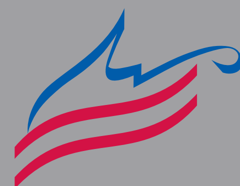
Court Watch

A report prepared for members of the West Virginia Chamber of Commerce 2018

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 2017 and Spring 2018 Terms of Court and present this report on the impact of those Court decisions on our state's economy to Chamber members.

The West Virginia Chamber of Commerce CourtWatch Legal Review Team 2018

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Overview of Significant West Virginia Business Legislation Enacted During the 2018 Legislative Session

HB 4268 – The Co-Tenancy Modernization and Majority Protection Act

The Co-Tenancy Modernization and Majority Protection Act ("the Act") states that when seven or more co-tenants jointly own the same tract of land, operators may develop the land if at least three-fourths of the ownership consent under West Virginia Code § 37B-1-4(a). The Act protects the non-consenting co-tenants by allowing them to either: (1) elect to receive royalty payments equal to the highest percentage royalty paid to one of the consenting co-tenants, or (2) elect to participate in the production and development and share the revenue from the development. W. Va. Code § 37B-1-4(b).

Prior to the Act, oil and gas companies needed to obtain the consent of every co-tenant that had an interest in the land, which was difficult to obtain when the co-tenants were unknown or unable to be located. Previous common law allowed one co-tenant, with a small interest in the mineral tract, to prevent the development of the oil and natural gas by not consenting.

HB 4187 – The Business Liability Protection Act: "Parking Lot Gun Bill"

Under the Business Liability Protection Act ("the Act"), West Virginia employers may not prohibit employees or customers from keeping a firearm(s) that she/he legally owns while locked in a privately-owned vehicle in company parking lots. The Act states that the owner of the property may still prohibit the open or concealed carrying of any firearm on property under his or her domain. W. Va. Code § 61-7-14(b). It is a criminal offense to not comply with the Act.

Although the Act limits employer's or business owner's control over certain parts of his own premises, it does provide the employer or owner with immunity from civil liability based upon the employer's compliance with the law. The law also does not create any new duty on the part of the employer to provide a safe workplace.

HB 4628 – Termination of Workers' Compensation "Old Fund" Debt Surcharge

House Bill 4628 amended West Virginia Code § 23-2C-3, relating to the redirection of certain surcharges and assessments on workers' compensation policies for periods prior to January 1, 2019; terminates the assessments and surcharges after December 31, 2018; and terminates the provisions of the section beginning on January 1, 2019. W. Va. Code § 23-2C-3(h). The Workers' Compensation "Old Fund" Debt was created in 2005 when the state's workers' compensation program was privatized.

West Virginia employers will soon see the relief in their workers' compensation premiums once the surcharge is eliminated at the end of 2018. The Bill terminates the current 9% surcharge on workers' compensation premiums which were directed towards the Workers Compensation "Old Fund" Debt. The West Virginia regulatory premium surcharge will remain in effect on workers' compensation policies, but the policyholder will no longer be subject to the 9% deficit surcharge after January 1, 2019.

HB 4013 – Venue Generally

West Virginia Code § 56-1-1 was amended in 2018 to clarify that in order for a non-resident to have venue in a West Virginia state court, a substantial part of the acts or omissions giving rise to the claim must have occurred in the state. W. Va. Code § 56-1-1(c). However, the statute also provides that non-residents may file actions in a West Virginia state court if they cannot otherwise obtain jurisdiction in the state where the original action arose. The purpose of the amendment is an attempt to rein in "litigation tourism," where out-of-state plaintiffs file lawsuits in state courts for harms that happened elsewhere. Another purpose is to preserve access to West Virginia courts for residents of West Virginia and for non-residents who are actually harmed in the state.

HB 4270 – Royalties to Mineral Owners: "Check Stub Bill"

House Bill 4270 amended the West Virginia Code by adding § 37B-1-1, § 37B-1-2, § 37B-1-3, and § 37B-1-4, all of which relate to the timely payment of royalties owed from the production of oil and natural gas. The Bill establishes when payment of royalties is owed to mineral owners, along with establishing interest penalties for late payments, and requires that payment from horizontal wells happen within 120 days of the sale and within 60 days for each additional sale.

The Bill is meant to bring uniformity to the process of landowners receiving their royalties, by requiring oil and gas companies to disclose the amount of resources produced on a quarterly basis to the royalty owners, along with the price per unit and details about the wells.

SB 360 – Flat Rate Royalty Leases

Senate Bill 360 amended West Virginia Code § 22-6-8 relating to oil and gas permits not being on flat well royalty leases. The law reverses the West Virginia Supreme Court decision in *Leggett v. EQT* decided in 2017. The Court held that post-production costs may be deducted from the 1/8th royalty share imposed under West Virginia Code § 22-6-8 for flat rate royalty leases subject to new permits. *Leggett v. EQT*, 800 S.E.2d 850, 857 (W. Va. 2017). Senate Bill 360 imposes a condition on the issuance of a well work permit that the owner of the oil and gas in place shall be tendered not less than one-eighth of the gross proceeds without any deduction of post-production expenses. Senate Bill 360 now requires royalty owners to get a guaranteed minimum royalty of 12.5% regardless of the post production deductions. Post production expenses include transportation or severance taxes, which previously were reduced from the owners' royalty checks before the Bill.

HB 2546 – Employer Provided Property

House Bill 2546 amended West Virginia Code § 21-5-4. This Bill allows an employer to deduct the value of employer-provided property from an employee's final paycheck if the property is not returned to the employer. The Bill allows replacement costs of employer-provided property to be deducted from an employee's final paycheck if the property is not returned within the designated time period. Employers must notify employees at the time of resignation or termination or as soon as possible thereafter, by certified mail or personal service of the replacement cost. To qualify as employer-provided property, the property must have been used in the course of the employer's business; the property must have a value of over $100; and the employee must have signed a written agreement when obtaining the employer-provided property. The written agreement must state: (1) the specific item provided, with a replacement cost; (2) a clear statement that the items must be returned immediately upon discharge or resignation; and (3) a clear statement, that if the employee does not timely return the property, the replacement costs will be deducted from the employee's final wages. W. Va. Code § 21-5-4(f)(1)(C).

West Virginia Chamber
SUMMARY OF BUSINESS LEGISLATION

SB 290 – DEP Water Quality Standards and Effluent Limits

Senate Bill 290 amended West Virginia Code § 22-11-6 by making changes to the water quality standards and pollution limits set by the Department of Environmental Protection. The Bill allows the Department of Environmental Protection to issue water pollution control permits that contain water quality-based net limits. Also, the Bill states that the DEP Secretary may not set state benchmarks for substances in discharges of storm water that are more restrictive than the federal benchmarks. W. Va. Code § 22-11-6(c). The Bill states that upon the request by an applicant, the secretary shall establish effluent limits for storm water that are developed in accordance with mixing zones that are appropriate for similar conditions. W. Va. Code § 22-11-6(d). The Secretary also must develop guidance for determining how benchmarks in permits issued demonstrate the adequacy of storm water best management practices.

SB 401 – Inpatient or Outpatient Substance Abuse Treatment

Senate Bill 401 added five new sections to the West Virginia Code: § 33-15-4p, § 33-16-3bb,§ 33-24-7q, § 33-25-8n, and § 33-25A-8p, all requiring coverage in health benefit plans for outpatient and inpatient treatment for substance use disorders by July 1, 2019. The Bill requires private insurers to cover, without prior authorization, up to six months of inpatient treatment for someone whose addiction treatment is declared a "medically necessary." The Bill allows the insurer to work with the facility to determine if the treatment for the substance abuse problem is "medically necessary." The Bill is aimed at addressing West Virginia's growing opioid problem and to provide insurance coverage and timely access for treatment to West Virginia citizens.

SB 273 – Opioid Reduction Act

Senate Bill 273 amends the Opioid Reduction Act. The Bill clarifies a physician's responsibilities for medication-assisted drug treatment programs, requires physician consultation with patients before prescribing opioids, limits the amount of prescriptions for opioids, provides referrals to pain clinics, requires insurance coverage to treat chronic pain, expands acts subject to prosecution, amends the Uniform Controlled Substances Act, and provides for unlawful retaliation and prescription drug monitoring. The Bill establishes new limits on opioid prescriptions and requires that adult patients receiving care in an emergency room be limited to a four-day supply of opioid medications, with children limited to a three-day supply. Also, patients receiving prescriptions for longer than seven days are required to execute a narcotics contract with their provider. The Bill is aimed to reduce the number of opioids available in West Virginia, and also creates an advanced directive where people can notify a health care provider if he or she does not want to be prescribed opioids.

SB 272 – Community Overdose Response Demonstration Pilot Project

Senate Bill 272 gives the Office of Drug Control Policy the ability to create a Community Overdose Response Demonstration Pilot Project to encourage government and community groups to work together in coordinating responses to drug overdoses and to educate the public on how to identify an overdose. Response teams will visit overdose victims and will coordinate resources and care for the victims to ensure that they receive addiction recovery assistance. The Bill also requires hospital emergency rooms and departments to report confirmed or suspected overdoses to the Office of Drug Control Policy.

West Virginia communities with a high frequency of drug overdoses will be eligible to participate in the Demonstration Pilot Project. These counties may seek private and federal funding to implement the program. The Bill also requires that emergency first responders carry and be trained to use Naloxone to resuscitate overdose victims.

SB 365 – The Young Entrepreneur Reinvestment Act

The Young Entrepreneur Reinvestment Act ("the Act") was previously enacted in 2016 and allows anyone under the age of 30 to have their filing fees waived when establishing a new business in West Virginia. The Act applies to for profit and nonprofit corporations, limited liability companies, general partnerships, and limited partnerships. W. Va. Code § 59-1-2(c). Senate Bill 365 repeals the prior sunset date of June 30, 2018 and now allows the provisions of the Act to remain in effect permanently.

West Virginia Chamber
SUMMARY OF BUSINESS LEGISLATION

W. Va. Investment Management Board v. Variable Annuity Life Insurance Company
Case No. 17-0486 (W. Va. June 5, 2018)

What the Court was asked to decide:

The Supreme Court addressed (1) whether the agreement of the West Virginia Investment Management Board ("IMB") and the Consolidated Public Retirement Board ("CPRB") to arbitrate its claims against the Variable Annuity Life Insurance Company ("VALIC") represented a valid and binding agreement; and (2) whether a West Virginia Business Court Division ("Business Court") judge properly acted as a presiding judge and as the resolution judge in the case, including serving on the arbitration panel that eventually decided the case.

What the Court decided:

The Supreme Court upheld the arbitration agreement as valid and enforceable, and further upheld the ability of the Business Court to craft alternative dispute solutions to resolve complex business disputes.

Facts:

The convoluted facts of this dispute begin with the decision of the CPRB to enter into an agreement with VALIC back in 1991 (the "1991 Agreement) to offer the option of a high-yield, fixed annuity investment to enrollees of a "defined contribution plan" for participants in the State Teachers Retirement System ("TRS"). The 1991 Agreement provided that 20% of the total Surrender Value in the VALIC investment could be withdrawn in a calendar year (the "20% Rule").

In 2008, the West Virginia Legislature passed a law that permitted "defined contribution plan" enrollees to transfer retirement funds from the VALIC annuity to another vehicle set up by TRS if more than 65% of the enrollees opted to do so. As 78% of the members opted to transfer their monies, the State sought to liquidate the VALIC investment, at which point VALIC invoked the 20% Rule in the 1991 Agreement to prevent the liquidation. Thereafter, the CPRB, IMB, and VALIC negotiated a new agreement (the "2008 Agreement") that was "materially similar" to the 1991 Agreement, including leaving the 20% Rule unaltered.

