Court Watch

A report prepared for members of the West Virginia Chamber of Commerce 2016

The Impact Of the West Virginia Supreme Court of Appeals On Our State's Economy

West Virginia Chamber

We express deep appreciation to the attorneys of our Legal Review Team who volunteered their time and expertise to review the cases decided by the West Virginia Supreme Court of Appeals in the Fall 2015 and Spring 2016 Terms of Court and present this report of the impact of those Court decisions on our state's economy to Chamber members.

CourtWatch Legal Review Team 2016
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Cunningham v. LeGrand,
785 S.E.2d 265 (W.Va. 2016)

What the Court was asked to Decide:

The Circuit Court of Kanawha County affirmed a commercial arbitration award arising from an arbitration provision contained in a limited liability company operating agreement and it entered a judgement in favor of Mountain Country Partners, LLC and Mr. LeGrand. Mr. Cunningham filed an appeal alleging that the Circuit Court should not have affirmed the award because the arbitrator "manifestly disregarded the law of West Virginia."

What the Court Decided:

The Supreme Court of Appeals for West Virginia held that the grounds set forth in the Federal Arbitration Act ("FAA"), 9 U.S.C.S. §§ 10-11, remain the only mechanism for challenging arbitration awards and that an award could not be challenged for "manifestly disregarded the law of West Virginia." Mr. Cunningham argued that dicta in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) suggested that he could assert certain non-FAA grounds, such as "manifestly disregarded the law of West Virginia" in seeking to vacate the arbitration award. Mr. Cunningham argued that the arbitrator relied on hearsay evidence and failed to reopen the proceedings to allow him to submit additional evidence post-award. However, the Court noted that the rules of evidence do not apply to arbitrators and that none of the arguments to set aside the award had any merit.

The Supreme Court held that "the high court was clear that sections 10 and 11 of the FAA provide 'exclusive regimes for the review provided by statute.'" *Id.* at 269. It further held that "manifest disregard for the law is not among the enumerated bases to vacate an award" under the FAA. Further, the Supreme Court adopted the language from the Fourth Circuit's decision in *Remmey v. PaineWebber, Inc*., 32 F.3d 143 (4th Cir. 1994) stating, "[a] court 'is limited to determining whether the arbitrators did the job they were told to do-not whether they did it well, or correctly, or reasonably, but simply whether they did it.'" Further the Supreme Court held that Mr. Cunningham cannot try to re-litigate a decision just because he disagrees with the arbitrator.

Facts:

In October 2006, Mr. Cunningham and Mr. LeGrand signed an operating agreement to form Mountain Country Partners, LLC. In July 2010, Mr. Cunningham filed a civil action in the Circuit Court of Kanawha County seeking injunctive relief for the purpose of gaining access to all corporate records and requested control of Mountain Country Partners, LLC because he felt that Mr. LeGrand was wrongfully disposing of assets and committing fraud. Because Mr. Cunningham had not submitted his claims to arbitration, as required by the Operating Agreement, Mr. LeGrand sought to dismiss the complaint. The Circuit Court stayed the case and ordered the parties to arbitration. After a three day arbitration hearing the arbitrator denied Mr. Cunningham's claims, but ruled for Mr. LeGrand on the counterclaims awarding $113,717.50 in damages and $162,442.00 in attorney's fees and costs. After the award was issued, Mr. Cunningham sought to re-open the record before the arbitrator. This motion was denied by the arbitrator and Mr. Cunningham filed a motion to vacate the award in Circuit Court because the arbitrator manifestly disregarded the law of West Virginia, the arbitrator considered hearsay evidence, and the arbitrator refused to reopen the proceedings for rebuttal evidence.

Holding:

Our Supreme Court clearly recognized that "manifest disregard for the law" is not a valid statutory basis under the FAA for challenging an arbitration award. Further, Mr. Cunningham did not allege that fraud or other illegal conduct during the arbitration allowed review of the merits of the arbitrator's decision under W. Va. Code § 55-10-25. There was no merit in Mr. Cunningham's attempt to vacate the award by asserting patently procedural issues such as the need to reopen the proceeding to respond to hearsay evidence.

Impact on Business:

Our Supreme Court has recognized that arbitrators have broad power to bind parties to an award and that the Circuit Courts are not allowed to review an arbitrator's award because the court would have rendered a different decision. The Supreme Court recognized that allowing courts to substitute their judgment would destroy the goals of effective arbitration. This decision is good for business because it will allow businesses to rely on the awards made by arbitrators with little fear that the courts will arbitrarily overturn these awards. There are only a few narrow grounds under the FAA to overturn an award and they will be strictly construed by the courts.

Nationstar Mortgage, LLC v. West,
785 S.E.2d 634 (W.Va. 2016)

What the Court was asked to decide:

The Circuit Court entered an order denying Nationstar Mortgage LLC's (Nationstar) motion to compel arbitration because of the Wests' lack of knowledge in financial matters and the absence of an "opt out" provision in the arbitration agreement. Nationstar argued on appeal that the Circuit Court erred in imposing a burden upon it to demonstrate that the agreement was specifically bargained for and that the Wests had the ability to reject arbitration prior to entering into their home loan. Because there was no "opt out" provision, the West's argued that their arbitration agreement with Nationstar was unconscionable.

The Circuit Court denied Nationstar's motion to compel arbitration holding that there was a lack of evidence that the arbitration agreement was specifically bargained for and that the Wests had the ability to opt-out of resolving any disputes in the transaction via arbitration. The West's argued that there was an imbalance in bargaining power between the parties. The Circuit Court ruled that the agreement was substantively and procedurally unconscionable because of its one-sided nature and the oppressiveness of the potential arbitration costs.

Nationstar file an interlocutory appeal to the Supreme Court of Appeals of West Virginia and asked whether the clearly labeled arbitration agreement in this case was enforceable or if the omission of an "opt out" provision, i.e. the lack of opportunity to enter into a home loan without an arbitration provision, made the agreement grossly unfair and thus unenforceable on the grounds of procedural unconscionability.

What the Court Decided:

The Supreme Court agreed with Nationstar and stated that a party to a contract has a duty to read the instrument. On the issue of procedural unconscionability, the Supreme Court stated that these types of contracts are routinely executed without the signatory's full reading or comprehension of the contract terms and that severe disparity between the bargaining parties does not render agreements illegitimate. So long as the parties meet each other's reasonable expectations, the contract stands.

The Supreme Court found that the fact that the arbitration provision was in capital letters negated any claims by the Wests that the arbitration provision was unenforceable as an "unfair surprise." The Wests failed to argue that they did not have an opportunity to read and inspect the document, and even so a party to a contract has a duty to read the instrument. Lastly, the omission of an "opt out" provision is not in itself sufficient evidence that an arbitration agreement is grossly unfair and thus unenforceable on grounds of procedural unconscionability.

On the topic of substantive unconscionability, the Circuit Court had found that the agreement was not "mutual with reciprocal obligations among the parties" and further relied upon the alleged oppressive costs associated with the arbitration. The Supreme Court reversed, finding that a lack of mutuality is not a characteristic that renders a contract unconscionable. Instead, the Court must make a fact-dependent inquiry to determine if a contract is substantively unconscionable. The Court reasoned that bilaterality is not required for conscionability; instead, "only a modicum of bilaterality is required." A one-sided contract protecting a security interest does not automatically meet the burden of substantive unconscionability.

Lastly, the Supreme Court found the Wests' argument based upon the prohibitive costs of arbitration unpersuasive to render the agreement unconscionable because the Circuit Court relied upon a non-existent requirement of complete mutuality of obligations in finding the agreement unenforceable. The Wests did not present any evidence to demonstrate that they could not afford the arbitration costs, thereby rendering their assertion wholly insufficient to meet their burden of demonstrating that the agreement was unconscionable.

Facts:

The Wests entered into a home loan agreement with Nationstar for $76,500. As part of the transaction the Wests signed an arbitration agreement, waiving all rights to litigation in the event of a dispute. The arbitration agreement had a disclaimer directly above the signatory line, in all capital letters, acknowledging that the parties were aware that they were signing away their rights to seek remedies in a jury trial:

> BY SIGNING BELOW, YOU ACKNOWLEDGE THAT YOU HAVE READ THIS ARBITRATION AGREEMENT. YOU UNDERSTAND AND AGREE THAT YOU ARE GIVING UP THE RIGHTS TO SEEK REMEDIES IN COURT INCLUDING THE RIGHT TO A JURY TRIAL; YOUR ABILITY TO COMPEL OTHER PARTIES TO PRODUCE DOCUMENTS OR TO BE EXAMINED IS MORE LIMITED IN ARBITRATION THAN IN A LAWSUIT; AND, YOUR RIGHTS TO APPEAL OR CHANGE AN ARBITRATION AWARD ARE VERY LIMITED.

Despite this provision, the Wests filed suit against Nationstar in regard to the loan they obtained. Nationstar filed a motion to compel arbitration pursuant to the loan agreement signed by both parties. In response, the West's filed a response alleging the arbitration should not be enforced as it was unconscionable. The Circuit Court ruled that the agreement was substantively and procedurally unconscionable because of its one-sided nature and the oppressiveness of arbitration costs that it required. The Circuit Court denied Nationstar's motion to compel because of the Wests' lack of knowledge in financial matters and the absence of an "opt out" provision in the disclaimer at issue.

Holding:

The Supreme Court of Appeals for West Virginia followed the long stated precedent and found that a party to a contract has a duty to read the instrument. Further, the Supreme Court held that the arbitration agreement at issue must be found both substantively and procedurally unconscionable to be unenforceable. In this case the Supreme Court found that the Wests failed to meet their burden of proof to set aside the arbitration provision and it reversed the Circuit Court's decision and ordered the parties to arbitration.

Impact on Business:

This decision ordering arbitration is a good one for West Virginia businesses. This decision binds those to contracts they have signed and follows long time precedent of upholding the duty to read your contract. The Supreme Court was willing to enforce the arbitration provision over the vague objections of the Wests that it would be too expensive for them to proceed in the arbitration forum. This decision will help businesses in West Virginia in the future enforce arbitration provisions.

Parsons v. Halliburton Energy Services.
785 S.E.2d 844 (April 11, 2016)

What the Court was asked to Decide:

The Court was asked to decide whether Defendant's failure to respond to Plaintiff's complaint, viewed under the principles of state contract law, served to waive its contractual right to arbitration.

What the Court Decided:

The Court held that under West Virginia's long-established law of contracts, courts do not require a showing of prejudice to establish a waiver of contract rights. Nevertheless, the Court decided that the Defendant did not implicitly waive its right to arbitrate by acting inconsistently with the right from the time the complaint was filed until Defendant filed a motion to compel arbitration.

Facts:

Plaintiff, Richard Parsons, was employed by Defendant Halliburton under an employment agreement that required all employment disputes be resolved through arbitration. The arbitration provision stated that all disputes with the Defendant "shall be finally and conclusively resolved through arbitration . . . instead of through trial before a court." After Parsons concluded his employment in October 2013, he filed suit in December 2013, alleging that Halliburton failed to timely pay his final wages as required by the West Virginia Wage Payment and Collection Act. Seven months later, Halliburton's first filing in response was a motion seeking to compel arbitration. During this time, Defendant's counsel asked for multiple extensions to file an answer and Plaintiff's counsel agreed. Parsons argued that Halliburton had waived its right to arbitration by failing to timely raise it.

Despite the seven-month delay before making a filing and the Defendant's requests for extension to file an answer, the circuit court found that Halliburton had not actively participated in the lawsuit. Moreover, the circuit court found that Plaintiff failed to prove he was prejudiced by Defendant's actions or delay.

Holding:

The Court held that the delay alone was meaningless and that the circumstances surrounding Halliburton's acts and language indicated that it did not implicitly waive its right to arbitrate. The Court began by noting that it is a well-established principle of contract law that contract rights can be expressly or impliedly waived. The Court further explained that to establish waiver, a party is not required to show prejudice or detrimental reliance caused by the opposing party's actions. To ensure clarity in previous decisions, the Court overruled Syllabus Point 3 of *Jarvis v. Pennsylvania Gas. Co.* and Syllabus Point 3 of *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, to the extent they require proof of prejudice or detrimental reliance to establish the common-law doctrine of waiver. The Court ultimately found that the Defendant did not expressly or implicitly waive its right to arbitrate through its acts and language and therefore affirmed the circuit court's order dismissing Plaintiff's complaint and compelling the parties to arbitrate.

Impact on Business:

The Court's decision preserves an employer's right to arbitrate even where the employer has represented to the employee that the employer plans to litigate. This is a positive decision for business as arbitration can be more-efficient and cost-effective alternative to litigation.

