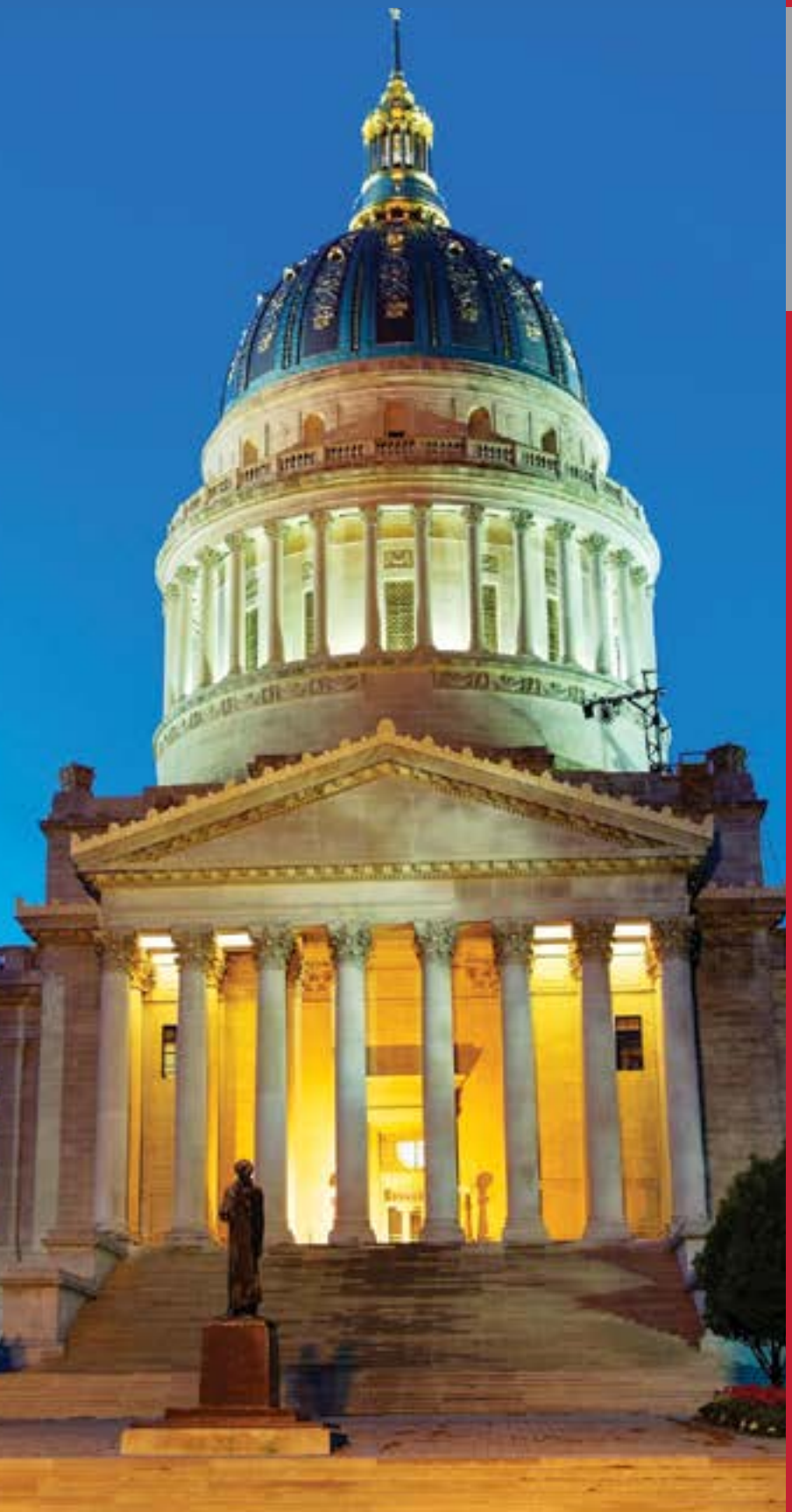
Court Watch



A report prepared for members of the West Virginia Chamber of Commerce 2020

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 2019 and Spring 2020 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
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Bayles v. Evans
Case No. 18-0871 (April 24, 2020)

What the Court was Asked to Decide:

The Court affirmed a decision of the Circuit Court of Marshall County that claims against an investment firm must be submitted to arbitration even though the plaintiff was not a party to the arbitration agreement.

What the Court Decided:

Facts:

William Bayles rolled over monies in his employers' 401(k) plan into a "brokerage account" with Ameriprise Financial Services, Inc. ("Ameriprise") and named Debra Bayles, his second wife, as the sole beneficiary. The application to establish the brokerage account contained a requirement that Mr. Bayles arbitrate any dispute he might have with Ameriprise regarding the account. Debra signed a "spousal consent" form that permitted Mr. Bayles to complete the transfer of the funds from his 401(k) account into the brokerage account.

A few months later, Mr. Bayles opened a "portfolio account" at Ameriprise and transferred most of the money in the brokerage account into the new portfolio account. As with the brokerage account, the application for the portfolio account required that any disputes concerning the portfolio account would be subject to arbitration. In addition, Mr. Bayles designated Debra as the beneficiary of the portfolio account.

On the same day that Mr. Bayles opened the portfolio account, he completed and signed a change of beneficiary form by which he designated his two adult children from his first marriage as the beneficiaries of the brokerage account (and only the brokerage account).

A few weeks later, Ameriprise sent a letter to Mr. Bayles to inform him that Ameriprise had removed Debra as a beneficiary on *both* the brokerage account and the portfolio account. Mr. Bayles never corrected this mistake, and he gave a copy of this letter to one of his adult children.

A few months later, Mr. Bayles died. Upon receiving notice of Mr. Bayles' death, Ameriprise began to investigate the discrepancy in beneficiary designations. Despite its knowledge that Debra and the adult children did not get along, Ameriprise decided to pay the benefits from both accounts solely to Mr. Bayles' adult children, and Debra got nothing.

Debra filed a lawsuit asserting that she was entitled to the benefits from both the brokerage account and the portfolio account. The lawsuit specifically referenced both contracts signed by Mr. Bayles and included claims against the adult children. After initially denying the defendants' motion to dismiss the lawsuit and compel arbitration, a decision that was reversed by the Court in *Evans v. Bayles*, 274 S.E.2d 540 (W. Va. 2016), the circuit court permitted Debra to amend her complaint and then granted the defendants' motion to compel arbitration. Debra appealed that decision.

Holding:

The Court affirmed the circuit court and found that the arbitration clauses in both the brokerage and portfolio account agreements to be valid and enforceable.

In reaching its conclusion, the Court rejected Debra's contention that she was not bound by the arbitration provisions because she did not sign the agreements that established each of

the accounts. While the Court acknowledged that, "as a general rule, only signatories to an arbitration agreement will be required to submit to arbitration[,]" it also recognized that in certain circumstances, a non-signatory to an arbitration agreement may be bound to the agreement. In the case before it, the Court determined that the doctrine of equitable estoppel prevented Debra from "'cherry-picking' the terms beneficial to her while disavowing the terms she would prefer not to be governed by, namely the arbitration clauses in both contracts." For that reason, the Court found that Debra was bound to arbitration provisions in the account agreements despite the fact that she did not sign either agreement.

Debra's amended complaint included a claim that the account agreements were the product of a fraud on her, which she contended rendered the arbitration provisions invalid as to her. The Court, however, found that her argument violated the doctrine of severability, under which a party resisting arbitration must challenge the enforceability of the arbitration clause only, and not the entire agreement. Debra claimed that the entire written contracts between her late husband and Ameriprise were fraudulently induced. Because of that, her claims of fraud were subject to the arbitration agreements as, under the doctrine of severability, the Court presumed that a valid arbitration agreement was formed by the parties.

Impact on Business:

The Court's decision in *Bayles* reminds defendants that arbitration agreements may be enforced against non-signatories in some circumstances. Any party to an arbitration agreement should carefully examine whether claims asserted by a non-signatory to a contract that contains the arbitration agreement may be subject to arbitration.

Golden Eagle Resources II, L.L.C. v. Willow Run Energy, L.L.C.
Case No. 19-0384 (Nov. 19, 2019)

What the Court was Asked to Decide:

The Court affirmed a decision of the Circuit Court of Pleasants County that a written arbitration agreement in a mineral lease required that a claim of cloud on title against non-signatories to the mineral lease must be decided in arbitration.

What the Court Decided:

Facts:

Willow Run conveyed mineral interests in property to Golden Eagle in a written agreement. The written contract contained an arbitration provision by which the parties agreed that any "disagreement between the Parties concerning this Agreement or performance thereunder" would be submitted to arbitration. A dispute arose about whether a cloud on title existed on the mineral interests conveyed, which led Golden Eagle to withhold payment for those interests, after which Willow Run filed a breach of contract civil action in the Circuit Court of Pleasants County.