Thereafter, the CPRB requested that VALIC transfer $248 million from the investment governed by the 1991 Agreement to the investment governed by the 2008 Agreement. A mere 8 days after that transfer, the IMB requested the liquidation of all funds in the investment governed by the 2008 Agreement. VALIC refused, invoking the 20% Rule contained in the 2008 Agreement, though it offered to liquidate the investment per the terms of the 20% Rule. CPRB and IMB then filed suit against VALIC, and this litigation ensured.

The case was transferred to the state's Business Court and was assigned to Judge Christopher Wilkes, the Chair of the Business Court. After a long and difficult discovery period, including one interlocutory appeal to the Supreme Court, the parties agreed to a detailed procedure for arbitration of the dispute ("arbitration agreement"), which included the following, undisputed provisions:

- "The parties shall mediate this dispute before Judge Wilkes . . . ."
- "In the event the action is not resolved through mediation, the parties shall submit to binding arbitration before a three-judge panel comprised of Judge Wilkes, Judge Joanna I. Tabit, and Judge Paul T. Farrell (the "arbitration"). Any disputes arising prior to the arbitration shall be resolved by Judge Wilkes."
- "The decision of the arbitrators is final and non-appealable.

Pursuant to the terms of the arbitration agreement, the parties arbitrated the issues related to the 1991 Agreement, the 2008 Agreement, and the 20% Rule to the arbitration panel. The arbitration panel ruled in favor of VALIC on all issues.

IMB and CRPB appealed to the Supreme Court on a number of grounds, including (1) that the arbitration agreement was unlawful, and therefore void; (2) that the arbitration as conducted was unlawful; and (3) that the arbitration panel's decision was wrong.

Holding:

The West Virginia Supreme Court pulled no punches in rejecting every argument put forth by the IMB and CRPB. In doing so, the Court firmly validated the Business Court's ability to fashion creative solutions to resolve complicated business disputes and cast a dim eye at a party that agreed to a dispute resolution procedure, and then attempted to undo the party's own agreement to that procedure because that party lost.

Initially, the Court easily dispensed with the argument that the agreement of the IMB and CPRB to arbitrate in front of the Business Court was invalid because the Business Court did not have the authority to conduct arbitrations. Counsel for IMB and CPRB argued that, because the agreement to arbitrate was "made at the eleventh hour prior to trial, they were deprived of the time to research the validity of the alternative dispute resolution to which they were agreeing." The Supreme Court found that their "contention is self-serving and flagrantly untrue in light of the fact Petitioners are not only sophisticated parties represented by highly-qualified counsel, but also because the arbitration did not take place for six months after the agreement to arbitrate was executed." The Court also pointedly noted that the IBM and CPRB "arrived at their current position that the alternative dispute resolution to which they agreed was unquestionably illegal only after the arbitration panel rendered its decision in favor of VALIC."

The Supreme Court then examined the role of Judge Wilkes, who was the judge assigned to hear the case at trial, and who also served as both mediator of the case and as a member of the arbitration panel that ultimately decided the case. While the Court found this to be unusual, it "saw no illegality in the makeup of the arbitration panel so as to void the proceedings." Moreover, the Court emphasized, again pointedly, that "the parties explicitly agreed that Judge Wilkes would mediate the case and then serve on the arbitration panel."

The Supreme Court also determined that the conduct of the arbitration itself, including a detailed and truncated arbitration hearing and the waiver of appellate review, did not violate the parties' constitutional right of access to courts. The Court determined, after a detailed review of the law in other jurisdictions, that "by virtue of the agreement that the arbitration would be 'final, and non-appealable[,]' these sophisticated parties, both represented by counsel, have waived the right to appellate review of the merits" under West Virginia law.

Finally, the Supreme Court found that the arbitration panel correctly considered the law and the facts in finding for VALIC in the arbitration.

The West Virginia Chamber of Commerce submitted an *Amicus* Brief in this appeal, urging the Supreme Court to uphold the arbitration decision of the Business Court.

This case is currently subject to the Plaintiffs' motion for Reconsideration, which will be considered during the Fall 2018 term of the Court.

Impact on Business:

The Supreme Court's decision validates the ability of the Business Court and parties it to craft creative alternative dispute resolution methods to expeditiously resolve disputes before the Business Court. In addition, confirmation of the arbitration award reflects the Court's recent trend of upholding both arbitration agreements and the results of arbitration. Finally, the Court made it clear that counsel who agree to an alternative dispute resolution procedure cannot later complain about that procedure simply because counsel lost in that procedure.

West Virginia Chamber
ARBITRATION

AMFM LLC, et al. v. Shanklin
799 S.E.2d 144 (W.Va. 2017)

<u>What the Court was asked to Decide:</u>

The West Virginia Supreme Court was asked to determine whether a durable power of attorney ("DPOA") provided an adult daughter with the authority to enter into an arbitration agreement with a nursing home on her mother's behalf.

<u>What the Court Decided:</u>

The Supreme Court of Appeals of West Virginia concluded that the durable power of attorney ("DPOA") granted authority to the adult daughter as the "alternate" DPOA. At the time of the decedent's admission to the AMFM nursing home, the decedent suffered from dementia. The decedent's adult daughter signed the admission papers on her behalf. The papers included an arbitration agreement. The lower Circuit Court of Lincoln County ruled that the daughter, as the "alternate" DPOA, lacked any authority to bind the decedent to an arbitration agreement. On appeal, the Supreme Court reversed the order from the Circuit Court and remanded the matter back to the Circuit Court for entry of an order granting the nursing home's motion to dismiss and to compel arbitration because her authority was not "void, invalid, or terminated," nor was she "exceeding or improperly exercising her authority." Further, under the plain language of *W. Va. Code § 39B-1-119(c),* the nursing home was permitted to rely on the daughter's authority as her mother's attorney-in-fact when she signed the arbitration agreement.

Facts:

The Plaintiff's mother executed a DPOA, which named her son as her attorney-in-fact and provided that her daughter was her "alternate" attorney-in-fact. As part of her mother's admission to AMFM's nursing home facility, the daughter signed admission documents, including an arbitration agreement. Her son was not present for the admission process or signing.

During her mother's three year stay in the nursing home, her daughter, the "alternate" DPOA, made a number of decisions for her mother as granted by the DPOA. The daughter began exercising these rights approximately three years before her mother was admitted to the nursing home.

After her mother's death, the daughter filed suit against AMFM, alleging several claims, including negligence, medical malpractice and violations of the West Virginia Consumer Credit Protection Act. AMFM moved to dismiss the lawsuit and to compel arbitration. The daughter argued that the nursing home's arbitration agreement was unenforceable because, as the "alternate" attorney-in-fact, she did not have the actual authority to enter into the agreement on her mother's behalf. The Circuit Court of Lincoln County agreed and denied AMFM's motion.

Holding:

The Supreme Court reversed the Circuit Court's denial of AMFM's motion to dismiss and compel arbitration, finding that an "alternate" power of attorney had the authority to bind her mother to an arbitration agreement as part of her mother's admission to a nursing home. The Supreme Court carefully examined the facts related to the daughter acting under the DPOA on behalf of her mother for a five year period, both before and after her mother's stay at the nursing home. By holding that the daughter was bound to the arbitration agreement, the Supreme Court confirmed the broad and binding nature of an arbitration agreement even if an "alternate" power of attorney signs the arbitration agreement. As long as the nursing home believed that the power of attorney had authority to act or was not exceeding their authority, the agreement is binding.

Impact on Business:

This decision shows the Supreme Court's continued willingness to enforce arbitration agreements in a variety of contexts. Here a nursing home negligence and malpractice claim will go to arbitration because the Supreme Court found that the agreement signed by an "alternate" DPOA was enforceable. A health care facility, such as a nursing home, may rely on a DPOA if it is without actual knowledge that the DPOA was invalid, even if the power of attorney was divested of authority; or exceeded or improperly exercised their authority. This will allow all businesses covered under *W. Va. Code § 39B-1-119(c)* to rely on a DPOA as presented, without delving into other issues regarding the appropriateness of the DPOA.

Hampden Coal, LLC v. Varney
810 S.E.2d 286 (W. Va. 2017)

What the Court was asked to Decide:

The Supreme Court addressed whether (1) an agreement to arbitrate claims between an employer and an at-will employee was valid and binding; and (2) whether an agreement to arbitrate could include claims for deliberate intent and claims under the West Virginia Human Rights Act (the "Act").

What the Court Decided:

The WV Supreme Court unanimously reversed the lower Circuit Court and determined that the agreement represented a valid and binding agreement to arbitrate that encompassed both deliberate intent claims and claims under the Act.

Facts:

Mr. Varney began working at Hampden Coal Company in 2000. As a result of corporate restructuring, the assets of Hampden Coal Company were purchased by Hampden Coal ("Hampden Coal"), after which the employees of Hampden Coal Company were transitioned to Hampden Coal. As part of that transition, Hampden Coal required all employees, including Mr. Varney, to sign a Mutual Arbitration Agreement ("Agreement"), a 1 ½ page document in which Mr. Varney and Hampden Coal agreed

> *to submit all past, present or future disputes that arise between us to final and binding arbitration. This means that a neutral arbitrator will decide any legal dispute between us, instead of a judge or jury. . . . Hampden Coal and I waive our right to go to court in exchange for this right to arbitration.*

The Agreement also stated that the parties agreed to submit to arbitration

> *all disputes or claims of any kind includ[ing] but [] not limited to claims of unlawful discrimination, retaliation or harassment based upon race, national origin, ancestry, disability, religion, sex, age, workers' compensation claims or history, veteran's status, or any other unlawful reason, and all other claims relating to employment or termination from employment. This shall also include claims for wages or other compensation due, claims for breach of any contract, tort claims or claims based on public policy.*

Mr. Varney sustained a workplace injury, after which he was demoted at work. As a result, he brought a civil action alleging a deliberate intent claim for his workplace injuries and employment claims under the Act related to his demotion. The lower Circuit Court denied Hampden Coal's motion to dismiss and refer to arbitration, finding that the Agreement (1) lacked consideration, (2) was substantively and procedurally unconscionable, (3) did not include claims for deliberate intent, and (4) did not include claims under the Act.

Holding:

Consistent with a string of arbitration decisions in recent years, the WV Supreme Court unanimously reversed the lower Circuit Court and determined that the Agreement represented a valid and binding agreement to arbitrate that encompassed both deliberate intent claims and claims under the Act.

Initially, the Supreme Court rejected the Circuit Court's determination that "arbitration agreements are viewed differently in an employment context compared to a commercial context." Instead, the Court reiterated that it "has never held that more stringent or different standards apply to our consideration of arbitration agreements in different contexts, nor have we ever adopted separate rules or factors for consideration of arbitration agreements in the employment context." Instead, "this Court makes clear that we apply the same legal standards to our review of all arbitration agreements."

Next, the Supreme Court determined that Mr. Varney's status as an at-will employee did not mean that the Agreement lacked "consideration and mutuality." Indeed, "a mutual agreement to arbitrate is sufficient consideration to support an arbitration agreement." That Mr. Varney was an at-will employee failed to impact the mutuality of the agreement to arbitrate.