Schumacher Homes of Circleville, Inc. v. Spencer,
2016 W.Va. Lexis 515 (June 13, 2016)

What the Court was asked to Decide:

The background of this decision is very significant. On April 24, 2015, the West Virginia Supreme Court rendered a decision in this case finding that the Circuit Court of Mason County correctly decided the issue of unconscionability and refused to order the matter to arbitration. *Schumacher Homes of Circleville, Inc. v. Spencer,* 235 W. Va. 335, 774 S.E.2d 1 (2015)(*Schumacher I*). In so holding, our Supreme Court examined the delegation clause that should have delegated the issue of unconscionability to the arbitrator, and they found it was vague and ambiguous and therefore unenforceable. Schumacher Homes of Circleville, Inc. (Schumacher Homes) appealed this issue to the United States Supreme Court and, for the second time in recent history, that Court summarily vacated and remanded the Supreme Court's holding on an arbitration matter. *Schumacher Homes of Circleville, Inc. v. Spencer*, 136 S. Ct. 1157, 2016 U.S. LEXIS 1448 (2016). The United States Supreme Court directed the WV Supreme Court to consider its recent decision in *DIRECTTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015).

What the Court Decided:

The WV Supreme Court's original decision in *Schumacher I* was written by Chief Justice Ketchum and he agreed with Mr. Spencer that the Circuit Court correctly decided the issue of unconscionability. He determined that the delegation provision in dispute did not clearly provide that the arbitrator was the sole party that could resolve issues about the validity, revocability or enforceability of the arbitration agreement under state contract law. After the United States Supreme Court vacated and remanded the issue, Chief Justice Ketchum reconsidered the issues in light of the decision in *DIRECTTV, supra*, and concluded that the delegation provision was not ambiguous and that it was enforceable. In so holding, the WV Supreme Court issued three new syllabus points regarding delegation provisions in an arbitration agreement as follows:

4. A "delegation provision" is a clause, within an agreement to arbitrate, which clearly and unmistakably provides that the parties to the agreement give to the arbitrator the power to decide the validity, revocability or enforceability of the arbitration agreement under general state contract law.

5. Under the Federal Arbitration Act, 9 U.S.C. § 2, and the doctrine of severability, where a delegation provision in a written arbitration agreement gives to an arbitrator the authority to determine whether the arbitration agreement is valid, irrevocable or enforceable under general principles of state contract law, a trial court is precluded from deciding a party's challenge to the arbitration agreement. When an arbitration agreement contains a delegation provision, the trial court must first consider a challenge, under general principles of state law applicable to all contracts, that is directed at the validity, revocability or enforceability of the delegation provision itself.

7. Under the Federal Arbitration Act, 9 U.S.C. § 2, there are two prerequisites for a delegation provision to be effective. First, the language of the delegation provision must reflect a clear and unmistakable intent by the parties to delegate state contract law questions about the validity, revocability, or enforceability of the arbitration agreement to an arbitrator. Second, the delegation provision must itself be valid, irrevocable and enforceable under general principles of state contract law.

Facts:

In June, 2011, John and Carolyn Spencer signed a form construction contract with Schumacher Homes. The form contract contained an arbitration clause and a delegation provision that stated as follows:

The arbitrator(s) shall determine all issues regarding the arbitrability of the dispute.

In July, 2013, Mr. and Mrs. Spencer brought a lawsuit against Schumacher Homes in the Circuit Court of Mason County alleging that there were defects in their newly built home. Schumacher Homes filed a Motion to Dismiss and Compel Arbitration and the Circuit Court entered an order denying the Motion to Compel Arbitration, finding that the arbitration provision was unconscionable and unenforceable under state contract law. Schumacher Homes appealed the order denying arbitration.

Holding:

In Chief Justice Ketchum's decision, he went through the United States Supreme Court's decision on delegation provisions in *Rent-A-Center, West, Inc. v. Jackson,* 561 U.S. 63, 66, 130 S.Ct. 2772, 2775 (2010) and it concluded that a delegation provision was only enforceable if the intent of the parties was clear and unmistakable to delegate solely to the arbitrator the questions of validity, revocability or enforceability to the arbitrator.

In re-examining the delegation provision of the form construction contract signed by Mr. and Mrs. Spencer set forth above, the Supreme Court this time found that the delegation provision was enforceable under state contract law because Mr. and Mrs. Spencer had never challenged the delegation provision under contract law, they only challenged the construction contract and the arbitration provisions as a whole. Chief Justice Ketchum completely abandoned his prior decision in *Schumacher I* finding that the term "arbitrability" was an ambiguous term.

One additional footnote in this decision merits discussion. At footnote twenty-eight, the Supreme Court discusses the Revised Uniform Arbitration Act, W.Va. Code §§ 55-10-1 to 33 and it notes that under W.Va. Code § 55-10-8(c), a Circuit Court exclusively has the jurisdiction to decide whether an arbitration provision is enforceable. The Supreme Court stated that this provision runs afoul of the United States Supreme Court's decision that state legislatures cannot undercut the provisions of the FAA, *Southland Corp. v. Keatin*g, 465 U.S. 1, 16 (1984) and therefore, this new code section may be preempted and unenforceable if an agreement has a valid and enforceable delegation provision.

Impact on Business:

Only after the United States Supreme Court summarily vacated and remanded *Schuacher I* did our WV Supreme Court get this decision correct. They grudgingly enforced the arbitration agreement in recognition of the fact that Mr. and Mrs. Spencer never challenged the delegation provisions. *Schumacher I* indicates that the WV Supreme Court still views arbitration with disfavor and therefore, it will take a very strict interpretation of the United States Supreme Court's precedents on arbitration. With that said, it appears that the WV Supreme Court will grudgingly follow these precedents. With that caveat, businesses need to act accordingly and if they want to create an enforceable delegation provision within an arbitration agreement, they must specifically state that the parties agree that the arbitrator is the sole person who may decide if the arbitration agreement is valid, revocable or enforceable.

Carmichael v. Enerfab, Inc.,
2015 WL 7628697 (November 20, 2015) (Memorandum Decision)

What the Court was asked to Decide

The Court was asked to decide three issues: (1) whether the circuit court erred in denying Plaintiff's motion for summary judgment because at the time of the events giving rise to this action, he was in a period of "pre-employment" and "that the prescription drug policy violated the disability laws and regulations;" (2) whether the circuit court erred in granting Enerfab's motion for summary judgment upon finding that Enerfab's policy was permitted as sufficiently job-related business necessity; and (3) whether the circuit court erred in granting Enerfab's motion for summary judgment upon finding that Plaintiff had already begun employment at times relevant to the appeal because the court, in doing so, made factual determination***s.***

What the Court Decided:

The Court affirmed the circuit court and held that the circuit court did not err in granting Enerfab's motion for summary judgment.

Facts:

Plaintiff, Carl Carmichael, reported for employment at the John Amos Power Plant in September 2012. During his job orientation he acknowledged a company drug policy that required him to notify Defendant Enerfab Inc. prior to beginning work, "about any prescription medications that would impair [his] ability to work safely or would show up on a drug test." He also acknowledged that the use of such medication was prohibited without authorization and completion of a "fitness of duty" form by a physician.

Approximately one month later, Plaintiff tripped while carrying a beam, causing him to report for first aid treatment. Pursuant to company policy, he was given a post-accident drug test that showed the presence of opiates in his system. Plaintiff then informed Enerfab's safety manager that he had a valid, legal prescription for, and was taking, hydrocodone. After the safety manager confirmed that Plaintiff had not previously disclosed that he was taking hydrocodone or presented the required "fitness for duty" form, he terminated Plaintiff's employment.

Plaintiff proceeded to file a charge of disability discrimination with the West Virginia Human Rights Commission ("Commission"), and the Commission made a "no probable cause" determination. Plaintiff filed his Complaint in the Circuit Court of Putnam County on July 20, 2013, alleging that Enerfab violated the West Virginia Human Rights Act and the Federal American's with Disability Act and invaded his privacy.

The parties filed cross motions for summary judgment. The circuit court granted Enerfab's motion, noting that "the [West Virginia Human Rights Act] does not prohibit employers from making health-related inquiries at the post-employment stage for purposes of determining whether an employee is capable of doing [his] job safely." The court also determined that Enerfab had not violated Plaintiff's right to privacy.

Holding:

As to Plaintiff's first assignment of error, the Court determined that Plaintiff was employed at the time of his orientation because he was (1) paid for attending orientation and (2) under the control of Enerfab at that time. The Court declined to address whether the circuit court erred in granting Enerfab's motion for summary judgment upon finding that respondent's policy was permitted under West Virginia Code of State Rules Section 77-1-5.5, which allows an employer to make certain inquiries at the commencement of employment duties if "[s]uch examination or inquiry is shown to be job related and consistent with business necessity." As to Plaintiff's third assignment of error, the Court determined that there was no genuine issue of material fact because Plaintiff offered no explanation for the discrepancy between his deposition testimony and the information contained in his affidavit.

Impact on Business:

Industrial employers, or similar workplaces that pose a risk of serious bodily harm, may benefit from this decision insofar as they can require employees to disclose any prescription medications that would impair their ability to work safely or would show up on a drug test so long as the inquiry is job related and consistent with business necessity.

Egan v. Steel of West Virginia,
2016 WL 765771 (February 26, 2016) (Memorandum Decision)

What the Court was asked to Decide::

The Court was asked to decide whether the circuit court erred by granting summary judgment to Defendant on Plaintiff's claims of sexual harassment and retaliatory discharge.

What the Court Decided:

The Court affirmed the circuit court holding that the undisputed evidence showed that Plaintiff failed to demonstrate that the alleged inappropriate conduct was imputable on some factual basis to Defendant.

Facts:

Plaintiff, Brenda Egan, was hired on August 16, 2011, by Defendant SWVA as a probationary employee. Plaintiff was trained on and knew the importance of crane safety – including that getting too close to an approaching crane was a safety violation and that walking underneath a loaded crane was considered a serious safety violation.

On October 3, 2011, Carrie Sparks, the union's grievance representative, asked Plaintiff how she was doing and Plaintiff responded that everything was fine. Sparks proceeded to apologize to Plaintiff for using profanity in her presence because Sparks subsequently learned that Plaintiff considered herself a religious person and was offended by profanity. Sparks also indicated she had heard rumors of sexual harassment involving petitioner by a co-worker and asked Plaintiff if she was okay. According to Sparks, Plaintiff responded that she was "old enough to be their mother. I just chastise them and go on. I can handle it. I'm okay."

Prior to her shift on October 4, 2011, Plaintiff spoke with her supervisor, Jonathan Newman, about her conversation with Sparks. She asked Newman to tell her co-workers that she was not a "rat" and did not initiate the conversation with Sparks. She also told Newman that she had been sexually harassed when one of her co-workers made a comment about masturbation being in the Bible. Plaintiff mentioned the name of another co-worker but did not offer any specific information about his conduct. Plaintiff told Newman that she wanted the sexual comments to stop and Newman conveyed that he would take care of the problem. Later that morning Newman and Plaintiff spoke with two groups of workers about their conduct. Plaintiff testified that, thereafter, the inappropriate conduct ceased.

On October 15, 2011, Newman terminated Plaintiff from employment because she failed to do the job he had directed her to do and because she had repeatedly violated crane safety rules. Newman had previously witnessed Plaintiff standing too close to a loaded crane on four or five other occasions. Despite Newman's counseling, Plaintiff continued to commit safety violations, so he terminated her employment.

Following her termination, Plaintiff complained to representatives in Human Resources ("HR") about her termination and, for the first time, told them that she had been sexually harassed at work. Plaintiff reported the use of profanity; that a co-worker sang about vaginas; that a co-worker made the comment "seaman like it in the rear;" that one of her co-workers made a masturbation gesture; that a co-worker explained to her what the "F" word stood for; and that a piece of machinery in the processing department had the words "pelvis pounder" written on it. She claims she generally heard most of these comments in the break room. However, after an investigation by

HR, none of Plaintiff's fellow co-workers substantiated her claims. To the contrary, they agreed that Plaintiff was properly discharged based upon her violations of crane safety rules and lack of productivity. Plaintiff was unable to identify anyone who could corroborate her version of events when subsequently asked by the investigating HR representative.

Plaintiff's claims against Defendant included hostile environment sexual harassment, gender discrimination, retaliatory discharge, and violation of the West Virginia Wage Payment and Collection Act. The wage payment claim was settled and ultimately dismissed. The circuit court granted Defendant's motion for summary judgment on the remaining claims. Plaintiff did not oppose Defendant's motion for summary judgment on the gender discrimination claim.

Holding:

The Court held that the circuit court properly granted Defendant's motion for summary judgment on Plaintiff's retaliatory discharge claim because (1) she failed to satisfy the subjective and objective elements required to establish that she engaged in a protected activity and (2) she failed to establish an inference of a retaliatory motive for her discharge. The Court explained that egregious safety violations, coupled with Plaintiff's lack of productivity, led Newman to terminate her employment.

The Court also held that the circuit court properly granted Defendant's motion for summary judgment on Plaintiff's sexual harassment claim because Plaintiff failed to prove all the elements necessary for a *prima facie* case of sexual harassment. The Court reasoned that Plaintiff failed to show that the conduct about which she complained was based on her gender. The majority of the comments were generally overheard in the break room and there was no reason to believe her co-workers talked any differently when she was not there.

