the decision of the circuit court.

At oral argument before this Court, the parties acknowledged and agreed that problems existed in the selection process. In his brief, the appellant, who is now the principal of the career center, argues that it was obvious that the job posting was not a bona fide posting in that Mr. Tassos had recommended a permit and selected Mr. Bandy for the position approximately three weeks prior to the posting. Accordingly, the appellant asserts that the selection of Mr. Bandy should have been set aside as violative of W. Va. Code, 18A-4-8b(a) [1990], and the position should have been readvertised and reselected.

The appellee, in its brief, states that the appellee did not become aware of the circumstances surrounding the permit application until 1991, more than one year after the initiation of the grievance proceedings. The appellee maintains that had the Board been aware of the fact that Mr. Tassos had made inaccurate statements, or more pointedly, certified Mr. Bandy as the most qualified applicant prior to the position being posted, it would have proceeded differently. We commend the appellee for being forthright.

Similarly, the Level IV hearing examiner found, in his decision on August 31, 1990, that the propriety of Mr. Tassos' representations on Mr. Bandy's permit application could be perceived as questionable. However, the hearing examiner concluded that the appellant did not, at the time of the posting, possess the requisite certification therefore making him ineligible for the position. The circuit court adopted the findings of fact and conclusions of law of the hearing examiner and held that the representations made by Mr. Tassos on behalf of Mr. Bandy for his permit application could be perceived as questionable; nevertheless, the appellant failed to meet the job requirements as posted.

In syllabus point 2 of Davis v. W. Va. Dept. of Motor Vehicles, 187 W. Va. 402, 419 S.E.2d 470 (1992), we addressed the weight to be accorded to conclusions of the lower court:

> '"In reviewing the judgment of the lower court this Court does not

> accord special weight to the lower court's conclusions of law, and will reverse the judgment below when it is based on an incorrect conclusion of law." Syllabus Point 1, Burks v. McNeel, 164 W. Va. 654, 264 S.E.2d 651 (1980). Syllabus, Bolton v. Bechtold, [178] W. Va. [556], 363 S.E.2d 241 (1987).' Syllabus Point 2, State ex rel. Dept. of Motor Vehicles v. Sanders, 184 W. Va. 55, 399 S.E.2d 455 (1990).

After a thorough review of the record, and arguments of counsel, we are of the opinion that the trial court erred in adopting the conclusion of the hearing examiner. There was obviously, as recognized by both parties, error in the selection process. Therefore, we reverse the decision of the circuit court and find that the appellee erred in not initially giving the position to the most qualified individual pursuant to W. Va. Code, 18A-4-8b(a) [1990]. We further hold that the appellant is entitled to continue to maintain the position as principal of the career center.

Based upon the foregoing reasons, the decision of the Circuit Court of Kanawha County is reversed.
Reversed.IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1993 Term

_____

No. 21531

_____

IN THE MATTER OF: MAGISTRATE M. L. TWYMAN,
MAGISTRATE FOR MARION COUNTY

_____

Disciplinary Proceeding

COMPLAINT DISMISSED

_____

Submitted: October 5, 1993
Filed: November 1, 1993

Charles R. Garten
Charleston, West Virginia
Attorney for Judicial Investigation Commission

David R. Janes
Fairmont, West Virginia
Attorney for Magistrate M. L. Twyman

This Opinion was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Under Rule III(C)(2) [1992 Supp.] of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding 'must be proved by clear and convincing evidence.'" Syl. pt. 4, In Re Pauley, 173 W. Va. 228, 314 S.E.2d 391 (1983).

2. "The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings." Syl. pt. 1, West Virginia Judicial Inquiry Com'n v. Dostert, 165 W. Va. 233, 271 S.E.2d 427 (1980).

Per Curiam:

This matter is before this Court upon review of the judicial disciplinary proceeding initiated against M. L. Twyman, Magistrate for Marion County, West Virginia. The Judicial Investigation Commission ("the Commission") filed a complaint, with the West Virginia Judicial Hearing Board ("the Board") against Magistrate Twyman and charged her with violating Canon 3A(1) and (5) and Canon 3B(1) and (2) of the Judicial Code of Ethics. Following a hearing on the matter, the Board recommended to this Court that the complaint against Magistrate Twyman be dismissed. We adopt the recommendation of the Board. For the reasons stated below, we hereby order that the complaint against Magistrate Twyman be dismissed.

I

Normally, Marion County has four magistrates, however, from April of 1990, through November of 1991, Marion County operated with only three magistrates. The fourth magistrate at that time, Ronald Crislip, was absent from his office during this time period, and he later passed away in April of 1991. The three remaining magistrates then became overloaded with the backlog created by the absence of Mr. Crislip.

The charges against Magistrate Twyman arose from an incident in which Raymond McIntire obtained a warrant for brandishing and assault against Byron Dunsler, in the Marion County Magistrate Court on November 3, 1991. The case of State of West Virginia ex rel. Raymond McIntire v. Byron Dunsler was assigned to Magistrate Twyman.