The Supreme Court then found that the Agreement was not substantively unconscionable. The substantive unconscionability analysis focused on the Agreement's provision of a one-year limitation for all claims brought in arbitration, including claims that would otherwise have a longer limitations period under a statute, such as the deliberate intent claim and claims under the Act, both of which have a two-year statutory limitations period. The Court first found that "[t]he general rule has long been that parties may contractually agree to a shortened limitations period, as long as the period is reasonable." Finding no reason why a one-year statute of limitations for deliberate intent claims or claims under the Act is unreasonable, the Court determined the Agreement to be substantively conscionable.

The Supreme Court also found the Agreement to be procedurally conscionable, primarily because the record contained . . . no evidence to support any of Mr. Varney's allegations concerning his personal circumstances or the manner in which the Agreement was presented for his signature. Further, there is no evidence that he tried but was denied the opportunity to either seek the advice of counsel or negotiate any terms of the Agreement." In making this observation, the Court noted that "[i]t is axiomatic that his counsel's arguments are not evidence."

Finally, the Supreme Court determined that deliberate intent claims fell within the scope of the claims to be arbitrated under the Agreement because such claims did not represent a "claim for workers' compensation benefits" that were excluded under the Agreement. In addition, the claims under the Act fell within the scope of the Agreement because such claims did not represent administrative claims made to government agencies such as the EEOC and NLRB, which were also excluded under the Agreement.

Impact on Business:

The Supreme Court's decision further strengthens the ability of businesses in general, and employers in particular, to use arbitration agreements to avoid having disputes resolved in a courtroom. Businesses are encouraged, however, to ensure that any arbitration agreements utilized are both procedurally and substantively fair.

West Virginia Chamber
ARBITARTION

State ex rel. U-Haul Company of W. Va. v. Tabit
Case No. 17-1052 (W.Va. May 21, 2018)

<u>What the Court was asked to Decide:</u>

The Court was asked to review the grant of class certification by the Circuit Court of Kanawha County in a consumer class action case.

<u>What the Court Decided:</u>

The Court affirmed the finding of class certification, despite the myriad of individual proof issues required for the Plaintiffs to fulfill their burden of proof under the West Virginia Consumer Credit Protection Act. Additionally, the Court reaffirmed their commitment to the liberal standard for class certification under *In re W.Va. Rezulin Litigation, 585 S.E.2d 52* (W.Va. 2003). In so doing the Court refused to follow the predominant trend towards a more restrictive view of the commonality and predominance requirements of Rule 23.

Facts:

On August 19, 2011, Respondents filed a putative class action against U-Haul alleging breach of contract, fraudulent concealment, and violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA"). Upon Respondents' motion, the circuit court certified a class of U-Haul customers who had opted not to make a donation to the "Conservation Fund" in the rental process, but were nonetheless charged an "Environmental Fee." U-Haul implemented the fee as a company policy in 2008. Customers were automatically charged an "environmental fee" of $1.00 to $5.00 per day for in-town rentals and $5 for one-way rentals. The fee appeared as a line-item charge on the rental contract, and U-Haul provided an explanation only if a customer asked. Moreover, Respondents offered evidence that when customers inquired about the fee, incorrect information was provided – some were told it was a government fee, and others were told it was used for "tires, oil, and things of that nature."

U-Haul sought a Writ of Prohibition to prevent the enforcement of the Kanawha County Circuit Court's order granting class certification. Petitioner argued that the court erred as a matter of law in finding that the respondents, Amanda Ferrell, John Stigall, and Misty Evans met the commonality and predominance requirements of Rule 23 of the West Virginia Rules of Civil Procedure.

Holding:

The Supreme Court of Appeals of West Virginia affirmed the trial court's decision to certify a class in a consumer class action against U-Haul of West Virginia arising from the charge of a small Environmental Fee in the course of vehicle rentals.

U-Haul challenged the circuit court's determination that respondents met the commonality and predominance requirements of Rule 23. In challenging commonality, U-Haul asserted that charging all members of the purported class the Environmental Fee was insufficient to establish commonality. U-Haul insisted that the only way those members could prove their claims of misrepresentation and fraud is through individualized proof, making the claims unsuited for class-wide determination. The Supreme Court of Appeals agreed with the circuit court's reliance on *Rezulin* and determined that individual issues and varying degrees of harm will not bar a class action. Further, the Supreme Court of Appeals noted that the threshold of commonality is not high and that the analysis should focus on common questions affecting all or a substantial amount of class members.

The Supreme Court then turned to predominance. According to the Court, the central question in deciding predominance is whether adjudication of the common issues in a given suit has important and desirable advantages with respect to judicial economy compared to all other issues, or when viewed by themselves. Moreover, common issues need not be dispositive, and a single common issue may be the overriding one in the litigation, despite the fact that the same suit also entails numerous remaining questions. In its breach of contract claim analysis, the Court agreed with the circuit court's finding that there are common questions of whether U-Haul breached written and oral contracts to members of the class by charging consumers more than the quoted rental rate. Additionally, the Court agreed that U-Haul's standardized policy of failing to communicate the fee supported common issues of fact or law for the class.

With respect to the fraudulent concealment and WVCCPA violation claims, the Supreme Court found that the circuit court "correctly determined that evidence concerning the respondents' allegations that U–Haul 'fraudulently concealed, intentionally concealed, suppressed and omitted the information' will be answered the same way for all class members." It also noted that it disagreed with U–Haul's contention that the presence of individual issues should defeat predominance. Instead, it again agreed with the circuit court that "'whether the evidence demonstrates a clear intent to keep ... customers in-the-dark about not only the fee itself but the true use of the fee and an understanding on U–Haul's behalf that customers would not willingly pay the environmental fee 'but for' its deceptive practices in ... collecting such fee' will be answered the same way for all class members." The Court's commonality and predominance analysis focused on the existence of common questions that could be answered by class representation.

Therefore, because the Respondents had met all the requirements for class certification in West Virginia, the Supreme Court of Appeals denied the writ of prohibition sought by U-Haul.

The Supreme Court determined that *Rezulin* is the seminal authority on certifying class actions in West Virginia.

Impact on Business:

The Supreme Court of Appeals set a dangerous precedent by reaffirming the liberalized standard for class certification under *In re Rezulin*. Although the United States Supreme Court determined in *Walmart v. Dukes,* 564 U.S. 338 (2011) that Rule 23 should not be treated as a mere pleading standard, the Supreme Court of Appeals of West Virginia did just that. If a claim requires individualized proof (such as fraud or misrepresentation), commonality does not exist. In West Virginia, a single thread of commonality is now enough to survive Rule 23 for class certification, even if additional extensive fact finding is necessary. This decision demonstrates West Virginia's status as having a liberal standard for class certification that is much more plaintiff-friendly than that used in other states or in the federal courts.

FirstEnergy Generation LLC v. Muto
2018 WL 1370339 (W.Va. March 12, 2018)

What the Court was Asked to Decide:

The Circuit Court of Harrison County entered an Order denying the defendant's post-trial motion following an adverse jury verdict in this "deliberate intention" action. On appeal, the defendant/ petitioner asserted that the evidence was insufficient to support a claim of deliberate intent, specifically asserting that two of the required elements were not met.

What the Court Decided:

The West Virginia Supreme Court held that the plaintiff failed to offer enough evidence to prove all the required elements of a deliberate intention claim.

Facts:

This case arises from events that occurred on January 22, 2013 at FirstEnergy's Harrison Power Station. That morning, a FirstEnergy maintenance crew entered its fly ash silo in order to replace a piece of equipment. To accomplish this task, the maintenance crew had to remove a piece of grating on an elevated platform. A few hours after they had begun the work, the crew noticed that the level of dust in the silo had increased to a level that reduced visibility to nearly zero. The crew asked the control room to shut down the "train" to reduce the level of dust, but this request was denied. The crew then decided to evacuate the silo and did so, without replacing the grating. Additionally, the crew did not tell anyone about the dust, the open grating, or that they were leaving. However, they did leave a rudimentary barricade and yellow caution tape around the hole. According to Occupational Safety and Health Administration regulations and FirstEnergy's own regulations, the tape should have been red to indicate a deadly hazard, rather than the caution that yellow signifies.

In the meantime, James Muto, the plaintiff, was on duty in the control room. His supervisor had decided to control the level dust in the silo by adjusting water levels in the pug mill dust collectors, rather than shutting down the "train." Mr. Muto had been dispatched to check the water levels. Approaching the silo, he noticed that the maintenance crew was no longer working and the elevated amount of dust in the air. He did not, however, radio this information to anyone. Instead, he entered the silo, climbed two sets of stairs, and ducked under the caution tape. Then, Mr. Muto fell through the hole in the grating left by the maintenance team, landed two levels below, and suffered a head injury.

A multi-day jury trial was held and the jury returned a verdict for Mr. Muto, awarding him over a million dollars in damages and awarding his wife $25,000 for loss of consortium. FirstEnergy then filed a motion for a new trial, a motion to alter or amend the judgement, and a motion for judgement as a matter of law. These motions were denied, and this appeal to the WV Supreme Court followed.

Holding:

West Virginia Code requires that five separate and specific elements be proven in order to establish that an employer acted with deliberate intention. The Court held that the Mutos had not proven two of the required elements — that the employer had actual knowledge of the existence of the unsafe working condition, and that the exposure to the unsafe working condition was intentional.

1) Actual Knowledge of the Unsafe Working Condition

   Mr. Muto argued that two conditions existed that led to his injuries: (1) open floor grating in an elevated platform inside the fly ash silo, which was improperly barricaded with yellow, instead of red, caution tape; and (2) excessive dust inside the fly ash silo causing near zero visibility. In order to prove this element of a deliberate intention claim, Mr. Muto had to provide evidence that a FirstEnergy management employee actually knew about either condition. This is a high threshold and is not satisfied by proving that the employer reasonably should have known about the condition. Prior to commencing work in the silo that morning, FirstEnergy management employees told the maintenance crew to not leave the grating open, and the supervisor of the crew testified that he had not told anyone that they had left. Additionally, FirstEnergy employees testified that, while they were aware of excessive dust, they were not aware of the near zero visibility conditions. Thus, the Supreme Court held that this element had not been proven.

2) Intentional Exposure to Unsafe Working Condition

   In order to establish the existence of intentional exposure, there must be some evidence that the employee was directed to continue working in unsafe conditions, despite the employer's knowledge of the conditions. Mr. Muto argued that he had been sent to check the water levels in the silo so that the dust levels could be reduced, and thus FirstEnergy intentionally exposed him to unsafe working conditions. The Supreme Court, however, found that no one told Mr. Muto to enter the silo or even knew that he planned to do so. Additionally, the Court found that even if he had been directed to enter the silo, no one directed Mr. Muto to duck under the caution tape and barricade surrounding the hole. Thus, the Court held that this element of a deliberate intention claim had not been met.

Because the Supreme Court found that two of the five elements for a deliberate intention claim had not been met, it held that the trial court had erred in denying FirstEnergy's motions. The case was remanded with directions. Justice Davis, in a strongly worded dissent, argued that the jury was able to watch all of the testimony, come to their own conclusions about inconsistencies in testimony, and thus their decisions should not have been overturned.

Impact on Business:

This decision is favorable to employers by raising the threshold that plaintiffs have to meet before being able to successfully bring a deliberate intent cause of action. This case tends to assist businesses going forward by allowing them to rely upon the plain language of the deliberate intent statute to help insulate those businesses from claims that do not meet the strict requirements of that statute.