In addition, the Court noted that Plaintiff failed to prove that the alleged misconduct was sufficiently severe or pervasive to alter her conditions of employment or create a hostile work environment. The Court reasoned that Plaintiff only mentioned one specific inappropriate remark to her supervisor and did not complain to HR about the conduct until after she was discharged.

Finally, the Court determined that Plaintiff failed to show the alleged inappropriate conduct was imputable on some factual basis to Defendant. In reaching this conclusion, the Court relied on the fact that Plaintiff did not allege that any member of management acted inappropriately. Defendant had a strict anti-harassment policy, encouraged employees to report all perceived instances of harassment, and prohibited retaliation against anyone who reports the same.

Impact on Business:

The Court's decision is positive for business as it discourages claims when the employee fails to show that any member of management acted inappropriately. The decision is also positive for business insomuch as it discourages an employee from asserting a wrongful discharge claim when the employee has repeatedly committed safety violations.

Fuller v. Board of Governors of W.Va. State University,
2016 WL 3369566 (June 17, 2016) (Memorandum Decision)

What the Court was asked to Decide:

The Court was asked to decide whether the circuit court erred in granting Defendant's motion for summary judgment. Specifically, the Court assessed whether there were any genuine issues of material fact as to whether Plaintiff was terminated in retaliation for reporting a hostile work environment and unsafe work conditions in violation of *Harless v. First National Bank*.[1]

What the Court Decided:

The Court affirmed the circuit court's grant of summary judgment in favor of the Defendant. The Court determined that Plaintiff's termination was reasonable because she abandoned her responsibilities at a critical and ill-chosen moment, showing absolutely no regard for the well-being of her young charges.

Facts:

Plaintiff LaTonya Fuller, an African-American female, was terminated from her employment with West Virginia State University as an educational outreach counselor for the Upward Bound program after chaperoning approximately 120 high school students on a weekend bus trip to Washington, D.C. On the trip, Plaintiff twice instructed the bus driver to stop the non-air conditioned bus (one of three used on the trip) after two students reported that they were having asthma attacks. On the second stop, she exited the bus with four students and sent the bus on, without a chaperone, while she and the students waited for an air-conditioned bus.

Later on the trip, Plaintiff purchased food from a nearby restaurant for a student who had a seafood allergy while the other students ate at a seafood buffet. Plaintiff claimed that her supervisor criticized her and the student for leaving and began to act in a volatile manner. Plaintiff proceeded to leave the group and attend a social event with a friend where she admits to consuming alcohol. After the social event, Plaintiff contacted her supervisor via text message to inform him that she would not return to the group. Upon returning to Charleston, Plaintiff brought the issues to West Virginia State University Administration's attention. The University placed her on administrative leave pending investigation and her employment was ultimately terminated.

Plaintiff proceeded to file a complaint in the Circuit Court of Kanawha County alleging discharge in violation of the West Virginia Human Rights Act on the basis of her race and gender. The circuit court found that Plaintiff failed to present any evidence that race or gender was a motivating factor in her termination and further determined that she failed to present any evidence of pretext.

Holding:

The Court affirmed the trial court holding that West Virginia State University produced a legitimate, non-discriminatory reason for Plaintiff's termination, specifically, Plaintiff's departure from the field trip without notifying her supervisors until hours later. The Court further explained that Plaintiff's termination was justified because she abandoned her responsibilities at a critical and ill-chosen moment, showing absolutely no regard for the well-being of her young charges. With regard to pretext, the Court found that Plaintiff offered no evidence that her firing was pre-textual; therefore, no question of material fact remained.

[1] 162 W.Va. 116, 246 S.E.2d 270 (1978).

Impact on Business:

The Court's decision is positive for business as it holds employees accountable. Employees should be required to fulfill their duties even when they have disagreements with management. To allow conduct similar to Fuller's would place a significant burden on employers. This decision should also serve to alleviate an employer's hesitation to fire at will employees who clearly abandon their duties.

Knotts v. Grafton City Hospital,
786 S.E.2d 188 (April 14, 2016)

What the Court was asked to Decide:

The Court was asked to decide whether, in an age discrimination case, the Court should adopt the "substantially younger" rule articulated by the United States Supreme Court in *O'Connor v. Consolidated Coin Caterers Corp*.[1]

What the Court Decided:

The Court adopted the "substantially younger" rule, reversed the summary judgment order of the circuit court, and remanded the case to the circuit court for further proceedings. In this ruling, the Court overruled the "over 40/under 40" rule applied by the Court in *Young v. Bellofram Corp*.[2] In line with the United States Supreme Court, the Court did not define "substantially younger" but noted that the term "defies an absolute definition and is best determined after considering the particular circumstances of each case."

Facts:

Grafton City Hospital terminated Plaintiff, Martha Knotts, from her position in housekeeping in 2012, citing violations of the hospital's patient confidentiality policy. Knotts broke the hospital's patient confidentiality policy by interacting with a newly admitted patient and the patient's son in the emergency room. The patient testified that Knotts was "like a mother to her" and the record indicates that the patient and her son had previously lived with Knotts for approximately one year. Despite these exigent circumstances, the hospital terminated Knotts the day after the violation.

After Knotts filed suit alleging age discrimination under the West Virginia Human Rights Act, the circuit court granted the hospital's motion for summary judgment, finding that Knotts failed to establish a prima facie case of age discrimination. The court gave no weight to the "substantially younger" replacements and comparison employees Knotts had offered as evidence to raise an inference of discrimination, relying on the West Virginia Supreme Court's opinion in *Young*.[3] The circuit court reasoned that both Knotts and her replacement were in the same protected class, over 40 years old, so Knotts had no cause of action for age discrimination under *Young*.[4]

Holding:

On appeal, the Court initially affirmed the circuit court's order in a memorandum decision before granting a petition for rehearing.

On rehearing, the Court determined that its decision in *Young* was in conflict with the United States Supreme Court's opinion in *O'Connor*.[5] The Court concluded that "good and sufficient cause" existed to depart from *Young* and concluded that the "substantially younger" approach adopted in *O'Connor* was "better and more legally sound." The Court explained that "substantially younger" was not defined by the United States Supreme Court, but failed to offer a definition because "substantially younger" is best determined after considering the particular circumstances of

[1] 517 U.S. 308, 116 S.Ct. 1307 (1996).
[2] 705 S.E.2d 560, 227 W.Va. 53 (W.Va. 2010).
[3] *Id.*
[4] *Id.*
[5] 517 U.S. 308, 116 S.Ct. 1307 (1996).

each case.[6] However, the Court noted that, generally, age differences of ten or more years are sufficiently substantial to satisfy the "substantially younger" rule. As a result, the Court remanded the case to the circuit court to allow it to assess Knotts's *prima facie* case in light of the newly adopted syllabus points.

Impact on Business:

The Court's decision will have a negative impact on business. The "substantially younger" test allows claims that would otherwise fail under the "over 40/under 40" test. This allows plaintiffs to bring an age discrimination case even when his or her replacement is also a member of the protected age class. It must be noted, however, that the decision does comport with U.S. Supreme Court precedent.

[6] See Coryell v. Bank One Trust Co. N.A., 101 Ohio St.3d 175, 181, 803 N.E.2d 781, 788 (Oh. 2004).

Nyamekye v. W.Va. University Hospital,
2015 WL 7628696 (November 20, 2015) (Memorandum Decision)

What the Court was asked to Decide:

The Court was asked to decide three issues: (1) whether Plaintiff asserted a prima facie case of discrimination; (2) whether the circuit court erred in finding that the same person hired and fired Plaintiff; (3) whether the circuit court erred in failing to consider that Defendant's reasons for firing Plaintiff were pre-textual.

What the Court Decided:

Facts:

Plaintiff, Richmond Nyamekye, was employed by Defendant, West Virginia University Hospitals, as a departmental support specialist from March 26, 2012 until he was terminated from employment on April 16, 2012. The first ninety days of Plaintiff's employment was a probationary period. Defendant's Employee Handbook stated, "in most cases, the probationary period will last for ninety days from your date of hire but is subject to the extension at the discretion of WVUH. Obviously, your employment could end at your option or ours before the end of the probationary period." Plaintiff is African-American and was the only African-American in the IT department. All other employees in the IT department were Caucasian.

Plaintiff originally interviewed on an open-interview day at the Erickson Alumni Center with Deveran George. Thereafter, Plaintiff interviewed with a committee assembled by William Dumire. Defendant asserts that Mr. Dumire alone made the decision to hire Plaintiff, but Ms. George testified that it was a "collective decision."

Plaintiff holds a Bachelor's degree from West Virginia University, and at the time of the events in question, was enrolled in West Virginia University's Executive Masters in Business Administration ("MBA") program. During his first week of employment, Plaintiff requested a leave of absence to attend a mandatory trip to Washington, D.C. for his MBA program. Mr. Dumire approved the leave of absence. While Plaintiff was on leave, Mr. Dumire sent Plaintiff an e-mail highlighting policies concerning leave, illness, and attendance.

On April 16, 2012, Dumire completed a Corrective Action Notice in which he discharged Plaintiff for several reasons:

> (1) Attendance – arrived 15 minutes late on Tuesday March 27, [d]id not notify supervisor or other staff; (2) attendance – left work area multiple times on March 27, 28, and 29, without notifying supervisor; (3) does not possess the necessary hardware qualifications, requirements outlined within the job description and as described/alluded to in employees resume during interview process; (4) does not collaborate well with existing team.

Plaintiff filed suit alleging wrongful discharge, and racial discrimination. He alleged that he was subject to a hostile work environment, disparate treatment, and was unable to do his job because he was never given a password to the Defendant's Axium software. Plaintiff further alleges that during his first week of employment his co-workers seemed to have him under "surveillance," and wanted him to be accountable to them even though they held equal positions with similar pay. Plaintiff also complained that one co-worker used the word "homie" regarding him and subjected him to stories regarding black men acting as drug dealers in trailer parks. The circuit court ultimately granted Defendant's motion for summary judgment.

Holding:

First, the Court found that Plaintiff did not provide the Court with a sufficient nexus between his race and the decision to terminate his employment. The Court determined that Plaintiff was a probationary employee at the time of his discharge and, therefore, subject to termination at Defendant's option. Second, the Court found that Mr. Dumire was the same person that hired and fired Plaintiff and noted that Plaintiff did not provide any evidence to contradict this finding. Finally, the Court held the reasons for Plaintiff's discharge were not pre-textual because Plaintiff was, again, unable to establish a nexus between his race and his termination from employment.

Impact on Business:

The Court's decision is positive for business insofar as it allows employers to establish a strong inference that an employee's termination is not discriminatory when the employee was hired and fired by the same individual.

Parsons v. Halliburton Energy Services.
785 S.E.2d 844 (April 11, 2016)

What the Court was asked to Decide:

The Court was asked to decide whether Defendant's failure to respond to Plaintiff's complaint, viewed under the principles of state contract law, served to waive its contractual right to arbitration.

What the Court Decided:

The Court held that under West Virginia's long-established law of contracts, courts do not require a showing of prejudice to establish a waiver of contract rights. Nevertheless, the Court decided that the Defendant did not implicitly waive its right to arbitrate by acting inconsistently with the right from the time the complaint was filed until Defendant filed a motion to compel arbitration.

Facts:

Plaintiff, Richard Parsons, was employed by Defendant Halliburton under an employment agreement that required all employment disputes be resolved through arbitration. The arbitration provision stated that all disputes with the Defendant "shall be finally and conclusively resolved through arbitration . . . instead of through trial before a court." After Parsons concluded his employment in October 2013, he filed suit in December 2013, alleging that Halliburton failed to timely pay his final wages as required by the West Virginia Wage Payment and Collection Act. Seven months later, Halliburton's first filing in response was a motion seeking to compel arbitration. During this time, Defendant's counsel asked for multiple extensions to file an answer and Plaintiff's counsel agreed. Parsons argued that Halliburton had waived its right to arbitration by failing to timely raise it.

Despite the seven-month delay before making a filing and the Defendant's requests for extension to file an answer, the circuit court found that Halliburton had not actively participated in the lawsuit. Moreover, the circuit court found that Plaintiff failed to prove he was prejudiced by Defendant's actions or delay.

Holding:

The Court held that the delay alone was meaningless and that the circumstances surrounding Halliburton's acts and language indicated that it did not implicitly waive its right to arbitrate. The Court began by noting that it is a well-established principle of contract law that contract rights can be expressly or impliedly waived. The Court further explained that to establish waiver, a party is not required to show prejudice or detrimental reliance caused by the opposing party's actions. To ensure clarity in previous decisions, the Court overruled Syllabus Point 3 of *Jarvis v. Pennsylvania Gas. Co.* and Syllabus Point 3 of *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, to the extent they require proof of prejudice or detrimental reliance to establish the common-law doctrine of waiver. The Court ultimately found that the Defendant did not expressly or implicitly waive its right to arbitrate through its acts and language and therefore affirmed the circuit court's order dismissing Plaintiff's complaint and compelling the parties to arbitrate.

