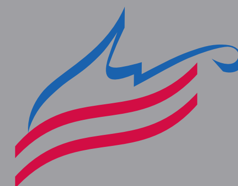
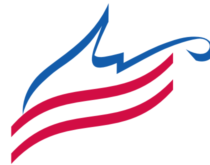
COURT WATCH

A report prepared for members of the West Virginia Chamber of Commerce 2019

IMPORTANT DECISIONS OF THE WEST VIRGINIA SUPREME COURT OF APPEALS



WEST VIRGINIA CHAMBER



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 2018 and Spring 2019 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 2019

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Rent-A-Center, Inc. v. Ellis
2019 WL 1982983 (April 30, 2019)

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

In this case, the Supreme Court determined whether Rent-A-Center was entitled to compel arbitration of a former employee's workers' compensation discrimination claim based upon the arbitration agreement that the employee signed at the time when she was hired.

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

The Court first examined whether the language of the delegation provision reflects "a clear and unmistakable intent by the parties to delegate state contract law questions about the validity, revocability and enforceability of the arbitration agreement to an arbitrator." The Court then employed the "clear and unmistakable" test to determine that it did. Next, the Court applied generic state contract law to determine the validity of the delegation clause of the arbitration agreement. The Court looked to both procedural unconscionability and substantive unconscionability to determine if the delegation clause was unenforceable on grounds of unconscionability.

The Court held under the Federal Arbitration Act that there was a clear and unmistakable agreement by the parties to delegate disputes about the enforceability of the arbitration agreement to the arbitrator and therefore, it was enforceable. The Court also agreed with Rent-A-Center that the delegation clause itself did not affect any burdens or benefits arising under the worker's compensation statute. The Court recognized that the employee sought to challenge the validity of the agreement requiring arbitration of her underlying worker's compensation discrimination claim, but this dispute had been delegated to the arbitrator.

Facts:

Plaintiff was terminated from employment based on her absences from work and then filed a workers' compensation discrimination claim against Rent-A-Center. Rent-A-Center moved to compel arbitration relying on the arbitration agreement signed at the time of Plaintiff's hiring in March 2011. Plaintiff challenged the arbitration agreement's delegation clause, which required that any challenge to the interpretation, applicability, enforceability or formation of the agreement be resolved by the arbitrator and not any court.

The Circuit Court found the delegation clause unconscionable and refused to enforce the arbitration agreement. On appeal, Rent-A-Center contended that the delegation clause was neither unconscionable nor unenforceable and therefore the clause should have been enforced and Plaintiff's matter sent to arbitration.

Holding:

By holding that the Circuit Court should have referred the parties' arguments about the enforceability of the arbitration agreement to an arbitrator, Justice Walker confirmed that when the delegation clause in an arbitration agreement clearly and unmistakably evidences the parties' intent to send gateway questions of arbitration to an arbitrator, the question should be sent to arbitration.

The Court stated that the delegation clause was clearly agreed to by the parties and that it was neither unconscionable nor unenforceable and therefore the agreement should have been enforced as signed and sent to an arbitrator. The Circuit Court's decision was reversed and remanded with directions to refer Plaintiff's challenge to the enforceability of the arbitration agreement to an arbitrator in accordance with the parties' contract.

Impact on Business:

This decision shows the Supreme Court's continued willingness to enforce arbitration agreements that include a delegation clause when the agreement clearly and unmistakably evidences an intent to send gateway questions of arbitration to an arbitrator. Business should make sure that their arbitration agreements include a delegation clause so that going forward their disputes regarding the enforceability of an arbitration agreement can be directed to an arbitrator and not the Circuit Courts. This will allow businesses to rely on disputes being sent to arbitration to determine the overall enforceability of an arbitration agreement between an employer and employee when the proper delegation clause is agreed to by both parties.

Tri-State Pipeline, Inc. v. Steorts
Case No. 18-0183 (May 17, 2019)

What the Court was Asked to Decide:

In this case, the Supreme Court's Memorandum Decision related to a construction dispute that had already been arbitrated by Tri-State Pipeline ("Tri-State") and it tried to sue a third-party that did not participate in the arbitration. The Court determined that collateral estoppel applied to Tri-State because it had participated in the arbitration and therefore it was a bar to Tri-State bringing suit on the identical issue previously litigated at arbitration.

What the Court Decided:

The Court concluded that all four elements of collateral estoppel were met and Tri-State could not proceed with its suit on an issue previously litigated and decided during arbitration. Tri-State argued that Steorts should be held wholly liable and assume Tri-State's liability as determined by the arbitrator.

On appeal, the Supreme Court of Appeals of West Virginia affirmed the decision of the Circuit Court of Kanawha County, stating there was no merit for Tri-State's argument that collateral estoppel was not applicable to the case. The Court emphasized that the arbitrator's decision was binding and final and Tri-State's attempt to shift liability was an attack on the arbitrator's decision. Tri-State sought to re-argue the same issues presented to the arbitrator, with no new facts or evidence presented to the court.

Facts:

Tri-State performed excavation work pursuant to a contract with Skaff Family Limited Partnership ("Skaff"). During the project, Jason Steorts and Steorts Homebuilders ("Steorts") were onsite building homes within the subdivision. Tri-State dumped dirt onto nearby property owned by Ridgewood Pool ("Ridgewood"), causing a landslide and extensive property damage. Skaff thereafter compensated Ridgewood and later purchased the subject property. In December of 2013, Skaff filed an arbitration against Tri-State, asserting claims of negligence and breach of contract. Skaff sought to recover $251,948 for remediation of slips and other damages in connection with Tri-State dumping dirt on the Ridgewood property.

Skaff and Tri-State had a binding arbitration proceeding in November of 2014. Mr. Steorts testified at the proceeding that he directed Tri-State to dump dirt onto Ridgewood's property. The arbitrator therefore found Skaff and Tri-State were both negligent in causing the landslide. The arbitrator reasoned that even if Steorts told Tri-State to place the dirt on the Ridgewood property, Tri-State was partially responsible because the property line was clearly shown on the map provided to Tri-State, and Tri-State's employee did not consult the map prior to dumping the dirt. The arbitrator awarded Skaff half of the claimed damages in the amount of $125,974. Skaff's claims against Tri-State were released in March of 2015.

In July 2016, Tri-State filed its Second Amended Third-Party Complaint against Steorts, seeking to recover $198,272 in damages it had paid to Skaff following arbitration. Steorts filed motions for summary judgement on grounds that Tri-State's claims were precluded by the earlier arbitration. The Circuit Court of Kanawha County, West Virginia granted summary judgment in favor of Steorts stating the claims were barred by collateral estoppel and/or res judicata.

Holding:

By holding that Tri-State was estopped from bringing its claim and that the arbitrator's decision was binding, the Court confirmed that the elements of collateral estoppel are satisfied when the issue brought is identical to the issue previously litigated at arbitration. The Court implied that bringing a claim based on identical facts will not be permitted under law in an attempt to shift liability, even if the first claim is litigated in arbitration.

The Court also confirmed that arbitration decisions serve as a final adjudications, satisfying the second element of collateral estoppel, and the final two elements are satisfied when the party against whom the doctrine of collateral estoppel is raised had a full and fair opportunity to litigate the issue. This opinion by the Court essentially served to uphold the basis of collateral estoppel which seeks to prevent the same set of facts being litigated after the case has been decided whether in court or arbitration.

Impact on Business:

This decision shows the Supreme Court's continued efforts to enforce arbitration agreements as final and binding and prevent parties from re-litigating issues in an attempt to shift liability between parties. For the first time, our Supreme Court has placed an arbitration award on equal footing with a Circuit Court order. Here, a construction company is unable to re-litigate its liability in order to wholly shift liability to another party and recover damages. Moving forward, this will prevent businesses from entering litigation on an issue already settled in arbitration, and bar businesses from attempting to argue third-party claims against a party with whom it was previously determined to share liability.

SER WVU Hospitals, Inc. v. Gaujot
Case No. 18-0841 (June 5, 2019)

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

The Court was asked to overturn a decision of the Circuit Court of Monongalia County in denying West Virginia University Hospitals' motion to decertify a class-action suit regarding charges for producing copies of medical records.

Facts:

The Supreme Court of Appeals of West Virginia recently issued an opinion with major ramifications for class action litigation in West Virginia. On June 5, 2019, the Court issued its decision in *State ex rel. West Virginia Univ. Hospitals., Inc. v. Gaujot,* 829 S.E.2d 54 (W. Va. 2019), expressly adopting a more stringent standard for determining commonality under *West Virginia Rule of Civil Procedure 23(a)(2*) and requiring circuit courts in West Virginia to conduct thorough, meaningful analyses when determining whether or not to certify a class.