Golden Eagle sought to dismiss the civil action and have the dispute referred to arbitration. After the circuit court agreed to allow Willow Run to amend its complaint to include a declaratory judgment claim against additional defendants who allegedly may have created the cloud on title, the circuit court refused to refer Golden Eagle's claims to arbitration because it found that (1) W. Va. Code § 51-2-2(d) (2017) grants circuit courts jurisdiction "to remove any cloud on the title to real property, or any part of the cloud, or any estate, right or interest in the real property[,]" and (2) the additional parties in the amended complaint, who were not signatories to the arbitration agreement, were necessary parties to the dispute as they allegedly may have caused the cloud on the title to the mineral interests conveyed to Golden Eagle.

Holding:

The Court reversed the circuit court and found that disputes concerning clouds of title to any real estate, right, or interest in real property were subject to arbitration under the West Virginia Revised Uniform Arbitration Act, W. Va. Code § 55-10-8, *et. al.* (the "Act"), because § 51-2-2(d) does not grant exclusive jurisdiction over such disputes to a circuit court. More importantly, the Court rejected the circuit court's reasoning that, "[a]s a matter of public policy, property rights are not subject to arbitration." *Golden Eagle* at 13. Instead, the Court emphasized that the Act allows "*any* existing or subsequent controversy arising between the parties" to be submitted to arbitration. *Golden Eagle* at 14 (emphasis in original). The Court concluded that the West Virginia Legislature's "use of the word 'any' . . . is not superfluous language, but was intended to mean that parties may craft binding arbitration agreements to cover disputes of whatever kind they may choose." *Golden Eagle* at 14.

The Court also determined that the presence of non-signatories to the arbitration agreement in the civil action did not defeat the validity or application of the arbitration agreement between Golden Eagle and Willow Run. The Court recognized that sending the dispute between Golden Eagle and Willow Run to arbitration, while Willow Run's declaratory judgment claim against the other defendants remained in the circuit court, would result in "piecemeal" litigation that was potentially inefficient and inconsistent. The Court, however, relying explicitly on its decision in *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W. Va. 486, 729 S.E.2d 808 (2012) (which addressed the arbitrability of claims under the FAA that resulted in piecemeal litigation), found that the circuit court "must enforce [under the Act] the bargain of the parties to arbitrate, even where the result

might be the inefficient maintenance of separate proceedings in different forums." Golden Eagle at 16.

Impact on Business:

Like many courts around the country, the West Virginia Supreme Court of Appeals has addressed a variety of arbitration issues in the past decade as businesses significantly increase the use of arbitration provisions in a wide variety of transactions, including mineral leases. Most of the resulting decisions have been decided under the Federal Arbitration Act ("FAA") as the transaction in dispute involves interstate commerce. *Golden Eagle* offered the Court a rare opportunity to address arbitration issues that arose solely under the Act instead of the FAA because the property involved was located completely within West Virginia.

Nonetheless, the Court adopted both an analysis and a result that mirrored its prior cases decided under the FAA, thereby signaling that it viewed West Virginia law in the Act as mirroring the law under the FAA. Because of this, parties to a mineral lease that include an arbitration provision can be confident that arbitration issues under West Virginia law will be treated the same as under federal law.

TD Auto Fin. LLC v. Reynolds
842 S.E.2d 783 (W. Va. 2020)

What the Court was asked to decide:

The Supreme Court of Appeals of West Virginia was asked to determine whether an arbitration provision in a vehicle financing application agreement applied to Plaintiffs' wrongful debt collection claims. The trial court had determined that the arbitration provision in the financing application was not applicable because a merger clause in a later executed Retail Installment Sales Contract supplanted the agreement to arbitrate.

What the Court decided:

The Supreme Court of Appeals, in a 3-2 decision, upheld the decision of the trial court, finding that the Retail Installment Sales Contract and its merger agreement displaced the arbitration provision in the financing application. The Court affirmed that Plaintiffs' claims should not be sent to arbitration.

Facts:

Plaintiffs were shopping for a new truck in the fall of 2014. During their interactions at a dealership, Plaintiffs executed a credit application permitting the dealership to identify vehicle financing options. Upon obtaining financing, Plaintiffs reached an agreement for the purchase of a 2014 Chevrolet Silverado, entering a "Retail Installment Sale Contract" ("RISC"). The credit application first executed by Plaintiffs included an arbitration provision, which provided:

> Any claim or dispute, whether in contract, tort or otherwise (including any dispute over the interpretation, scope, or validity of this Important Contract of Arbitration or the arbitrability of any issue), between our employees, parents, subsidiaries, affiliate companies, agents, successors or assignees, which arises out of or relates to this application and Important Contract of Arbitration, any installment sale contract or lease agreement, or any resulting transaction or relationship (including any such relationship with third parties who do not sign this application and important Contract of Arbitration) shall, at the election of any of us .... be resolved by a neutral, binding arbitration and not by a court action.

The RISC did not include an arbitration provision, but did include a "merger" or "integration" clause, (such clauses are used to prevent the parties to a contract from later claiming that the contract does not reflect their entire understanding, was changed by a subsequent oral agreement, or is not consistent with prior agreements). In this case, the "merger"/"integration" clause in the RISC provided: "HOW THIS CONTRACT CAN BE CHANGED. This contract contains the entire agreement between you and us relating to this contract. Any change to this contract must be in writing and we must sign it. No oral changes are binding."

Sometime later, Plaintiffs defaulted on their loan and TD Auto Finance (the lender) began collection efforts. Plaintiffs subsequently filed a lawsuit in the Circuit Court of Mercer County, alleging violations of the West Virginia Consumer Credit and Protection Act (WVCCPA), the West Virginia Computer Crimes and Abuse Act (WVCCAA), and alleged invasion of privacy and intentional infliction of emotional distress. A motion to compel arbitration was denied by the lower court on the basis that the merger clause in the RISC displaced the arbitration provision of the earlier executed financing agreement. The Defendants (TD Auto Finance and other third-party debt collectors) appealed.

Holding:

The Supreme Court of Appeals posed the central issue of review as "whether the arbitration provision . . . in the credit application survives the 'merger clause' in the RISC, which states that the RISC constitutes the 'entire agreement' between the parties." The Court noted that while there is a clear agreement to arbitrate under the financing application, RISC contains no such arbitration agreement nor reference to the prior agreement, and explicitly purports to be the entire agreement between the parties. The court analyzed the contracts as "separate written instruments" and found the arbitration provision was not incorporated into the RISC; because the RISC had a merger clause. The Court (opinion by Justice Workman) concluded "that the arbitration provisions in the credit application did not survive the merger clause of the RISC, thereby nullifying respondents' obligation to arbitrate their claims against petitioners."

Justice Hutchinson penned a concurring opinion, noting that simpler principles of contract interpretation could lead to the same result, providing: "When Crossroads Chevrolet offered a pickup truck for sale according to the terms in the RISC, Crossroads Chevrolet's offer did not contain an arbitration provision. When Mr. and Mrs. Reynolds accepted the offer, they did not assent to arbitrate any disputes with Crossroads Chevrolet. Accordingly, under basic, run-of-the-mill rules of contract interpretation, the Reynoldses are not bound to arbitrate their dispute with TD Auto Finance regarding the RISC."

Justice Jenkins dissented (joined by Justice Armstead), taking issue with the majority's classification of the financing application and the RISC as separate documents, noting that because both agreements were executed on the same day, as the part of the same transaction, and in light of the strong public policy favoring arbitration, the claims should have been compelled to arbitration.

Impact on Business:

This decision is a departure from previous decisions in West Virginia that generally have enforced arbitration provisions. Nonetheless, the decision does offer a roadmap for the inclusion (and enforcement) of arbitration provisions in those transactions requiring the execution of multiple or multi-part agreements, namely that the arbitration provision be incorporated into each segment of the transaction, preferably in its entirely, but at the very least, by explicit reference.

West Virginia Department of Transportation, Division of Highways v. Pifer
Case No. 18-0517 (Nov. 19, 2019)

What the Court was Asked to Decide:

Petitioner, the West Virginia Division of Highways ("DOH"), asked the Supreme Court of Appeals to decide whether "condemnation blight" damages are a permissible element of just compensation under West Virginia law. Additionally, the DOH contended that the court below errored by allowing the jury to determine the date of the taking and improperly applied pre-petition interest to Respondents' award.

What the Court Decided:

The Supreme Court of Appeals, Justice Workman, held (1) that condemnation blight damages are a permissible element of just compensation when an owner can establish an unreasonable delay in the institution of the condemnation proceeding following its formal announcement, (2) that a jury may determine the time for which condemnation blight damages are to be taxed but not the time of the taking, and (3) interest on a condemnation award, including any award for condemnation blight damages, must be applied from the date at which the petition was filed.

Facts:

For more than twenty years, the Pifers ran a family operated service station, convenience store, and towing service fronting County Route 14 in Mineral Wells, West Virginia. In October of 1998, the DOH held a public informational meeting regarding a planned Interchange of Interstate 77 and County Route 14, and in December of that year DOH chose a plan that would require taking most of the Pifers' land fronting County Route 14. The DOH informed Respondents that construction would begin in spring of 2005. However, construction was delayed and in April of 2008 the DOH reached out to the Pifers to let them know that the DOH's plans had changed and that the majority of their land would be spared. On March 9, 2010, the DOH filed a petition to condemn a small portion of the Pifers' land, depositing $3,550 as estimated compensation. Commissioners appointed to assess the value of the property determined that an award of $17,500 would be appropriate, but the commissioner's proposal was rejected by both parties. Accordingly, the matter was set for jury trial.

