

**August 8, 2005**

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

Benjamin, Justice, concurring, in part, and dissenting, in part:

The means by which our Constitution may be impaired, even innocently, are at once subtle and not readily apparent. Artful in their form, their perceived immediate need can hide their ultimate potential for damage to our system of governance. These instruments for harm may be statutory, judicial, administrative or procedural. They may take the form of actions by one branch of government seeking to exercise an authority delegated by our Constitution to another branch of government. Beguiling in their manner, they may seem to be no more than an excuse codified to remedy a perceived injustice. Ours, necessarily, is a duty of independent scrutiny and impartial review.

Consistent with this duty, it would be calamitous for us to ignore the unconstitutionality of a statute simply because of its endorsement by one group or another as a necessary remedy to a current problem of society. The administration of justice requires more of us than acquiescence to such partisanship. We must base our decisions on the soundness of legal principles and not simply on the expediencies of the day. Therefore, the fact that this case was brought pursuant to the Medical Professional Liability Act (“MPLA”), W. Va. Code § 55-7B-1, *et seq.*, must, necessarily, be of no greater consequence to our

deliberation in this matter than our consideration of any other statutory section which we are called upon to review.

We must focus our review upon whether portions of the MPLA, purporting to govern a sub-category of civil liability cases, are consistent with our Constitution, or, if not, whether they must yield to our Constitution's delegation of such authority to the Judiciary (*i.e.*, this Court's rules governing the practice and procedure applicable to civil liability cases brought in the courts of this State). While the Legislature may have chosen to enact certain statutory provisions applicable only to medical professional liability actions in an attempt to stabilize the availability of health care services in this State, the Legislature may not in so doing appropriate for itself the constitutional authority to supercede or nullify this Court's constitutionally empowered procedural rules or to deny long-standing rights reserved to the people.

Thus, I concur with the majority's conclusion that the non-unanimous verdict provision of W. Va. Code §55-7B-6d (2001) is unconstitutional because it violates Article V, Section 1 of the West Virginia Constitution. Article V, Section 1, known as the "Separation of Powers Clause," mandates that the powers of the legislative, executive and judicial branches of government remain separate and distinct. The West Virginia Constitution, likewise, specifies each branch's legitimate powers. Article VIII, Section 3 of

the West Virginia Constitution, vests this Court with the exclusive power to enact rules governing “process, practice, and procedure” in the courts of this State.

I agree with the majority that rules governing jury verdicts, such as size and unanimity requirements, are procedural matters over which this Court has sole authority. *See, e.g., Owens-Corning Fiberglas Corp. v. Martin*, 942 S.W.2d 712, 721 (Tex. Ct. App. 1997)(noting number of jurors required to reach a verdict is a procedural matter under Texas law); *State v. Lopez*, 390 N.W.2d 306, 308 (Minn. Ct. App. 1986)(finding number of jurors is procedural matter); *State v. Girts*, 700 N.E.2d 395, 408 (Ohio Ct. App. 1997)(recognizing number of persons comprising a jury is a matter of procedure subject to the court’s rule making authority). Rules governing jury size and unanimity are deemed procedural because they do not affect substantive rights. Rather, they determine how substantive rights are to be enforced. So long as this Court has a validly enacted procedural rule governing an issue, the Legislature may not seek to circumvent such a rule under the guise of tort reform or any other perceived immediacy.

Rule 48<sup>1</sup> of the *West Virginia Rules of Civil Procedure*, adopted in 1998, three years prior to the enactment W. Va. Code §55-7B-6d, permits a majority verdict in the very limited circumstances where the *parties stipulate* to a less than unanimous verdict. Thus, adoption of Rule 48, which is modeled after Rule 48 of the *Federal Rules of Civil Procedure*, modified the long standing common law unanimous verdict requirement in limited situations. Addressing the unanimous verdict requirement in federal courts in light of Rule 48 of the *Federal Rules of Civil Procedure*, the United States District Court for the Eastern District of Pennsylvania has stated:

Since the creation of the federal judicial system, federal courts have always required that a jury verdict be unanimous. . . . In *American Publishing*, the Supreme Court held that the Seventh Amendment to the United States Constitution requires a unanimous jury verdict in civil cases brought in the courts of federal territories. The Court stated:

Now unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any more details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is abridging the right.

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<sup>1</sup>Rule 48 states, in its entirety:

The parties may stipulate that the jury shall consist of any number fewer than six or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

Recently, the Supreme Court has modified the position it took in the *American Publishing* case. Since that decision, many state courts have abandoned the unanimous verdict rule and have required only a majority of jurors reach a verdict. . . . These cases, however, have addressed only the issue of unanimous verdicts in state criminal trials, although they can be interpreted as also permitting states to utilize majority jury verdicts in civil cases. However, as Justice Powell emphasized in *Johnson v. Louisiana*, these decisions have not eliminated the requirement that in federal courts a jury must be unanimous.

The long-standing commitment to unanimous jury verdicts in federal courts has been recognized in Rule 48 of the *Federal Rules of Civil Procedure* which provides:

The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

Implicit in the Rule is that unless otherwise stipulated by the parties, a jury verdict in federal courts must be unanimous.