In *Gaujot*, the Plaintiffs alleged that West Virginia University Hospitals violated a previous version of *W. Va. Code § 16-29-2(a)* by charging $0.40 per page for medical records. Under that statute, medical records providers may charge an amount that "reimburses [the provider] . . . for all reasonable expenses incurred in complying with this article." Because the statute expressly recognizes that medical record providers can recover an amount that "reimburses" them for the costs to produce the records and that amount necessarily varies from record production to record production, West Virginia University Hospitals sought to decertify a previously certified class on the grounds that the class lacked commonality because the issue of liability under the statute could not be resolved on a class-wide basis and therefore commonality under *West Virginia Rule of Civil Procedure 23(a)(2)* did not exist. The circuit court denied West Virginia University Hospital's motion to decertify, and the Hospital then sought a writ of prohibition to review that denial. After argument, the Court granted the writ and remanded the matter to the circuit court for reconsideration.

Holding:

In granting the writ, the Court created six new syllabus points and re-emphasized two existing syllabus points to guide circuit courts in properly resolving class certification issues. The eight syllabus points created and re-affirmed by the Court can roughly be divided into three crucial points of law that govern class certification in West Virginia moving forward. First, the court re-emphasized that "[a] class action may only be certified if the trial court is satisfied, *after a thorough analysis,* that the prerequisites of Rule 23(a) of the West Virginia Rules of Civil Procedure have been satisfied." Based on the record below, the Court found that the circuit court violated this principle by improperly "persist[ing] in finding commonality without ever truly addressing the Hospitals' arguments or indicating with clarity the rationale for such findings." Put simply, the Court re-emphasized that "circuit court[s] must approach certification decisions in a conscientious, careful, and methodical fashion," and going forward, circuit courts must properly and thoroughly address and resolve all issues raised by the parties in its order certifying (or, hopefully, not certifying) the class.

Next, the Court expressly incorporated the heightened commonality test adopted by the Supreme Court of the United States in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 369 (2011) into *West Virginia Rule of Civil Procedure 23(a)(2).* Prior to the express adoption of this test, plaintiffs' attorneys frequently argued that any common question satisfied Rule 23(a)(2), regardless of whether that common question helped resolve the litigation. The Court expressly rejected this reading, stating "a 'question' 'common to the class' must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims." Commonality

therefore requires plaintiffs to show that the class presents questions that can be resolved in one fell swoop across the class, not simply that a number of plaintiffs suffered the same sort of harm.

Finally, the Court noted that the commonality analysis often "require[s] at least an initial review of the merits." Plaintiffs attorneys frequently attempted to evade commonality review by arguing that merits questions could only be examined *after* class certification under existing law. The Court rejected this argument, holding "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Put simply, courts may—and must—consider the merits of a plaintiff's class claims whenever those merits are critical to determine whether the plaintiff's claims present a common question sufficient to satisfy Rule 23(a)(2).

Impact on Business:

The Court's decision in *Gaujot* is a promising development in West Virginia class action law. It emphasized that class certification is not a rubber stamp—it must only be awarded after a thorough analysis of the plaintiff's claims to determine that Rule 23's requirements are satisfied. This heightened standard should help defend against improper classes in the future.

Employee Resource Group LLC v. Collins
2019 WL 2338500 (June 3, 2019)

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

The Court was asked to determine whether the circuit court erred in refusing to enforce the Arbitration Agreement based upon its determination that the agreement was not signed by the employee.

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

Under West Virginia's *lex loci delicti* choice-of-law rule, the Court held that the arbitration agreement was enforceable under applicable Kentucky law because electronic signatures satisfy signature requirements and the Respondent did not produce sufficient evidence to overcome Petitioner's prima facie showing of an existing, valid arbitration agreement.

Facts:

Employee Resource Group, LLC (ERG), the Petitioner, appealed the Circuit Court of Mingo County order denying its motion to enforce an arbitration agreement against Anita Collins, the Respondent. Petitioner contended the circuit court erred in finding that it failed to produce a signed copy of the agreement and therefore asked that the Supreme Court enforce the agreement.

Respondent was hired by ERG to work at Wendy's in South Williamson, Kentucky. She was sent an email containing an "Agreement and Receipt for Dispute Resolution Program" (the Arbitration Agreement) and was asked to review and electronically sign it, along with other documents. A copy of that digital signature was submitted to the circuit court reading "Digitally Signed by: Anita Collins; Date: Apr-24-2016 1:12:25 PM EDT" on the line above "Associate Signature."

On November 3, 2016, Respondent was terminated from her position at Wendy's. Upon termination, she filed a complaint that she was sexually harassed at her workplace and was fired from her employment because she reported this ongoing harassment. Respondent's claims included (1) violation of the *Kentucky Civil Rights Act, Ky. Rev. St. § 344.040*; (2) retaliation in violation of the Kentucky Civil Rights Act; (3) wrongful termination; (4) extreme and outrageous conduct; (5) hostile work environment; and (6) negligent supervision/retention.

Petitioners filed answers and a motion to compel arbitration in response to Respondent's claims. Respondent countered that the arbitration agreement was unenforceable because she "did not sign the document." She argued that while the typed name "Anita Collins" appeared in the areas where the document requests a digital signature, there were no actual signatures on the document. Respondent further claimed that she had never seen or signed the agreement.

On May 22, 2017, the circuit court denied Petitioners' motion to enforce arbitration and granted petitioners leave to "re-address said motion after" the parties engaged in discovery. During discovery, Respondent testified that she had never signed the documents or provided necessary paperwork of the hiring process. Subsequent to her testimony, petitioners produced a copy of respondent's I-9, driver's license, and W-4. Mr. Ball, Ms. Collin's hiring manager, testified that it was his customary routine to review, on his own, and with the employee, any documents sent to the employee during the hire.

Respondent again contended that she "did not in fact sign the document," but rather the digital signatures were pre-stamped by Mr. Ball. The circuit court denied Petitioner's motion to enforce arbitration on December 5, 2017. The circuit court found that the employee's name was

pre-stamped onto the document and that under Kentucky law "an individual cannot be legally bound by an agreement to which she did not consent." The court held that no enforceable contract existed between Petitioner and Respondent, to which Petitioner appealed.

Holding:

The Supreme Court noted that under the Federal Arbitration Act, "whether a valid arbitration agreement exists between the parties is determined by the applicable contract law." Additionally, under West Virginia's choice-of-law rule, the "substantive rights between the parties are determined by the law of the place of injury." Thus, because the agreement and the allegations forming the basis of Respondent's claims against petitioners took place in Kentucky, Kentucky law is necessarily applied.

Under Kentucky law, "the party seeking to enforce an agreement has the burden of establishing its existence, . . . once prima facie evidence of the agreement has been presented, the burden shifts to the party seeking to avoid the agreement." The Supreme Court stated that the record "unequivocally" contained a digitally signed copy of the Arbitration Agreement. While respondent claimed it was a "pre-stamped" signature, the only way the digital signature would have appeared is if Respondent had entered her self-created password into the portal that was emailed to her. Additionally, the Supreme Court found that the digital signature requirement complied with *Ky. Rev. St. § 369.107*, providing that "a contract may not be denied legal effect or enforceability solely because an electronic record was used" and that an electronic signature satisfies a signature requirement. Accordingly, the Supreme Court held that the circuit court erred when it considered the arbitration agreement unenforceable on account of an electronic signature because Respondent did not provide sufficient information to satisfy her burden of proof on the unenforceability claim.

Impact on Business:

Although this case involved an interpretation of Kentucky law, it provides an example of the West Virginia Court being willing to enforce an electronic signature, a common device in today's marketplace. Moreover, it is yet another recent example of our Court being receptive to arbitration agreements.

Woods v. Jefferds Corporation
824 S.E.2d 539 (W.Va. 2019)

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

The Court was asked to determine whether a corporation's reliance on a physician's examination and recommendations for "reasonable accommodations" was permissible.

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

The Court held that an employer is permitted to rely on a medical expert's reasonable opinion when determining whether a disabled individual is qualified to perform a job's essential functions.

Facts:

Donald Woods brought suit against Jefferds Corporation (Jefferds) under West Virginia's Human Rights Act, alleging disability discrimination and claiming Jefferds declined to hire him because of his physical disability.

Donald Woods responded to an advertisement by Jefferds for an engineering equipment manager at the Buffalo Toyota plant. Mr. Woods interviewed for the position and was told he was "perhaps, maybe, the best candidate . . . so far." Donald Woods disclosed to the Jefferds employees interviewing him that he had a prosthetic leg and would have two job limitations: 1) he has difficulty picking up and walking with heavy objects, and 2) he cannot wear a heavy steel-toe boot on his prosthetic. Jefferds agreed Mr. Woods could use a dolly to carry heavy objects and could wear a tennis-shoe in lieu of the steel-toe. Mr. Woods was conditionally offered the position on the successful completion of an examination by an independent physician.

After a thorough physical examination, the physician declared Mr. Woods was "unable to do jobs that required squatting or climbing ladders" and should not be given a job that required "excessive stooping, bending & crouching." Upon learning these results, an HR director for Jefferds told Mr. Woods that he would not be given the job because the ability to perform these tasks was essential. Mr. Woods countered that he could accomplish them and offered to demonstrate his abilities, but was denied the opportunity. He subsequently filed suit on February 19, 2015.