At trial, the Pifers argued that in addition to compensation for the land taken by the DOH, they suffered from condemnation blight due to lost rental income. They put on testimony of an appraiser that they suffered $35,000 a year in lost rental values. The jury awarded $3,800 for the taking and $175,165 for lost rental income for the five years between 2003 and 2007. DOH appealed and argued that the admission of evidence regarding condemnation blight and the timing of the take was contrary to law, and that the trial court's calculation of interest was improper.

Holding:

The Court first tackled the DOH's contention that the trial court improperly allowed the jury to determine the date of the taking. The Court explained that although it agrees with the DOH that the date of taking was, as a matter of law, the date at which the petition was filed, the parties never disputed nor did the trial court allow the jury to decide the date of the taking. Instead, the trial court asked the jury whether the Pifers were entitled to condemnation blight damages during the period prior to the take. Such damages are, the Court explained, damages suffered in anticipation of the taking.

The Court next addressed whether West Virginia law allows for the recovery of condemnation blight damages. The Court noted a distinction between states with constitutions which provide for just compensation only for takings and those that expand the scope of constitutional protection to include damages to private property as well as takings. In the latter states, such as West Virginia, recovery for condemnation blight damages are typically permissible. Previously, the Court's decisions had been limited to addressing the effect of condemnation blight on the value of property at the time of the take, not pre-take damages. In these decisions, the Court held that increases and diminution of the property's value due to the activities of the condemning authority are not to be considered when determining the value of the take. In the present case, however, the Court concluded that these prior decisions offered little guidance. Looking to persuasive authority from Wisconsin, Missouri, and Nevada, the Court held that a land owner may recover condemnation blight damages as an element of just compensation in a condemnation proceeding if the owner establishes an unreasonable delay in the institution of the condemnation proceeding following its formal announcement.

Finally, the Court turned to the issue of whether the trial court appropriately calculated interest on the jury's verdict. The Court noted that it had recently recognized that the statutes governing condemnation proceedings, W. Va. Code § 54-2-14 in particular, expressly provide that interest is to be applied from the time at which the petition is filed. Accordingly, the Court held that the trial court errored in applying pre-petition interest to the Pifers' condemnation blight damages.

Impact on Business:

The Court's holding significantly increases the scope of compensation that may be awarded in condemnation proceedings. Business owners facing condemnation should be aware that an unreasonable delay between a condemning authority's announcement of its plans to condemn the owner's property and the filing of a petition of condemnation could entitle them to condemnation blight damages, damages that can dwarf the value of the condemned property. Thus, when a business owner learns that their business may be the subject of condemnation proceedings, the owner should carefully document how the threat of condemnation has affected the business's profits so that, in the event that proceedings are unreasonably delayed, it can prove damages.

John A. Sheppard Memorial Ecological Reservation Inc. v. Fanning
Case No. 19-0450 (Nov. 19, 2019)

What the Court was Asked to Decide:

The United States District Court for the Southern District of West Virginia asked the Supreme Court of Appeals to rule on the following certified question: "Other than as expressly authorized by West Virginia Code § 31E-3-304(b)(2), does West Virginia law authorize derivative actions for state law claims brought on behalf of West Virginia nonprofit corporations?"

What the Court Decided:

The Supreme Court of Appeals answered in the negative, holding that other than as expressly authorized by West Virginia Code § 31E-3-304(b)(2), the West Virginia Nonprofit Corporation Act does not allow a director to bring a derivative action on behalf of a nonprofit corporation.

Facts:

The John A. Sheppard Memorial Ecological Reservation Inc.("JASMER") was incorporated as a nonprofit under West Virginia Law in 1976. In 2018, two board members, Michael Fanning and Michael Sager, filed suit in the Southern District Court of West Virginia against JASMER and other members of JASMER's board of directors. Among the claims brought by plaintiffs were three derivative claims seeking to recover damages from other board members on behalf of the nonprofit. These claims alleged breach of fiduciary duties, conversion of property, and constructive fraud and private inurement on the part of certain board members. JASMER and the defendant board members moved to dismiss the plaintiffs' action, contending that West Virginia law did not permit plaintiffs' derivative claims. Concluding that the motion raised a novel issue of West Virginia law, the Southern District certified its question to the Supreme Court of Appeals.

Holding:

The Supreme Court of Appeals began its analysis by noting counts three through seven of the Plaintiffs' complaint asserted derivative claims, which the Court defined as an action that asserts on behalf of a corporation claims that the corporation has not itself prosecuted. While the West Virginia Nonprofit Corporation Act authorizes derivative suits brought by directors to challenge ultra vires acts of the Corporation, the Act does not expressly authorize derivative suits seeking other kinds of relief. Given the parties agreed that the West Virginia Nonprofit Corporation Act did not authorize Plaintiffs' derivative claims, the Court turned to whether such claims may be brought under common law.

Although West Virginia common law has recognized derivative claims in the context of for-profit corporations, the Court noted that it had not yet done so in the context of non-profit corporations. To determine if imposing such a claim under common law would be consistent with the West Virginia Nonprofit Corporation Act, the Court looked to the Act's history. Key to the Court's analysis was that the ABA's Revised Model Nonprofit Corporation Act, upon which the West Virginia Act was based, expressly authorized claims like those brought by the Plaintiffs. The Court explained that the legislature's exclusion of this authorization when it adopted the Model Act constitutes strong evidence that such claims are inconsistent with the West Virginia Act. Thus, the Court held that other than as expressly authorized by West Virginia Code § 31E-3-304(b)(2), the West Virginia Nonprofit Corporation Act does not allow a director to bring a derivative action on behalf of a nonprofit corporation.

Impact on Business:

This decision is limited to derivative actions in the non-profit context. While directors of non-profits can challenge ultra vires acts under statute, the Court's ruling does not allow for litigation under the West Virginia Nonprofit Corporation Act.

Blanda v. Martin & Seibert L.C.
Case No. 19-0317 (Nov. 22, 2019)

What the Court was asked to Decide:

The Supreme Court of Appeals was asked to answer the following certified question from the United States District Court for the Southern District of West Virginia: "Does West Virginia Code § 61-3-24 [, a criminal law statute,] constitute a substantial public policy for the State of West Virginia that would support a cause of action for wrongful discharge in violation of public policy pursuant to *Harless v. Nat'l. Bank*, 162 W.Va. 116 [246 S.E.2d 270] (1978), and its progeny?"

What the Court Decided:

The Supreme Court of Appeals answered the Certified Question in the negative.

Facts:

Christine Blanda was an accounts receivable clerk employed by Martin & Seibert L.C. in charge of billing clients for the hours worked by the law firm's attorneys and other workers. In 2013, Ms. Blanda suspected that the firm was unlawfully billing clients, and she voiced her concerns to employees of the law firm. Ms. Blanda never received disciplinary action for voicing her concerns, and she never threatened to report her suspicions to anyone outside of the firm.

In 2014, Ms. Blanda was instructed to cross-train with another employee. Ms. Blanda claimed that she was training the employee but received no reciprocal training. Ms. Blanda also claimed that the firm's policy of encouraging employees to voice concerns to supervisors was rescinded when one of the Respondents told her that she could not talk to anyone about the firm's billing practices. On December 4, 2014, Ms. Blanda was issued a formal warning notice about her job performance, and she asserted that the claims in the notice were false.

On January 23, 2015, Ms. Blanda noticed that the firm posted her job for hiring. She immediately contacted Lisa Green, one of the firm's attorneys, and Ms. Green told her that she suspected that the firm was setting up Ms. Blanda to take the fall for the illegal billing practices. Ms. Green contacted Michael Callaghan, former Assistant United States Attorney and chief of the Criminal Division in the Southern District of West Virginia, for advice on reporting Respondents' conduct to the State Bar and FBI. Ms. Green claimed that Mr. Callaghan contacted the FBI, and Ms. Green advised Ms. Blanda to contact Mr. Callaghan for advice.

Ms. Blanda claimed that, after her conversation with Mr. Callaghan, she felt it necessary to start gathering evidence to protect herself. On January 26, 2015, Ms. Blanda emailed 227 attachments to herself that consisted of raw billable hours data from the firm's timekeeping files. The law firm had a monitoring system that detected the emails, and Ms. Blanda was immediately fired for violating the firm's employee handbook policy prohibiting the disclosure of confidential information, including compensation data, and subjecting violators to termination. After she was fired, Ms. Blanda took paper files from the law firm. Ms. Blanda provided information to the FBI, and the FBI "raided" the law firm. The law firm thereafter disbanded. Ms. Blanda filed for unemployment benefits, stating that she was terminated for emailing timesheets to herself in violation of firm policy. She reiterated that statement during her deposition.

Ms. Blanda filed a whistleblower claim against the Respondents under the Dodd-Frank Act. However, because she did not report the alleged violation to the Securities and Exchange Commission, her claim was no longer viable as a result of a recent United States Supreme Court case.

