IN THE WEST VIRGINIA SENATE
SECOND EXTRAORDINARY SESSION
2018



*IN RE: The Matter of Impeachment Proceedings*
*Against Respondent Justice Elizabeth Walker*

**BOARD OF MANAGERS OF THE WEST VIRGINIA HOUSE OF DELEGATES' RESPONSE TO JUSTICE WALKER'S MOTION TO DISMISS**

Comes Now, the Board of Managers of the West Virginia House of Delegates (hereinafter "Board of Managers") in opposition to the Respondent Justice Elizabeth Walker's Motion to Dismiss (hereinafter "Respondent") and hereby opposes said Motion for the reasons outlined below. In support of its response, the Board of Managers states as follows:

## I. ISSUES

The issue complained of by Respondent is that she claims that Article XIV of the pleadings has failed to state a removable offense against Respondent individually. This claim raises numerous points of law which must be examined.

## II. STANDARD OF REVIEW

The policy of the State of West Virginia generally concerning Motions to Dismiss, as articulated in Rule 12 of the *West Virginia Rules of Civil Procedure*, is to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion to dismiss must be denied. All the Plaintiff is required to do in any action before a Court or tribunal of this state is to set forth sufficient information to outline the elements of his or her claim. While the Board of Managers is painfully aware that this impeachment is not a process under the Rules of Civil Procedure, we do believe that the Rules furnish us some guidance to be considered in reviewing this request.

Here, in this tribunal, the motion practice is governed by Rule 23 (a) of the *Rules of the West Virginia Senate While Sitting as a Court of Impeachment During the Eighty-Third Legislature* which states that "All motions, objections, and procedural questions made by the parties shall be addressed to the Presiding Officer, who shall decide the motion, objection, or procedural question: *Provided*, That a vote to overturn the Presiding Officer's decision on any motion, objection, or procedural question shall be taken, without debate, on the demand of any Senator sustained by one tenth of the Senators present, and an affirmative vote of a majority of the Senators present and voting shall overturn the Presiding Officer's decision on the motion, objection, or procedural question." The Board of Managers argues that there are sundry reasons why the Presiding Officer should not dismiss Article XIV of the Articles of Impeachment, as adopted by the House of Delegates in House Resolution 202.

## III. ARGUMENT

### The House Complied with Applicable Standards in Formulating Article XIV

With regard to the standard of review to be applied to this proceeding, the Board of Managers confesses that there is little precedent to guide us in this undertaking. Litigation and decisions arising from impeachment proceedings are rare. Further, as our state utilizes a different—and more relaxed—standard for impeachment than the Federal standards, the exact applicability of many of these holdings to this proceeding is in doubt.

Federal impeachment proceedings have been challenged in federal courts on a number of occasions. Significantly, the United States Supreme Court has ruled that procedural actions of the United States Senate in an impeachment proceeding posed a nonjusticiable political question.

In *Nixon v. United States*, 506 U.S. 224, (1993), Judge Walter L. Nixon had been convicted in a criminal trial on two counts of making false statements before a grand jury and was sent to prison. He refused, however, to resign and continued to receive his salary as a judge while in prison. The judge was thereafter impeached by the House of Representatives and removed from

office by vote of the Senate. He subsequently brought a suit arguing, specifically, that the Senate's use of a trial committee to take evidence in his proceeding violated the Constitution's provision that the Senate "try" all impeachments, arguing the Senate as a whole was required to do so.

The United States Senate Supreme Court disagreed, noting that the Constitution grants "the sole Power" to try impeachments "in the Senate and nowhere else"; and the word "try" "lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions." *Nixon* 227-9. This constitutional grant of sole authority, the Court reasoned, meant that the "Senate alone shall have authority to determine whether an individual should be acquitted or convicted" and how that process would therefore be arranged and laid out. In addition, because impeachment functions as the "only check on the Judicial Branch by the Legislature," the Court noted the important separation of powers concerns that would be implicated if the "final reviewing authority with respect to impeachments [was placed] in the hands of the same body that the impeachment process is meant to regulate." *Nixon* 235-6.

With respect, the Board of Managers is uncomfortable with the Presiding Officer determining which Articles of Impeachment are or are not invalid, or which are sufficient or insufficient for any reason, given this precedent and given the West Virginia Senate's unique Constitutional duty, analogous to that of its Federal counterpart, as it "shall have the sole power to try impeachments." *W. Va. Constitution*. Art. IV, §9. It could, respectfully, even be argued as a matter of concern that the Justices of the Court could have the power to select a Presiding Officer who could then disallow for procedural reasons each of the very Articles under which they were impeached, and thus, avoid any censure or scrutiny of their alleged wrongful acts. To quote the United States Supreme Court in *Nixon,* because impeachment functions as the" only check on the Judicial Branch by the Legislature," it seems to us equally inappropriate for the potential to exist for the "final reviewing authority with respect to impeachments [to be placed] in the hands of

the same body that the impeachment process is meant to regulate." *Nixon,* Id. We believe it is better to err on the side of caution and avoid any appearance of impropriety.