On October 4, 2017, the Circuit Court of Putnam County granted summary judgment to Jefferds and dismissed Mr. Woods' discrimination claim. The circuit court concluded that Jefferds demonstrated a legitimate, non-discriminatory reason for its decision not to hire Mr. Woods. Mr. Woods appealed to the West Virginia Supreme Court.

Holding:

The Supreme Court noted that the *West Virginia Human Rights Act, W. Va. Code § 5-11-9* (2019), prohibits employers from discriminating against a qualified individual with respect to "hire[,] terms, conditions or privileges of employment if the individual is able and competent," with or without "reasonable accommodation," "to perform the essential functions of the job," even if such individual is . . . disabled[.]" Mr. Woods alleged that Jefferds discriminated against him based solely upon his disability. However, the court noted that individuals alleging such disability discrimination in the context of an employment-related claim must not only show they have a "disability," but must also show that they are a "qualified individual with a disability" that is able to perform the essential functions of the job. The plaintiff must bear the burden of proving that he is qualified before the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the negative action taken[.]"

Mr. Woods claimed that he could have been considered a qualified individual if Jefferds had offered him some reasonable accommodation for his disability, but he failed to identify what that might be. Jefferds, on the other hand argued that the physician's report, viewed from its perspective, "showed the plaintiff could not perform the essential functions of the job." Ultimately, the Court sided with Jefferds, finding that, under the West Virginia Human Rights Act, "an employer may rely upon the reasonable opinion of a medical expert when deciding if a disabled individual is medically qualified to perform the essential functions of a job. A reasonable opinion is one made in good faith by an expert familiar with the individual, including the individual's work and medical history, and with the essential functional requirements of the job."

Impact on Business:

This case serves as a reminder that disability accommodation processes will continue to require careful analysis and thorough preparation when it comes to ensuring that employers are meeting all statutory requirements regarding employee and applicant accommodations. Here, Jefferds, being made aware of Mr. Woods' limitations, had extended a conditional offer of employment to Mr. Woods, provided a job description to the examining physician, and subsequently relied on the physician's opinion. These steps were enough to establish statutory compliance under the West Virginia Human Rights Act.

The Court made a practical decision that will aid employers in knowing and meeting their obligations in this area of the law.

SER Franklin v. Tatterson
821 S.E.2d 330 (W.Va. 2018)

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

Whether text messages exchanged between an individual seeking to prevent her former employer from seeking criminal prosecution for embezzlement may be admitted as evidence or whether those text messages constitute an inadmissible settlement negotiation under *West Virginia Rule of Evidence 408*.[1]

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

Justice Walker, writing for the entire court, held that Rule 408 *does not* apply to information surrounding settlement offers that are made before a party has asserted a claim or has threatened to assert a claim against the defendant. Because the Circuit Court of Jackson County committed clear error of law in prohibiting the admission of those text messages, the Supreme Court of Appeals granted a writ of prohibition that barred the Circuit Court from prohibiting the admission of those text messages during the defendant's embezzlement trial.

Facts:

In October of 2015, the accountant at Hartley Oil Company, Inc. ("Hartley Oil") discovered an embezzlement scheme involving its employee, Cathy Brown. When approached, Ms. Brown immediately left work for the day claiming to be sick. Over the next seven days, Ms. Brown and the accountant exchanged several text messages. In those text messages, Ms. Brown expressed regret for stealing the money, proposed methods to repay the funds, and questioned whether the owners of Harley Oil intended to seek criminal prosecution. Excerpts of those texts include:

> *What did she say am I'm [sic] going to jail or are they going to work with me fir [sic] paying it back . . . I am so sorry for everything . . . I know what I did was wrong and I wish I could take it back I am willing to pay every penny back to them I will do anything. . . I know that is no excuse for what I did. Please don't hate me . . . now I just don't want to go to jail.*

Ms. Brown was subsequently charged with embezzling approximately $306,000 while employed at Hartley Oil. Prior to her trial in 2017, the prosecution filed a notice of intent to introduce text messages exchanged between Ms. Brown and Hartley Oil's accountant. The Circuit Court entered an order denying admission of the text messages. In so doing, the Circuit Court found that Rule 4081 applies to not only civil but also criminal proceedings and that the text messages constituted a settlement negotiation between Ms. Brown and the accountant. In response to the Circuit Court's order, the Jackson County Prosecuting Attorney sought a writ of prohibition to keep the Circuit Court from enforcing its order suppressing all evidence relating to the text messages.

Holding:

The Court granted the requested writ, and prohibited the Circuit Court of Jackson County from enforcing its August 3, 2017 order denying admission of the text messages because those text messages were not exchanged in the context of a civil settlement negotiation.

While an actual lawsuit does not necessarily have to be filed in order to preclude the admission of evidence, courts generally require legal action be threatened before pre-litigation negotiations are protected under Rule 408. Here, the owners of Hartley Oil had neither filed suit, sought

1 West Virginia Rule of Evidence 408 states in part, "Evidence of the following is not admissible . . . either to prove or disprove the . . . liability of a party in a disputed claim . . .: furnishing, promising, or offering . . . a valuable consideration in compromising or attempting to compromise the claim; and conduct or a statement made during compromise negotiations about the claim."

criminal prosecution, nor threatened to sue before Ms. Brown sent the text messages. Further, the accountant lacked the authority to enter into a settlement negotiation, which is an implicit requirement of Rule 408. For the foregoing reasons, the Court refused to extend Rule 408 protection to Ms. Brown's text messages.

Impact on Business:

This holding does not necessarily impact business in a positive or negative way. Instead, it establishes a general rule that electronic communications regarding a settlement negotiation, exchanged prior to the threat or actual commencement of legal action, may be admissible in subsequent court proceedings. As such, businesses should be aware that any discussion of reparations or admissions of guilt made while attempting to prevent a party from suing, when the party has neither filed suit nor threatened to file suit, may be admitted against that business in Court.

Amoruso v. Commerce and Industry Insurance Co.
826 S.E.2d 642 (March 27, 2019)

What the Court was asked to Decide:

Is a default judgment against a potentially improper party still valid if the party failed to respond with a timely Rule 60(b) motion?

What the Court Decided:

Default judgment was proper against the improper party. The Circuit Court's refusal to set aside the judgment is affirmed.

Facts:

Samuel Amoruso obtained an insurance policy from Commerce and Industry Insurance under his company's name, Quality Supplier Trucking, Inc. In June 2014, Commerce and Industry Insurance filed a claim against Amoruso in his personal capacity d/b/a Quality Supplier Trucking, Inc., for failing to pay insurance premiums. Amoruso responded to the Complaint and reluctantly to discovery requests, but failed to respond to an amended complaint. The summons and amended complaint were personally served on Amoruso in June 2015. The summons expressly stated, "[i]f you fail [to serve an answer to the Amended Complaint within 20 days of service], judgment by default will be taken against you for the relief demanded in the complaint." The court entered default judgment against Amoruso when he failed to respond.

Sixteen months later, Amoruso moved to set aside the judgment because he was an improper party. He contended that Commerce and Industry should have sued Quality Supplier Trucking directly. The Circuit Court of Mineral County denied Amoruso's motion because it was filed after the one year statute of limitations set forth in Rule 60(b) of the West Virginia Rules of Civil Procedure for setting aside a judgment.

Rule 60(b) subsection 4 is *not* subject to the one year limitation. Amoruso argued on appeal the judgment should be set aside under Rule 60(b)(4) because the court did not have personal jurisdiction over him. To support this, Amoruso argued that because the insurer sued him in his personal capacity, they sued the wrong person. Amoruso believed that he was the wrong party to be named but, instead, Quality Supplier Trucking would have been the correct party. Because of the improper name, the Court did not have personal jurisdiction over Amoruso.

Holding:

Rule 60(b) plainly prohibits setting aside a judgment beyond one year after the judgment was entered. Amoruso also waived his objection to personal jurisdiction by responding to the initial complaint and discovery, not filing a Rule 12 motion, and not challenging the Court's jurisdiction until now. The circuit court did not err and Amoruso's motion was properly denied.

The Court issued a new syllabus point:

> *An erroneous application of the law does not render a judgment void and, therefore, does not provide a basis for relief from void judgments under Rule 60(b)(4) of the West Virginia Rules of Civil Procedure.*

Impact on Business:

According to this case, an insurer may still recover from an improper party. Not that this is encouraged, but it allows an insurer security when a party may be hard to contact or provides insufficient or inaccurate information.

Ashraf v. State Auto Prop. & Cas. Ins. Co.
Case No. 18-0382 (May 20, 2019)

What the Court was Asked to Decide:

Did an insurer impliedly waive its right to enforce a Vacancy Provision within the insured's policy by reissuing the policy for approximately three years after becoming aware of the vacancy?

What the Court Decided:

The insurer did not waive its right to enforce the policy.