West Virginia Chamber
DELIBERATE INTENT

Brown v. Berkeley Family Medicine Associates, Inc.
2017 WL 3821807 (September 1, 2017)

<u>What the Court was Asked to Decide:</u>

Whether the Circuit Court of Berkeley County erred by placing limits on petitioner's ability to present her case by selecting certain words and phrases that her counsel could not use before the jury, such as "rule," "danger," and "dangerous."

<u>What the Court Decided:</u>

The Supreme Court of Appeals of West Virginia found no abuse of discretion in the circuit court's ruling which prohibited petitioner's counsel "from making potentially misleading and inflammatory statements to the jury."

Facts:

Petitioner's husband was evaluated at Berkeley Family Medicine Associates, Inc., ("BFMA") by a physician assistant for respiratory complaints and chest pain. He underwent a CT scan of the chest which was read by a radiologist as consistent with inflammation of the lungs of uncertain cause. The physician's assistant prescribed an antibiotic and a follow up appointment was made, with instructions to return to BFMA if the husband's condition persisted or worsened. By the time petitioner's husband returned for his follow-up appointment, his condition had significantly deteriorated and he was hospitalized and died several days later. Petitioner thereafter filed a medical malpractice action against BFMA and the physician's assistant alleging that they had deviated from the standard of care in their treatment of her husband, thereby causing his death.

Before trial, respondents filed a motion with the circuit court to prohibit petitioner from arguing that "jurors had the power to improve the personal and community safety of jury members by reaching a verdict that would reduce or eliminate allegedly dangerous or unsafe conduct." The court denied the motion but allowed respondents to raise the same issue by way of objection during trial.

At trial, beginning with his opening statement, petitioner's counsel sought to equate the standard of care to a "rule" which had to be followed by health care providers. Respondents objected and the trial judge ruled that the term "standard of care" must be used rather than a general term such as "rule." Based on another objection by respondents, the trial court cautioned petitioner not to use the terms "danger" or "dangerous" to describe the medical condition of petitioner's husband.

The jury returned a defense verdict and petitioner appealed several of the trial court's rulings to the Supreme Court of Appeals of West Virginia, including those which prohibited her counsel from using certain words and phrases before the jury.

Holding:

The West Virginia Supreme Court held that the lower circuit court did not err in prohibiting the petitioner from using certain terms that were potentially confusing and misleading to jurors. The Petitioner was afforded the opportunity to present her arguments and her case in a fair and impartial manner, free from arguably confusing and misleading inferences.

Impact on Business:

The Supreme Court's decision provides a basis for defending cases in which plaintiffs' attorneys are using "Reptile Tactics" based upon a 2009 book entitled ***"Reptile: The 2009 Manual of the Plaintiff's Revolution."*** Reptile Tactics have been used in medical malpractice, product liability, commercial trucking, and general tort actions.

Reptile Tactics are based on the theory that if the primitive (reptilian) portion of jurors' brains can be triggered by a perceived threat to themselves and others in their community, they will decide cases based on emotional rather than logical grounds, which will presumably result in increased monetary awards. The reptile portion of the brain is purportedly activated by using words and phrases that convey a sense of danger resulting from a defendant's violation of a generalized rule. The WV Supreme Court's ruling in *Brown v. BFMA* will allow defense counsel to counter the use of such tactics by objecting to words and phrases that are intended to substitute for more precise terms such as "standard of care," and thereby prevent plaintiffs' attorneys from employing Reptile Tactics during the discovery phase of cases and at trial.

Defense counsel representing businesses should be aware of how Reptile Tactics are applied and how to effectively counter these tactics.

WEST VIRGINIA CHAMBER
DISCOVERY / JURY INSTRUCTIONS

Morrisey v. W. Va. AFL-CIO
804 S.E.2d 883 (W. Va. 2017)

What the Court was Asked to Decide:

This case began in the Circuit Court of Kanawha County before Judge Jennifer Bailey. The lower court granted a temporary preliminary injunction on August 11, 2016, halting the implementation and enforcement of the "Workplace Freedom Act," the state's Right to Work ("RTW") law that took effect on July 1, 2016. On February 24, 2017, Judge Bailey issued a preliminary injunction finding the unions' arguments meritorious. With no realistic final ruling in sight, the Attorney General appealed the preliminary injunction ruling to the West Virginia Supreme Court.[1] The question presented to the West Virginia Supreme Court of Appeals was whether the lower court erred in finding that the unions showed a likelihood of success in their legal challenge to the constitutionality of the RTW law and, therefore, erred in granting the preliminary injunction.

What the Court Decided:

The WV Supreme Court found that the unions failed to establish a likelihood of success on the merits of their constitutional claims against the RTW law; thus, the lower court abused its discretion in granting the preliminary injunction. The Court dissolved the lower court's injunction and remanded the case, directing the lower court to conduct whatever final hearing it required and issue a final ruling, presumably consistent with the Supreme Court's holdings. That ruling still has not been issued by the lower court, but the injunction has been dissolved.

Facts:

The WV Legislature passed Senate Bill 1 in 2016 and it became law on July 1, 2016. West Virginia joined 27 other states that have adopted similar "Right to Work" laws. Unions could no longer demand union security clauses that had the effect of compulsory membership and compulsory payment of union dues and/or agency fees. In response to the new law, several labor unions and the AFL-CIO brought suit to challenge its constitutionality, claiming it hindered the unions' associational right to consult for the common good and took union property without just compensation, thereby violating a union's liberty interests by requiring it to expend their labor for nonunion employees without the ability to charge fees for such labor, referred to by the unions as requiring it to represent so-called "free-loaders."

Holding:

To succeed with a preliminary injunction at the lower circuit court level, the unions had to show beyond a reasonable doubt that the new law violated the Constitution. In that regard, the State argued on appeal that the unions had not and could not demonstrate a likelihood of success on their constitutional arguments.

Dissolving the injunction, the WV Supreme Court referenced an identical associational argument made to the US Supreme Court concerning a similar RTW law enacted in a different state. The US Supreme Court held that the constitutional right to assemble and associate does not allow a union to compel non-members to participate in union assemblies as a condition of employment.[2] Further, the decision found that unions have no constitutional entitlement to fees of non-member employees.[3] The unions could not provide any state or federal appellate decision that had accepted their freedom of association argument regarding a similarly written RTW law.

[1] *Ordinarily a preliminary injunction cannot be appealed, however, Judge Bailey effectively made her preliminary ruling a permanent one by simply avoiding a final Order in this case.*
[2] *Lincoln Fed. Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co., 335 U.S. at 529-531).*
[3] *Id.*

The AFL-CIO also argued that prohibiting unions from collecting fees from non-members, while requiring them to provide equal services to non-members, resulted in an unconstitutional taking of property. The Court disagreed, finding that absent any current collective bargaining agreements with union security clauses, unions have only a unilateral expectation of receiving fees from non-members and that unions could only speculate that they would be able to successfully demand an employer agree to a union security clause, since such clauses are not required by federal labor law. Because West Virginia's RTW law did not affect any existing collective bargaining agreements and only affected future agreements, the unions could not demonstrate that the law violated any existing property rights.

Lastly, the unions argued that the law basically requires unions to work for nothing, thereby contravening a union's liberty interests. The Court said such a contention is "bare," and that no other appellate court in the country has adopted similar arguments to strike down RTW laws in other states.

After reversing the lower court's order and dissolving the preliminary injunction, the Supreme Court remanded the case to the lower court to conduct a final hearing on the merits of the parties' arguments and to issue a final ruling, presumably consistent with the Supreme Court's holdings. To date, Judge Bailey still has not issued a final ruling consistent with the Court's ruling.

Impact on Business:

This is a positive case, not only for employers, but also for the State and employees as well. We can now say clearly that West Virginia is a Right to Work state. This will be useful in attracting new businesses to the State, and both employers and employees are guaranteed relief from compulsory union membership. Meanwhile, unions must do the work necessary to prove their value to already unionized workforces.

West Virginia Chamber
EMPLOYMENT / LABOR LAW

Burke v. Wetzel County Commission
2018 WL 2769056 (W. Va. June 6, 2018)

<u>What the Court was asked to Decide:</u>

The Court was asked to determine: (1) whether Defendants Wetzel County Commission and the County Assessor were joint employers; (2) whether Defendants were entitled to qualified immunity applicable to government agencies; and (3) whether Plaintiff's claims for unlawful discharge under the West Virginia Human Rights Act ("WVHRA"), hostile work environment under the WVHRA, unlawful discharge under the Family and Medical Leave Act ("FMLA"), violation of the state constitutional rights, common law retaliatory discharge, and violation of the Whistleblower Law stated a claim for purposes of a motion to dismiss.

<u>What the Court Decided:</u>

The Supreme Court found that the allegations in the complaint precluded the application of qualified immunity in the context of a 12(b)(6) motion to dismiss and that all of Plaintiff's claims sufficiently pled a cause of action for the purposes of a 12(b)(6) motion to dismiss, except for the claim for violation of constitutional rights, which is repetitive of the claim of retaliatory discharge. The Court further found that the joint-employer issue could not be decided on a motion to dismiss.

Facts:

Plaintiff Eric Burke filed suit against Defendants Wetzel County Commission (the "Commission") and Assessor Scott Lemley, asserting claims for harassment, retaliatory discharge, and violation of constitutional rights following his extended medical leave and his decision to challenge Lemley for the office of Assessor.

Plaintiff worked as a Field Appraisal Supervisor for the Assessor's office. During the course of his employment, Plaintiff suffered from a back condition that was disabling at times. In March 2015, Plaintiff applied for FMLA leave for back surgery scheduled in April 2015. Plaintiff asserted that on March 31, 2015, Lemley raised an issue with the medication that Plaintiff was taking and stated that he needed a release from a physician to return to work either before or after his FMLA leave. Prior to his FMLA leave, Plaintiff claimed that he attempted to return to work after being sick, but was told that he needed to allow Lemley full access to his medical records, to which he objected. Plaintiff further alleged that Lemley told him to leave the premises and confiscated his keys to the courthouse, electronic key fob, and his state ID. Plaintiff attempted to return to work after his FMLA leave and provided Lemley with an unrestricted release to return, but Lemley refused to accept the medical authorization; instead, he demanded a release from another physician and a list of all of his medications. Plaintiff claimed that he reported the alleged harassment to the Commission and filed his intention to run against Lemley for Assessor in November 2015. Plaintiff asserted that he was then subjected to increased harassment and discrimination by Lemley, and that, following Lemley's reelection, he was terminated.

In response to Plaintiff's lawsuit, Defendants filed a motion to dismiss arguing that the Commission was not Plaintiff's employer, that the facts set forth in the complaint showed that Lemley made reasonable accommodations for Plaintiff's medical needs, that neither Lemley nor the Commission were "state actors", and that Lemley was entitled to qualified immunity. The circuit court granted the motion to dismiss, and Plaintiff appealed to the West Virginia Supreme Court of Appeals.

Holding:

As an initial matter, the Supreme Court of Appeals found that factual disputes existed as to whether the County Commission and the Assessor's office were joint employers of Plaintiff. The Court focused on statutes addressing the relationship between local government entities, which do not apply to private-sector employers. The Court overturned the finding of qualified immunity, which does not apply to private-sector employers.