The last time a Motion to Dismiss was made in a Federal impeachment proceeding was in the trial of President Clinton before the United States Senate. That was not upon motion by the President's counsel, but rather, was initiated by a motion from one of the sitting senators, our own Senator Byrd[1]. Dismissal of a case before the West Virginia Senate, once Articles of Impeachment were tendered to that body by the House of Delegates, would, analogously, require the consent of the Senate.

The posture of the Respondent is that the Respondent is making a Motion to Dismiss based upon the sole cited precedent of *United States v. Thomas*, 367. F. 3rd. 194 (4th. Cir. 2004). We believe that this precedent is easily distinguishable from the matter before this tribunal. In *Thomas*, a man was stopped on a Federal reservation in the Commonwealth of Virginia for driving while intoxicated; Mr. Thomas had three prior DWI convictions in Maryland, and was, the Court found, wrongfully convicted of a fourth offense DWI in the matter giving rise to the holding, as his Motion to Dismiss had been wrongfully denied by the trial court. That case was a purely criminal matter, whereas this matter is neither civil nor criminal, but a political proceeding taken under West Virginia Constitutional authority. This matter, unlike that in *Thomas*, raises no Federal questions, but proceeds solely under the law of the state of West Virginia. The *Thomas* holding arises from disputes at trial concerning conflicts between the application of the laws of Virginia and Maryland, two Commonwealths not involved in any manner in this proceeding. That holding touches upon no issue of West Virginia law. Thus, while good law for some purpose, it has no appreciable applicability here.

If, as we believe, that the usual and customary Rules of Civil Procedure can provide any guidance in this matter in any way, they, and all precedent thereunder, argue against the dismissal

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[1] For the text of this day's proceedings in that matter, see the transcript at http://edition.cnn.com/ALLPOLITICS/stories/1999/01/25/transcripts/dismiss.html

of Article XIV. Our Supreme Court stated in *Dimon v. Mansy*,198 W.Va. 40, 479 S.E.2d 339 (1996) that "'the singular purpose of a Rule 12(b)(6) motion is to seek a determination whether the plaintiff is entitled to offer evidence to support the claims made in the complaint." "All that is required to state a cause of action is a short and plain statement of a claim that will give the defendant fair notice of what plaintiff's claim is and the grounds upon which it rests. The Supreme Court has recognized that a motion under Rule 12(b)(6) should be viewed with disfavor and rarely granted. If the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied." *Brown v. City of Montgomery*, 233 W.Va. 119, 126-127, 755 S.E.2d 653, 660-661 (2014) (citing Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b)(6)[2], at 384–88 (4th ed. 2012) (footnotes omitted)) "A trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)." Quoted in Syllabus Point 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977).

West Virginia has not adopted in its civil proceedings the Federal plausibility standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) requiring that a plaintiff "state a claim to relief that is plausible on its face," although we believe that this Article would survive that heightened test. West Virginia law requires, rather, that a Court may not dismiss proceedings "merely because it doubts that the plaintiff will prevail, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings." *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W. Va. 603, 245 S.E.2d 157 (1978). Moreover, "A motion to dismiss a complaint for failure to state a cause of action is generally viewed with disfavor, because the complaint is to be construed in light most favorable to plaintiff and its allegations are to be taken as true." *Collia v. McJunkin*, 178 W. Va. 158, 358 S.E.2d 242 (1987).

Thus; if this were a civil matter, and not a Constitutionally enjoined proceeding, Article XIV provides a minimally sufficient expression of the rationales concerning the allegations for which the Respondent stands accused and a reasonable and coherent statement of the conduct, or lack thereof, which she engaged in which have given rise to the charges against her. The allegations in Article XIV do not have to constitute the best expressed and most clearly delineated expression possible of these charges, merely ones which are sufficient to give her adequate notice of what plaintiff's claim is and the grounds upon which it rests, *Brown*, supra. That issue of adequacy of notice is not something that the Respondent's counsel has even deigned to address. Thus, this issue is moot, and the Article should not be dismissed.

Respondent states that she cannot be held individually responsible for alleged collective action. Respectfully, this is not a tenable position. While Respondent did, and continues to, hold but a single vote on the Court, she did have -some- measure and control of the directions, actions, and inactions of that body. She had, we contend, a duty to act to effectuate certain standards, and in some manner, we allege, neglected to fulfill that duty, resulting in maladministration. The trial shall be upon her specific contributions to the action or inaction undertaken by the Court. Article XIV even notes clearly that, it pertains to "[t]he failure by the Justices, individually and collectively, to carry out these necessary and proper administrative activities", and is thus, not solely an implement of collective punishment.