Facts:

In 1997, Dr. Ashraf and his wife purchased a building in Fairmont, West Virginia. The building was used as an assisted living facility until 2006. Starting in 2006, the building became vacant and remained unoccupied. Ashraf insured the home through State Auto. The State Auto insurance policy contained the following provision:

> b. Vacancy Provisions
>
> If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:
>
> (1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:
>
> (a) Vandalism;
>
> . . .
>
> (2) With respect to Covered Causes of Loss other than those listed . . . above, [including vandalism], we will reduce the amount we should otherwise pay for the loss or damage by 15%.

In 2009, the vacant home was vandalized. Ashraf reported the vandalism to State Auto, but was denied coverage as a result of the vacancy and vandalism exception. Following the 2009 incident, Ashraf continued his policy with State Auto, and State Auto continued issuing the same policy. The price of the policy continued to increase, and by 2012 Ashraf had a policy on the home covering up to $420,228.35, based on the property value.

In October 2012, the home was destroyed by fire and deemed a total loss. Ashraf again reported the incident. State Auto denied full coverage again under the Vacancy Provision, but did not deny coverage completely. Instead State Auto reduced the damage award by 15% in accordance with part (2) of the Vacancy Provision.

Ashraf filed suit against State Auto arguing, among other things, that the 15% reduction violated Chapter 33, Article 17, Section 9 of the West Virginia Code which provides for recovery of "the whole amount of insurance stated in the policy" in the case of a total loss by fire. He believed State Auto also waived the application of the Vacancy Provision by reissuing the policy after learning of the vacancy in 2009.

Holding:

The Doctrine of Waiver does not apply. The Supreme Court refused to accept Ashraf's argument that "State Auto's reissuance of insurance coverage 'with knowledge of a vacancy waived the application of [the] vacancy clause in the insurance contract.'" The Court distinguished this case

from two previous cases which waived the vacancy provision based on the insurer's knowledge at the time of the policy's formation. In both *McKinney v. Providence Washington Insurance Co., 144 W. Va. 559* (1959) and *Kimball Ice Co. v. Springfield Fire & Marine Ins. Co.*, 100 W. Va. 728, 732 (1926), the insurers were aware of a vacancy at the time the policy was drafted and implemented. Here, however, the vacancy did not occur until after the policy was implemented. The Supreme Court held that State Auto did not expressly or impliedly waive the vacancy provision.

Secondly, the 15% reduction was proper under the plain and unambiguous language of the policy. The fact that the insured was a "sophisticated businessman" and recognized the benefits of maintaining insurance on the vacant building—like allowing fluidity between occupancy and vacancy—was just one factor the court considered in determining that State Auto did not waive the Vacancy Provision.

Impact on Business:

The plain and unambiguous language of an insurance policy is given significant weight. This is another example of the court favoring the written provision, allowing insurers to enforce the plain language of the insurance policy.

Dosso v. Farmers & Mechanics Insurance Co.
Case No. 17-0664 (June 17, 2019)

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

Did an insurer properly close a claim and deny coverage when the vehicle was not subjected to a diagnostic examination, but a letter was sent to the insured mentioning that his claim was "considered closed?"

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

The insurer was proper in denying coverage and the case was sufficiently closed by the letter sent to the insured.

Facts:

Maurice Dosso insured his 2000 Ford Expedition with Farmers and Mechanics Insurance Companies ("Farmers") from October 6, 2014 until the policy's expiration in October 5, 2015. In late December of 2014, Dosso filed a claim with Farmers alleging water damage covered under his policy which prevented his vehicle from starting. Upon appraisal by an agent of Farmers, the vehicle started and the damage appeared to be "wear and tear" which was not covered under Dosso's policy. The appraiser's report states the following: "Truck appears to have water leak at windshield, [front] of roof [panel] is rusting and may have deteriorated seal between roof and [windshield]. [T]his is definitely a problem that has been present quite a while and has gotten worse over time…." Additionally, the appraiser noted that the windshield was lined with silicone, indicating that the problem had been noticed, and a previous owner has attempted to fix it.

After the appraisal, Farmers provided Dosso with an opportunity to take his vehicle to a garage for a diagnosis, but Dosso refused. Thereafter, Farmers sent Dosso a series of three letters. The first letter, dated January 22, 2015, informed Dosso that because the appraisal was unsuccessful, a diagnostic examination would be necessary to determine "the cause of [the] loss." The second letter sent in February 2016 warned Dosso that if he did not take his vehicle in for a diagnostic examination, then coverage would be denied. The third letter, was sent shortly after the thirty day deadline informing Dosso that his claim was "considered closed."

Dosso filed suit in February of 2017. The Complaint contains language such as "[Farmers'] decision to deny" and "denial." The circuit court granted summary judgment for Farmers and ordered Dosso to pay one-half of the discovery commissioner's fees and costs. Dosso appealed, contesting his denial of coverage and arguing that he, as an indigent party, was not required to pay one-half of the commissioner's fees and costs. During discovery the discovery commissioner addressed bad discovery requests by both parties, but refused to outrightly attribute bad faith to either party. Dosso's argument in contesting his denial was that Farmers never closed the claim, so it remains open.

Holding:

Farmers sufficiently investigated Dosso's claims and properly notified Dosso accordingly. The burden of performing the diagnostic examination did not fall on Farmers. Farmers properly inspected the vehicle, and the appraiser found that the damage "was from wear and tear." These losses were not covered by Dosso's policy, and coverage was properly denied.

Secondly, where an indigent party was not found by the discovery commissioner to have engaged in bad faith, that party was not liable for the discovery commissioner's fees and costs.

Impact on Business:

An insurer is not under an obligation to make the insured cooperate. As long as the insurer performs its obligations under the policy, like performing an appraisal, the insurer may properly deny coverage.

SER Universal Underwriters Ins. Co. v. Wilson
825 S.E.2d 95 (W.Va. 2019)

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

Whether the Circuit Court of Marion County ("the Circuit Court") erred in denying Universal Underwriters Insurance Company's ("Universal") motion for summary judgment because a material issue of fact existed; and whether the insured had a reasonable expectation of policy coverage for his son.

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

Justice Hutchison, writing for the majority granted Universal's writ and ordered the Circuit Court to grant summary judgment for Universal.

Facts:

In May of 2014, Salvatore Cava drove out of a parking lot in Bridgeport and collided with a motorcycle being driven by David Ralph Allen. Mr. Allen sustained severe injuries and passed away several days later. The car driven by Salvatore Cava was owned by the auto dealership, Dan's Car World. Dan's Car World, in turn, was owned by Salvatore Cava's father, Dan Cava ("Mr. Cava").

Universal provided an insurance policy for Dan's Car World that included both a Garage Operations and Auto Hazard provision, limited to $300,000 in liability coverage and a Commercial Umbrella provision that provided up to $5,000,000 in liability coverage.

In December of 2014, the administratrix of Mr. Allen's estate ("the Respondent") filed suit against both Salvatore Cava and Dan's Car World. The Respondent also brought a declaratory judgment action against Universal to determine the amount of insurance coverage available. In 2016, the Respondent amended the Complaint to also include Mr. Cava as a defendant. Universal offered to settle the suit for $300,000, the maximum amount under the Garage Operations and Auto Hazard provision of the policy; however, it denied coverage under the umbrella policy, asserting that the $5,000,000 umbrella provision did not cover Salvatore Cava because he was not a "designated person" under the provision. The Respondent rejected the $300,000 settlement offer and continued to assert that the umbrella provision provided additional liability coverage for the claims asserted against Salvatore.

Universal filed a motion for summary judgment in the declaratory judgment case against the Respondent. In an opinion letter dated May 29, 2018, the Circuit Court denied Universal's motion for summary judgment on the coverage issue for two reasons. First, a material issue of fact existed regarding the reasonable expectation that Salvatore Cava was covered under the umbrella provision. Second, the Circuit Court found that judicial estoppel could not be invoked by Universal to preclude Mr. Cava from testifying about an alleged conversation he had with Universal's agent regarding Salvatore Cava's coverage. Following the denial, Universal filed this appeal.

Holding:

Generally, an ambiguity in a policy provision must exist regarding the terms of an insurance contract in order for the doctrine of reasonable expectations to apply. However, an exception to that general rule exists when reliable and relevant evidence, extrinsic to the insurance contract, casts a reasonable doubt as to whether coverage was provided by an otherwise unambiguous policy. In this case, umbrella coverage clearly extended only to the garage owner, Dan Cave. This lack of ambiguity in Universal's umbrella provision precluded the application of the doctrine of reasonable expectations to provide coverage to Salvatore Cava.

Impact on Business:

Not surprisingly, this case is a cautionary tale for business owners to read and understand their insurance policy provisions. The "doctrine of reasonable expectations" might provide an 'out' for a prospective insured, but if the policy is unambiguous – as this one involving Mr. Cava apparently was – the terms of the policy will control.