Impact on Business:

The Court's decision preserves an employer's right to arbitrate even where the employer has represented to the employee that the employer plans to litigate. This is a positive decision for business as arbitration can be more-efficient and cost-effective alternative to litigation.

Rotruck v. Smith,
2016 WL 547190 (February 10, 2016) (Memorandum Decision)

What the Court was asked to Decide:

The Court was asked to decide two issues: (1) whether Plaintiff's contract with Defendant was illegal, and (2) whether Defendant assigned wages in compliance with W.Va. Code § 21-5-3(e) (2015).

What the Court Decided:

The Court held that the employment contract was not illegal because there is no legal impediment for hiring someone based on the prerequisite that they obtain a license. The Court further held that the advances to Plaintiff by Defendant were not consumer credit transactions or consumer loans, but more akin to salary advances provided in response to Plaintiff's financial need. Therefore, under *Clendenin Lumber & Supply Co., v. Carpenter,*[1] Defendant was not subject to the wage assignment requirements of W.Va. Code § 21-5-3(e).

Facts:

The Plaintiff, Melissa Rotruck, was hired as a sales associate by Defendant, Insurance Queen, on July 21, 2011. In connection with her hiring, Plaintiff signed a document setting out her job description that expressly stated she "[m]ust be licensed to sell insurance in the States determined by the [sic] management within 2 months of date of hire." The document further stated that "Sales Associates are compensated by commissions or a small salary plus commission at a lower rate." During the trial, Plaintiff acknowledged that she agreed to commission-only compensation.

Prior to her discharge from employment, Plaintiff failed to obtain a license as required by her hiring document despite repeatedly misleading Defendant about her attempts to take the licensing test. Due to her failure to obtain a license to sell insurance, Plaintiff could not earn a commission pursuant to W.Va. Code § 33-44-4(a).

Nevertheless, Plaintiff received some compensation for her services from Defendant during the course of her employment. In 2011, Plaintiff received wages totaling $4,309.39, and she was paid a total of $3,079.00 in 2012. In addition, Defendant provided Plaintiff with financial assistance on occasion by filling her car with gas, paying for some of her medication, making her car payment on two occasions, and advancing her cash to cover emergencies ($100 in one instance and $500 in another). These expenditures were deducted from Plaintiff's future earnings.

Plaintiff's employment with Defendant was terminated on April 6, 2012, for failing to obtain insurance licenses and misleading Defendant in regard to taking the relevant exams. Following her termination, Plaintiff filed a complaint under the Wage Payment Collection Act against Defendant. After conducting a bench trial, the circuit court found that Plaintiff had failed to prove her claim and granted judgment as a matter of law to Defendant.

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[1] 305 S.E.2d 332, 172 W.Va. 375 (1983).

`Holding:

The Court affirmed the circuit court's judgment holding that Plaintiff's employment contract was legal and Defendant assigned wages in compliance with W.Va. Code § 21-5-3(e). The Court began by determining that Plaintiff was essentially hired as a sales associate with a prerequisite that she obtain a license to sell insurance. The Court noted that within professions that require licensure, it is common practice to hire individuals pending their acquisition of the necessary license. The employment agreement was no different from an internship where an individual volunteers to work for little or no compensation in order to gain valuable knowledge and experience. Thus, the Court held that there was no legal impediment to prevent an employer from hiring someone under a commission-only agreement even when that person cannot receive a commission.

The Court also held that Plaintiff failed to establish that Defendant was a creditor and, therefore, Defendant was not subject to the wage assignment requirements of W.Va. Code § 21-5-3(e). The Court reasoned that the advances to Plaintiff by Defendant were similar to salary advances rather than consumer credit transactions or consumer loans. Under these circumstances, the advances are not considered wage assignments and Defendant is not considered a creditor. Accordingly, the Court held that under *Clendenin Lumber*,[2] Defendant was not subject to the wage assignment requirements of W.Va. Code § 21-5-3(e).

Impact on Business:

The Court's decision correctly places the burden on the employee to obtain the pre-requisite licenses when the employment agreement specifies that the employee must obtain a license to receive compensation.

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[2] 305 S.E.2d 332, 172 W.Va. 375 (1983).

Taylor et al. v. W.Va. Department of Health and Human Resources,
2016 WL 1564279 (April 14, 2016)

What the Court was asked to Decide:

The Court was asked to decide whether the circuit court erred by granting summary judgment as to Plaintiffs' whistle-blower, retaliatory discharge, gender discrimination, and invasion of privacy claims.

What the Court Decided:

The Court affirmed the circuit court's grant of summary judgment as to petitioners' retaliatory discharge and gender discrimination claims, but concluded that the circuit court erred in granting summary judgment in favor of respondents on petitioners' whistle-blower claims.

Facts:

Plaintiffs Jennifer Taylor and Susan Perry were formerly employed in the Legal Services office of Defendant West Virginia Department of Health and Human Resources ("DHHR"). In 2011, a Request for Proposal ("RFP") was issued soliciting bids for a contract to provide advertising services to DHHR. In 2012, a DHHR communications staffer informed Perry that he had concerns about the scoring of the RFP, and Perry requested Taylor to perform a legal review. Upon learning of the review, the Deputy Secretary for Administration of DHHR informed Perry that the review was inappropriate and could be perceived as "bid fixing." After initially agreeing to "stand down" on their concerns, Perry later identified a challenge to the RFP as a potential legal issue during the transition from one DHHR Secretary to another. The acting secretary initiated an investigation that resulted in the matter being turned over to the Kanawha County Prosecutor's Office, which declined to prosecute. Taylor was subsequently terminated. Perry was terminated after refusing reassignment to another position.

Taylor and Perry brought suit alleging violation of the whistle-blower law, retaliatory discharge, gender discrimination, and false light invasion of privacy. After discovery and orders granting partial summary judgment on some of Defendant's claims, the circuit court ultimately granted summary judgment with respect to all claims.

Holding:

The Court began by criticizing the final order entered by the circuit court that had been prepared by respondents' counsel, and cautioned circuit courts regarding the risks of adopting and entering such orders wholesale.

The Court then held that the circuit court erred in finding that the claims were barred by qualified immunity, but affirmed the grant of summary judgment on the claims for retaliatory discharge, gender discrimination, and false light invasion of privacy. The Court reasoned that the petitioners' claims were not barred by qualified immunity because summary judgment for qualified immunity claims can only be granted if there is no "bona fide dispute as the foundational or historical facts that underlie the immunity determination." The Court reversed and remanded the whistle-blower claims, holding that the circuit court's order contained significant issues of fact that must be resolved by the trier of fact.

Impact on Business:

This public sector case will not have any impact on business per se. The Whistle-Blower Act does not apply to private employers. The decision, however, is a reminder that fact-intensive analyses by a circuit court will rarely support summary judgment in West Virginia trial courts.

W.Va. Board of Education v. Marple,
783 S.E.2d 75 (November 10, 2015)

What the Court was asked to Decide:

The Court was asked to decide whether Dr. Jorea Marple, Superintendent of West Virginia Schools, had a constitutionally protected interest in her continued employment. The Court was also asked to decide whether the doctrines of sovereign and qualified immunity protected the West Virginia Board of Education's ("Board") and former president L. Wade Linger's discretion, including whether to hire or retain an employee.

The circuit court denied the Board's and Linger's motion to dismiss and held that they were not entitled to assert sovereign immunity under the *West Virginia Constitution* because they were insured under a state liability insurance policy. The circuit court's order failed to discuss whether the Board's motion should be dismissed because of qualified immunity.

What the Court Decided:

The Supreme Court reversed the circuit court, ruling that Dr. Marple's complaint should have been dismissed under the doctrine of qualified immunity. The Court went on to hold that the state insurance policy exception to sovereign immunity, created by West Virginia Code § 29-12-5(a)(4) (2006) and recognized by Syllabus Point 2 of *Pittsburgh Elevator Co. v. W.Va. Bd. of Regents*,[1] applies only to immunity under the *West Virginia Constitution* and does not extend to qualified immunity. The Court further explained "to waive the qualified immunity of a state agency or its official, the insurance policy must do so expressly, in accordance with Syllabus Point 5 of P*arkulo v. W.Va. Bd. of Probation & Parole*.[2]

Facts:

Dr. Jorea Marple, Plaintiff, was terminated as Superintendent of Schools for West Virginia in 2012 after serving for two years under an at-will employment contract. During her employment, Dr. Marple received exemplary performance evaluations and a pay raise. The Board also issued a press release during her employment describing her as an "outstanding visionary and leader" who "brought national recognition to our state."

Despite these accolades, the Board voted to terminate Dr. Marple's employment in a regularly scheduled meeting held on November 14 and 15, 2012. Two weeks later, the Board publicly voted to affirm Dr. Marple's termination. The Board and Linger proceeded to offer a statement regarding Dr. Marple's termination stating that satisfactory progress had not occurred in public education and that a new superintendent might achieve different results. Dr. Marple had no opportunity to reject or rebut the Board's statement.

Dr. Marple sued the Board and Linger alleging violation of her due process rights under the West Virginia Constitution. Specifically, she alleged (1) the Board's statement infringed upon her liberty interest in her good name and potential for future government employment, and (2) she had a property interest in continued employment as superintendent. The Board and Linger filed a motion to dismiss asserting that immunity barred each of Dr. Marple's claims.

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[1] 310 S.E.2d 675, 172 W.Va. 743 (W.Va. 1983).
[2] 483 S.E.2d 507, 199 W.Va. 161 (W.Va. 1996).

Holding:

The Supreme Court held that the state insurance policy exception to immunity recognized in *Pittsburgh Elevator Co. v. W.Va. Bd. of Regents*[3] applies only to sovereign immunity under the West Virginia Constitution and not to qualified immunity. The Court distinguished sovereign and qualified immunity, noting that sovereign immunity is designed to protect the public purse, while qualified immunity allows officials to do their jobs and exercise judgment, wisdom, and sense without worry of a lawsuit.

The Court ruled that the Board's and Linger's motion to dismiss should have been granted under the doctrine of qualified immunity. The Court explained that Dr. Marple did not allege sufficient facts to show that either a liberty or property interest was implicated by the acts of the Board or Mr. Linger.

The Court reasoned that the Board's statement was not "stigmatizing enough to implicate Dr. Marple's liberty interest." In response to Dr. Marple's claim that she had a protected property interest, the Court determined that Dr. Marple's employment contract "clearly and unambiguously provided that she was an at-will employee and contained no guarantee of future employment or procedure for termination." The Court also explained that the language of the *West Virginia Constitution* Article XII, § 2 and West Virginia Code § 18-3-1 (2006) designate the position of Superintendent of Schools for the State of West Virginia to be at-will. Thus, as a matter of law, the Court determined that the Board and Linger had the discretion to terminate her position at their will and pleasure.

Impact on Business:

The Court's decision to restrict the state insurance policy exception to sovereign immunity recognized in *Pittsburgh Elevator Co*,[4] and not extend this exception to qualified immunity is a significant advantage for state government actors. This allows government officials to do their job without constant concern about personal liability.

[3] 310 S.E.2d 675, 172 W.Va. 743 (W.Va. 1983).
[4] Id.

State ex rel. Biafore v. Tomblin,
Case No. 16-0013 (January 22, 2016)

What the Court was Asked to Decide:

Whether W. Va. Code § 3-10-5, which provides a mechanism for the replacement of state legislators, required the Governor to appoint a replacement for an outgoing State Senator from the party with which the outgoing Senator was affiliated at the time of his ***election***, or whether the code required the replacement to come from the party with which the outgoing Senator was affiliated ***immediately before his resignation***. Specifically, the Court was asked whether W. Va. Code § 3-10-5 was susceptible to multiple interpretations where the outgoing Senator switched his party affiliation from Democrat to Republican after he was elected and was registered as a Republican at the time of his resignation.

What the Court Decided:

The Court held that W. Va. Code §3-10-5 was plain and unambiguous and required the outgoing Senator's replacement to be named from the party with which the senator was affiliated immediately prior to the vacancy – in this case, the Republican Party.

Facts:

In November of 2012, Senator Daniel Hall was elected by the people of the 9th Senatorial District to a four year term in the West Virginia Senate. Hall ran as a Democrat and won election with roughly 54% of the popular vote. Hall remained a registered Democrat for the first two years of his term. In the 2014 general election, the West Virginia Republican Party made major gains in the state's legislative bodies. Republicans won sixty-four seats in the House of Delegates and secured eleven out of eighteen available Senate seats. After the election, the State Senate was deadlocked with seventeen elected Democrats and seventeen elected Republicans.

On November 5, 2014, one day after the general election, Hall switched his party affiliation from Democrat to Republican. Hall's switch gave the Republicans a one seat majority in the Senate and Hall was subsequently named Majority Whip of the Republican Party. The Republicans maintained this thin, one vote majority until December 29, 2016 when Hall announced that he would resign his Senate seat. Hall then resigned on January 4, 2016.