Even if we were to concede Respondent's contention, the law is replete with numerous examples of sanctions for individual punishment for collective action. Foremost among them perhaps is the felony murder rule, dating back at least three hundred years, which, of course, allows an offender's accomplices or co-conspirators to be found guilty of murder when an offender kills (regardless of intent to kill) in the commission of a dangerous or enumerated crime. Binder (2011). "Making the Best of Felony Murder". *Boston University Law Review*. 91: 403. This provision, valid in West Virginia, is a clear example that, within the general framework of our concept of justice, individuals can be punished for collective acts of their colleagues—even those

acts of which they had no direct knowledge, would not have approved of, or had any ability to control—when such acts are found to be heinous enough to merit such sanction. Given that this standard is sufficient to apply in a criminal matter, where the loss of liberty for many years (and in some jurisdictions, potentially even the loss of one's life) is the direct penalty, it is difficult to argue that in a political proceeding, where the only penalty is that of the shame of removal from office, and the loss of certain remuneration and privileges, that Respondent cannot be punished for collective actions of her colleagues or her neglect of duty in failing to prevent the same, if those acts are found heinous enough to merit such sanction in the eyes of the Senate.

Respondent contends that "there can be no 'maladministration' where an individual Justice no authority to 'administer' the Court." The *W.Va. Constitution*, Art. VIII, §3 states that "The Court shall have general supervisory control over all intermediate appellate courts, circuit courts and magistrate courts." It does not place this supervisory responsibility upon the Chief Justice alone, but upon the Court collectively, as a whole. Whether Respondent felt able or effective in the administration of the Court and its subordinate bodies is not for us to decide, but we do contend that she had that duty to act and to supervise subordinate Courts as a member of the Court, and that the extent to which she failed to effectively perform that duty is a fit subject for the consideration of the Senate.

Art. IV, §9 of the *W.Va. Constitution* enumerates that "the House of Delegates shall have the sole power of impeachment...[and] the Senate shall have the sole power to try impeachments." We believe, under the Separation of Powers doctrine, that it is the sole province of those legislative bodies to determine for themselves what are and are not impeachable offenses and to determine the manner in which they shall be presented. As noted, the United States Supreme Court, in *Nixon*, *supra*, agrees with this position.

Respondent argues that the structure of Article XIV is inconsistent with Rule 19 of the *Rules of the West Virginia Senate While Sitting as a Court of Impeachment During the Eighty-*

*Third Legislature.* It is, with respect, up to the Senate to determine if there is any such inconsistency. While Respondent is correct to note that she must have a separate and individual trial, and correct, we believe, in that her culpability under the charges of Article XIV rests primarily upon her own actions—and inactions, that she is not deprived of her ability to prepare defenses against allegations cast against the Court as a whole. As a member of that Court, she must, we believe, bear some share of the collective responsibility for its failures; this can, of course, be mitigated or allayed by evidence which she may tender at trial showing her attempts to prevent or halt the harmful behavior of that body which is complained of in the Article.

It is, we concede, speculatively conceivable that an individual Justice could be convicted by the Senate upon the charges specified in Article XIV based only on actions committed by the other Justices or by the Chief Justice. However, we have no grounds to believe that to be a possibility in the instant matter. As the trial upon the charges contained in Article XIV will be solely for this Respondent individually, we anticipate that this trial will focus upon the Respondent's individual actions or inactions concerning the behavior specified in that Article, and to the extent that her share of the collective responsibility is relevant, not merely upon the activities of the Court as a whole, or the other Justices as a group, but principally and most significantly upon -her- part in those activities during her tenure.

Thus, as has been demonstrated, even if we were to concede Respondent's argument, individual punishment for collective acts is not a forbidden legal principle. Moreover, we do not believe that this is what is intended, as with regard to the Respondent, her trial on the allegations in article XIV will be focused upon her actions or inactions. Thus, Article XIV is proper against Respondent, is not legally nor logically flawed, and should not be dismissed.

For the foregoing reasons, Respondent's Motion that this matter should be dismissed must be denied. The Board of Managers complied with the Constitution, and the Senate must now comply and exercise its sole jurisdiction over this matter.

Accordingly, Respondent's Motion is without merit and we respectfully request this Presiding Officer to deny the same.

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**CERTIFICATE OF SERVICE**

I, JOHN H. SHOTT, on behalf of the Board of Managers, do hereby certify that the foregoing "*Board of Managers of the West Virginia House of Delegates' Response to Justice Walker's Motion to Dismiss*" has been served upon the following individuals this 10th day of September, 2018, by delivering a true and exact copy thereof as follows:

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