Andrews v. Antero Resources Corp. and Hall Drilling, LLC
Case No. 17-0126 (June 10, 2019)

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

The Court addressed the decision of the Mass Litigation Panel ("MLP") to grant summary judgment to defendants Antero Resources Corp. ("Antero") and Hall Drilling LLC ("Hall Drilling") on the claims of Property Owners for private nuisance from activities related to "natural gas exploration, extraction, transportation and associated activities in close proximity to [Property Owners'] properties."

Facts:

The Property Owners in *Andrews* represented the first trial group in *In re. Marcellus Shale Litigation*, in which hundreds of lawsuits have been filed against E&P and midstream oil and gas companies, alleging that activities related to the production, compression, and transportation of natural gas represent a private nuisance.

The Property Owners alleged that the unconventional drilling operations of Antero and Hall Drilling "in relation to their development of the Marcellus shale have caused Property Owners to lose the use and enjoyment of their properties due to the annoyance, inconvenience, and discomfort caused by excessive heavy equipment and truck traffic, diesel fumes and other emissions from the trucks, gas fumes and odors, vibrations, noise, lights, and dust." They filed a complaint alleging claims for "private temporary continuing abatable nuisance and negligence" against Antero and Hall Drilling arising from their "natural gas exploration, extraction, transportation and associated activities in close proximity to [Property Owners'] properties."

While the Property Owners alleged a number of claims in their initial complaint, they eventually voluntarily dismissed all claims for (1) property damages, (2) physical or medical injury, and (3) negligence. By the time the MLP addressed the motions for summary judgment filed by Antero and Hall Drilling, therefore, only the Property Owners' private nuisance claims remained.

While the MLP granted Antero's and Hall Drilling's motions for summary judgment, it "declined to apply principles of nuisance law, and instead ruled on the summary judgment motions based upon Antero's contractual and property rights." Specifically, the MLP's Order stated that "[b]ecause the Court resolves summary judgment based upon Antero's contractual and property rights, it does not address the issues to which common law private nuisance principles would be applied. The Court, therefore, reaches no conclusion regarding whether Antero's actions would otherwise meet the legal definition of a nuisance." In doing so, the MLP relied upon the fact that the Property Owners owned the surface of their respective properties only, as the minerals had been severed in the early 1900s, and the latest mineral deed for each property had given Antero the right develop the natural gas under those properties. Those development rights were retained by the oil and gas mineral owners in the severance deeds separating the surface estates from the mineral estates, and the MLP found that the severance deeds constituted an easement and that the activities of Antero and Hall Drilling did not exceed the scope of that easement.

Holding:

In a 3-2 decision, Justice Jenkins, writing the majority opinion, affirmed the summary judgment granted by the MLP based on "contract and property rights." The Court found that the mineral leases in question permitted the use of the surface for operations to remove the oil and gas, and it rejected the Property Owners' argument "that a mineral owner does not have the right to extract natural gas using methods that were uncontemplated when the operative severance deeds were executed, where those uncontemplated methods are not necessary to the extraction of the minerals and substantially burden the surface."

The Court acknowledged that none of the Property Owners' surface properties were actually being used to access the minerals: "Reportedly, five of the six well pads at issue were located within a range of .42 mile to 1 mile from Property Owners' properties." As a result, the Court turned to the "standard for balancing the rights of surface owners and mineral owners in relation to implied uses of the surface estate" as outlined in *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721 (W.Va. 1980), where the Court held that "[i]n order for a claim for an implied easement for surface rights in connection with mining activities to be successful, it must be demonstrated not only that the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without any substantial burden to the surface owner."

Noting that the MLP found that the Property Owners "did not offer evidence 'to establish . . . what is reasonable and necessary to develop the underlying minerals, other than self-serving assertions that Defendants' activities . . . are excessive[,]'" the Court determined that "Property Owners have failed to develop an argument to show the existence of a material fact as to whether or not Antero's activities to develop its mineral estate are reasonably necessary." Thus, the Property Owners failed to satisfy the first part of the test in *Buffalo Mining*.

The Court also determined that the Property Owners failed to present evidence to satisfy the second part of the test in Buffalo Mining; i.e., that the "right can be exercised without any substantial burden to the surface owner." In doing so, the Court noted that where a severance deed "severs the mineral and surface estates and plainly allows for the extraction of the mineral estate, certain uses of the surface by the mineral owner are necessarily implied." The Court noted that cases which found more modern methods of mineral extraction to be a "substantial burden" to the surface owner focused on the destruction of the surface owners' ability to use the surface (such as strip mining or auger mining), which contrasts with evidence that horizontal fracking actually results in less surface disturbance because it uses fewer well pads and is less intrusive than traditional vertical drilling that requires numerous wells. As a result, the Court determined that "it was incumbent upon Property Owners to present evidence to establish how the burdens resulting from the off-site horizontal drilling of which they now complain (i.e., dust, traffic, lights, noise, and fumes) has prohibited them from using their land in any way that would be compatible with the physical presence of vertical wells directly on their land. They have failed to do so." While the Court listed the Property Owners' complaints about the activities in detail, it determined that none of those activities rose to the level of a "substantial burden to the surface owner."

Impact on Business.

While this is an important win for Antero and Hall Drilling, and it will generate a tremendous amount of attention, the long-term impact is less clear.

First, the Court emphasized that its decision was based "upon Antero's contractual and property rights" and not on principles of nuisance law. In fact, Justice Walker filed a concurring opinion:

> *"….to emphasize what the majority opinion does not do. The Court does not decide whether Respondents' activities on Petitioners' surface estates created a nuisance. And, the Court does not answer the broader question of whether the owner of mineral rights underlying Surface Estate A may or may not create a nuisance on Surface Estate A to develop the minerals below Surface Estate B. The Court does not decide those issues because this particular case did not present the opportunity to do so."*

Justice Jenkins also noted in the majority opinion that "Petitioners did not challenge on appeal the Panel's decision to apply contract and property law, rather than principles of nuisance law, in deciding Respondents' motions for summary judgment. Instead, they argued that the Panel applied the wrong contract and property law."

Second, the Court's analysis focuses on situations where a party owns the leasehold right to develop the mineral estate under the property of a surface owner who brings claims related to the party's activities on the surface to extract the minerals. While this may be the case for companies involved in horizontal drilling activity, midstream companies generally do not own leasehold rights to develop the mineral estate around compressor stations or gas processing facilities.

Third, an unanswered question specifically identified in Justice Walker's concurrence centers on whether an activity on the surface of Property A may be a "reasonable use" of the surface of Property A to develop the mineral estate of Property A and Property B, but is nonetheless a "nuisance" to the surface owner of Property B. The MLP avoided this question when it granted summary judgment on the Property Owners' nuisance claims by focusing on the contractual and legal principles, which the Property Owners did not adequately challenge on appeal.

Finally, the Court's decision in *Andrews* stands in stark contrast to its opinion in *Crowder v. EQT*, No. 17-0968 (June 5, 2019), in which the Court held that "a mineral owner or lessee does not have the right to use the surface to benefit mining or drilling operations on other lands, in the absence of an express agreement with the surface owner permitting those operations." In reaching this conclusion, the Court emphasized that a mineral owner's right to "reasonably use" the surface to extract minerals extended only to the minerals underneath the surface subject to the mineral lease. That right does not extend to using the surface to extract minerals from adjacent parcels, regardless of how reasonable the use may be. The result is that absent an express agreement to the contrary with the surface owner of the property on which a well pad is located, Antero could be liable to the surface owner for trespass, yet the same activities provide adjacent surface owners with little or no legal relief.

EQT Production Company v. Crowder
Case No. 17-0968 (January 5, 2019)

What the Court was Asked to Decide:

The Court affirmed a decision of the Circuit Court of Doddridge County that EQT Production Company ("EQT"), which leased the right to extract oil and natural gas from mineral owners/lessees beneath a surface tract owned by Crowder, cannot use the surface of Crowder's property to produce minerals from neighboring properties in the absence of an agreement with the owner of the surface tract, even if the mineral owners/lessees agreed to pooling and unitization.

Facts:

Crowder owned the surface of a tract of land in Doddridge County, West Virginia. EQT held a century-old lease that allowed EQT to drill wells to extract oil and gas from beneath Crowder's surface estate.

Crowder brought a lawsuit to challenge EQT's use of his surface estate to drill horizontal wells that extended under neighboring properties so that EQT could extract natural gas from beneath those properties. Specifically, he contended that "EQT did not have the right to enter on, burden, damage, or otherwise occupy Plaintiffs' surface lands at all for the purpose of extracting minerals from other, neighboring mineral tracts." To the extent that EQT was drilling for, and removing minerals from neighboring properties from a well pad on Crowder's surface estate, Crowder alleged that EQT was trespassing on his surface tract.

At the time that the century-old lease was executed, the lessor owned both the surface and minerals in fee. The minerals were later severed from the surface, and subdivided tracts were conveyed as "surface only." Crowder challenged EQT's use of his surface property to drill horizontal wells that extended beyond his property boundary to produce and transport oil and gas to/from adjacent tracts.