On January 8, 2016, West Virginia Democratic Party Chairman Belinda Biafore filed a petition for a Writ of Mandamus with the Supreme Court of Appeals of West Virginia. In her petition, Biafore requested that the Court require Governor Tomblin to fill Hall's vacancy in the West Virginia Senate from a list of three candidates submitted by the Democratic Party. Biafore and the Democrats argued that, because Hall was elected as a Democrat, his replacement should come from a list of candidates submitted by the Democratic Party's 9th District Executive Committee. In response, Republicans argued that, because Hall was affiliated with the Republican Party immediately preceding his resignation, Hall's replacement should come from a list of candidates submitted by the Republican Party's 9th District Executive Committee.

Holding:

The Court first held that the language of the relevant statute, W. Va. Code § 3-10-5 was plain and unambiguous and thus was not subject to judicial interpretation. In pertinent part, W. Va. Code § 3-10-5 provides:

> (a) Any vacancy in the office of State Senator…shall be filled by appointment by the Governor, from a list of three legally qualified persons submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated.
>
> (c) In the case of a State Senator, the list shall be submitted by the party executive committee of the state senatorial district in which the vacating senator resided at the time of his or her election or appointment. The appointment to fill a vacancy in the State Senate is for the unexpired term, unless section one of this article requires a subsequent election to fill the remainder of the term, which shall follow the procedure set forth in section one of this article.

Applying the plain language of the statute, the Court held that, because Hall was "affiliated" – via his party registration – with the Republicans "immediately preceding" his resignation, Hall's replacement must come from the list submitted by the Republican Party.

The Court went on to reject the Democrats' argument that section (c) created an ambiguity in the statute. Instead, the Court held that section (c) simply provided for the geographic entity within the party that is to provide the list of nominees for the Governor's selection of a replacement. In other words, section (c) simply stated that the list of replacement candidates must come from the party executive committee in the 9th District – the district in which Hall was elected – as opposed to the state party's headquarters.

The Court also reviewed and upheld the constitutionality of W. Va. Code § 3-10-5. The Court undertook a thorough review of similar cases in other states, along with the prior Supreme Court precedent, and found that there was no prohibition against the replacement protocol laid out in the statute. The Court reasoned that the statute provided adequate protections of due process and that the mechanism for replacement of a State Senator was firmly within the purview of the state.

Finally, the Court made special note to point out that its decision was not a political question, but rather was its interpretation of the law as written.

Impact on Business:

The Court's ruling in *State of West Virginia Ex Rel Biafore v. Tomblin* has significant implications for West Virginia businesses and business owners. The Court's refusal to read ambiguity into a statute where none existed helps to provide business owners with the predictability of law required to make major investments – in both infrastructure and workforce – in West Virginia. The Court's ruling also allowed the Republicans to maintain their one vote majority in the State Senate.

Murthy v. Karpacs-Brown,
Case No. 15-0376 (June 6, 2016)

What the Court was asked to Decide:

Whether it was appropriate for the circuit court to impose monetary sanctions upon the physician defendant for alleged litigation misconduct ?

What the Court Decided:

The court held the imposition of sanctions was improper and reversed the circuit court's order.

Facts:

This case went to the West Virginia Supreme Court for the second time in a dispute over sanctions awarded against a doctor after a plaintiffs' jury verdict in a medical professional liability action. The plaintiffs won a $4M jury verdict against the doctor and on appeal, in *Karpacs-Brown v. Murthy*, 224 W.Va. 516, 686 S.E.2d 746 (2009) (*"Murthy 1"*), the Supreme Court reduced the verdict for noneconomic loss to $1M and reversed and remanded the circuit court's award of attorneys' fees and costs for an evidentiary hearing, noting in particular "[i]t is improper, however, to impose sanctions on a party for general misconduct which is unrelated to any identifiable harm suffered by the other party in the case…".

On remand, the circuit court held a hearing and again awarded attorneys' fees and costs again accepting plaintiffs' argument that the physician's insurance carrier controlled the defense (and argued it did so in other cases) and "followed a past practice" of refusing to settle meritorious claims and that the physician acted vexatiously and in bad faith, and failed to participate in a meaningful way in court-ordered mediation. The court also found the defense expert witness was "deliberately" under-prepared for his deposition, and the physician "ambushed" plaintiff at trial by testifying, without prior notice, about an exculpatory conversation with the decedent. The court made these factual findings after a hearing with no testimony and submission of documents only and entered an order tendered by plaintiffs' counsel which was not copied to defense counsel, a practice the Court criticized in a footnote.

Holding:

The Court reversed sanctions for several reasons, noting that the second order entered by the court was "virtually identical" to the order reversed in *Murthy I.* The court held the Rules of Civil Procedure don't provide that parties can be forced to settle and found that the court should have issued timely sanctions (if requested) against defendants' for refusal to mediate causing plaintiffs to file motions to compel, consisting of the costs of the motion and not, as the circuit court did, as a basis for a total award of fees. The Court found no basis for sanctions because that defendant "under prepared" their expert as opposed to the expert simply not preparing himself and noted the expert was excluded from testifying, which was already a "severe" sanction. Last, sanctions against the doctor for supposedly changing her testimony were improper because the challenged testimony was triggered by plaintiffs' cross examination.

Concurring Opinion:

Justice Workman concurred, but decided to write separately "to accentuate the existence of viable foundations upon which a nuanced order of sanctions *could have been* premised…," stat-

ing: “If the sanctions had been independently fashioned to address the defendant’s questionable actions during this protracted litigation, this Court possibly could have had a basis upon which to affirm the trial court’s rulings, thus preserving the inherent and discretionary power of a trial court to control the proceedings of litigation. Instead, the trial court made only a faint attempt on remand to provide this Court with an adequate basis upon which to sustain its determination.”

Impact on Business:

While sanctions for litigation abuse can be awarded against either side, this opinion makes clear the rigor required before they are imposed, particularly upon defendants who choose not to settle cases and opt for trial. Courts must hold hearings and make factual findings based on evidence.

Aldridge v. Highland Insurance Company,
2016 WL 3369562 (June 17, 2016) (Memorandum Decision)

What the Court was Asked to Decide:

Whether the Circuit Court of Kanawha County erred in granting summary judgment to an insurance company and insurance agent in an action alleging negligent failure to properly inform an insured of adequate coverage and negligent failure to procure insurance.

What the Court Decided:

The Supreme Court of Appeals of West Virginia affirmed the Circuit Court's ruling granting summary judgment in favor of Highland Insurance and insurance agent, Sharon Rees.

Facts:

On January 21, 2013, Aldridge suffered a work-related injury when he slipped on a high, steeply-graded, icy roof after being ordered by his employer, Fahey Exteriors, to climb onto the roof. Aldridge was not wearing a safety harness. Aldridge filed suit against Fahey, alleging deliberate intent. Upon learning that it was not insured to cover Aldridge's claim, Fahey filed a Third-Party Complaint against Highland Insurance Company and Sharon Rees, Fahey's insurance agent, alleging negligent failure to properly inform client of adequate coverage and negligent failure to procure insurance.

Subsequently, Highland Insurance and Agent Rees filed a Motion for Summary Judgment, arguing that Fahey elected to waive deliberate intent coverage and that no cause of action for negligent failure to properly inform exists in West Virginia. Highland Insurance and Agent Rees further argued that even if such a claim existed, it did not breach any duty to inform Fahey with regard to its insurance policy. Respondents presented evidence establishing that Joshua Fahey (the principal owner of Fahey Exteriors) signed a waiver of deliberate intent coverage when purchasing insurance for the company in 2009. Not only did Mr. Fahey check the waiver box and sign the form on November 4, 2009, but there was a notation on the form stating, "11-4-09 spoke with Joshua about deliberate intent-he has to keep prem. down so he doesn't want the cov. now." Agent Rees testified that when Fahey's policy came up for renewal in 2011, it again declined deliberate intent coverage. In addition, Fahey's insurance carrier, BrickStreet Insurance, sent correspondence to Fahey on November 9, 2012, advising Fahey to review the enclosed policy and make sure that all information is correct. The policy clearly contained an exclusion for deliberate acts.

Prior to the Circuit Court's ruling on summary judgment, Aldridge and Fahey engaged in mediation and reached a settlement under which Fahey admitted liability and damages in excess of its insurance coverage. Fahey further agreed to assign to Aldridge all of its right, title, and interest in all of its third party claims against Highland Insurance and Agent Rees. Aldridge then argued that he needed more time to complete discovery in his new role as the assignee of Fahey's third party claims against Highland Insurance and Agent Rees.

On June 1, 2015, the Circuit Court entered an order granting Highland Insurance and Agent Rees' Motion for Summary Judgment, finding that West Virginia does not recognize a claim based upon an insurance agent's duty to advise its clients regarding coverage, and, even if it did, there is no evidence to establish a breach of that duty. The Circuit Court further held that, because Fahey did not request deliberate intent coverage and expressly declined it, Highland Insurance and Agent Rees had no duty to procure the deliberate intent coverage. The Circuit Court also refused to extend Aldridge's request to extend the discovery deadline to allow Aldridge to complete more discovery once it stepped in the shoes of Fahey through the assignment.

Holding:

The Supreme Court of Appeals of West Virginia affirmed the Circuit Court's order granting summary judgment in favor of Highland Insurance and Agent Rees. First, the Supreme Court determined that Aldridge was afforded a fair and full opportunity to engage in discovery prior to the assignment and acquired no greater right in the claim than Fahey had at the time of the assignment. Specifically, Aldridge's counsel was present when Fahey's counsel deposed Agent Rees, who testified that she recalled discussing deliberate intent coverage with Fahey in 2011. Alridge's counsel declined twice to question Agent Rees during her deposition. However, Aldridge's counsel did question Mr. Fahey about the third-party claim.

Next, the Court noted that it has never recognized an insurance agent's duty to advise a client about coverage nor has it recognized a "special relationship" exception that would trigger such a duty. Regardless, the record established that Agent Rees discussed deliberate intent coverage with Mr. Fahey in 2009 and 2011, but that he purposefully declined it to save money on his insurance premiums.

Moreover, the Supreme Court acknowledged that Aldridge misunderstood the failure to procure theory and conflated it with his claim that Highland Insurance and Agent Rees negligently failed to advise him. The Court held that, to establish a claim for a failure to procure, "there must be a request for the desired coverage." Highland Insurance and Agent Rees did not have a duty to procure deliberate intent insurance for Fahey prior to Aldridge's injury merely because Fahey hired additional roofing employees subsequently to signing the 2009 waiver of deliberate intent coverage. Even if that duty existed, Fahey again declined deliberate intent coverage in 2011 when renewing its policy.

Finally, the Supreme Court determined that there was no genuine issue of material fact to dispute that Mr. Fahey was advised regarding deliberate intent coverage in 2009 and 2011 and that he declined to purchase such coverage in an effort to save money.

Impact on Business:

This memorandum decision is favorable to insurance companies and their agents by establishing a reasonable duty to insureds. It is reasonable to expect insurance agents to procure insurance requested. However, it would be unreasonable for insurance companies and their agents to be held liable to clients who specifically decline to pay for coverage and then regret that decision when a loss occurs and having that coverage would have been helpful. Businesses must make their own decisions about the scope of insurance coverage to purchase and then live with the decision made.

Doe v. Pak,
784 S.E.2d 328 (W. Va. 2016)

What the Court was Asked to Decide:

When an insurer makes an advance payment to a tort-claimant upon condition that the advance payment will be credited against a future judgment or determination of damages, should the damages recovered by the claimant on a subsequent judgment be reduced by the amount of the advance payment?

What the Court Decided:

Yes, the Court held that "when an insurer makes an advance payment to a tort-claimant upon condition that the advance payment will be credited against a future judgment or determination of damages, the damages recovered by the claimant on a subsequent judgment shall be reduced by the amount of the advance payment."

Facts:

On November 23, 2009, Plaintiff Hasil Pak was involved in a car wreck when an unknown, hit-and-run driver crossed into her lane while traveling in the opposite direction and hit her car. Ms. Pak was physically injured, and she claimed her injuries kept her from, inter alia, performing her housework.

Ms. Pak had a motor vehicle insurance policy from State Farm. State Farm paid $25,000.00 for Ms. Pak's medical bills. Additionally, Ms. Pak also has uninsured motorists coverage with a limit of $100,000.00 for personal injuries. Pursuant to the uninsured motorists coverage, State Farm offered to settle Ms. Pak's case for $30,628.15, but Ms. Pak refused the offer.

Ms. Pak filed a complaint against the unknown (and therefore uninsured) "John Doe" in the Circuit Court of Monongalia County and served State Farm with the complaint to recover damages under her uninsured motorists coverage. Prior to trial, State Farm again offered to pay Ms. Pak $30,628.15 as an advance payment toward any subsequent judgment. Pursuant to this offer, State Farm sent a letter to Ms. Pak's counsel on June 29, 2012, which stated in pertinent part:

> Your client's current demand is $100,000.00; which is the policy limit. At this time, it appears we have reached an impasse. I am enclosing our payment for the amount of the initial offer since our last evaluation. The initial offer was $30,628.15. . . .
>
> *This payment will also be credited against any final determination of damages.* (Emphasis added).