The Court held that Plaintiff pled sufficient facts to survive a motion to dismiss the WVHRA disability discrimination claim. The Court rejected Defendants' argument that they had accommodated Plaintiff by providing him FMLA leave. The Court explained that the basis of the claim was that he was harassed and retaliated against because of his disability and need for leave; thus, Plaintiff could still have a claim even if he was provided FMLA leave.

Turning to the disability harassment claim, the Court held that the same standard should apply to disability harassment claims as sexual harassment claims: (1) the subject conduct was unwelcome; (2) it was based on the disability of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment; and (4) it was imputable on some factual basis to the employer. The allegations of inappropriate remarks and intimidating behavior, changes in work duties, and different treatment compared to coworkers were sufficient to survive a motion to dismiss.

In regards to unlawful discharge under the FMLA, the Court noted that in most situations an employer must restore an employee to the same or an equivalent position after the employee returns from FMLA leave. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites, and status. The Court found that there was a question of fact to as to whether Plaintiff was reinstated to an equivalent position where Defendants changed Plaintiff's working conditions by: (1) refusing to allow him access to a county vehicle; (2) refusing to allow him to perform appraisals; (3) refusing to give him keys to access work areas; (4) restricting his work assignments; and (5) refusing to allow him computer access.

Turning to the claims for violation of Plaintiff's constitutional rights, the Court held that the claim was one for retaliatory discharge that arose from Plaintiff's employment; thus, the claim was essentially repetitive of the retaliatory discharge claim asserted. The Court allowed the common law retaliatory discharge claim to proceed because Plaintiff had alleged violations of federal and state statutes and the West Virginia Constitution, which can give rise to a claim for violation of public policy.

Finally, the Supreme Court allowed the claim for a violation of the West Virginia Whistleblower Law to proceed. This statute applies only to public-sector employees.

Impact on Business:

The Court expressly held for the first time that the four-part test for sexual harassment also applies to claims for disability-related harassment. This case is also important because it affirms that employees can rely on the federal FMLA to assert common law retaliation claims under West Virginia law.

West Virginia Chamber
Employment / Labor Law

Goff v. Williams Holdings, LLC
2018 WL 2194018 (W. Va. May 14, 2018)

<u>What the Court was asked to Decide:</u>

The Court was asked to determine whether the circuit court erred in directing a verdict in Defendants' favor after the jury returned a verdict in Plaintiff's favor in a claim for unpaid overtime under the West Virginia Wage Payment and Collection Act.

<u>What the Court Decided:</u>

The Court upheld the circuit court's decision, holding that Plaintiff failed to produce competent evidence of unpaid wages and failed to prove that Defendants had knowledge that Plaintiff was working off-the-clock.

Facts:

Plaintiff Roger Goff filed suit against Defendants Williams Holdings, LLC, Williams Transport, and Teddie G. Williams, asserting a claim for a violation of the West Virginia Wage Payment and Collection Act (the "WPCA").

Plaintiff was hired by Williams Holdings to drive a company van to transport railroad workers. In addition to transporting railroad workers, Plaintiff was to keep the van clean and properly maintained. Defendants asserted that Plaintiff was to clean the van during the periods in which he was waiting for passengers, but Plaintiff asserted that he was unable to do so because the waiting time varied from ten minutes to eight hours. Plaintiff claimed that he spent approximately five hours of unpaid time per week cleaning the van.

Plaintiff brought a claim under the WPCA for this unpaid time. The circuit court held a two-day jury trial. Plaintiff's own estimate of cleaning time was the only evidence he relied on to support his claim. Defendants' owner testified that employees were expected to clean the van during their paid shifts and that employees had enough time to complete these tasks during their shifts while waiting for passengers.

The jury returned a verdict in Plaintiff's favor. After trial, Defendants renewed their prior motion for judgment as a matter of law. The circuit court granted Defendants' motion for judgment as a matter of law for two reasons. First, the court found that Plaintiff was not an "employee" within the meaning of the WPCA when performing the cleaning work because Defendants did not have any knowledge that Plaintiff was performing this work outside of his paid shifts. Second, the court found that Plaintiff's proof of damages was too speculative.

Holding:

On appeal, the Supreme Court of Appeals turned to principles established under the federal Fair Labor Standards Act ("FLSA") in addressing the claim for unpaid work. The Court explained the general rule that when an employer's records are lacking, a plaintiff may prove the number of hours worked by making a reasonable estimate of those hours. However, in this case, there was no evidence that Defendants' records were inaccurate or otherwise lacking.

Further, the Supreme Court held that to recover against an employer for uncompensated hours, an employee must establish that his or her employer had knowledge, either actual or constructive, of the overtime work. Without that knowledge, the employer is not considered to have "suffered" or "permitted" the employee to work. In this case, Plaintiff provided no evidence that established knowledge of the work being performed. For these reasons, the Supreme Court affirmed the ruling of the circuit court.

Impact on Business:

This case reaffirms that West Virginia courts will look to FLSA precedent when analyzing analogous state wage-and-hour laws. This is important because it creates uniformity for West Virginia employers. Consistent with the FLSA case law, this case establishes that, notwithstanding the liberal rule of "suffering an employee to work," an employer is not completely at the mercy of an employee who claims, without records or other competent evidence, to have performed uncompensated work.

WEST VIRGINIA CHAMBER
EMPLOYMENT / LABOR LAW

McClung v. West Virginia State Police
2017 WL 5632831 (W. Va. November 22, 2017)

<u>What the Court was asked to Decide:</u>

The Court was asked to determine whether Plaintiff was deprived of her right to free speech and was unlawfully demoted because she was reassigned after discussing with a West Virginia state senator the possibility of moving the West Virginia State Police Department's forensic crime laboratory to another state agency.

<u>What the Court Decided:</u>

The Court affirmed the circuit court and held that the circuit court did not err in granting Defendant's motion for summary judgment and dismissing the Plaintiff's retaliatory discharge claim.

Facts:

Plaintiff Soraya McClung sued the Defendant, claiming that her reassignment from Laboratory Director to Analyst IV constituted an unlawful, retaliatory demotion and constructive discharge. Plaintiff also claimed that the Defendant violated her right to free speech in terminating her employment for engaging with the legislature on a matter of public concern.

Plaintiff was employed by Defendant's forensic crime laboratory beginning in 1990 and was promoted to Director in October 2007. During the 2014 legislative session, Plaintiff began discussing with a West Virginia state senator the possibility of removing the forensic crime laboratory from the organizational structure of Defendant. Without Defendant's knowledge, Plaintiff (1) gathered information regarding the forensic crime laboratory's potential removal; (2) provided the information to the legislature; and (3) testified before legislative committees about the same. As a result of Plaintiff's actions, a 2014 legislative bill was drafted that called for the forensic crime laboratory to be removed from the State Police. Plaintiff was questioned about her involvement in the legislative action, and, after initially denying any part in it, she informed Defendant that she had provided information to the committee. Defendant then demoted Plaintiff to Analyst IV, stating that her demotion was a result of her lobbying for the removal of the forensic crime laboratory.

Plaintiff filed a lawsuit asserting that her speech to the legislative committee was protected because she was speaking as a private citizen on a matter of public concern, and thus, her demotion was retaliatory and unlawful. The circuit court granted Defendant's motion for summary judgment on the basis that Plaintiff was speaking as an employee of the Defendant and not as a private citizen. Plaintiff appealed the circuit court's ruling to the West Virginia Supreme Court of Appeals.

Holding:

In its decision upholding the dismissal, the Supreme Court relied on case law interpreting the First Amendment to the United States Constitution because it is virtually identical to the free-speech clause of the West Virginia Constitution. The Supreme Court held that the First Amendment only protects an employee's speech if spoken as a citizen on a matter of public concern; an employee's speech in his or her official capacity is not protected. Here, Plaintiff spoke not as a citizen, but as the Director of the Defendant's forensic laboratory.

Impact on Business:

Although this case comes from the public sector, there is a fundamental principle upheld that is of interest to all employers. In finding that Plaintiff was acting as an employee, and not as a private citizen, the Court took the next step in implicitly finding that Plaintiff was insubordinate. She went behind the backs of her supervisors and engaged in conduct that was detrimental to the organization. Accordingly, she was appropriately subject to discipline. All employers will appreciate this common-sense decision.

West Virginia Chamber
EMPLOYMENT / LABOR LAW

State ex rel. Raven Crest Contracting, LLC v. Thompson
807 S.E.2d 256 (W. Va. 2017)

<u>What the Court was asked to Decide:</u>

The Court was asked to determine whether a failure to rehire claim, filed only nine months after the alleged failure to rehire, was barred by the two-year statute of limitations which barred the employee's wrongful termination claim with the same employer.

<u>What the Court Decided:</u>

The Court found that the former employee's failure to rehire claim was a separate and new act of discrimination and was not barred by the statute of limitations.

Facts:

Plaintiff Larry Adkins filed suit against Defendants Raven Crest Contracting, LLC and Xinergy of West Virginia, Inc., claiming that he was wrongfully discharged and/or not rehired on account of his age and disability in violation of the West Virginia Human Rights Act ("WVHRA").

Plaintiff began working as an equipment operator in Defendants' coal-mining operations in 2008. In January 2012, Plaintiff experienced medical problems and physical disabilities related to his heart. His medical provider excused him from work. On April 11, 2012, Defendants idled the surface mine and laid off all employees, including Plaintiff. At some point after Defendants closed the mine, Plaintiff's medical provider released him to return to work. In January 2014, Defendants resumed coal-mining operations at the same facility. Plaintiff sought to be re-employed but was not rehired.

On September 12, 2014, Plaintiff filed a lawsuit in which he alleged that Defendants "terminated the plaintiff's employment and/or failed to re-hire the plaintiff" on account of his age and disability. Defendants moved to dismiss the complaint asserting that the WVHRA's two-year statute of limitations barred the lawsuit because Plaintiff was terminated more than two years prior. In response, Plaintiff admitted that his claim for wrongful termination was time-barred, but he alleged that his claim for failure to rehire was not. Defendants replied that Plaintiff knew about any alleged discrimination at the time of his employment termination, and therefore, both claims should be dismissed as untimely. The circuit court dismissed the wrongful termination claim but allowed the failure to re-hire claim to proceed. Defendants then filed a petition for a writ of prohibition with the Supreme Court of Appeals.

Holding:

In allowing the failure to rehire claim to proceed, the Supreme Court reiterated that the statute of limitations for employment discrimination cases begins to run from the date a plaintiff first learns of the adverse employment decision. Additionally, the Court held that an employer's failure to rehire an employee subsequent to an allegedly discriminatory termination, absent a new and discrete act of discrimination in the refusal to rehire, cannot resurrect the stale discriminatory termination. One of the distinguishing factors in deciding whether a new and discrete act of discrimination has taken place is whether the employer made clear to the employee at the time of termination that its decision was final and would not be revisited, so that a future application for reinstatement would be futile.

In this case, the Supreme Court recognized that the Plaintiff was terminated when Defendants idled the surface mine and dismissed all employees. Once the mining operations resumed, Plaintiff applied to be rehired. The Court held that there was nothing in the complaint to suggest that Defendants' allegedly discriminatory termination decision was permanent or that Plaintiff's January 2014 application for employment was a futile gesture designed to delay the running of the statute of limitations. Thus, the failure to rehire claim was timely.

Impact on Business:

This case reaffirms that the two-year statute of limitations under the WVHRA begins to run at the time an employee learns of an adverse employment action. Employers should understand that a failure to rehire claim will often be a separate and new claim with its own statute of limitations. Only if an employer has made clear that the employee will not receive further consideration is the employee on notice of a permanent exclusion, which starts the statute of limitations running on any future job applications.