The Circuit Court of Doddridge County agreed with Crowder and entered an order granting partial summary judgment, which held that EQT had no express or implied right to enter or use Crowder's surface land to drill into and produce gas from neighboring mineral tracts. A jury awarded $190,000 in damages for that trespass, and EQT appealed.

Holding:

Notably, the Court and the parties agreed on the long-recognized legal principle that "the owner of a mineral estate has the implicit right to use the surface estate overlying the minerals, in a reasonable manner, to access and remove those minerals." The Court held, however, that this legal principle was limited to use of the surface for production of minerals under the surface tract only -- and not for production from neighboring lands. In addition, the Court held that even if the lessees of the minerals underneath the surface tract had signed lease modifications that allowed the mineral lessors to pool and unitize the minerals, such did not allow the mineral lessors/producers to use the surface of the property to extract minerals from underneath neighboring properties.

Specifically, the Court held that "a mineral owner or lessee has an implied right to use the surface of a tract in any way reasonable and necessary to the development of minerals underlying the tract. However, a mineral owner or lessee does not have the right to use the surface to benefit mining or drilling operations on other lands, in the absence of an express agreement with the surface owner permitting those operations."

Finally, the Court expressly noted that it did not decide the case on Crowder's claim that EQT's use of his surface property was "excessive" and not reasonable. Instead, the Court confined its holding to trespass and property law claims.

Impact on Business:

A key takeaway from this decision is that an operator cannot rely on implied rights to use a surface owner's property for development of minerals produced from pooled and unitized tracts when the surface and minerals are separately owned. This issue can be resolved by a carefully drafted surface use agreement containing language granting surface and subsurface easements for the development of oil and gas.

The Court's decision regarding the right to produce oil and gas via pooling through a surface drill tract in the absence of an express grant or reservation to use the surface could create additional hurdles and costs for oil and gas operations, and it will likely result in increased litigation in the absence of a surface use agreement.

Finally, the Court's decision in *Crowder* stands in stark contrast to its opinion in *Andrews v. Antero Resources Corp. and Hall Drilling, LLC,* No. 17-0126 (W. Va. June 10, 2019), in which the Court found that mineral leases which permitted the use of a surface tract for operations to remove the oil and gas from surrounding properties defeated claims of nuisance of owners of adjacent surface tracts and rejected the argument "that a mineral owner does not have the right to extract natural gas using methods that were uncontemplated when the operative severance deeds were executed, where those uncontemplated methods are not necessary to the extraction of the minerals and substantially burden the surface."

The result of *Crowder* and *Andrews* is that absent an express agreement to the contrary with the surface owner of the property on which a well pad is located, an oil or natural gas producer could be liable to the surface owner for trespass, yet the same activities provide adjacent surface owners with little or no legal relief.

Steager v. Consol Energy, Inc., et al.
Case Nos. 18-0121 through 18-0125, and 18-0227 and 18-0228. (June 5, 2019); and Case No. 31866 (April 28, 2005)

What the Court was asked to decide:

To determine whether the West Virginia State Tax Department for properly calculated the operating expense deduction in the valuation of producing natural gas wells for property tax purposes.

What the Court decided:

The Court affirmed in part, reversed in part and remanded a holding of the WV Business Court in a multi-county case which had overruled significant aspects of the Tax Commissioner's methods for valuation of natural gas wells for property tax purposes.

Facts:

The taxpayers are owners of various gas wells in Doddridge, Ritchie, Lewis, and McDowell Counties. These gas well interests are appraised for ad valorem tax purposes by petitioner Dale W. Steager, West Virginia State Tax Commissioner ("Tax Department"), and assessed by the respective county commissions. This case involves valuation of both conventional gas wells and Marcellus wells.

To determine the value of gas wells for ad valorem taxation purposes, gas well owners provide gross receipts from their well production, to which the Tax Department applies a "production decline rate." From this figure, the "average annual industry operating expenses" are deducted to establish a "net receipts" value. That value is then capitalized to determine the taxable value.

With respect to the operating expenses referenced above, *West Virginia Code of State Rules § 110-1J-4.3* provides that the Tax Commissioner shall "every five (5) years, determine the average annual industry operating expenses per well. The average annual industry operating expenses shall be deducted from working interest gross receipts to develop an income stream for application of a yield capitalization procedure"

Each tax year, the Tax Department issues an Administrative Notice which states what the average annual industry operating expense is for that tax year; it is expressed by way of a percentage of the well's gross receipts, with a "not to exceed" fixed dollar amount or, as Taxpayers have characterized it, a "cap."

Taxpayers appealed their gas well valuations to the respective Boards of Assessment Appeals ("Board(s)") for the appropriate county, claiming that their actual expenses were in excess of the stated percentages and that the cap resulted in an artificial reduction in the operating expense deduction where their expenses exceeded the cap.

Taxpayers provided expert testimony in support of these figures and analysis of the inequality occasioned by the cap. These experts also testified that industry-reported operating expense percentages were closer to respondents' actual values than the Tax Department's average percentage.

In response, the Tax Department offered testimony from its appraiser Cynthia Hoover who explained that the average operating expense figures were derived from a survey of gas well producers conducted in 2014. She explained that, based on the results of that survey for conventional gas wells, on average each well incurred expenses of $5,000.00. This monetary amount approximated, on average, 30% of the gross receipts per well. Notably, she agreed that application of

the $5,000.00 “not to exceed” amount served to treat higher-producing wells differently than lower-producing wells and that the cap resulted in certain wells with higher gross receipts not realizing a full 30% operating expense deduction. Ms. Hoover agreed that the Tax Department had previously invited taxpayers to provide actual expenses if less than a 30% reduction (i.e., the $5,000 cap equates to only a 10% operating expense deduction on a well with $50,000 in gross receipts).

Holding:

The Supreme Court affirmed the Circuit Court order and held that the mandatory language of the statute’s transition rule had to be honored. In a case involving the calculation of ad valorem taxes on natural gas wells, the West Virginia Supreme Court held that (a) the State Tax Department improperly imposed a fixed dollar cap on the operating expense deductions; (2) the Tax Department properly omitted certain post-production operating expenses in the calculation of the annual industry average operating expenses; but (3) inconsistently rejected the Business Court’s use of percentage deduction for operating expenses in lieu of a fixed monetary average, the latter of which it ordered be employed in setting the correct values on remand.

Impact on Business:

This ruling, given its facial inconsistency on the manner of determining deductible operating expenses, creates significant uncertainty for the oil and gas industry, notwithstanding that the willingness of the Court to review the Tax Department’s rules, in relation to commercial ad valorem taxation, is a welcome development. The legislative rules for ad valorem taxation have several areas where the Tax Department uses averages and limitations that may be ripe for review. Given the uncertainty facing the Business Court on remand with directions to make further rulings in a manner “consistent” with the Court’s inconsistent decision, may, ultimately lead to legislative intervention on these important issues.

Mercer Mall v. Gearhart and Mercer County Commission
Case No. 17-0325 (March 11, 2019)

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

Whether, for ad valorem property tax purposes, did an Assessor and County Commission acting as a Board of Equalization and Review abuse its discretion, in rejecting the use of the income method in setting property tax values for income-producing values.

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

The Court affirmed the Circuit Court of Mercer County and held that the Assessor and the Commission could use the cost approach to valuation and decline to adopt an appraisal applying the income approach to valuation.

Facts:

This matter arises from the real property assessment of the Mercer Mall, a regional enclosed shopping mall, in Bluefield, West Virginia. For the 2017 tax year, Respondent, Mercer County Assessor Sharon Gearhart ("the Assessor"), assessed the property on the basis of a $19,011,800 market value.

The Taxpayer appeared before the County Commission of Mercer County ("the Commission"), sitting as the Board of Equalization and Review, to contest the assessment by the Assessor. In support of its position, petitioner subsequently presented an appraiser who performed an appraisal using the income approach and determined the value of the mall at $10,000,000.

The Commission acknowledged receipt of the Taxpayer's appraisal but determined that it was based on the income approach, rather than the cost approach and was therefore inapplicable. The Commission voted that the correct assessment was based on a market value of $19 million, as determined by the Assessor.

The Taxpayer appealed the decision and the Circuit Court of Mercer County remanded the on the grounds that the record below was inadequate to support the Commission's ruling.

At the final hearing the Deputy Assessor, testified that the $19 million appraisal came from the sale of the property recorded in 2005, or 2007. At the time of the sale the appraised value was reduced from $32 million to $19 million, approximately $22 per square foot. Mr. Price testified that he compared the Mercer Mall to malls in Beckley, Bridgeport, and Huntington, and that the square foot valuation of Mercer Mall was the lowest of the four. Mr. Price testified that the assessor also took note of a comparable strip mall, located in Bluefield, West Virginia, that sold for $28.83 per square foot in 2017.