Ms. Blanda then asserted that her only recourse was a common law retaliatory discharge claim under *Harless v. First Nat'l. Bank in Fairmont*. She claimed that she was discharged in violation of the substantial public policy found in *W. Va. Code* § 61-3-24, which criminalizes obtaining money by false pretenses. Respondents countered that the decision in *Swears v. R.M. Roach & Sons, Inc.* already considered the issue raised by Ms. Blanda and foreclosed the theory. The United States District Court for the Southern District of West Virginia submitted the Certified Question to the West Virginia Supreme Court of Appeals, seeking an authoritative determination regarding whether the state-law *Harless* claim provides alternative means of recourse when the Dodd-Frank Act's whistleblower protections are not available.

Holding:

The West Virginia Supreme Court of Appeals, concluded that the Certified Question from the United States District Court for the Southern District of West Virginia needed to be narrowed to: "Does West Virginia Code § 61-3-24 constitute a substantial public policy under *Harless v. First Nat'l. Bank*, 162 W.Va. 116 (1978), and its progeny, to protect an employer of a non-public employee who reported suspected criminal conduct to the appropriate authority and claims to have been retaliated against as a result?" After narrowing the Certified Question, the Court found that it did not.

The Court acknowledged that retaliatory discharge claims are usually based on public policy articulated by the Legislature. Pointing to Footnote 9 of *Swears v. R.M. Roach & Sons, Inc.*, for the proposition that, in wrongful discharge cases that review assertions of criminal conduct, the Court noted that it has only found a substantial public policy violation when the claimant was terminated for refusing to engage in illegal activity. The Court held that Ms. Blanda's allegations did not fall under that framework because she alleged that she was fired because she engaged in whistleblower activity, not because she refused to engage in criminal activity.

Taking special note that the West Virginia Whistle-Blower Law limits whistleblower protections to the public sector, and that the Legislature explicitly provided expressions public policy extending whistleblower protections to private employees in other areas, the Court refused to extend the scope of *W. Va. Code* § 61-3-24 to a private employee without a similar explicit expression from the Legislature. The Court concluded that making *W. Va. Code* § 61-3-24 a source of public policy in such whistleblower actions, when the legislature had specifically limited the claims to a specific classes of employees, would make employers "deputized enforcers of our criminal statutes in order to avoid *Harless*-type liability and 'throw open the floodgates of litigation by allowing an employee to confer protected status on himself or herself merely by making an allegation of illegal conduct by a co-worker to a supervisor, no matter how serious, spurious, or unsupported it may be.'" The Court refused to open those floodgates, holding that *W. Va. Code* § 61-3-24 did not constitute a substantial public policy under Harless and its protecting an employee of a private employer who reported suspected criminal conduct to the appropriate authority and claims to have been retaliated against as a result.

Impact on Business:

The *Blanda* decision limits an employer's exposure to wrongful discharge claims under *Harless* on the grounds of substantial public policy. This decision reflects the Court's hesitance to extend substantial public policy beyond that expressed by the Legislature. The Court held that employers should not be "deputized enforcers" of criminal statutes to avoid *Harless*-type liability. Ultimately, the *Blanda* decision aids employers by not further extending a cause of action that is still somewhat in a gray area – a cause of action that has caused enough uncertainty in the employer-employee relationship.

Burns v. W.Va. Dept. of Educ. & the Arts
Case No. 18-0293 (Nov. 20, 2019)

What the Court was asked to Decide:

The Circuit Court of Kanawha County granted summary judgment in favor of Respondent West Virginia Department of Education and Arts ("WVDEA") on Petitioner Burns' claims of failure to accommodate and constructive discharge. Petitioner contested the Kanawha County Circuit Court's summary judgment order on appeal. The Supreme Court of Appeals considered whether summary judgment was appropriate – that is, whether Burns had shown a genuine issue of fact as to whether she was due an accommodation and whether she was justified in quitting.

What the Court Decided:

The Supreme Court of Appeals affirmed the circuit court's entry of summary judgment in favor of the WVDEA, the employer.

Facts:

Shirley Burns worked as a structural historian for the WVDEA until she resigned in March 2014. In March of 2013, Ms. Burns suffered an asthma attack that required hospitalization and bedrest for the better part of a month. She took leave under the Family Medical Leave Act ("FMLA"), which ran concurrently with her paid sick leave and available annual leave per WVDEA policy. Ms. Burns returned to work in April 2013, and though she never made a formal request for an accommodation, a fellow employee would meet her with a wheelchair at the loading dock where Ms. Burns' husband dropped her off for work and take her to her office. Ms. Burns used the wheelchair throughout the day as needed and an employee would take her back to the loading dock at the end of the day. Because of her adult-onset respiratory illness and poor lung capacity, Ms. Burns, on the order of her physician attended pulmonary rehabilitation/respiratory therapy twice a week. She used her accrued sick leave and annual leave to attend the appointments.

When her paid sick leave was nearly depleted, Ms. Burns wrote a letter to Commissioner Randall Reid-Smith asking that the WVDEA permit her to work weekends from home rather than requiring her to take paid leave for her weekly absences from work for medical treatments. Ms. Burns provided the names of her doctors for Mr. Reid-Smith to gather more information and completed an Americans with Disabilities Act ("ADA") "Request for Accommodation" Form. Based on responses gathered from her physician, WVDEA did not accommodate Ms. Burns' request. Ms. Burns exhausted her paid sick and annual leave on January 9, 2014. That same day, Kanawha County's water supply became contaminated due to a chemical leak. Hearing that there was an odor associated with the contaminated water, Ms. Burns took unpaid leave. She returned to work January 13, and that same day, her employer was instructed to flush its pipes. Ms. Burns noticed an odor that afternoon, and when she returned to work on January 14, she had an asthma attack. She was treated in the emergency room and released.

Ms. Burns was approved for emergency medical leave starting January 14, 2014 and was also approved for the WVDEA's leave donation program. However, Ms. Burns resigned. She then filed suit against the WVDEA under the West Virginia Human Rights Act ("WVHRA"), alleging that she was unlawfully denied a reasonable accommodation and that she was constructively discharged because her accommodation was denied.

Both parties filed for summary judgment, conceding that no facts were in dispute. The circuit court granted summary judgment in favor of the WVDEA finding that: (1) Ms. Burns did not require any accommodation to perform the essential functions of her job and was permitted to take

paid leave for her weekly medical treatments; and (2) Ms. Burns' constructive discharge claim, based entirely on the denial of her request for accommodation, failed as a matter of law.

Holding:

The Supreme Court of Appeals upheld the circuit court's grant of summary judgment. The Supreme Court held that Ms. Burns failed to grasp that while the accommodation she requested would be helpful, it was not required for her to complete the essential functions of her job. Accordingly, there was no liability for the WVDEA under the WVHRA. The Court stressed that a work-from-home accommodation was not necessary because Ms. Burns was already permitted to miss work and attend her appointments. Ms. Burns wanted the accommodation to keep her from using accrued paid sick and annual leave and then unpaid leave, but the Court found no authority to support that the WVDEA was required by law to grant that accommodation request. Rather, the Court noted that the EEOC Enforcement Guidance reinforced the propriety of paid and unpaid leave as a reasonable accommodation. The Fourth Circuit came to the same conclusion in *Myers v. Hose*. Thus, relying on that guidance, the Court held that the WVDEA was not liable for failing to accommodate because Ms. Burns' accommodation requests were stemming from a *desire*, not a need.

In response to the constructive discharge claim, the Court held that there was no connection between Ms. Burns' requested accommodation and the ill health effects (the asthma attack) that she suffered on January 14, 2014. Ms. Burns only returned to work for one-and-a-half days after the water contamination – pursuant to the Governor's "back-to-work order" -- and that period was not long enough to establish the requisite intolerable environment necessary to maintain a constructive discharge claim against the WVDEA.

Impact on Business:

This decision clarifies that an employee does not necessarily get to dictate the accommodation that he or she desires. Rather, the focus should be on the accommodation that is needed for the employee to do the job. That may not necessarily be the employee's first choice. Moreover, the Court refused to allow an employee to claim constructive discharge in the face of substantial effort by the employer.

Cabell Cty. Comm'n. v. Whitt
Case No. 18-0408 (Nov. 19, 2019)

What the Court was asked to Decide:

The Supreme Court of Appeals was asked to review a circuit court's order that rejected a motion to dismiss claims of intentional infliction of emotional distress and false imprisonment against a county administrator.

What the Court Decided:

The Supreme Court reversed the circuit court's order insofar as it denied summary judgment to Beth Thompson, the administrator, on the claims of intentional infliction of emotional distress and false imprisonment, finding that Ms. Thompson was immune from liability on those claims. The Court declined to consider whether the circuit court's denial of summary judgment on the whistleblower claim was appropriate since the claim did not fall within the collateral order doctrine and was not properly before the Court on a petition for extraordinary relief.

Facts:

On September 19, 2016, Joseph Whitt was terminated from his employment as IT Director for the Cabell County Commission . Prior to his termination, Mr. Whitt had worked for the Commission for twelve years as an IT Specialist and, following a promotion in July 2015, the Commission's IT Director. At the same time that Mr. Whitt was promoted, Ms. Thompson was hired as Cabell County Administrator, becoming Mr. Whitt's immediate supervisor. During the fourteen months that Ms. Thompson supervised Mr. Whitt, there were no problems raised regarding Mr. Whitt's work.