In magistrate court, criminal cases must be conducted within 120 days of the issuance of a warrant if the defendant is in custody or the defendant makes a motion for a speedy trial, or the case may be dismissed. Otherwise, a misdemeanor case must be commenced within one year from issuance of the warrant unless good cause exists for delay. See State ex rel. Stiltner v. Harshbarger, 170 W. Va. 739, 296 S.E.2d 861 (1982).

In November of 1991, Mr. McIntire contacted the Marion County Magistrate Court and was advised that the complaint had been served and a hearing date would be scheduled for December of 1991. On two other occasions Mr. McIntire contacted the magistrate court in order to find out the actual day of the hearing, and on each occasion, the hearing had been rescheduled for January of 1992, and then for May of 1992. The hearing was rescheduled a third time when Tammy Newhouse, the Magistrate Assistant for Magistrate Twyman, spoke with defense attorney, Ross Maruka, and he informed her that he could not be present for the hearing scheduled on May 19, 1992. The matter was continued, but notices of the continuance were not sent to the respective parties.

On September 9, 1992, a hearing was held before Magistrate Twyman with Mr. Maruka appearing on behalf of the defendant, Mr. Dunsler, and Assistant Prosecuting Attorney, Penny Hartman, appearing on behalf of the State. Mr. Maruka filed a motion to dismiss because the case had not been heard within 120 days. There was no objection made by the assistant prosecuting

attorney, therefore, Magistrate Twyman dismissed the case. Following the hearing, Mr. McIntire was informed that his complaint had been dismissed.

On September 12, 1992, Mr. McIntire filed a complaint against Magistrate Twyman with the Commission. After reviewing the complaint, the Commission followed through with an investigation and found probable cause existed for the Commission to file a complaint with the Board. Accordingly, on January 12, 1993, the Commission filed a complaint against Magistrate Twyman charging her with violating Canon 3(A)(1) and (5) and 3B(1) and (2) of the Judicial Code of Ethics, which provides:

> The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:
>
> A. Adjudicative Responsibilities. (1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism . . . . (5) A judge should dispose promptly of the business of the court . . . .
>
> B. Administrative Responsibilities. (1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials . . . . (2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

On May 21, 1993, a hearing was held before the Board regarding the charges against Magistrate Twyman. On July 6, 1993, the Board submitted its findings of fact, conclusions of law and proposed disposition for review by this Court. The Board concluded and ultimately recommended that due to the overload in the Marion County Magistrate Court, Magistrate Twyman did not violate the above-mentioned Judicial Code of Ethics, and therefore, the complaint against Magistrate Twyman should be dismissed.

II

With respect to the handling of complaints against magistrates, this Court set forth the requisite standard of proof initially in syllabus point 4 of In Re Pauley, 173 W. Va. 228, 314 S.E.2d 391 (1983): "Under Rule III(C)(2) [1992 Supp.] of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding 'must be proved by clear and convincing evidence.'"

Upon review, this Court is required to make an independent evaluation of the Board's findings and recommendations as stated in syllabus point 1 of West Virginia Judicial Inquiry Com'n v. Dostert, 165 W. Va. 233, 271 S.E.2d 427 (1980): "The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings."

In the case before us, Magistrate Twyman is in essence charged with failing to diligently carry out her judicial and administrative duties. However, we are of the opinion that the delay which occurred in the case styled State ex rel. Raymond McIntire v. Byron Dunsler was justified in that the evidence presented supports Magistrate Twyman's contention that the Marion County Magistrate Office was faced with an unusually heavy workload due to the absence of the county's fourth magistrate.

The Commission contends that because Magistrate Twyman failed to promptly dispose of this criminal action, Mr. McIntire never had an opportunity to "have his day in court." As mentioned earlier, in magistrate court under certain circumstances criminal cases are to be heard within 120 days from the issuance of a warrant. However, as asserted by counsel for Magistrate Twyman, the general limit for hearing a criminal matter is one year from the issuance of the warrant unless good cause exists for delay. See Stiltner, supra. Mr. McIntire obtained his criminal warrant on November 4, 1991, and the hearing pertaining to this warrant was scheduled and heard on September 9, 1992, within the one-year limit per Stiltner. Therefore, Magistrate Twyman acted within the allotted time period mandated by West Virginia law.

We do not condone dilatory behavior on the part of judicial officers. However, we are of the opinion that due to the overload in the Marion County Magistrate Court at the time, the delay which occurred in the case of State of West Virginia ex rel. Raymond McIntire v. Byron Dunsler, was not intentional. Furthermore, the assistant prosecuting attorney did not object to the dismissal even though more time remained before the lapse of the one-year period. Magistrate Twyman testified that had the State objected to the motion, citing good cause for the delay, then the case would have gone to trial.

This Court has independently evaluated the record in this case and heard oral arguments from the respective parties. For the reasons stated herein, we believe that the record is void of clear and convincing evidence to support the charges raised in the Commission's complaint against Magistrate Twyman, and therefore, we accept the recommendation of the

Judicial Hearing Board to dismiss the complaint against Magistrate Twyman.

Complaint Dismissed.