The Commission reported its findings to the Circuit Court of Mercer County. The report noted that the majority of assessors in West Virginia utilize the "cost-minus depreciation" method to arrive at an appraised value, and utilizing that method, the Assessor assessed the Mercer Mall on the basis of a $19,011,800 market value, for the year 2017. The Commission noted further that petitioner submitted an appraisal that used the income approach to appraise value, but asserted that the income approach is typically only used for low income housing properties, and not to assess other commercial properties.

The Commission determined that the Assessor provided sufficient data to support this assessment including: (1) information regarding the recent sale of a mall in Bluefield, that sold for a purchase price of $28.83 per square foot; (2) that the average daily traffic count on US 460 on Cumberland Road near Mercer Mall is slightly more than 16,000; (3) that the valuation of $23.75

has not increased for several years, "in order to help the mall through a prolonged economic downturn;" (4) that regionally, the Crossroads Mall in Beckley is taxed on a value of $40.58 per square foot, the Huntington Mall is taxed on a value of $39.41 per square foot, the Meadowbrook Mall is taxed on a value of $42.03 per square foot; and (5) the Crossroads Mall in Raleigh recently sold for $33 per square foot. Further, the Commission took notice that Assessor Gearhart testified that her office has adopted a long-term strategy of maintaining the petitioner's assessment at a modest level.

The Taxpayer complained that the circuit court erred by "summarily" rejecting the appraisal presented by Taxpayer's witness and in not adopting the income approach to valuation. The *West Virginia Code of State Rules § 110-1P-3.2* recognizes three different appraisal methods for determining "the value of industrial and commercial real properties." Pursuant to *West Virginia Code of State Rules § 110-1P-3.2.1,* "the Tax Commissioner shall consider and use where applicable, three (3) generally accepted approaches to value: (A) cost, (B) income, and (C) market." In addition, appraisals must consider a variety of factors, as enumerated in *West Virginia Code of State Rules §110-1P-3.1.1.1-3.1.1.10.*

Holding:

The Supreme Court affirmed the Circuit Court order and held that the County Commission did not abuse its discretion in declining to adopt the income approach to valuation. The record reflects that the Assessor was not provided income information for the Mercer Mall in order to conduct its own appraisal using the income approach. The Court reiterated that, an assessor need not perform a useless act of considering an appraisal method where the assessor does not have sufficient data to perform that appraisal method.

Impact on Business:

This case reaffirms both the virtually unbridled discretion that local assessors have to ignore the use of the income method in setting property tax values for income-producing values (despite the authorization of using such method in the governing regulations). The ruling also reaffirms a commercial taxpayer's virtually unsustainable burden of proving an assessor's valuation to be erroneous by clear evidence that is convincing to the reviewing county commission (the public body most dependent on the property tax revenues inherently at issue in such cases).

Murray Energy, et al. v. Steager
Case No. 18-0018 (April 29, 2019)

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

Whether, for *ad valorem* property tax purposes, does the method of valuing coal properties as prescribed in the Code of State Rules violate the statutory requirement of assessment at "true and actual value" or the constitutional equality requirements of Article X, Section 1 of the West Virginia Constitution and the Equal Protection provisions of the United States and West Virginia Constitutions.

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

The Court (by a 4-1 vote, with Justice Jenkins dissenting) Affirmed the Circuit Court of Marshall County ruling that the Circuit Court correctly concluded that the method of valuing coal properties as prescribed in the Code of State Rules violated neither the statutory requirement of assessment at "true and actual value" nor the constitutional equality requirements of Article X, Section 1 of the West Virginia Constitution and the Equal Protection provisions of the United States and West Virginia Constitutions.

Facts:

Murray Energy Corporation and Consolidation Coal Company (hereinafter "Taxpayer) are owners of coal interests in Marshall County. These coal interests are appraised for ad valorem tax purposes by respondent Dale Steager, State Tax Commissioner of West Virginia (hereinafter "Tax Department") and assessed by the respondents County Commission of Marshall County through its Assessor, Christopher J. Kessler.

The Tax Department utilizes a "statewide mass appraisal system" for valuation of active and reserve coal properties, as described in *West Virginia Code of State Rules § 110-1I-1 et seq.* (2006). This case involves the Tax Department's use of certain averages for purposes of valuing Taxpayers' coal interests through the mass appraisal system.

The mass appraisal system uses averages for certain values necessary to calculate the value of the minerals, rather than individualized data. The two averages challenged are the statewide Steam Coal Price Per Ton average ("SCPPT") and the seam thickness average as calculated by using the sources and formulas prescribed by regulation. These averages are then filed with the West Virginia Secretary of State as "natural resource valuation variables" and made available for public comment annually.

According to the Tax Department, the SCPPT average for any particular year is calculated by using 1) confidential data concerning purchases of coal obtained from the West Virginia Public Service Commission and reports of fuel purchases from the Federal Energy Regulatory Commission/the U. S. Energy Information Administration; 2) published information from major coal companies; 3) royalty information derived from county courthouses; and 4) industry publications.

Only West Virginia-sourced coal information is utilized from these databases. The SCPPT average for any particular tax year is derived by averaging the price per ton for the three years preceding the tax year, i.e., a "three-year rolling average."

In this case, the 2016 tax year SCPPT is being challenged, which was calculated by using the variables provided in tax years 2012 through 2014—the three years preceding the assessment date of July 1, 2015—for the 2016 tax year.

On June 30, 2015, the Tax Department filed the variables for the 2016 tax year and de-

clared the SCPPT to be $60.35/ton. This figure was left open for public comment until August 15, 2015. Taxpayers did not provide comment.

As for the coal seam thickness average, seams of coal vary in thickness and density, which obviously determines the amount of coal at any particular location. The Legislature determined that use of an average to estimate the seam thickness at any given location based on acreage was appropriate.

On January 22, 2016, Taxpayers protested the Tax Department's valuation of their Marshall County coal interests for the 2016 tax year to the Marshall County Commission sitting as the Board of Equalization and Review (the "Board"). Taxpayers challenged the Tax Department's use of the coal seam thickness average and rolling three-year average to determine the average steam coal price per ton rather than the "spot price" of coal as of the July 1, 2015, assessment date.

Taxpayers argued that these methodologies and averages did not reflect the "true and actual" value of their coal properties, causing them to be over-valued for ad valorem taxation purposes.

The Tax Department admitted that the $60.35/ton used in the SCPPT was higher than what the average price per ton was as of the assessment date of July 1, 2015, by design and was the result of using the three-year rolling average.

Upon consideration of the foregoing testimony the Board denied the protest. Taxpayers appealed to the Circuit Court and, after briefing by the parties, the Circuit Court likewise denied the appeal, affirming the Board's rejection of Taxpayers' protest. Adopting the Tax Department's position wholesale, the Circuit Court concluded that because the Constitution provides that "value" is "to be ascertained as directed by law," the legislative rules are the Legislature's manner of directing the determination of value. It found that Taxpayers failed to establish that the Tax Department's calculations were inaccurate, but rather proposed new methodologies to displace the one prescribed by legislative rule. As to Taxpayers' equal protection argument, the circuit court concluded that there was no showing of unequal treatment.

Holding:

The Court affirmed the Circuit Court of Marshall County that the method of valuing coal properties as prescribed in the Code of State of Rules violated neither the statutory requirement of assessment at 'true and actual value' nor the constitutional equality requirements of Article X, Section 1 of the West Virginia Constitution and the Equal Protection provisions of the United States and West Virginia Constitutions

Impact on Business:

The regulations setting forth the mass appraisal methodology for valuation of coal properties is not violation of West Virginia's statutory taxation mandates or Constitutional requirements of equal and uniform taxation. The valuation methodology contained in *West Virginia Code of State Rules § 110-1I¬1 et seq.* for the calculation and use of an average Steam Coal Price Per Ton and average coal seam thickness does not violate the equality provision of West Virginia Constitution Article X, Section 1 or the equal protection provisions of the West Virginia and United States Constitutions. To the extent that valuations under those Rules yield inaccurate valuations, legislative intervention appears to be the only remedy.

Musick v. University Park at Evansdale
Case No. 17-0309. (Nov. 8, 2018)

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

Whether, for *ad valorem* property tax purposes, a leasehold has value independent of the freehold estate?

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

The Court affirmed the Circuit Court of Monongalia County and held that, the Assessor did not apply the proper standard for assessing leasehold interests and because the lease was not freely assignable the valuation of the leasehold interest should be corrected to $0.

Facts:

The taxpayer (University Park at Evansdale (UPE) is the lessor of certain property commonly known as University Park located on the Evansdale Campus of West Virginia University. This property, owned by the West Virginia University Board of Governors (WVU), contains student housing facilities and a small amount of retail space. WVU leased the property to UPE for the development and construction of University Park, and UPE simultaneously subleased the student housing properties back to WVU for purposes of offering it to students for housing. In doing so, UPE retained the ability to sublease the retail space, which comprises only approximately three percent of the property.