State Farm and Ms. Pak continued to disagree on the extent of her damages, and the case went to trial in September 2013. The jury returned a verdict of $101,000.00, exclusive of prejudgment interest, which included the following: $25,000.00 for medical expenses; $30,000.00 for loss of earning capacity; $10,000.00 for loss of household services to date; $6,000.00 for pain, suffering, mental anguish, and loss of enjoyment of life to date; and $30,000.00 for pain, suffering, mental anguish, and loss of enjoyment of life to be incurred in the future.

Ms. Pak submitted a proposed final order that did not credit State Farm for its payment of $25,000.00 on its medical payments coverage or its $30,628.15 advance payment on its uninsured motorists' coverage. State Farm objected to the proposed order on the basis that the judgment should be reduced by these payments and prejudgment interest should not accrue on them.

On May 14, 2014, the circuit court entered an order ruling on State Farm's objections. In its order, the circuit court found that Ms. Pak's judgment should be reduced by State Farm's $25,000.00 payment on its medical payments coverage for Ms. Pak's medical bills, and thus, pre-judgment interest should not accrue on that amount. The circuit court, however, refused to credit State Farm for its $30,628.15 advance payment or omit that amount from the calculation of pre-judgment interest. As to this advance payment, the circuit court concluded that: "this amount was gratuitously paid by State Farm . . . this payment could very well be found to constitute a gift[.]"

Holding:

The Court found that "giving credit for advance payments prevents the injured party from being reimbursed twice for the same injury." *Id.* at 332 (quoting *Keating v. Contractors Tire Serv., Inc.*, 428 So. 2d 624 (Ala. 1983)). Further, "not only does a credit for advance payments protect an insurer from having to pay twice for the same damages, but it also benefits insureds by encouraging expedited payment without resort to trial." *Id.* Likewise, commentators have remarked that advance payments:

> [H]ave been designed to avoid criticisms which have been leveled at the liability insurance system on the ground that the injured party is normally in no financial position to await the outcome of a trial which might be long delayed and that therefore liability insurers are in a position to exert leverage in forcing a settlement more favorable than might otherwise be available because of the pressure of the injured party's financial necessities.

Id. (quoting W. E. Shipley, *Effect of Advance Payment by Tortfeasor's Liability Insurer to Injured Claimant*, 25 A.L.R.3d 1091 (1966)).

The Court, therefore, found it was "compelled by this rationale to follow [its] sister jurisdictions in recognizing a credit for advance payments." *Id.*

Impact on Business:

There should be no risk of double recovery for one wrong or injury, and as a matter of public policy, insurers should be incentivized to make advance payments as credits when appropriate without the risk they will not be given credit for the payment.

Farmers & Mechanics Mutual Insurance Company v. Allen,
778 S.E.2d 718 (W. Va. 2015)

What the Court was Asked to Decide:

Is a tenant who is neither a named nor definitional insured of a landlord's homeowner's insurance policy an insured under the landlord's policy by the mere fact that the tenant may have an insurable interest in the leased property?

What the Court Decided:

No, the Court held "a tenant who is neither a named nor definitional insured of a landlord's homeowner's insurance policy is not an insured under the landlord's policy by the mere fact that the tenant may have an insurable interest in the leased property." *Farmers & Mechs. Mut. Ins. Co. v. Allen*, 778 S.E.2d 718, Syl. Pt. 2 (W. Va. 2015).

Facts:

Michael O'Connor and his adult daughter Shelly O'Connor owned a dwelling located in Keyser, West Virginia ("subject property"), as tenants in common. In December 2009, Shelly O'Connor entered into a lease-to-own agreement for the subject property with Marcus Allen.

Shelly O'Connor purchased a homeowner's insurance policy from F & M covering the subject property. Shelly O'Connor was the named insured on the F & M policy. Her father, Michael O'Connor, was named as an additional insured.

The F & M homeowner's policy insured the subject property against various perils including risk of loss by fire. The policy did not name the tenant, Marcus Allen, as an insured, a definitional insured, or in any other capacity. Further, F & M was not made aware that the tenant, Marcus Allen, was living in the subject property, nor was it made aware of the lease-to-own agreement that Shelly O'Connor entered into with Marcus Allen.

Shelly O'Connor testified that she advised Marcus Allen to purchase renter's insurance. Marcus Allen thereafter purchased a renter's insurance policy from State Auto Insurance. Marcus Allen's rental insurance policy was effective from March 10, 2010, through March 10, 2011, and provided the following coverage and limits of liability: personal property ($20,000), personal liability ($100,000/each occurrence), loss of use ($6,000), and medical pay to others ($1,000/each person).

On May 6, 2010, Marcus Allen was cooking food on the stove in the subject property when a grease fire ensued. Marcus Allen died in the fire, and the property sustained extensive damage. Thereafter, Shelly O'Connor filed an insurance claim under the F & M homeowner's policy. After reviewing the claim, F & M paid its insureds, Shelly O'Connor and Michael O'Connor, for the property damage caused by the fire.

The decedent's father, Marlon Allen, Sr., individually and in his capacity as the administrator of Marcus Allen's estate, filed a wrongful death claim against Michael O'Connor, alleging that Michael O'Connor, as landlord, was negligent in failing to have a smoke detector installed in the subject property which resulted in tenant Marcus Allen's death. The complaint asserted, "Defendant O'Connor by renting [the] dwelling in question to the decedent assured him that the dwelling was safe, secure and inhabitable." Michael O'Connor filed an answer to this lawsuit, which included a counterclaim filed by his insurance company, F & M, asserting a subrogation claim against the tenant's estate for the proceeds F & M paid to Shelly O'Connor following the fire.

The tenant's estate filed an answer to the counterclaim, asserting that F & M could not maintain a subrogation claim against the estate because the tenant/decedent Marcus Allen obtained an interest in the F & M policy because a portion of each monthly payment he made to Shelly O'Connor under the lease-to-own agreement went to "mortgage, *insurance* and taxes." Thus, the estate argued, Marcus Allen was an additional insured under the F & M homeowner's policy, and under established insurance law, F & M could not seek subrogation against its own insured.

On October 8, 2013, F & M filed a motion for summary judgment seeking a ruling that tenant/decedent Marcus Allen was not an insured under the F & M policy. On November 1, 2013, the estate filed a cross-motion for summary judgment arguing that Marcus Allen should be deemed an insured under the F & M policy and, therefore, F & M was prohibited from asserting a subrogation claim against the estate. The circuit court granted the estate's motion for summary judgment, concluding that tenant/decedent Marcus Allen had an interest in the F & M insurance policy because a portion of his rental payments were allocated to "insurance" pursuant to the lease-to-own agreement. The circuit court did not rule that Marcus Allen was a named, additional, or definitional insured under the F & M policy. Instead, the circuit court concluded that Marcus Allen was an "equitable insured." F & M appealed.

Holding:

The Court recognized that "an insurance policy is a contract between the insurer and the insured named in the policy." *Id.* at 723 (quoting *Mazon v. Camden Fire Ins. Ass'n*, 389 S.E.2d 743, 745 (1990)). Further, "where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." *Id.* (quoting *Keffer v. Prudential Ins. Co.*, 172 S.E.2d 714, 715 (1970)).

In this case, the F & M policy clearly and unambiguously stated that the insurance contract was between F & M and Shelly O'Connor and Michael O'Connor. The circuit court failed to apply this clear, unambiguous language. Instead, the circuit court subjected the F & M policy to its own judicial construction and interpretation by finding that the tenant/decedent, a person who was not a named or definitional insured under the insurance contract, was an 'equitable insured' of the F & M policy. This ruling altered the clear, unambiguous provisions of the F & M policy by adding an additional insured to the insurance contract. Under Syllabus Point 1 of *Keffer*, the circuit court erred by enlarging the terms of the F & M policy instead of giving full effect to the policy's clear and unambiguous language. *Id.*

Impact on Business:

The court avoided a slippery slope that could have opened the flood gates for coverage that insurers do not intend to insure. As the court noted, "adopting the 'equitable insured' ruling could make every homeowner's insurance policy purchased by a landlord subject to side agreements between the named insured (landlords) and third parties (tenants) who, though not named in the policy or known to the insurer, could allege that they had an 'equitable' right to be covered under such a policy. This would create uncertainty as to who was covered under a particular policy and could lead to extensive, costly litigation. *Id.* at 724-25.

International Union of Operating Engineers v. L.A. Pipeline Construction Company, Inc., 786 S.E.2d 620 (W. Va. 2016)

What the Court was asked to Decide:

The Court was asked to answer a certified question from the United States District Court for the Southern District of West Virginia regarding the expiration date of a perpetual irrevocable letter of credit serving as a wage bond. Specifically, the Court was asked whether a perpetual irrevocable letter of credit serving as a wage bond remains in effect until terminated pursuant to the West Virginia Wage Payment Collection Act, or does it automatically expire after five years as provided by the Uniform Commercial Code.

What the Court Decided:

The Court decided that the Wage Payment Collection Act prevails over the Uniform Commercial Code. Therefore, a perpetual irrevocable letter of credit serving as a wage bond obtained pursuant to the Wage Payment and Collection Act by an out-of-state corporation remains in effect until terminated with the approval of the Labor Commissioner.

Facts:

When L.A. Pipeline started operating in West Virginia, it was required to obtain a wage bond securing its employees' wages under the Wage Payment Collection Act. Thus, in January 2009, L.A. Pipeline obtained a "Perpetual Irrevocable Letter of Credit/Wage Bond" from United Bank, Inc. The letter of credit listed the Labor Commissioner as the beneficiary, and allowed the Commissioner to draw funds from United Bank if L.A. Pipeline failed to fully pay its employees.

In April, 2011, L.A. Pipeline failed to pay its engineers' fringe benefits and administrative union dues and sought to avoid liability by claiming its wage bond had expired. The engineers sued L.A. Pipeline and ultimately obtained an agreed judgment order for $129,273.90 in unpaid employee benefit contributions. L.A. Pipeline argued that the engineers could not draw on the letter of credit serving as a wage bond with United to satisfy the judgment, because under the Uniform Commercial Code it had automatically expired in January 2014, five years after it was issued.

Holding:

The Court held that the Wage Payment Collection Act clearly and unambiguously allows for termination of a wage bond only with approval of the Labor Commissioner, and only after he/she determines that all wages and fringe benefits were or can be paid. Further, the conflicting provision of the Uniform Commercial Code that "perpetual" letters of terminate automatically after five years does not control the termination of a perpetual irrevocable letter of credit serving as a wage bond. Thus, the only way to terminate a perpetual irrevocable letter of credit serving as a wage bond pursuant to the Wage Payment Collection Act is with the approval of the Labor Commissioner.

Impact on Business

Financial institutions who have issued similar letters of credit in reliance on the termination provisions of the Uniform Commercial Code provisions are now exposed, potentially for years beyond what they originally anticipated. In light of this ruling, financial institutions may be reluctant to issue such letters of credit, and businesses may have difficulty securing them in the future. Without a letter of credit or wage bond, some businesses may not be able to operate in West Virginia.

State ex rel. State Auto Property Insurance Companies v. Stucky,
2016 WL 3410352 (June 14, 2016) (Memorandum Decision)

What Was the Court Asked to Decide:

The Court was asked to issue a writ prohibiting enforcement of the Circuit Court of Kanawha County's order denying State Auto's motion to dismiss bad faith claims asserted against it by CMD Plus, Inc. Specifically, the Court was asked to determine whether CMD had standing to assert bad faith claims as a first-party claimant, when those claims arose from State Auto's handling of third-party claims against CMD. There was no dispute that third-party bad faith claims are barred under West Virginia law.

What Did the Court Decide:

The Court determined that CMD was a first-party claimant and upheld the circuit court's denial of State Auto's motion to dismiss. Chief Justice Menis E. Ketchum and Justice Allen H. Loughry II wrote dissenting opinions.

Facts:

CMD was insured under a commercial general liability policy with State Auto. CMD contracted with homeowners, C.K. and Kimberly Shah, to construct a home. The Shahs' neighbors, Barry and Ann Evans, filed a civil action against CMD alleging that CMD's construction activities resulted in damage to their property. CMD then filed a third-party complaint against State Auto, alleging breach of contract and statutory bad faith claims arising out of the handling of the Evanses claims against CMD. Specifically, there were delays in the investigation and settlement of the Evanses' claims against CMD. Notably, however, State Auto defended CMD throughout the litigation of the Evanses' claims, and fully indemnified CMD. Thus, CMD was not responsible for an excess judgment and it received a full release from liability for the Evanses' claims.

State Auto then renewed its motion to dismiss CMD's bad faith claims, arguing that those claims amounted to third-party bad faith claims which are not recognized under West Virginia law. Essentially, State Auto argued that because it defended and fully indemnified CMD, bad faith claims related to the handling of the litigation belonged to the Evanses, not CMD. Allowing CMD to prosecute such claim would be sanctioning a prohibited third-party claim repackaged as a permissible first-party claim.