West Virginia Chamber
EMPLOYMENT / LABOR LAW

Verizon Services Corp. v. Board of Review of Workforce West Virginia
811 S.E.2d 885 (W. Va. 2018)

<u>What the Court was asked to Decide:</u>

The Court was asked to determine whether a "stoppage of work" occurred at Verizon's Clarksburg facility during a labor strike that would disqualify Claimants from receiving unemployment compensation benefits when operations were moved to other facilities.

<u>What the Court Decided:</u>

Yes - the Court found that a work stoppage occurred at the employer's facility that disqualified striking employees from receiving unemployment compensation benefits.

Facts:

Petitioner Verizon Services Corp. ("Verizon") appealed the Board of Review of Workforce West Virginia's ("Board") and the circuit court's decisions that granted 25 Verizon employees unemployment compensation benefits for a period during which they were on strike. Verizon asserted that a "stoppage of work" occurred at the Clarksburg facility during the strike and that the stoppage of work disqualified Claimants from receiving unemployment compensation benefits.

Verizon operated a call center in Clarksburg, West Virginia, through which it provided sales and services to customers who live in other states. In the spring of 2016, Verizon experienced a nationwide strike of its union employees. During the strike, Claimants performed no work and did not receive any wages; the Clarksburg facility was closed and any calls that would have normally been answered by that facility were automatically transferred to Verizon call centers outside of West Virginia.

Claimants sought unemployment compensation benefits for this period. A labor dispute tribunal assigned by the Board held an evidentiary hearing and determined that Claimants were not disqualified from receiving unemployment compensation benefits because operations continued at other Verizon locations. After the decision was affirmed by the Board, Verizon appealed the ruling to the circuit court. The circuit court affirmed the Board's decision. The case was appealed to the West Virginia Supreme Court of Appeals.

Holding:

The Supreme Court reversed and held that the Claimants were disqualified from receiving unemployment benefits. The 2016 version of the West Virginia Unemployment Compensation statute in effect at that time provided that employees were disqualified from receiving benefits when there is "total or partial unemployment due to a stoppage at work which exists because of a labor dispute at the factory, establishment or other premises at which he or she was last employed." The Court held that "factory, establishment or other premise at which [the employee] was last employed" for purposes of a work stoppage means the distinct geographical location where the claimant was last employed prior to the labor dispute. Thus, Verizon's nationwide operations should not have been considered when analyzing whether there was a "work stoppage" in Clarksburg. No employees, union or otherwise, worked at the Clarksburg facility during the strike, and the facility completely ceased to operate during the entire strike period.

Impact on Business:

This was an important decision for Verizon because employees were denied unemployment compensation benefits for striking when the work they were to perform was re-assigned to another location. This decision may have little impact on future cases because the West Virginia Legislature amended this statute effective July 2, 2017. The statute now provides that an individual is disqualified from receiving benefits for any week "in which he or she did not work as a result of … [a] strike or other bona fide labor dispute which caused him or her to leave or lose his or her employment." See: *W.Va. Code 21A-6-3(4)(a).*

WEST VIRGINIA CHAMBER
EMPLOYMENT / LABOR LAW

McLaughlin v. Murphy
2018 WL 2175705 (W. Va. May 11, 2018)

What the Court Was Asked to Decide:

Whether the Circuit Court correctly dismissed the plaintiff's complaint against a health care provider because the plaintiff did not comply with *W.Va. Code § 55-7B-6(a)-(b*) which requires that a Notice of Claim and a Certificate of Merit must be served on any defendant at least thirty days before filing suit?

What the Court Decided:

The Supreme Court affirmed the dismissal of the action because the plaintiff did not comply with the mandatory pre-suit filings required under the Medical Professional Liability Act (MPLA).

Facts:

McLaughlin was a wrongful death case in which the plaintiff claimed that the defendants negligently released a psychiatric patient, who later acted erratically in two restaurants and was struck and killed by a car and died on December 28, 2013. His Estate (the Plaintiff) filed two separate complaints, but did not serve a Notice of Claim and Certificates of Merit as required by the MPLA *(W.Va. Code § 55-7B-6(a).)* The first case, filed on December 23, 2014, was dismissed on April 13, 2015. On January 6, 2016, the plaintiff's motion to "alter or amend" the Dismissal Order under WVRCP 59(e) was denied, and the circuit court made it "abundantly clear" that the claims were subject to the MPLA, meaning "a screening certificate of merit was required due to the complex medical issues and decisions at the center of the case." While the Rule 59 motion was pending in the first case, Plaintiff filed the second case on December 22, 2015, again without a Notice of Claim and Certificate of Merit. Seven months later, plaintiff provided a Notice of Claim, while promising to detail the claims "in a forthcoming screening certificate of merit," which was not produced until after the defendants moved to dismiss the second case. Then, plaintiff filed a Certificate of Merit which was "created and produced approximately eleven months after the filing of the complaint." The Circuit Court dismissed the action on February 3, 2017 and denied a motion to "alter or amend" its Order on April 17, 2017, noting that in filing the second complaint, plaintiff or his counsel 'knowingly and intentionally disregarded the clear language of the prior Memorandum Opinion and Order, as well as the language of *W.Va. Code § 55-7B-6(a)-(b).'*" The court also found that petitioner waited nearly one year after refiling his complaint to produce a screening certificate of merit.

Holding:

In a Memorandum Decision, the Supreme Court of Appeals affirmed the dismissal of the two complaints because Plaintiff's allegations involved complex medical issues which mandated that a screening certificate of merit was required to be timely filed pursuant to *West Virginia Code § 55-7B-6.* Petitioner had ample time to file the certificate during the pendency of the first complaint and prior to filing the second complaint. However, he chose to wait until approximately twenty months after the filing of the first complaint before finally presenting the Circuit Court with the certificate. Further, when the Circuit Court was considering the Motions to Dismiss, at no point did petitioner present argument or evidence, as he does here, that he experienced any difficulties in securing the decedent's medical records or an expert review of those records." The Supreme Court also rejected the claim that the Circuit Court improperly applied the doctrine of collateral estoppel, because the Petitioner's argument was "a single sentence that does not cite any statute, rule of law, or legal precedent" in violation of West Virginia Rule of Appellate Procedure 10(c)(7), which requires that briefs "contain an argument exhibiting clearly the points of fact and law presented . . . and citing the authorities relied on, under headings that correspond with the assignments of error."

Impact on Business:

McLaughlin is a favorable decision because it enforces the mandatory requirements of *West Virginia Code § 55-7B-6*. A series of prior decisions enforced those requirements, but in some measure still allowed a plaintiff to cure defects within a year of dismissal. Where there is a complete failure (or refusal) to comply with the statute, *McLaughlin* demonstrates that complaints should be dismissed. Memorandum Decisions do not contain syllabus points and are of less precedential value; however, Memorandum Decisions by rule are issued when the Court finds "no substantial question of law."

West Virginia Chamber
HEALTHCARE / MEDICAL MALPRACTICE

First Mercury Ins. Co. v. Russell
806 S.E.2d 429 (W.Va. 2017)

What the Court was asked to Decide:

Does coverage exist for a statutory deliberate intent action when the employer's commercial general liability policy is amended by an endorsement that includes a "Stop Gap—Employers Liability Coverage Endorsement—West Virginia" that expressly provides coverage for bodily injury to employees, as well as an exclusion for statutory deliberate intent claims?

What the Court Decided:

The Court held that the policy at issue was internally inconsistent and ambiguous and, therefore, interpreted the policy in favor of the insured and affirmed the circuit court's partial summary judgment rulings.

Facts:

In 2012, Kimes Steel sought to purchase various types of insurance coverage to meet the insurance requirements for a potential client contract with James River Coal. Mr. Shannon Kimes, the principal of Kimes Steel, worked with an independent insurance agent who solicited quotes for the required insurance coverage based upon a list provided by James River Coal. First Mercury, the Petitioner, a surplus line carrier who is not admitted or licensed to engage in the insurance business in West Virginia, responded to the solicitation with a bid to provide the coverage required by James River Coal.

Nevertheless, Kimes Steel then purchased two insurance policies from First Mercury. The First Mercury CGL policy contains a standard exclusion for employer's liability for injuries to employees; however, the standard exclusion is modified by an endorsement identified as "Stop Gap—Employers Liability Coverage Endorsement—West Virginia" ("Stop Gap"), that was specifically requested by Kimes Steel. The First Mercury excess policy includes a standard "follow form" provision, which incorporates the terms of the underlying policy.

The first two insurance policies were in place when Respondent Jeffrey Russell was involved in a workplace accident at Kimes Steel in May 2013. The Russells filed their complaint in February 2014, alleging that Kimes Steel acted with "deliberate intention" as defined in *W.Va. Code §23-4-2* (2005). The Russells further alleged that Kimes Steel required its employee, Jeffrey Russell, to perform his job duties without required safety equipment, instructions, and precautions for working that presented a high degree of risk and strong probability of serious injury or death.

First Mercury issued a denial of coverage letter to Kimes Steel in May 2014, informing that First Mercury would not provide a legal defense, nor would it indemnify Kimes Steel for any damages stemming from liability to the Russells. First Mercury also filed a declaratory judgment action in the U.S. District Court for the Southern District of West Virginia seeking a declaration that the policies provided no coverage for the Russells' claims. The declaratory judgment action was dismissed by the court, and the Russells amended their complaint against First Mercury alleging that First Mercury is obligated to provide a defense and indemnification to Kimes Steel under the insurance policies. In October 2014, Kimes Steel filed a cross-claim against First Mercury, asserting breach of contract and bad faith arising from Petitioner's denial of coverage to Kimes Steel with respect to the Russells' claims.

All parties moved for partial summary judgment on the coverage issues. In May 2016, the circuit court issued an order denying First Mercury's Motion for Partial Summary Judgment, granting the Russells' Cross-Motion and Defendant Kimes Steel's Motion for Partial Summary Judgment on Coverage issues. The circuit court based its findings on the conclusion that the Stop Gap endorsement language is ambiguous with respect to covering the Russells' deliberate intent action. Additionally, the circuit court concluded that Kimes Steel had a reasonable expectation of coverage for the Russells' claims, that the policy language rendered the stop gap coverage illusory, and that Petitioner was estopped from denying coverage and owed Kimes Steel a duty to defend. First Mercury appealed this order to the West Virginia Supreme Court of Appeals.

Holding:

The Supreme Court affirmed the circuit court's order finding that the Stop Gap policy was ambiguous and must be interpreted in favor of the insured, Kimes Steel, and thus, the policy provides coverage for the Russells' deliberate intent claims.

The Stop Gap endorsement provides, in relevant part:

A. The following is added to Section I- Coverages:

COVERAGE- STOP GAP- EMPLOYERS LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated by West Virginia Law to pay as damages because of "bodily injury by accident" or "bodily injury by disease" to your "employee" to which this insurance applies. . . .

A CGL policy protects a business against a variety of liability claims, but typically does not provide coverage for employee bodily injury arising out of employment. As opposed to workers' compensation coverage which is designed to release both an employer and its employees from common-law rules of liability and damage and provide compensation for injuries to employees without the burdensome requirements of proving common-law negligence. Between these two protections lies a "gap" in coverage. In this gap are claims made against a business by injured employees whose claims are not generally compensable under the workers' compensation system. Stop gap is the gap filler intended for the purpose of providing coverage for employers when employees are able to bring an action for injury despite workers' compensation immunity.