On July 6, 2015, Mr. Whitt sent Ms. Thompson an email regarding the backup capability of the Commission's systems. Mr. Whitt informed her of the limited reliability of the backup systems, and he provided Ms. Thompson with a proposal from Alpha Technologies to remediate those deficiencies. Ms. Thompson reported the proposal to the Commission, but the Commission rejected the proposal due to budgetary constraints.

Fourteen months later, on August 31, 2016, the server housing all of the Cabell County Clerk's financial data crashed. The crash resulted in the loss of nine months of electronic financial data, including budget, payroll, and accounts payable because the backup system was not functioning properly at the time of the crash. No one knows how long the backup system was not working because Mr. Whitt, during his employment as IT Director, did not verify that information was being backed up.

Mr. Whitt stated to Ms. Thompson and to the members of the Commission that the data loss was a direct result of the Commission's refusal to procure the additional backup capabilities that he recommended. He reiterated this during a meeting of variously elected county officials to address the issues resulting from the crash. After the meeting, Ms. Thompson called the members of the Commission and informed them of what Mr. Whitt said. Two days later, the decision was made to terminate Mr. Whitt's employment.

On September 19, 2016, Ms. Thompson began by asking Mr. Whitt for passwords and other information, which he complied with. Ms. Thompson then consulted with the Commission's attorney on how the termination should be carried out and was advised to have a deputy accompany her to Mr. Whitt's office and escort him out of the building. At approximately 4:00 p.m. that day, Ms. Thompson, with Deputy Robert McQuaid, executed the plan. After handing Mr. Whitt the termination letter, Ms. Thompson left. The deputy stayed and, after Mr. Whitt gathered his belongings, escorted him out of the building. The deputy never touched Mr. Whitt.

Mr. Whitt filed suit against both the Commission and Ms. Thompson alleging wrongful termination under West Virginia Whistle-Blower Law, *W. Va. Code* §§ 6C-1-1, et *sew.* and intentional infliction of emotional distress resulting from the manner in which he was discharged. Mr. Whitt subsequently amended his complaint to add a claim for false imprisonment resulting from the manner in which he was discharged.

The circuit court denied the petitioners' motion for summary judgment, concluding that the evidence was sufficient to support Mr. Whitt's claims of whistleblower violation, intentional infliction of emotional distress, and false imprisonment. The circuit court also found that Ms. Thompson was not immune from liability under the Government Tort Claims Insurance Reform Act, *W. Va. Code* §§ 29-12A-1, *et seq.* or entitled to qualified immunity.

Months later, the circuit court entered an order finding that the Commission was statutorily immune from Mr. Whitt's claims of intentional infliction of emotional distress and false imprisonment. The court declined, however, to alter its previous ruling that Ms. Thompson was not entitled to statutory or qualified immunity on the intentional infliction of emotional distress and false imprisonment claims.

Holding:

The Supreme Court reversed the circuit court's finding that Ms. Thompson was not immune from Mr. Whitt's claims of intentional infliction of emotional distress and false imprisonment. The Court noted that Ms. Thompson, as County Administrator, was an employee of the County Commission. In terminating Mr. Whitt's employment, she was acting pursuant to the commissioners' directives, and she consulted an attorney prior to the termination. The attorney advised Ms. Thompson to have the deputy accompany her, so the Court held that she was not "off on a lark" (*i.e.*, acting outside of her role as Administrator) in having Deputy McQuaid accompany her and escort Mr. Whitt to the parking lot.

The Court also held that Ms. Thompson was not acting with malicious purpose, in bad faith, or in a wanton reckless manner in violation of *W. Va. Code* § 29-12A-5(b)(2). The Court specified that having a deputy escort an employee to the car was not "some sort of 'perp walk'" because the sight of an armed deputy in a courthouse would not "cause any bystanders to make any negative assumptions about an individual walking out of the courthouse with a deputy." The Court, further, cited to a multitude of cases that rejected the notion that an employer's action in having a terminated employee removed from the building could support a claim for outrage or for negligent or intentional infliction of emotional distress. As such, the Court held that the allegations were not sufficient to support a finding of malice under *W. Va. Code* § 29-12A-5(b)(2). Because Ms. Thompson's actions were not malicious, in bad faith, or in a wanton reckless manner, the Court concluded that she was immune from liability on the intentional infliction of emotional distress and false imprisonment claims.

As for the appeal of the claims under the Whistle-Blower Law, the Court held that the whistleblower claims were completely separate from the intentional tort claims, so the Court found no basis to exercise its discretion to review the whistleblower claims under the collateral order doctrine. The Court also declined to review the whistleblower issues by converting the appeal to a petition for extraordinary relief since the facts did not align with the five necessary factors articulated in *State ex rel. Hoover v. Berger*, 199 W.Va. 12 (1996).

Impact on Business:

Although this decision involved issues of immunity for a public official, there is language in the opinion that will be very helpful to employers who face the Hobson's choice of whether to escort a terminated employee out of the workplace with security (for a multitude of reasons) or to face an allegation of inflicting emotional distress or effecting a false imprisonment.

Henzler v. Turnoutz, LLC
Case No. 18-0507 (June 12, 2020)

What the Court was asked to Decide:

Petitioner David Henzler appealed the Circuit Court of Kanawha County's grant of Respondent Turnoutz's Motion for Summary Judgment on his age discrimination claims. The West Virginia Supreme Court of Appeals considered whether there was a genuine issue of material fact as to whether Turnoutz, was entitled to the benefit of the severance agreement and general release that Mr. Henzler executed with his former employer.

What the Court Decided:

The Supreme Court of Appeals found that the circuit court erred in granting summary judgment to Turnoutz. The Court reversed the circuit court's order and remanded the matter to the Circuit Court of Kanawha County.

Facts:

David Henzler was employed by CrossAmerica Partners, LP ("CAP") as an area supervisor of One Stop convenience stores for nineteen years. Mr. Henzler lost his job when approximately 41 of those stores were leased to Turnoutz, LLC. Mr. Henzler applied for a job with Turnoutz but was not hired. Henzler filed an age discrimination suit against Turnoutz under the West Virginia Human Rights Act ("WVHRA"), alleging that he was rejected in favor of younger, less-qualified candidates.

Turnoutz moved for summary judgment after discovery, claiming that Henzler released any employment-related claims against Turnoutz when he executed a severance agreement and general release with CAP ("CAP Release"), which purported to release CAP and its "corporate affiliates" from any and all claims resulting from previous acts or omissions. The circuit court agreed, granted the motion, and dismissed Mr. Henzler's age discrimination claim against Turnoutz.

Mr. Henzler argued on appeal that there were genuine issues of material fact as to whether the release applied to his claims against Turnoutz.

Holding:

The Supreme Court agreed with Mr. Henzler that the CAP Release would apply to Turnoutz only if: (1) the parties had named Turnoutz as an entity released from liability as to Mr. Henzler, or (2) Turnoutz is an affiliate of or successor to CAP. The Court noted that the CAP Release did not specifically name as a "Company Released Party." Moreover, the Court rejected Turnoutz's argument that it was a "successor or affiliate" of CAP because Turnoutz had not offered any evidence of a merger or acquisition with CAP. Thus, inasmuch as Turnoutz was not a named party to the agreement, nor had it offered evidence that it was a successor or affiliate, the Court concluded that a genuine issue of material fact existed as to CAP's relationship to Turnoutz and whether the CAP release was applicable to Mr. Henzler's claims against Turnoutz.

Impact on Business:

The *Henzler* decision highlights the need to clearly identify any and all parties that a company intends to be protected under a general release and severance agreement. Similarly, the decision highlights the need to clearly identify in relevant documentation that a company is a successor or affiliate intended to be protected under a general release or severance agreement.

Morrisey v. West Virginia AFL-CIO
Case No. 19-0298 (Apr. 21, 2020)

What the Court was Asked to Decide:

Whether the Circuit Court of Kanawha County erred in finding that West Virginia's "Workplace Freedom Act" was an unconstitutional taking.

What the Court Decided:

The Supreme Court of Appeals of West Virginia upheld the constitutionality of West Virginia's Right to Work law and reversed a circuit court decision that found otherwise. The Court remanded the case to the circuit court with directions to enter summary judgment in favor of the State of West Virginia.

Facts:

In 2016, the West Virginia Legislature passed the "Workplace Freedom Act," (the "Act") joining 25 other states that had passed similar legislation. That number has since increased to 28 total states that have passed a Right to Work law. Essentially, the Right to Work law in West Virginia establishes that a person may not be required to join a labor union as a condition of employment or be required to pay any dues or fees to a labor union as a condition of employment. (These fees, commonly called "agency fees," will be referred to as "compelled dues" throughout this article, consistent with the Supreme Court's vernacular.)

Since its passage, the Act has faced a myriad of legal challenges and delays, including the lawsuit leading to this decision. Shortly before its effective date - July 1, 2016 - several labor organizations filed a lawsuit that challenged the Act's constitutionality. The circuit court found the Act's prohibition on compelled dues as a condition of employment to be an unconstitutional taking as to a union's representation obligations, and an infringement on the labor organizations' freedom to associate and their liberty interests. Despite earlier clear direction from the Supreme Court in this same case when the circuit court originally enjoined enforcement of the Act, the circuit court ultimately struck down the Act.