Under the terms of the lease, UPE was required to develop improvements on the university land at its own expense, subject to approval from WVU. ninety-seven percent of the improvements consists of residential premises for use by WVU as student housing, and the remaining three percent of the improvements consists of commercial premises providing amenities for WVU students, faculty, and staff. WVU immediately received title and ownership to the improvements and the personal property as they were constructed, with the exception of certain limited improvements and personal property belonging to subtenants of the commercial premises as they were brought onto the university land, which WVU already owned.

WVU owns the university land, the improvements, and the personal property, which together comprise University Park. Use of University Park is limited to WVU housing for students, faculty, and staff; commercial, retail, and governmental enterprises benefitting WVU's constituents or the general public subject to WVU's written approval; and other expressly-defined permitted uses stipulated to by WVU under the lease.

In January 2015, Assessor Musick assessed UPE's leasehold interest in University Park based on a value of $9,035,617 for the tax year 2015. Because it is State property, the fee estate owned by WVU is not taxable.

UPE challenged the assessment before the Board of Equalization and Review (BER), arguing that because the leasehold was neither freely assignable nor a bargain lease, its leasehold interest had a $0 value. The Assessor admitted that he did not utilize the methodology promulgated by the Tax Commissioner for assessment of leasehold interests. The BER concluded that because UPE was asserting that the valuation should be $0 and therefore effectively not taxable, the issue was one of taxability, not valuation. and concluded that it lacked jurisdiction.

On February 28, 2017, the circuit court granted the petition for appeal in favor of UPE. The circuit court found that remand was not appropriate because the BER made its decision regarding taxability and jurisdiction after both parties were given a full opportunity to present evidence regarding valuation.

Holding:

The Supreme Court affirmed the Circuit Court order and held that because the record before us demonstrates that The Assessor did not apply the proper standard for assessing leasehold interests and because he also agreed that the lease was not freely assignable, the Court concluded that UPE showed by clear and convincing evidence that the 2015 valuation of the leasehold interest should be corrected to $0.

Impact on Business:

This ruling provides guidance to Private-Public partnerships wherein private investors develop projects to the benefit of its public partner. The determination that the leasehold is exempt from *ad valorem* property tax under certain terms may encourage more of these projects.

Penn Virginia Operating Co., LLC v. Yokum
Case No. 18-0019 (March 19, 2019)

What the Court was Asked to Decide:

Whether, for *ad valorem* property tax purposes, an owner of timberland has a right to review of the WV Division of Forestry's denial of its application for managed timberland valuation treatment despite the untimely filing of that application?

What the Court Decided:

The Court reversed and remanded the consolidated appeal from the Circuit Courts of Randolph, Barbour and Upshur Counties. with directions allowing the Taxpayer the right to appeal the denial of its application to the Director of the Division of Forestry, given the Taxpayer's assertions, that the September 1 deadline is not to be strictly enforced and that Taxpayer's forest properties were entitled to certification as managed timberland for Tax Year 2016, are more appropriately to be made before the Director of the Division of Forestry ("Forestry").

Facts:

Taxpayer owns 61,357.26 acres of timberland in West Virginia in Randolph, Barbour and Upshur Counties. Taxpayer entered into a cooperative contract with the West Virginia Department of Forestry in 2008, and its properties have been classified as managed timberland for *ad valorem* tax purposes from 2009 to the present, with the exception of Tax Year 2016.

While the character and use of Taxpayer's properties have remained consistent with the Managed Timberland Program, its classification as managed properties for Tax Year 2016 was denied because the application was sixteen days late. As a result, the tax liability for Tax Year 2016 increased by $523,554.98.

The Taxpayer claimed that the late filing was "due to an oversight." By letter dated September 21, 2015, from Forestry, Taxpayer was informed that its application was untimely and that Taxpayer's properties would not be certified as managed timberland for Tax Year 2016. The letter concluded: "Your only recourse is to file a grievance of valuation as per WV § 11-1C-11b(e)."

After the letter to Taxpayer, Forestry sent the Tax Commissioner a list of all properties granted and denied managed timberland certification for Tax Year 2016. The list showed that Forestry denied certification to Taxpayer's properties in Randolph, Barbour and Upshur Counties. The Tax Commissioner notified the assessors in those Counties, and Taxpayer's properties were assessed at the higher market value. Taxpayer's tax liability increased by $523,554.98 for Tax Year 2016.

Taxpayer challenged the increase in tax liability before the Randolph, Barbour and Upshur County assessors, resulting in property tax rulings by the Tax Commissioner regarding Taxpayer's application for certification for Tax Year 2016. The property tax rulings were virtually identical. The Tax Commissioner concluded that, because Taxpayer failed to meet the September 1 deadline set forth in *W.Va. C.S.R. § 110-1H-13*, Taxpayer's properties were not eligible for valuation as managed timberland for Tax Year 2016.

In March 2016, Taxpayer filed petitions in the Circuit Courts of Randolph, Barbour and Upshur Counties appealing the rulings of the Tax Commissioner.

Taxpayer filed a motion for summary judgment. Taxpayer asserted that, because Forestry is solely authorized to classify real property as managed timberland, Taxpayer was incorrectly informed that its only recourse was to challenge the denial of certification before the assessors. Thus, Taxpayer asked the Circuit Court to remand.

On December 6, 2017, the Randolph County Circuit Judge entered the consolidated order affirming the three property tax rulings of the Tax Commissioner and granting summary judgment in favor of the respondents. The Circuit Court determined that, because Taxpayer failed to timely apply for certification due to an admitted oversight, Taxpayer's properties were correctly valued at fair market value for Tax Year 2016.

The Circuit Court acknowledged that only Forestry may certify property as managed timberland and that such authority cannot be exercised by the Tax Commissioner or by county assessors. The Circuit Court further determined that, by following the advice of Forestry to proceed before the assessors, Taxpayer properly obtained judicial review of the tax increase. The Circuit Court reasoned that Taxpayer's appeal "resembles a question of classification" because the procedure followed resolved which valuation method to apply to Taxpayer's properties for Tax Year 2016.

Holding:

The Court reversed and remanded the consolidated appeal from the Circuit Court of Randolph County Barbour and Upshur Counties and instructed the lower court to enter an order directing the Director of the Division of Forestry to review whether Taxpayer's application for certification of its properties in Randolph, Barbour and Upshur Counties as managed timberland may be considered for Tax Year 2016, and, if the Director determines the application may be so considered, to determine whether to grant certification if the properties were managed pursuant to the requirements of the cooperative contract and the Managed Timberland Program .

Impact on Business:

This case establishes that a Taxpayer whose application for treatment of timberland as managed timberland for State tax purposes has the right to appeal the denial to the Director of the West Virginia Division of Forestry.

Pennington v. West Virginia Office of the Insurance Commissioner and Mountaineer Coal Company
Case Nos. 17-1060, 17-1061, 17-1063, 17-1123 (November 2, 2018)

What the Court Was Asked to Decide:

What are the time limitations for the filing of an application for occupational pneumoconiosis benefits when a prior claim has been filed and there has been no additional hazardous exposure?

Facts:

Four claims were consolidated in this appeal to the Court from the Board of Review. In each claim, the claimant had filed a previous claim for occupational pneumoconiosis benefits with no awards granted in the prior claim and the subsequent claim was filed more than three (3) years beyond the date of last exposure.

Holding:

Where a prior claim for occupational pneumoconiosis benefits has been denied, a new application for such benefits may be filed, based on the same date of last exposure as the prior claim if filed within three (3) years from the date of last exposure to occupational dust, pursuant to the first time limitation requirement of West Virginia Code 23-4-15(b). If the subsequent claim is not filed within that time limitation, a new application may also be filed pursuant to the second time limitation of that statute, which is within three (3) years from and after a diagnosis of impairment due to occupational pneumoconiosis is made known to the claimant by a physician. The Court further held that under the second time limitation a new application will not be referred to the Occupational Pneumoconiosis Board for evaluation unless a Physician's Report is filed with the application that sets forth a diagnosed impairment due to occupational pneumoconiosis.

SER Gallagher Bassett v. Webster
Case No. 19-0043 (June 12, 2019)

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

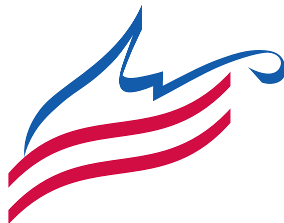
Whether the provisions of *West Virginia Code 23-2C-21(a)* prohibited a cause of action by an employee against a third-party administrator acting on behalf of a self-insured employer?

Facts:

The claimant sued her former employer alleging workers' compensation discrimination, worker's compensation fraud and defamation. The claimant then subsequently filed an amended complaint adding the employer's third-party administration as a defendant.

Holding:

The Court specifically held that under the "plain meaning" of *West Virginia Code 23-2C-21(a)*, a cause of action may not be maintained by employee against the third-party administrator for workers' compensation discrimination, who is acting on behalf of a self-insured employer. The Court further held that *West Virginia Code 23-2C-21* is constitutional and does not violate the equal protection provisions of the West Virginia Constitution. Finally, the Court held that the cause of action asserted for fraudulent misrepresentation, was barred by the two (2) year statute of limitations.



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