*Masino v. Outboard Marine Corp.*, 88 F.R.D. 251, 252-253 (E.D.Pa. 1980)(internal citations and footnotes omitted). The right to a unanimous jury verdict is embedded in this nation's history. This Court, recognizing the substantive right to a unanimous verdict requirement, has adopted in its procedural rules a limited exception which expressly requires the agreement of the parties. Thus, only the parties may agree to waive their substantive right to a unanimous jury verdict. The Legislature's attempt to infringe not only upon this Court's rule making power, but also upon the people's common law rights to a unanimous verdict, is unconstitutional. I, therefore, concur in the majority's holding that the non-unanimous verdict provision of W. Va. Code §55-7B-6d is unconstitutional.

Likewise, I concur that the twelve person jury requirement contained within W. Va. Code §55-7B-6d is an unconstitutional violation of the Separation of Powers Clause because it, too, infringes upon this Court's rule making power. As noted above, rules governing the size of a jury are procedural matters governed by this Court's rules. I dissent, however, from the majority's reversal of the trial court's decision herein to empanel a twelve member jury. Rule 47(b) of the *West Virginia Rules of Civil Procedure* vests a trial court with the discretion to direct that a jury consist of more than six jurors. Specifically, Rule 47(b) provides, in pertinent part, "[u]nless the court directs that a jury shall consist of a greater number, a jury shall consist of six persons." The record is clear that the trial court directed that the jury in this matter consist of twelve persons. However, the record before this Court does not indicate *why* the trial court directed that twelve persons be empaneled on the jury. I choose not speculate that the trial court had an improper reason, *i.e.*, a belief that the unconstitutional provisions contained within W. Va. Code § 55-7B-6d were binding on it, for the court's decision to empanel a twelve person jury. As the record is unclear as to the reason for the decision to empanel twelve persons, Appellant's burden has not been met. I would not reverse this discretionary decision.

Similarly, I dissent from Syllabus Point 4 and the majority's analysis of the non-severability clause contained in W. Va. Code § 55-7B-11(b).<sup>2</sup> Instead of invalidating the

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<sup>2</sup>W. Va. Code § 55-7B-11(b) provides:

clause in question as unconstitutional, the majority utilizes a statutory interpretation approach to the clause. The result is that the majority premises its invalidity finding on the statutory interpretation of a clause which is clear and unambiguous. Principles of statutory interpretation should only be invoked where the statutory language is ambiguous. *See*, Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970) (“[w]here language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation”); Syl. Pt. 1, in part, *Ohio County Comm’n v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983) (“[j]udicial interpretation of a statute is warranted only if the statute is ambiguous”). The language contained within W. Va. Code § 55-7B-11(b) is not ambiguous and is as clear as any that this Court has been called upon to consider. By its terms, the clause is either a valid exercise of power or it is an invalid attempt to appropriate power. The middle ground of invoking statutory interpretation principles to determine validity is simply not a option, in my opinion, for deciding the validity of W. Va. Code §55-7B-11.

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If any provision of the amendments to section five of this article, any provision of the new section six-d of this article or any provision of the amendments to section eleven, article six, chapter fifty-six of the code as provided in House Bill 601, enacted during the sixth extraordinary session of the Legislature, two thousand one, is held invalid, or the application thereof to any person is held invalid, then, notwithstanding any other provision of law, every other provision of said House Bill 601 shall be deemed invalid and of no further force and effect.

I conclude that a legislative body may not, years after it has dissolved and been replaced by a new legislative body, reach out from the grave to invalidate an otherwise valid law of this state in the manner intended by this clause. The insertion of a “poison pill” clause into otherwise valid legislation constitutes a usurpation of this Court’s role in determining the validity of lawfully enacted statutes. Our system of governance does not envision legislative “dares” to this Court to not invalidate unconstitutional legislative enactments. A non-severability clause, such as here, improperly seeks to protect an unconstitutional enactment from legitimate scrutiny by the judicial branch by linking it to viability of valid law (law which has been followed and properly relied upon in this State for years). By such “poison pills”, the message to this Court is clear – either we permit unconstitutional legislation to stand, or otherwise valid statutes which have been relied upon and used for years by citizens of West Virginia become collateral damage. The Judiciary must resist such an injection of politics into this Court’s decisions. This Court’s duty to determine the constitutionality of legislation must not be impeded, constrained, threatened or cajoled. Separation of Powers, a foundation of our constitutional system of governance, proscribes any such legislative posturing which would cause us indirectly to do that which we would not do directly.

The non-severability provision of W. Va. Code §55-7B-11(b) violates the Separation of Powers Clause of our Constitution. It constitutes an improper attempt by the Legislature to usurp this Court’s independent consideration of the constitutionality of individual statutes.



Any attempt to improperly influence this Court's duty of constitutional scrutiny by hinging the validity of otherwise constitutional legislation upon the requirement that this Court uphold otherwise unconstitutional legislation is intolerable and, therefore, invalid. The 2001 Legislature cannot now act to repeal otherwise valid legislation in 2005. Should the current Legislature seek to do so, it may.