Holding:

In reversing the lower court, the Supreme Court found that the provisions of the Act that prohibited compelled dues to a union as a condition of employment do not violate any rights of association under the West Virginia Constitution. The Court discussed the long history of labor relations in both the State of West Virginia and the United States, and the Court noted that no "federal or state appellate court [], in over seven decades, has struck down such a law." The Court also found that no punitive action was directed towards members of labor organizations or the labor organizations themselves in this matter. Simply, the Court found nothing in the law to discourage or prevent labor organizations from recruiting workers or any retaliation against workers who choose to join an organization. Indeed, the Court stated that the freedom to associate also includes the freedom not to associate. Thus, the Court found that no rights to associate had been infringed.

The Court also found that the prohibition of these compelled dues did not constitute an unconstitutional taking by the State. The Act, the Court stated, does not impose a duty upon labor organizations to provide services to nonpaying employees; rather, the obligation to fairly represent all employees derives from federal law. The Court further rejected the labor organizations' "free rider" argument, joining with courts around the country that have upheld similar laws. Rather than providing their services for no cost to non-dues-paying employees, also known to unions as

"free-riders," the labor organizations enjoy substantial benefits that derive from being the exclusive bargaining representative. The Court stated that a labor organization's position as the exclusive bargaining representative essentially gives them a "seat at the table." The Court thus found that no unconstitutional taking occurred under the Workplace Freedom Act through the prohibition of compelled dues.

The Court finally found that the Act does not infringe upon any liberty interest because it imposed no requirement that labor organizations provide services to nonmembers. The Court again emphasized that this requirement flows from federal labor law, not state law. Therefore, the Court found that the Act did not infringe upon any liberty interest of the labor organizations.

As a final note, the Court was particularly persuaded by the Supreme Court of the United States' recent decision in Janus v. American Federation of State, County and Municipal Employees, Council 31, __ U.S. __, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018). Janus also dealt with compelled dues, but in the public sector.

Impact on Business:

West Virginia's Workplace Freedom Act is finally settled law. Employees can no longer be required to join a union or pay dues to a union as a condition of employment. Such clauses in collective bargaining agreements need to be evaluated and possibly changed to avoid being in conflict with the Workplace Freedom Act.

Newton v. Morgantown Mach. & Hydraulics of W. Va., Inc.
Case No. 18-0653 (Nov. 19, 2019)

What the Court was asked to Decide:

The issue before the Court was whether an employee stated a cause of action for being fired as a result of engaging in a workplace fight.

What the Court Decided:

The Supreme Court of Appeals affirmed the circuit court's dismissal of Newton's claim, finding that Newton failed to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

Facts:

Mr. Newton was hired in April of 2011 by Respondents as a truck dispatcher. On March 12, 2016, Newton engaged in a physical altercation with another employee in the workplace. The following day, Mr. Newton and the other employee were terminated from their positions.

Mr. Newton filed suit against Respondents in the Circuit Court of Monongalia County alleging that he was wrongfully discharged from his at-will employment under *Harless v. First Nat'l. Bank in Fairmont*, 162 W. Va. 115 (1978). Mr. Newton claimed that he was fired for using "only absolutely necessary force to defend himself." Respondents filed a motion to dismiss the complaint, arguing that the force Mr. Newton referred to was not in response to lethal imminent danger, but rather in response to a workplace argument. The circuit court granted the motion, finding that the self-defense exception to the at-will employment doctrine did not apply in this case because no weapons, dangerous circumstances, or threats of lethal imminent danger were present in the altercation.

Holding:

The Supreme Court had previously recognized an exception to the at-will employment doctrine when an employee is terminated from employment for acting in self-defense to an imminent threat of personal harm. *Feliciano v. 7-Eleven, Inc.*, 210 W. Va .740 (2001). (The employee there had supposedly apprehended a robbery suspect in violation of company policy, and was terminated.).

Notwithstanding the *Feliciano* precedent, the Court upheld the circuit court's dismissal of Mr. Newton's complaint. The Court found that there were no statements in Mr. Newton's complaint that alleged the public policy exception in *Feliciano* other than the fact that he was physically assaulted. The Court pointed out that Mr. Newton never provided facts showing that he was faced with lethal imminent danger. Relying on precedent that general allegations are insufficient to state a claim, the Court concluded that Mr. Newton failed to assert facts to support his allegation of wrongful discharge. Rather, he merely provided conclusory statements about a physical altercation with a coworker. While the Court had previously recognized that self-defense is a clear public policy exception to the doctrine of at-will employment, in *Feliciano*, the Court held that the exception applies only in the most dangerous circumstances where there is a lethal imminent danger. Mr. Newton's complaint did not allege facts showing that there was a lethal imminent danger, and thus, the circuit court's dismissal of his complaint was proper.

Impact on Business:

Workplace violence is of great concern to both employers and employees. Many, if not all, employers have policies designed to stop violence before it begins. Employers must be able to police workplace altercations and levy the ultimate sanction of employment termination. The Court understood the practical problems and did not dilute employers' ability to protect the workplace.

West Virginia Division of Highways v. Powell
Case Nos. 18-0929 and 18-0932 (Mar. 20, 2020)

What the Court was Asked to Decide:

The West Virginia Supreme Court of Appeals considered whether the circuit court erred in finding that an employment selection grievance was timely filed under the discovery rule.

What the Court Decided:

The Court reversed the circuit court and remanded for entry of an order affirming the Grievance Board's dismissal of the grievance as untimely.

Facts:

The West Virginia Division of Highways ("DOH") posted a vacancy and interviewed four applicants, including Terra Goins and Michael Powell, for the position. The DOH determined that the two top candidates for the position were Ms. Goins and an applicant named Josh Anderson. Ultimately, Ms. Goins was selected for the job. Mr. Powell was informed that he was not selected for the position on June 29, 2015.

On November 4, 2015, Goins and Powell's talked and he questioned her about her work experience. Based on their conversation, Powell concluded that Goins was not qualified for the DOH position. He filed a grievance on November 20, 2015, alleging that Goins did not meet the minimum requirements for the position and should not have been appointed and requested that he be awarded the position and backpay for the salary increase offered with the position.

At the Level One grievance phase, the Grievance Evaluator denied Powell relief because his grievance was not timely filed. The grievance proceeded to Level Two for mediation, which was unsuccessful. A Level Three hearing was then held before a Grievance Board administrative law judge ("ALJ"), who dismissed the grievance as untimely.

Mr. Powell appealed to the circuit court. The circuit court reversed the ALJ, finding that the grievance was timely filed under the discovery rule. The circuit court also determined that Mr. Powell was qualified for the position and that Ms. Goins was not, even though these issues were not addressed at the grievance level. The DOH and Ms. Goins brought separate appeals.

Holding:

The Court found that the circuit court misapplied the discovery rule contained in W. Va. Code § 6C-2-4(a)(1). This provision sets forth the time period for a public employee to file a grievance as follows:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance…

Under this provision, "the applicable time period is ordinarily deemed to begin to run when the employer unequivocally notifies the employee of the grievable decision." Under the discovery rule, however, the Court explained that "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance."

Finding that the discovery rule had no application here, the Court held that "the time period for a public employee to file an employment selection grievance begins when the grievant is unequivocally notified of the selection decision by the employer, not when the grievant discovers facts about the person selected for the position." Thus, pursuant to W. Va. Code § 6C-2-4(a)(1), Mr. Powell had fifteen working days to file his grievance after he was unequivocally informed of his non-selection for the DOH position on June 29, 2015. Because Mr. Powell waited to file it only after learning about Ms. Goins qualifications almost five months later, his grievance was untimely.

Impact on Business:

The Court's ruling is helpful to public employers because it limits the time period for challenging an employment selection grievance. By starting the time period for filing a grievance at the time the employer notifies the employee of the grievable decision, grievants are held responsible for reasonably investigating his or her grievable event.

Taylor v. Wallace Auto Parts & Services, Inc.
2020 WL 1316730 (March 19, 2020) – FEDERAL CASE

What the Court was Asked to Decide:

The Court addressed whether a product liability defendant could file a Notice of Comparative Fault of Non-Party under *W. Va. Code* §55-7-13d against the employer of the plaintiff. In addition, the Court addressed whether the product liability defendant must allege or prove that the non-party employer acted with "deliberate intent" under the Workers' Compensation Statute before the non-employer can be placed on the jury verdict form for the jury to apportion liability.

What the Court Decided:

Facts:

Ronald Taylor suffered fatal injuries at the Morgan Camp mine in Randolph County, West Virginia. On June 4, 2018, Mr. Taylor, a shuttle car operator, was riding in a personnel carrier that struck a metal screw jack lying on the mine floor. When the vehicle hit the screw jack, the screw jack struck Mr. Taylor in the head, severely injuring and eventually killing him.