The heading of the policy provides stop gap coverage for claims made against a business by injured employees whose claims are not generally compensable under the workers' compensation system. On the other hand, the language that follows the heading attempts to limit coverage to bodily injury by accident or bodily injury by disease to your employee to which this insurance provides. Thus, the heading displays a clear, yet different, message than the policy language that follows. Therefore, the portion of the Stop Gap policy is ambiguous and must be interpreted in favor of Kimes Steel because it is well settled West Virginia law that ambiguous terms in insurance contracts are to be construed in favor of the insured.

The Petitioner argued that the policy contained exclusionary language that stated:

2. Exclusions

This insurance does not apply to:

. . . . .

1. West Virginia Workers Compensation Law, Sect. 23.4.2

"Bodily injury by accident" or "bodily injury by disease" caused by any action determined to be of deliberate intentions as specified under West Virginia Workers Compensation Law, Sect. 23-4-2.

West Virginia Chamber
INSURANCE

It has been established that an insurer wishing to avoid liability on a policy purporting to give general coverage must make exclusionary clauses very clear and obvious. The language used in First Mercury's policy Exclusion 1 is very clear, but the policy issued provides coverage for deliberate intent claims, and in accompanying plain and clear exclusion denying the very same coverage. This inclusion of both the Stop Gap Endorsement and Exclusion 1 creates additional ambiguity. Thus, ambiguous terms in insurance contracts are to be construed against the insurance company and in favor of the insured and the order of the circuit court is affirmed.

Impact on Business:

An insurance policy will be interpreted in favor of the insured when it is found to be ambiguous. It is important for insurers to write their policies clearly without conflicting terms or ambiguous language because the courts will interpret those policies in favor of the insured rather than the insurers.

Ottaviano v. Durst
2017 W.Va. LEXIS 652 (W. Va. September 5, 2017)

<u>What the Court was asked to Decide:</u>

Did the circuit court err when it dismissed the Petitioner's complaint for failure to state a claim and failed to consider the exception of the litigation privilege in concluding that Petitioner could not assert a third-party bad faith cause of action under the West Virginia Human Rights Act?

<u>What the Court Decided:</u>

The Court affirmed the circuit court's order as appropriate under Rule 21 of the Rules of Appellate Procedure because the Petitioner failed to state a claim upon which relief could be granted in her complaint.

Facts:

Petitioner's complaint details actions that occurred in an underlying civil action. The underlying action stemmed from an accident in which John Ottaviano ("John"), the father of Mark Ottaviano ("Mark"), ran over and killed Mark with his vehicle. State Farm Mutual Automobile Insurance Company ("State Farm") insured the vehicle that John was operating. Mark's estate filed a wrongful death action against John, and State Farm assigned defense for John. Respondent, an attorney employed by the law firm hired to represent John, was counsel for John. The wrongful death action was tried before a jury, and the jury returned a verdict of $190,000.00 to Mark's estate. State Farm paid Mark's estate the bodily injury policy limits of $100,000.00, plus costs.

Following the trial and resolution of this underlying lawsuit, Petitioner filed suit against State Farm, and its defense counsel, Tiffany Durst, alleging that they are liable for damages under the West Virginia Human Rights Act, asserting first- and third-party bad faith claims. The complaint states that the Respondents engaged in discriminatory practices by failing to competently investigate the underlying case and make a reasonable offer of settlement.

The Petitioner's complaint characterized Respondent Durst as an agent for State Farm, and claimed that she and State Farm engaged in discriminatory practices that resulted in economic loss to the Petitioner. Petitioner further asserted that the circuit court erred in finding that the litigation privilege prohibited suit against respondent because the court failed to consider an exception to that privilege. Petitioner claimed that the circuit court erroneously concluded that counsel Durst was not an agent of State Farm. Finally, the Petitioner claimed that *W. Va. Code §33-11-4* does not preclude a third-party cause of action against an insurer under the West Virginia Human Rights Act.

Respondents moved to dismiss Petitioner's complaint against her for failure to state a claim upon which relief can be granted, and the circuit court granted the motion. The case was appealed to the West Virginia Supreme Court.

Holding:

The Supreme Court held that the dismissal of Petitioner's complaint under West Virginia Rule of Civil Procedure 12(b)(6) was proper and warranted because the complaint failed to assert a claim for malicious prosecution or fraud, because the allegations in Petitioner's complaint concerned conduct which occurred during the course of Respondent Durst's representation, and because the conduct was related to the underlying civil action.

The Court found that there were no allegations that Respondent Durst acted outside the scope of her representation or acted solely for her own interests. Respondent Durst was not an

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attorney-agent of State Farm. Defense attorneys are hired to represent insureds and are not engaged in the business of insurance; thus, she was not State Farm's agent and was not liable for the bad faith claims. "The Unfair Trade Practices, Act W. Va. Code §§33-11-1 to 10, and the tort of bad faith apply only to those persons or entities and their agents who are engaged in the business of insurance." Syl. Pt. 2, *Barefield v. DPIC Cos., Inc.,* 600 S.E.2d 256, 258 (2004). Lastly, the Petitioner failed to assert a claim under the West Virginia Human Rights Act because Petitioner failed to assert membership in a protected class.

Impact on Business:

When an insurance company assigns a case to a law firm to represent its insured, the lawyer who handles the case does not become the insurer's agent and cannot be held liable for bad faith claims. It is important that an agency relationship does not exist because the lawyer is a third-party who cannot speak on behalf of the insurer.

McNair v. Johnson & Johnson
2018 WL 2186550 (W. Va. May 11, 2018)

<u>What the Court Was Asked to Decide:</u>

The Court was asked to answer the following certified question from the United States Court of Appeals for the Fourth Circuit: "Whether West Virginia law permits a claim of failure to warn and negligent misrepresentation against a branded drug manufacturer when the drug ingested was produced by a generic manufacturer ?"

<u>What the Court Decided:</u>

No – the Supreme Court refused to adopt the theory of "innovator liability" in West Virginia. The Supreme Court issued the following syllabus point: *"There is no cause of action in West Virginia for failure to warn and negligent misrepresentation against a brand name drug manufacturer when the drug ingested was produced by a generic drug manufacturer."*

Facts:

Plaintiffs, the McNairs, sued Janssen Pharmaceuticals alleging that "Mrs. McNair developed acute respiratory distress ("ARDS") after ingesting the generic drug levofloxacin which was manufactured by Dr. Reddy's Laboratories ("Dr. Reddy's")." Janssen was the "innovator" of the drug, which was originally trademarked and sold it under the brand Levaquin®. As required by the FDA, "Janssen produced the warnings on the label that accompanied the distribution of Levaquin, which were subsequently used by generic manufacturers of levofloxacin." Plaintiffs claimed that "Janssen as aware that ARDS had been linked to the use of levofloxacin but negligently failed to include a warning, knowing this omission would exist not only in its distribution of Levaquin, but also in the warnings accompanying generic versions of the drug."

The plaintiffs sued Janssen, claiming that "even though Mrs. McNair took a generic version of the drug, Janssen had exclusive control of the content of the warnings that were published to the public and to health care providers for both the brand name and the generic forms of the drug." The plaintiffs argued that Janssen was liable, even though Mrs. McNair took the generic version of the medication. The plaintiffs also argued that they could not sue Dr. Reddy's because federal law precluded an action against the generic manufacturer based on a failure to warn "because the generic manufacturer was prohibited from changing the warning on its label in any way from the warning label prepared by Janssen." Thus, because actions against generic manufacturers are preempted under federal law, the plaintiffs argued that "granting Janssen's motion would mean no party is liable for the alleged misinformation that purportedly caused Mrs. McNair's injury."

The United States District Court granted summary judgment in favor of Janssen, finding that "because Janssen did not manufacture the product that Mrs. McNair ingested, there is no proximate cause and no basis on which to hold Janssen liable." On appeal, the Fourth Circuit certified the question of "innovator liability" to the Supreme Court of Appeals of West Virginia.

The U.S. Chamber of Commerce and the West Virginia Chamber of Commerce submitted an *Amicus* Brief in this appeal, urging the Supreme Court to reject an expansion of "innovator liability" in West Virginia.

Holding:

The Supreme Court rejected the expansion of "innovator liability" in West Virginia. The Court issued a lengthy opinion, reviewing FDA regulation of pharmaceutical warning labels, decisions from other state and federal courts, and West Virginia law. The Court concluded that "[r]equiring the defendant in a products liability case to be either the manufacturer or the seller of the

product is the majority rule in this country." The Court also declined to stray from the majority rule because to do so would require it to weigh public policy considerations already decided by Congress and the FDA, and therefore declined to create a remedy. Finding the majority rule consistent with West Virginia law, the Court issued a new syllabus point, stating: "There is no cause of action in West Virginia for failure to warn and negligent misrepresentation against a brand name drug manufacturer when the drug ingested was produced by a generic drug manufacturer."

The Supreme Court's decision was consistent with the position asserted by the U.S. Chamber and the West Virginia Chamber of Commerce in its Amicus Brief.

Justices Davis and Workman dissented. The *McNair* case is currently subject to the plaintiffs' Motion for Reconsideration which will be considered in the Fall 2018 Term of Court.

Impact on Business:

This is a favorable decision in pharmaceutical products liability actions. It places West Virginia in the mainstream of other courts which have refused to adopt the theory of innovator liability.

J.C. by & through Michelle C. v. Pfizer, Inc.
814 S.E.2d 234 (W. Va. 2018)

<u>What the Court Was Asked to Decide:</u>

Whether the plaintiff had to support its "failure to warn" claims in a pharmaceutical products liability action with expert testimony ?

<u>What the Court Decided:</u>

The Supreme Court held that expert testimony is required. Because the pharmaceutical claims involved complex matters of science and medicine beyond the common knowledge of the average juror, the plaintiff was required to support its claims with expert testimony. The Supreme Court affirmed summary judgment in favor of the defendant.

Facts:

This case was one of several cases where the plaintiffs claimed injuries as a result of taking the prescription drug Zoloft ®. All of the claims were referred to the Mass Litigation Panel. In this case, the plaintiff claimed that drug manufacturer Pfizer "negligently failed to adequately warn them of the risk of birth defects through the ingestion of Zoloft during pregnancy…"

Plaintiff named an expert witness who was unable to appear for deposition "due to unspecified health reasons." After Pfizer moved to disqualify the expert, the court allowed the plaintiff, over Pfizer's objection, to substitute another expert. After plaintiff's motions to limit Pfizer's ability to depose the second expert were denied, the expert witness was withdrawn without explanation. Pfizer moved for summary judgment, arguing the plaintiff's failure to warn claims required expert testimony. The plaintiff, contrary to earlier arguments that the court could not deny them the right to have "critical" expert testimony, later argued that expert testimony was not necessary and that the claim could be proven through Pfizer's own witnesses and documents.

The Mass Litigation Panel ("MLP") granted summary judgment in favor of defendant Pfizer. The MLP ruled that an expert witness was required in a pharmaceutical "failure to warn" case, because it involves "complex technical, scientific, and medical issues beyond the common knowledge and experience of the average person." The MLP also found "[w]hether Pfizer behaved as a reasonably prudent manufacturer would when warning about the use of Zoloft during pregnancy involves complex issues of science and medicine"; that "this is not a case where the label is silent regarding the alleged risk" because the label during the relevant time carried the Category C pregnancy warning; that "the FDA has repeatedly approved Zoloft's label"; that "numerous independent organizations have concluded that the evidence does not support a causal link between Zoloft and birth defects"; that the "inclusion of warnings that are not supported by the science can lead to unintended and adverse consequences for the patient." and that the petitioners' "prior statements regarding the importance of their labeling expert and the prejudice to their case without such an expert are inconsistent with any assertion that they do not need such an expert because the alleged inadequacy of the Zoloft label is "obvious."."