Holding:

The Court concluded that CMD could maintain its bad faith claims because CMD was suing its own insurer for failing to use good faith in settling claims brought against CMD by the Evanses, even though CMD was not responsible for an excess judgment.

The dissenting opinions criticize this holding, arguing that West Virginia has never recognized first-party bad faith claims resulting from an insurer's failure to use good faith in settling claims of a third-party against its insured, unless there was an excess judgment against the insured. Moreover, the dissenting Justices argued that the statutory provisions framing CMD's bad faith claims did not apply in the context of CMD's claims for coverage under the State Auto policy. Instead, those provisions applied in the context of the claims asserted by the Evanses, who were third-party claimants. The dissenting Justices reasoned that because CMD was protected by the State Auto liability policy, it had no standing to assert a statutory bad faith claim for the handling of the Evanses' claims.

Impact on Business:

The Court's analysis in this Memorandum Decision puts businesses in a better position to assert bad faith claims against their insurers if the insurer mishandles liability claims or litigation filed against the business. This could impact the insurer's right to choose counsel for the insured, and its right to direct litigation in favor of the insured businesses.

Conversely, this decision negatively impacts the insurance industry by broadening the definition of first-party claims in West Virginia. This is a trend that the insurance industry has suffered since third-party bad faith was abolished in 2005. Since that time, the Court has consistently rejected arguments from insurers that certain bad faith claims are third-party claims wrapped in the cloak of first-party claims. Allowing judicially created third-party bad faith claims to proceed adds numerous challenges and complexities for insurers in litigation. Ultimately, the risk and cost to the insurance industry of third-party bad faith claims will be passed on to policyholders through increased premiums.

State ex rel. State Farm Mutual Automobile Insurance Company v. Cramer
785 S.E.2d 257 (W.Va. 2016)

What the Court was Asked to Decide:

Whether the Circuit Court of Wetzel County erred in forcing State Farm to produce in discovery the contact information of non-party West Virginia policyholders without their prior consent?

What the Court Decided:

The WV Supreme Court held that the lower Circuit Court committed error, and that State Farm did not have to produce the contact information of State Farm's non-party West Virginia insureds.

Facts:

William Bassett sustained serious injuries in an auto accident with an uninsured driver. Mr. Bassett and his wife were insured under three State Farm policies, each of which included the mandatory $20,000 per person, $40,000 per accident uninsured motorists coverage. Bassett argued that his damages greatly exceeded that amount and that he is entitled to at least $100,000/$300,000 in uninsured coverage due to State Farm's failure to properly offer additional uninsured coverage.

During the discovery phase of the case, State Farm reformed the three policies to provide uninsured motorists coverage of $240,000, which was equal to the liability limits of the policies. Due to this position, Bassett's breach of contract claim became a non-issue and the focus of the case became whether State Farm had engaged in unfair claim settlement practices (i.e. bad faith).

In discovery, Bassett requested information regarding offers of uninsured motorists coverage to other State Farm insureds. State Farm objected and Bassett filed a motion to compel, stating that his claim was based upon State Farm's failure to use the proper form for offering optional additional coverage and that he is entitled to discover State Farm's practice in using the wrong form. The Circuit Court granted Bassett's motion to compel. State Farm filed a motion to reconsider, alleging that it had identified over 400 non-party insureds whose privacy rights would not be protected by the protective order that had previously been entered and that a new protective order should be entered to prevent it from having to disclose the private contact information of those non-party insureds. The Circuit Court denied State Farm's motion for reconsideration so State Farm appealed to the Supreme Court of Appeals of West Virginia.

Holding:

The Supreme Court of Appeals of West Virginia held that the names, addresses, and telephone numbers of State Farm's other policyholders were not discoverable. The Court held that State Farm had produced other information that was needed by Bassett in its bad faith claim (i.e. the form that it used for the non-party insureds, when and how often State Farm paid additional coverage to insureds based upon usage of the incorrect form, and information about first-party lawsuits against State Farm with bad faith allegations). The Court also was concerned about the potential for intrusive contacts of non-party insureds due to the inadequacy of the protective orders.

Impact on Business:

In the world of civil litigation, "Law and Order" courtroom moments are few and far between. The overwhelming majority of civil actions settle short of trial. However, civil litigation

remains the bane of business owners because of the time and expense associated with discovery. Part of the reason that discovery is such an issue in West Virginia is that our case law allows plaintiffs to conduct large-scale inquiries. One example is *State ex rel. Allstate Ins. Co. v. Gaughan*, 220 W. Va. 113, 640 S.E.2d 176 (2006), where the Court found that homeowners' request for discovery of 10 years of real property damage claims was not unduly burdensome on an employer which allegedly admitted that the review would involve approximately 3,500 case files and $70,000 in attorney time. While the Plaintiff's bar maintains its right to conduct discovery in an effort to find the truth, the reality of discovery is that it tends to impose its greatest burdens on businesses that are defendants in litigation.

State ex rel. State Farm Mut. Auto. Ins. Co. v. Cramer is important because the Supreme Court of Appeals of West Virginia limited the scope of discovery, protecting non-party insureds from having to contend with intrusive contacts from a plaintiff seeking to bolster his case against State Farm. This ruling also protected State Farm from the risk of additional suits from those non-party insureds following communications with the plaintiff about his claim.

Using the Insurance Commissioner's promulgated form "creates a presumption," when signed by an insured, that the insured received "an effective offer of the optional coverages" and that the insured "exercised a knowing and intelligent election or rejection" of the coverage. W. Va. Code §33-6-31d (1993). Thus, simply using the approved form will, in most cases, protect insurance companies from these types of claims.

Travelers Indemnity Company v. U.S. Silica,
2015 W. Va. LEXIS 1105 (November 10, 2015)

What the Court was Asked to Decide:

Is the satisfaction of the notice provision in an insurance policy a condition precedent to coverage for the policyholder?

What the Court Decided:

Yes, the Court held "the satisfaction of the notice provision in an insurance policy is a condition precedent to coverage for the policyholder."

Facts:

As a producer of silica sand, U.S. Silica was named as a defendant in numerous silica claims. When International Telephone and Telegraph Corporation ("ITT") sold the company to Pacific Coast Resources Company ("Pacific Coast") on September 12, 1985, ITT provided an indemnity agreement to indemnify Pacific Coast for these, and other, silica claims. Under the terms of the indemnity agreement, ITT agreed to (1) reimburse 100% of the defense and settlement costs for silica claims with exposure entirely before September 12, 1985, and (2) reimburse a portion of the defense and settlement costs for silica claims with exposure both before and after September 12, 1985. For silica claims with exposure entirely after September 12, 1985, ITT provided no indemnity.

On September 12, 1995, ITT's indemnity agreement was assigned to U.S. Silica. Although the original indemnity agreement expired on this date, it was extended for an additional ten years, with a new expiration date of September 12, 2005. Throughout this period, numerous silica claims were filed in which U.S. Silica, and/or its predecessors, was named as a defendant. From the record in this case, it appears that U.S. Silica incurred the majority of its unreimbursed defense and settlement costs related to silica claims between 2001 and 2005.

Upon the expiration of the ITT indemnity agreement, U.S. Silica reviewed its policies of insurance to determine whether any coverage existed to pay its unreimbursed silica claims costs. Although due diligence searches had been performed at various points during U.S. Silica's history in conjunction with its ownership changes, three policies of comprehensive general liability insurance purchased by the Pittsburgh Glass Sand Company ("PGS"), one of U.S. Silica's predecessors, from the Travelers Insurance Company and the Travelers Indemnity Company were not discovered in U.S. Silica's insurance files until September 2005. The first policy was in effect from April 1, 1949 - April 1, 1952; the second policy period ran from April 1, 1952 - April 1, 1955; and the third policy was in effect from April 1, 1955 - April 1, 1958.

Upon discovery of these policies, U.S. Silica sent Travelers a letter on September 20, 2005, informing Travelers of the silica claims and requesting coverage under these Travelers policies for out-of-pocket expenses. On November 22, 2005, U.S. Silica sent Travelers another letter; in this correspondence, U.S. Silica sought reimbursement of its pre-September 12, 2005, settlement and defense costs and requested a defense for newly-filed silica claims. Having received no response, U.S. Silica filed the instant declaratory judgment action against Travelers on January 6, 2006, in the Circuit Court of Morgan County.

As a result of similar litigation pending in New York and California, the instant proceeding was stayed. On August 3, 2010, Travelers sent U.S. Silica a reservation of rights letter denying coverage and a defense for all of the pre-2010 silica claims citing numerous grounds, including questioning the authenticity of the insurance policies and U.S. Silica's status as a successor to PGS. In this letter, Travelers also cited U.S. Silica's failure to comply with the policies' assistance and cooperation clause and notice provision.

In April 2012, the circuit court lifted the stay, and, in August 2013, the circuit court denied both parties' motions for summary judgment. A jury trial was held in September 2013, resulting in a jury verdict in favor of U.S. Silica in the amount of $8,037,745. Travelers then appealed.

Holding:

The Court found that each of the three Travelers insurance policies at issue contained a notice provision requiring the insured (i.e., U.S. Silica and/or its predecessor(s)) to notify its insurer (i.e. Travelers):

> If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

Id. at 11. The Court also held that "the satisfaction of the notice provision in an insurance policy is a condition precedent to coverage for the policyholder." *Id.* The Court reasoned as follows:

> Given that compliance with [ ] a notice provision is a condition precedent to the existence of coverage under the subject policy, resolution of the notice issue necessarily determines the outcome of the instant declaratory judgment proceeding. In other words, if U.S. Silica failed to comply with the subject notice provision, such lack of notice is a bar to coverage, and Travelers has no duty to provide insurance for the losses claimed by U.S. Silica. However, if U.S. Silica properly notified Travelers of its claims for which it seeks coverage, Travelers would be required to provide the requested insurance unless another policy exclusion operates to preclude coverage.
>
> *Id.* at 12-13.

Impact on Business:

The terms of a contract will be given their effect. Here, a notice provision contained in the insurance policy is a necessary condition precedent to coverage. Ultimately, by giving effect to the language of policies, insurers can appropriate underwrite and price risk, resulting to fair pricing.

Panhandle Used Equipment, LLC v. Mark W. Matkovich, W.Va. State Tax Commissioner,
No. 15-0230 (April 8, 2016) (Memorandum Decision)

What the Court was asked to Decide:

Whether a small business taxpayer, challenging the Tax Commissioner's estimated assessment of additional consumers sales and use tax and facially invalid estimated assessment of business franchise tax, having timely mailed petitions mistakenly to the address of the Tax Commissioner and not to the address listed for the West Virginia Office of Tax Appeals ("the WVOTA"), is absolutely barred from consideration of the merits of its challenge to the assessments.

What the Court Decided:

The three-vote Court majority held that the taxpayer was not entitled to the benefit of an equitable exception to strict statutory filing deadlines for tax appeals, because the Tax Commissioner's notices of assessment were not all that confusing about where to send the petitions for appeal and because the taxpayer was not sufficiently unsophisticated to claim confusion by the notices. Justices Workman and Ketchum dissented, with the latter filing a dissenting opinion characterizing the Tax Commissioner's notices and handling of the taxpayer's timely but misdirected appeal petitions as "trickery" which should not foreclose the taxpayer's opportunity to have his appeal considered on their substantive merits.

Facts:

The taxpayer was a small, single member West Virginia limited liability company (LLC) formed, owned and operated as a part-time side business by an individual whose primary employment was in the construction industry. The taxpayer's business consisted of buying and selling principally used construction equipment from and to businesses engaged in construction work in several states, and of acting as a broker for parties trading in such equipment for their own accounts.

In a notice of assessment issued against the taxpayer, without an audit, the Tax Commissioner asserted that the taxpayer owed an estimated amount of business franchise tax together with interest and additions. In a second notice of assessment, also absent an audit, the Tax Commissioner asserted that the taxpayer owed estimated additional sales and use tax, together with interest and additions, for a combined total estimated assessed liabilities of $63,309.61. Though never considered on the merits, due to the below-described process, the first estimated assessment was facially invalid due to the express exemption of single-member LLCs from the business franchise tax, and the estimated sales and use tax assessment was issued devoid of any basis in the taxpayer's records.

Based on the advice of the taxpayer's unlicensed regular tax return preparer/representative, petitions seeking review of the assessments and using the sample petition forms provided in the Tax Commissioner's notices were completed by the representative and personally mailed by the taxpayer well within the time required. However, due to the representative's confusion, the address used was the one to which the notices required taxpayers to send other, separate completed forms, designating representatives for all purposes, including representation before WVOTA. Then, more than ten (10) days before the petitions were due at WVOTA, the taxpayer inquired there as to their status when he learned that, though they had not been received by WVOTA because they were mistakenly sent to the Tax Commissioner's agency, WVOTA's representative with whom he spoke said that he could still expect the petitions to be forwarded by that agency. Despite

such assurances, and even though the petitions were received by the Tax Commissioner's agency shortly after they were mailed, no action was ever taken to forward them to WVOTA.