The plaintiff, the administratrix of Mr. Taylor's estate, filed suit against Wallace Auto Parts & Service, Inc. ("Wallace") alleging various product liability claims as she argued that due to the design of the personnel carrier, the driver could not see the screw jack. The plaintiff did not file any claim against Mr. Taylor's employer, Carter Roag Coal Company ("CRCC").

Wallace filed an answer, and thereafter filed a Notice of Comparative Fault of Non-Party that named CRCC as the non-party ("Notice"). Plaintiff moved to strike the Notice because, as Mr. Taylor's employer, CRCC was granted immunity under the West Virginia Workers' Compensation Act and, therefore, could not be placed on the jury verdict form unless Wallace proved all five elements of deliberate intent under *W. Va. Code* §23-4-2(d)(2).

Holding:

The Court first examined the language of *W. Va. Code* §55-7-13d and emphasized that, under the plain language of the statute, "[a]ssessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of named parties. Where fault is assessed against nonparties, findings of such fault do not subject any nonparty to liability in that or any other action, or may not be introduced as evidence of liability or for any other purpose in any other action[.]" Taylor at *2 (emphasis in original). In addition, §55-7-13(d)(a)(4) states that "[n]othing in this section is meant to eliminate or diminish any defenses or immunities, which exist as of the effective date of this section, except as expressly noted herein[.]" *Taylor* at *2 (emphasis in original).

Finding that "the Legislature contemplated a set of circumstances where a nonparty might be included on the verdict form despite its immunity via the Workers Compensation Act or another avenue[,]" the Court determined that CRCC could be included on the jury verdict form because Wallace correctly followed the statutory procedures in its Notice. The Court found that the statute permitted "only parties to the case [to] have their liability established by" apportionment on a jury verdict form, as "[n]on-parties are not bound nor can they be bound by any aspect of any verdict rendered pursuant to section 55-7-13d." Taylor at *2. Instead, "the process required by [§55-7-13d] seeks to set the level of fault attributable to [Wallace], and Plaintiff's recovery from [Wallace] will be confined by that percentage – exactly as contemplated and provided for by the statute." ." *Taylor* at *2.

The Court also rejected the plaintiff's position that Wallace had to prove all five elements of deliberate intent under §23-4-2(d)(2) against CRCC before CRCC could be added to the jury verdict from. The Court reasoned that, in the case before it, the plaintiff did not make a claim against CRCC, and hence CRCC was not subject to any claim for liability or money damages in the case before the Court. As such, Wallace's attempt to include CRCC on the jury verdict form under §55-7-13d was not barred or limited by anything in the West Virginia Workers' Compensation Act, including §23-4-2(d)(2).

Impact on Business:

The *Taylor* decision represents an excellent decision for non-employer defendants facing workplace injury claims. Non-employer defendants will now be able to file a Notice of Comparative Fault of Non-Party under §55-7-13d against an employer that an employee may choose to exclude from a lawsuit because of the high burden of proof required to bring a deliberate intent claim against the employer.

An unintended consequence, however, may be that every lawsuit arising out of a workplace injury will likely now include a deliberate intent claim against the employer regardless of the merits or strength of such claim. Otherwise, a jury may apportion a significant amount of the fault to a non-party employer defendant, which may significantly reduce the verdict for the plaintiff.

Brown v. State Farm Mut. Auto. Ins. Co.
2020 W. Va. LEXIS 10 (Jan. 13, 2020)

What the Court was Asked to Decide:

Whether the Circuit Court properly ruled that the petitioner did not establish the required elements for a negligent spoliation or intentional spoliation claim.

What the Court Decided:

Petitioner failed to satisfy multiple elements of both his negligent and intentional spoliation of evidence claims.

Facts:

Jeremy Brown ("Mr. Brown") and his then-wife, Margaret Brown (Mrs. Brown"), were involved in a single vehicle automobile accident that occurred on October 23, 2015. Mr. Brown alleged that Mrs. Brown was the driver of the vehicle, which was insured by State Farm Mutual Automobile Insurance Company ("State Farm"). However, the crash report indicated that he was the driver.

State Farm took possession of the vehicle after the accident. After inspecting the vehicle and taking pictures of it, State Farm sold the vehicle for scrap. At this time, Mr. Brown had not retained counsel in connection with the accident, and there was no evidence on the record to suggest that State Farm received a request to preserve the vehicle. However, Mr. Brown placed State Farm on notice of a claim after the vehicle was no longer in State Farm's possession.

On October 17, 2016, Mr. Brown filed suit against Mrs. Brown. In his complaint, Mr. Brown alleged that Mrs. Brown negligently operated the vehicle and crashed it into a roadside guardrail. After engaging in discovery, Mr. Brown settled with Mrs. Brown. The Circuit Court entered a partial dismissal order for the claims against Mrs. Brown.

Prior to the settlement with Mrs. Brown, Mr. Brown filed an amended complaint naming State Farm as a defendant and asserting negligent and intentional spoliation of evidence claims against State Farm related to the destruction of the vehicle. State Farm filed a motion for summary judgment. The Circuit Court found that Mr. Brown was unable to establish the required elements for his negligent spoliation or intentional spoliation claims. Thus, the Circuit Court entered a Judgment Order granting State Farm's motion for summary judgment.

Holding:

The necessary elements of a negligent spoliation claim are:

> (1) the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances; (4) spoliation of the evidence; (5) the spoliated evidence was vital to a party's ability to prevail in a pending or potential civil action; and (6) damages. Once the first five elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The third-party spoliator must overcome the rebuttable presumption or else be liable for damages.

Hannah v. Heeter, 584 S.E.2d 560, at 564, syl. Pt. 2 (W. Va. 2003).

The elements of an intentional spoliation claim are similar to the elements of a negligent spoliation claim:

> The tort of intentional spoliation of evidence consists of the following elements: (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages. Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The spoliator must overcome the rebuttable presumption or else be liable for damages.

Id. at Syl. Pt. 11.

The inability to meet any one of these elements is fatal to a claim for negligent or intentional spoliation of evidence. Because there was not a pending civil action against State Farm at the time it disposed of the vehicle, and Mr. Brown failed to offer evidence that State Farm had knowledge of a pending or potential civil action, Mr. Brown failed to meet the first two elements of each type of spoliation claim. Furthermore, the Court found no error in the Circuit Court's decision that State Farm did not owe a duty to petitioner to preserve the vehicle. Thus, the court affirmed the Circuit Court's grant of summary judgment.

Impact on Business:

Although the Court ruled in favor of the insurance provider, this opinion is a cautionary example of the steps that need to be taken with the disposal of possible evidence.

Garner v. Belfor USA Group, Inc.
2020 W. Va. LEXIS 145 (March 13, 2020)

What the Court was Asked to Decide:

Whether the parties' contractual relationship was facilitated by an insurance provider and if so, if that was a genuine issue of material fact to preclude summary judgment.

What the Court Decided:

The Court held that whether the relationship was facilitated by the insurance provider was irrelevant from the contractual dispute, and thus, was not material.

Facts:

Linda Garner ("Garner") had frozen pipes burst in her Charleston home. Her homeowner's insurer, Liberty Mutual Fire Insurance Company, provided coverage for the damage. Garner entered into a contractual agreement with Belfor USA Group, Inc. ("Belfor") to complete the repairs, and on January 7, 2015, Garner signed a certificate of completion.

In June of 2017, Belfor filed a complaint alleging that Garner failed to pay the balance owed for the repairs, despite having received payment from her insurer. Garner disputed the claims.

After taking Garner's deposition, Belfor filed a motion for summary judgment, attaching excerpts from the deposition and other documents in support of the motion. Garner responded, also attaching documents as evidence. Garner claimed she was not obligated to pay the balance because the repairs were not done in a "workmanlike manner and/or were never completed." She also claimed the Circuit Court failed to consider her exhibits relating to whether the relationship was facilitated by the insurer.

After considering the pleadings and hearing argument, the Circuit Court granted summary judgment to Belfor and ordered Garner to pay the balance owed under the agreement.

Holding:

The Court held that whether Liberty Mutual Fire Insurance Company facilitated the contractual relationship was not related to the contractual dispute. Thus, it was not a material fact that could be used to preclude summary judgment.

The Court also noted that the evidence Garner relied on in support of her argument that her insurer had facilitated the contractual relationship was only provided to the court after the order granting summary judgment. This was despite the fact that she was aware she could attach exhibits to her response, and in fact, she did attached documents related to other assertions to her response.

Impact on Business:

This case protects insurance companies who facilitate contractual relationships from being brought into court as related parties when contractual disputes arise. This decision will also preserve the ability of insurers to facilitate these kinds of relationships. If the fact that the relationship was facilitated by an insurer was a defense to paying obligations under the contract, contractors and service providers would likely be hesitant to enter into those agreements.

Mine Temp, LLC v. Wells Fargo Ins. Servs. of W. Va., Inc.
W. Va. 2019 LEXIS 511 (November 4, 2019)

What the Court was Asked to Decide:

Whether West Virginia law recognizes (1) an insurer or its agent's "duty to advise" or (2) a "special relationship" exception that would give rise to such a duty.

What the Court Decided:

West Virginia does not recognize an insurer or its agent's "duty to advise" nor a "special relationship" exception that would trigger such a duty.