The MLP also analyzed the documents which the plaintiffs claimed proved their case, including "animal studies, epidemiology, adverse event reports, Core Data Sheets, and FDA regulations," concluding they were "not within the common knowledge and experience of the average juror…"; "[that] such evidence cannot substitute for expert testimony on the adequacy of the Zoloft label"; and that "[n]either the interpretation of such studies nor the appropriate method for distilling such lengthy and complex information into a prescription drug label is within the ordinary knowledge and experience of the average juror."

West Virginia Chamber
PRODUCTS LIABILITY

The MLP therefore concluded that "the adequacy of Zoloft's label required expert testimony." Because the petitioners had withdrawn their expert witness, the Panel concluded that they could not meet the burden of proof on an essential element of their claim.

Holding:

In a lengthy opinion, the Supreme Court agreed with the MLP's analysis and conclusions that expert testimony is required to prove the liability and causation elements of the plaintiffs' pharmaceutical "failure to warm" claim. The Supreme Court upheld the lower Court's ruling of summary judgment in favor of Pfizer.

The Court found plaintiff had the burden to prove an inadequate warning or "to prove that Pfizer acted unreasonably regarding the pregnancy warning on its 2003 Zoloft label, i.e., the Category C warning mandated by the FDA, as well as the additional warning that patients should 'notify their physician if they become pregnant or intend to become pregnant during therapy[,]' and that the failure to adequately warn proximately caused their alleged injuries." Recognizing the label's approval by the FDA was evidence of reasonableness, the Court stated "our precedent reflects that expert testimony will be necessary to sustain an evidentiary burden when the matters involved are beyond the common knowledge and experience of the average juror."

Like the MLP, the Supreme Court also noted that the plaintiffs opposed Pfizer's motion to disqualify their first expert, arguing that the expert's testimony "was critical to their claim," and expressed amazement at the plaintiff's withdrawal of their second expert witness.

After a detailed discussion of West Virginia precedent on the need for expert testimony and the common knowledge exception, the Court concluded "[o]ur consideration of the complex issues in the case at bar concerning what should and should not be included in a drug label demonstrates that this is a case where expert testimony is necessary…," and "[t]o find otherwise, following our consideration of the facts, claims, and circumstances of this case, would be to invite an unsound, unintelligent, and speculative verdict based upon matters beyond the cognition and experience of the average juror."

The court issued a new syllabus point: *"The determination of whether expert testimony is necessary to sustain the burden of proof in complex cases involving matters of science, medicine, engineering, technology and the like is made on a case-by-case basis. When the issues involved are beyond the common knowledge and experience of the average juror, expert testimony shall be required."*

Impact on Business:

This is a favorable opinion which recognizes that complex pharmaceutical "failure to warn" and causation issues require plaintiffs to produce expert testimony. Requiring qualified experts is consistent with the Court's jurisprudence, but now applies that principle to pharmaceutical product liability actions based on failure to warn. As the Court recognized, allowing complex cases to proceed without experts would invite "an unsound, unintelligent, and speculative verdict based upon matters beyond the cognition and experience of the average juror." This decision is consistent with the mainstream of cases from other jurisdictions.

State ex rel. Fairmont State University Board of Governors v. Wilson
806 S.E.2d 794 (W. Va. 2017)

<u>What the Court was Asked to Decide:</u>

Whether the Circuit Court of Marion County was the proper venue for a lawsuit filed against the Fairmont State University Board of Governors ("Fairmont State") and the West Virginia Higher Education Policy Commission ("HEPC") ?

<u>What the Court Decided:</u>

Pointing to the "clear directive" of West Virginia's exclusive venue statute for actions against the State, *West Virginia Code §14-2-2,* the Supreme Court of Appeals concluded that lawsuits against state agencies may be brought only in the Circuit Court of Kanawha County.

Facts:

Faculty members of Fairmont State University filed a complaint in the Circuit Court of Marion County seeking injunctive relief, a writ of mandamus, and a declaratory judgment against Fairmont State and the HEPC for alleged violations of the Open Governmental Proceedings Act, the Freedom of Information Act, as well as for HEPC's alleged failure to prevent the illegal actions.

Fairmont State and HEPC filed identical motions to dismiss based on, among other things, the exclusive venue statute that required lawsuits against state agencies to be filed in Kanawha County. *W. Va. Code §14-2-2.*

The Circuit Court denied the Motions to Dismiss. Fairmont State filed a petition for a Writ of Prohibition with the West Virginia Supreme Court of Appeals.

Holding:

The West Virginia Supreme Court of Appeals held that the Circuit Court had exceeded its legitimate powers in permitting the action to proceed in Marion County. The Court examined the "exclusive venue" statute for actions filed against the State, West Virginia Code §14-2-2, which provides:

> The following proceedings shall be brought and prosecuted only in the circuit court of Kanawha County: (1) Any suit in which . . . a state agency is made a party defendant.

W. Va. Code § 14-2-2(a). There was no dispute that Fairmont and HEPC fell within the statute's definition of a "state agency." See *W. Va. Code §14-2-3* (defining state agency for purposes of venue as a "state department, board, commission, institution, or other administrative agency of state government").

Additionally, the Court noted that none of the statutory exceptions to this general venue rule applied to this specific case (or to these specific state agencies). Of particular relevance, the Court explored the statutory exceptions set forth in *West Virginia Code § 14-2-2a,* which expressly exempted West Virginia University and Marshall University from the requirement that actions against those institutions may be brought only in Kanawha County. In applying this same statutory provision, the circuit court conceded that it mentioned only WVU and Marshall, yet the circuit court extended its application to Fairmont State "because it could think of no reason why the Legislature would treat Fairmont State differently[.]"

The Supreme Court rejected this arbitrary addition to the statute and held that the specific (and unambiguous) exemption for WVU and Marshall did not function to extend the exemption to other universities. The Court reasoned that courts must not read into a statute that which is not there and that none of the other exceptions to the rule were applicable. Accordingly, the Court held that *West Virginia Code § 14-2-2* required that the matter be brought in Kanawha County.

Subsequent Legislative Action:

Perhaps in response to this decision, the West Virginia Legislature amended *West Virginia Code § 14-2-2(a)*, effective June 6, 2018, to read as follow:

> Any suit, action, or proceeding in which the state, the Governor, any other state officer, or a state agency is made a party defendant . . . may be brought and prosecuted in the circuit court of any county wherein the plaintiff or petitioner who is appearing in the action or proceeding resides, or where the cause of action arose; or, alternatively, in the circuit court of Kanawha County. *W. Va. Code § 14-2-2.*

Impact on Business:

Ultimately, the impact on business remains to be seen. The Supreme Court of Appeals' decision was a straight forward application of the then-existing language of *West Virginia Code §14-2-2*. Yet, the subsequent legislative amendment in 2018 has altered the landscape. Originally, the rationale for requiring actions against state agencies to be filed in Kanawha County was to prevent the inconvenience and possible public detriment that could be caused by requiring state officials to defend their official conduct and to protect the State's financial interests in remote parts of the State far removed from the capital. Modern developments, one would assume, have alleviated much of the concerns underpinning this rationale.

However, the newly enacted version of *W. Va. Code § 14-2-2* does contemplate that lawsuits that have historically been filed in the seat of government – including actions designed to challenge the constitutionality of official state conduct or to enjoin certain state action – could now be filed in any county in the State, forcing state officials to defend "vexatious litigation in counties far distant from their daily duties." *Pittsburgh Elevator Co. v. W. Virginia Bd. of Regents*, 172 W. Va. 743, 758, 310 S.E.2d 675, 690 (1983) (Neely, concurring in part and dissenting in part). At the same time, businesses that seek legal relief against the State or her officers now have the option of pursuing such an action closer to home, with the attendant convenience and savings in travel costs and legal fees.

Edward Reed v. Excel Logistics, Inc.
Case No. 17-0864 (W.Va. June 6, 2018)

What the Court was asked to Decide:

Whether, in the absence of an adversarial proceeding and ruling, an employer may declare and collect as an overpayment those temporary total disability benefits which were paid beyond the statutory limit for such benefits?

What the Court decided:

No – an employer is prohibited from declaring an overpayment in the absence of a petition to modify the award and an adversarial proceeding which resulted in a favorable ruling to the employer. The Court ruled that in order for an employer to recover such an overpayment of temporary total disability benefits, there must be an adjudicated final decision in the employer's favor.

Facts:

The claimant sustained an injury on June 27, 2013 and temporary total disability benefits were instituted by the employer's carrier. Those benefits continued until November 25, 2015, when they were terminated as a result of the claimant's treating physician determining that the claimant had reached maximum medical improvement.

After the termination of temporary total disability benefits, the claimant was referred out for a permanent partial disability evaluation and was granted a 4% permanent partial disability award, equal to $7,553.44. However, prior to the payment of the permanent partial disability award, the carrier's claim examiner determined that the claimant had been overpaid temporary total disability benefits beyond the maximum allowable period of 104 weeks as specified by West Virginia Code § 23-4-6(c). The claims examiner then entered an Order declaring that the claimant had been overpaid 156 days of temporary total disability benefits and that the overpayment was being deducted from the permanent partial disability award, leaving the claimant still owing the employer $2,956.28. The claimant protested and, after litigation at the Office of Judges, an Order was entered by the Administrative Law Judge reversing the claims examiner's finding and holding that the employer had failed to properly terminate the claimant's benefits in June of 2015.

The employer pursued an appeal to the Board of Review, which reversed the Office of Judge's ruling and reinstated the claims examiner's original decision regarding the overpayment. The claimant appealed the Board of Review's decision to the West Virginia Supreme Court of Appeals.

Holding:

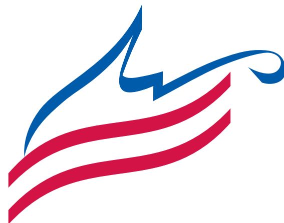
The Court held that notwithstanding the statutory limitation of 104 weeks for the payment of temporary total disability benefits, the employer was prohibited from declaring an overpayment in the absence of a petition to modify the award and an adversarial proceeding which resulted in a favorable ruling to the employer. The Court ruled that in order for an employer to recover such an overpayment of temporary total disability benefits, there must be an adjudicated final decision in the employer's favor.

The Court further held that once a work-related injury has been ruled compensable and a claimant has been awarded temporary total disability benefits, a claimant will continue to receive such benefits until the employer properly seeks to modify or terminate that award. The Court further held that while the modification or termination is pending, if the employer is required to continue payments and the claimant is later found not entitled to the benefits, an overpayment exists for which the employer may seek recovery.

It should also be noted that Justice Walker filed a dissenting opinion and concluded that the majority had simply missed the point that the claimant had received benefits beyond what he was permitted by statute to receive.

Impact on Business:

This ruling by the Supreme Court makes it difficult to collect an overpayment temporary total disability benefits without the employer or its representative resorting to an adversarial proceeding, notwithstanding that our statute does not permit an employer to file a protest to institute such a proceeding, except for occupational pneumoconiosis claims.



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