Due to the petitions not having been received by WVOTA within the required time, and without considering their merits, the WVOTA issued an administrative decision granting the Tax Commissioner's motion to dismiss the petitions and uphold the estimated assessments. An appeal was taken by the taxpayer to the Circuit Court of Berkeley County, which entered an order affirming the administrative decision, which the taxpayer in turn appealed to the West Virginia Supreme Court.

Holding:

In its Memorandum Decision, the three-justice majority held that the equitable exception to strict enforcement of statutory filing deadlines for tax appeals such as this, though recognized in a footnote in its earlier case of *Helton v Reed,* 219 W.Va. 557, 638 S.E.2d 160 (2006), did not apply because the taxpayer here was not unsophisticated, and because, even though there were multiple addresses in the Tax Commissioner's notices of the assessments, those notices were not so confusing as to justify equitable relief.

In concluding that the taxpayer was not unsophisticated, the majority inexplicably relied on the fact that the taxpayer had turned to its regular, unlicensed and obviously unsophisticated tax return preparer for assistance in preparing and filing its petitions. Even more troubling are the facially erroneous assertions about various facts in the Memorandum Decision, on which the majority appeared to rely in its ruling.

First, the majority's Memorandum Decision erroneously attributes to the Tax Commissioner and then appears to rely on the contention that the coal company in *Helton* filed its refund petition with WVOTA within the required time. Not only is that neither what happened in *Helton* nor what the Tax Commissioner argued, but any reliance on it to distinguish the holding in *Helton* from this case is wholly inapposite since the taxpayer here is citing, from footnote dicta in the *Helton* opinion, an equitable *exception* to the *Helton* holding.

Second, the majority's Memorandum Decision repeated and appeared to also rely on the clearly erroneous finding of the Circuit Court that the taxpayer's inquiry of the WVOTA was after the time when its petitions could have been timely received there. Though the taxpayer brought this error to the Supreme Court's attention, the majority's Memorandum Decision not only omits any mention of it, but appears to embrace it as further grounds for denying the taxpayer any equitable relief.

Third, in what is perhaps a mere clerical error but which, if not, is highly prejudicial, the majority's Memorandum Decision contains a footnote which erroneously states that "there is no evidence in the record that [the taxpayer] mailed its [petitions], therefore we decline to consider [the argument that the governing procedural rules directed the mailing of petitions to an erroneous address] at this time." Though that argument is entirely valid, it is patently erroneous for the majority to assert that "there is no evidence that [the taxpayer] mailed its [petitions] …"

Finally, although confusing instructions are, ultimately, in the eyes of the beholding trier of fact, it must be noted that in a well-attended public professional conference held months before the issuance of the majority's Memorandum Decision, a senior representative of the Tax Commissioner acknowledged, in the Tax Commissioner's presence, that sophisticated and competently represented taxpayers made, with noticeable frequency, the same mistake as this taxpayer in terms of where they mailed their tax appeal petitions. That is hardly surprising in light of the highly unusual provi-

sions in the WVOTA's governing procedural rules expressly contemplating identical mistakes as if they inherently accrue from the subject notices. Though the overt public admission of the Tax Commissioner's official about the frequency of such filing mistakes was properly brought to the Court's attention, the majority's Memorandum Decision omits any acknowledgement of it.

Impact on Business:

Normally, as a Memorandum Decision, which in most cases is primarily employed to only affirm a non-controversial lower court ruling, this ruling would hardly merit a mention in terms of broader business community impact. However, in light of so many facial errors, all of which accrue to the conclusive prejudice of this particular small business, it must be said that this decision raises fundamental questions about the efficacy of the Memorandum Decision process itself. Indeed, logic suggests that, given the number and substantive nature of such facial errors in this Memorandum Decision, a strong implication emerges of the absence of a careful and truly meaningful review of the merits which such Memorandum Decisions are supposed to provide.

Moreover, considering that two of the Court's five justices took the highly unusual step of dissenting to a Memorandum Decision, including one even filing a written dissent with an express characterization of the Tax Commissioner's actions as "trickery," that concern is even the greater. This ruling should be of concern to the business community not only because one of its smaller members was the victim of such "trickery" due to the tax assessment process, but more importantly, because the automatic right to the plenary review process, purportedly assuring a careful and substantive review on the merits of ALL appeals to the Supreme Court, is the primary reason cited as to why West Virginia does not need an intermediate court of appeals.

State ex rel. Airsquid Ventures v. Hummel,
Case No. 15-0098 (September 24, 2015)

What the Court was Asked to Decide:

Does a "choice of law" provision in an agreement that provides for the substantive laws of West Virginia to apply to disputes arising under the agreement exclude the procedural laws of West Virginia from applying if the matter will be resolved in West Virginia courts?

What the Court Decided:

The court focused on the exact language of the venue provision in the Agreement and enforced that language, as written. Accordingly, the court granted the Writ of Prohibition and transferred the wrongful death action to the Circuit Court of Berkeley County.

Facts:

Avishek Sengupta, a resident of Maryland, participated in the Tough Mudder Mid-Atlantic event in Gerrardstown, Berkeley County, West Virginia, on April 20, 2013 (the "Event"). Unfortunately, Mr. Sengupta died while attempting to complete an obstacle known as "Walk the Plank" that was part of the Event.

After Mr. Sengupta's death, his mother and personal representative (the "Estate") filed a wrongful death action in the Circuit Court of Marshall County, West Virginia, The Defendants, all of which either organized or promoted the Event, moved to either dismiss the civil action or transfer venue to the Circuit Court of Berkeley County, West Virginia, based upon the following language in the "Assumption of Risk, Waiver of Liability, and Indemnity Agreement Mid-Atlantic Spring - 2013" signed by Mr. Sengupta (the"Agreement") prior to his participation in the Event:

> *Venue and Jurisdiction: I understand that if legal action is brought, the appropriate state or federal trial court for the state in which the TM Event is held has the sole and exclusive jurisdiction and that only the substantive laws of the State in which the [Event] is held shall apply.*

The Defendants moved to dismiss the civil action for improper venue or, in the alternative, moved to transfer venue of the civil action to the Circuit Court of Berkeley County. The Circuit Court of Marshall County denied the motion and ruled that venue was proper in Marshall County. The Defendants filed a Petition for Writ of Prohibition, and the Supreme Court of Appeals of West Virginia granted the Writ.

Holding:

The primary issue before the court concerned whether the Circuit Court properly found that the Defendants "had consented to venue in any West Virginia court having subject matter jurisdiction over this case. The Circuit Court decided that, as the Defendants had consented to apply the substantive laws of West Virginia, "there was no need to conduct the venue analysis otherwise required by the provisions of West Virginia Code § 56-1-1" because, "by referencing only the substantive laws of this state as being applicable, the Agreement necessarily excluded the application of this state's procedural laws."

The court quickly dispatched the Estate's argument that the Agreement "expressly repudiated procedural statutes in the consideration of venue and jurisdiction" by referencing "only the substantive laws of the State in which" the Event is held. Instead, the court found that "the ex-

press reference to *only* the substantive laws of this state was the means by which to avoid a conflict of laws issue. . . . It was not intended to, and neither could it, prevent application of the procedural laws of this state."

The court also noted that the Circuit Court's decision that the Defendants "had consented to venue in any West Virginia court" rested upon "wholly ignoring the limiting effect of the term 'the'" in the phrase "the appropriate state or federal court" in the Agreement. It further found that the Circuit Court "simply overlooked the significance of the related term 'appropriate'" in the same phrase. As a result, the court determined that West Virginia's general venue statute in W. Va. Code § 56-1-1, would identify "which state court is the appropriate court in which to bring suit under the terms of the Agreement."

Thereafter, the court applied the provisions of West Virginia's general venue statute and found that "[e]ach and every critical event that took place relevant to the alleged wrongful death occurred in Berkeley County." In fact, the "singular nexus between the underlying suit and Marshall County, and one that is statutorily insignificant, is the location of Mrs. Sengupta's lawyers within Marshall County."

For these reasons, the court granted the Writ and transferred the wrongful death action to the Circuit Court of Berkeley County.

Impact on Business:

First, this case reveals that a business can, through written agreements, exercise some control over the venue for lawsuits against it. Here, the court focused on the exact language of the venue provision in the Agreement and enforced that language, as written. It could have determined that, since the Defendants consented to jurisdiction in West Virginia, it also consented to venue in any court in the state. Instead, it reiterated that jurisdiction is different than venue, and each must be examined separately.

Second, the court emphasized that "the" means "the" in the context of a written agreement. The court pointedly stated that the Circuit Court "alter[ed] the terms of the Agreement with its revisionary analysis" by "simply omitt[ing] referent to a key term of the phrase at issue - 'the appropriate state or federal trial court."

SER Khoury v. Cuomo,
Case No. 15-0852 (February 10, 2016)

What the Court was asked to Decide:

Whether plaintiffs, who were Ohio residents, could bring an action in West Virginia arising from negligent acts which occurred in Ohio ?

What the Court Decided:

The Supreme Court held the Circuit Court did not abuse its discretion in denying defendants' motion to dismiss and allowed the case to proceed in West Virginia.

Facts:

The defendant physicians practiced in West Virginia but had an office in Belmont County, Ohio. The plaintiffs were Ohio residents and all of the care occurred in the physicians' Ohio office. The plaintiffs filed suit in Ohio County, West Virginia. The defendants moved to dismiss, arguing that under the factors to be considered under the West Virginia *forum non conveniens* statute (W.Va. Code § 56-1-1a), the parties would be better served if the action were filed in the State of Ohio, "where the cause of action arose, where the principal witnesses are located, and where the [plaintiff] resided. The Circuit Court denied the motion, holding that venue was proper under the statue.

Holding:

The West Virginia Supreme Court held that the circuit court adequately reviewed the factors under the *forum non conveniens* statute. Facts important to the Court were the proximity of the doctor's practice to Ohio, the circuit court's finding that it regularly interprets Ohio law, a presuit tolling agreement which was subject to West Virginia law, the representation by plaintiffs that lay witnesses would come to WV, that video depositions of treating physicians are routinely used, and tortious conduct alleged related to a letter sent from West Virginia. "The Circuit Court of Ohio County complied with those admonitions by analyzing each of the eight factors under subsection (a) of the statute and by memorializing its decision in the findings of fact and conclusions of law set forth in its July 31, 2015, order. While some factors weighed in favor of dismissing the action, others weighed in favor of [plaintiff], and the circuit court was not required, as a matter of law, to diminish her preference of forum."

Impact on Business:

It is difficult to obtain dismissal of cases on forum non conveniens grounds under W.Va. Code §56-1-1a. Where the Circuit Court makes factual findings that support allowing suits to go forward, the Supreme Court is deferential and will uphold plaintiffs' choice of forum. The impact is that cases like this one, where most of the witnesses and the tort occurred elsewhere, are more difficult and expensive to litigate, particularly in the ability to obtain testimony and bring live witnesses to trial.

Gill v. City of Charleston,
No. 14-0983 (February 10, 2016) (Memorandum Decision)

What the Court was asked to Decide:

When may a non-compensable pre-existing injury be added as a compensable component in a workers' compensation claim?

What the Court Decided:

The Court held that pre-existing injuries, unless they result in a discreet new injury, are not compensable conditions merely because they aggravate a subsequent compensable injury.

Facts:

The claim involved a back injury the claimant sustained on February 8, 2012 while lifting a practice dummy during firefighter training for the City of Charleston. That claim was ruled compensable and diagnosed as a lumbar and thoracic sprain. Prior to the claimant's injury in 2012, he sustained his first back injury in 1985 when he was 18 years old while lifting a door handle on his car. Additionally, in 1992, the claimant fell approximately 80 feet while rock climbing. As the result of that fall, the claimant sustained several injuries, including injuries to his low back.

During the course of his treatment for the lumbosacral and thoracic sprain resulting from the 2012 injury, authorization was requested for four additional diagnoses to be added as compensable components of the claim. The additional diagnoses were added by the Office of Judges on the basis that the record demonstrated the claimant's injury in 2012 catalyzed or precipitated a disabling aggravation of the pre-existing lumbar spine condition. The administrative law judge concluded that "such aggravation of a pre-existing condition by a compensable injury. . . necessarily sanctions the inclusion of the aggravated, pre-existing condition as a compensable element of the injury."

The Office of Judges decision was reversed by the Board of Review. The claimant then appealed the Board of Review decision to the West Virginia Supreme Court.

Holding:

The Court concluded that pursuant to the apportionment provisions of West Virginia Code § 23-4-9b, a pre-existing non-compensable disability must be separated out from any subsequent compensable injury. The Court held that a non-compensable pre-existing injury may not be added as a compensable component to a workers' compensation claim merely because it aggravates a compensable injury.

The Court further held that to the extent an aggravation of a non-compensable, pre-existing injury results in a discreet new injury, that new injury may be held to be compensable.

Impact on business:

As the result of the Court's ruling, pre-existing injuries, unless they result in a discreet new injury, are not compensable conditions merely because they aggravate a subsequent compensable injury.

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