Facts:

In 2007, Mine Temp entered into an independent contractor agreement with ICG/Wolf Run Mining ("Wolf Run") to provide apprentice miners to a coal mine. The agreement required Mine Temp to (1) obtain commercial general liability ("CGL") insurance and (2) to indemnify Wolf Run from claims resulting from or arising out of Mine Temp's performance of the work. The agreement expired on April 30, 2008.

Mine Temp contacted Wells Fargo for the purpose of obtaining insurance in order to satisfy the requirements of the agreement. Wells Fargo presented Mine Temp with quotes from three insurance companies. Mine Temp chose to purchase a CGL policy from Chubb Custom Insurance Company ("Chubb").

The CGL policy provided coverage for any "damages that the insured becomes legally obligated to pay by reason of liability imposed by law; or assumed in an insured contract." However, the policy included two relevant exclusions. The first was an Employer's Liability Exclusion that provided that "[t]his insurance does not apply to bodily injury to an employee of the insured arising out of and in the course of: 1. employment by the insured; or 2. performing duties related to the conduct of the insured's business . . . . This exclusion does not apply to the liability for damages assumed by the insured in an insured contract."

On May 30, 2008, after the agreement expired, a Mine Temp employee was fatally injured when a Wolf Run employee backed over him with an end loader while he was working at a mine owned and operated by Wolf Run. The employee's estate filed separate civil actions against Mine Temp and Wolf Run. In the civil action against Wolf Run, Wolf Run filed a cross-claim against Mine Temp based upon the indemnity provision in the independent contractor agreement.

Mine Temp, thus, reported the claims to its respective insurance carrier through Wells Fargo. Chubb denied coverage for Wolf Run's cross-claim for indemnification against Mine Temp based upon the policy's Employer's Liability, Total Exclusion.

Mine Temp filed an instant declaratory judgment action against Chubb and Wells Fargo alleging that it was entitled to coverage for all claims asserted against it in the action brought by the employer's estate. Additionally, Mine Temp alleged that "Wells Fargo had a duty to act with reasonable care and prudence in obtaining the appropriate insurance for" Mine Temp and, "[i]n the event that coverage is not provided in said policy, then the Defendant Wells Fargo was negligent in its procurement of the appropriate insurance."

In response, Chubb filed a motion for summary judgment based on the CGL's Employer's Liability, Total Exclusion. The Circuit Court granted Chubb's motion for summary judgment concluding that the Employer's Liability, Total Exclusion excluded coverage for the claims of the employee's estate.

In the action brought by the employee's estate, the Circuit Court granted summary judgment in favor of Mine Temp as to Wolf Run's cross-claim for contractual indemnity because the independent contractor agreement had expired before the accident, and there was no evidence showing that the parties had a "meeting of the minds" to continue the agreement after it expired.

In the action between Mine Temp and Wells Fargo, Wells Fargo filed a motion for summary judgment against Mine Temp, alleging that, given (1) the independent contractor agreement had expired prior to the accident and (2) any duty Mine Temp had to indemnify Wolf Run was extinguished by the expiration of that agreement, then any alleged negligent failure of Wells Fargo to place coverage for the indemnity contained in the expired agreement must also fail as a matter of law. In the alternative, Wells Fargo argued that, as an "agent" for Chubb in placing the coverage, it is immune from suit in tort or contract by the insured, Mine Temp, under existing West Virginia law. In its response to Wells Fargo's motion for summary judgment, Mine Temp argued that it had a special relationship with Wells Fargo under which Wells Fargo represented to Mine Temp that it had procured the proper insurance required by the indemnity provision in Mine Temp's independent contractor agreement with Wolf Run.

The Circuit Court granted Wells Fargo's motion for summary judgment holding that because the independent contractor agreement expired before the date of the accident, any claim for negligence by Wells Fargo in the placement of the CGL policy fails as a matter of law. This was because the failure to place coverage for the insured contract could not be the proximate cause of losses suffered by the Mine Temp. Further, the court found that "any claim for alleged negligence by Wells Fargo in the placement of the CGL policy [also] fails as a matter of law, since the claim for failure to place coverage for an expired 'insured contract' is moot." Finally, to the extent Mine Temp argued that it had a special relationship with Wells Fargo such that Wells Fargo had a duty to advise Mine Temp that it was adequately insured for the risk flowing from the independent contractor agreement and the indemnity provision therein, the Circuit Court agreed with Wells Fargo that, under West Virginia law, licensed insurance agents, acting within the scope of their employment for the insurer, cannot be sued by an insured in either tort or contract.

Holding:

West Virginia law does not recognize an insurer or its agent's "duty to advise" an insured as to the insured's insurance coverage needs nor a "special relationship" exception that would give rise to such a duty. Furthermore, since the independent contractor agreement had expired before the accident giving rise to contractual indemnification claim, Mine Temp was not required to indemnify Wolf Run for the claims of the employee's estate. Thus, the expired agreement was no longer an "insured contract" under the policy. The Circuit Court did not err and Wells Fargo's motion for summary judgment was properly granted.

Impact on Business:

According to this case, an insurer or its agent does not have a duty to advise its insured as to the insured's insurance coverage needs. Additionally, a "special relationship" between the insured and an agent does create an exception that would give rise to such a duty. Thus, insurers and their agents will not be held liable in situations where they operate as brokers for the insured and the insurance provider. Businesses need to take care in purchasing insurance to be sure that it covers their needs and that they understand the policy's exclusions. Finally, companies using independent contract agreements that require indemnity insurance need to ensure that they are paying attention to expiration dates in these contracts, while still allowing the contractor to work on their property.

Tritapoe v. Old Republic Nat'l Title Ins. Co.
2020 W. Va. LEXIS 167 (March 23, 2020)

What the Court was Asked to Decide:

Does an insurer have a duty to defend an action and indemnify the policyholder when the claim relates to a roadway not on the insured's property and the roadway could have been discovered through inspection of the property?

What the Court Decided:

The insurer did not have a duty to defend the action because the roadway at issue was not on the insured's property. Moreover, there was an exception in the policy for defects that could have been discovered by survey and inspection of the premises, as was the case here.

Facts:

Keith Tritapoe ("Tritapoe") purchased property in Berkeley County, West Virginia in June of 2015. Old Republic National Title Insurance Company ("Old Republic") issued a Title Commitment for the property. The legal description in the Title Commitment included a right-of-way. The conveyance was made expressly subject to any and all applicable rights of way of record.

Old Republic also issued Tritapoe a Homeowner's Policy of Title Insurance, which provided that Old Republic would pay to defend the title in legal actions that arose from a covered risk and which were not excluded. The policy excluded losses, costs, attorney's fees, and expenses resulting from facts discoverable by an accurate survey and inspection of the premises or rights or claims of parties in possession not shown by the public records.

Shortly after moving to the property, Tritapoe blocked his neighbors' access to a roadway. In response, his neighbors filed a civil action again Tritapoe to reclaim access. Tritapoe tendered the defense of this action to Old Republic, claiming that Old Republic had a duty to indemnify him and defend his title. Old Republic refused to accept the tender of defense, citing to the exceptions in the Title Commitment and Homeowner's Policy.

On March 6, 2018, Tritapoe filed a declaratory judgment action, asking the Circuit Court to declare that he was entitled to have Old Republic defend his title or indemnify him in the civil action. The court granted Old Republic's motion to dismiss, finding that efforts by Tritapoe to contact his predecessor in title or survey the land would have revealed the roadway's existence and invoked the exclusions in the Title Commitment and Insurance Policy. In fact, Tritapoe had the land surveyed after the purchase, and he conceded that the survey confirmed the roadway at issue was not on his property.

Tritapoe appealed the dismissal order, asserting that the Circuit Court reviewed facts beyond the scope of his complaint and thus effectively converted the motion to dismiss to a motion for summary judgment.

Holding:

The Court affirmed the Circuit Court's order dismissing the case. The Court relied on the fact that the roadway at issue was not on Triatpoe's property—a fact that Tritapoe had conceded. The Title Commitment and Insurance Policy clearly only applied to property that Tritapoe owned. Moreover, the Court went on to note that even if the policy applied to the property at issue, there was a clear, unambiguous exclusion from coverage.

Impact on Business:

This case protects insurers from having to defend actions outside of the scope of the insurance contract. The decision also reaffirmed that exclusions to coverage in insurance policy agreements are given their plain meaning.

Kruse v. Farid
Case No. 18-0464 (Nov. 8, 2019)

What the Court was Asked to Decide:

The Supreme Court of Appeals of West Virginia was asked to decide whether the circuit court erred in granting summary judgment, finding Dr. Farid did not have a duty to provide follow-up medical care to Misty Kruse after she left Raleigh General Hospital against medical advice ("AMA").

What the Court Decided:

The Court affirmed the circuit court order granting summary judgment because the undisputed facts showed the patient left the hospital against medical advice.

Facts:

Ms. Kruse had her gallbladder removed at Raleigh General Hospital and after discharge, returned to the hospital a few days later, and Dr. Farid performed a procedure and inserted stents. The next day, Kruse left the hospital after signing form entitled "Leaving the Hospital Against Medical Advice." The nurses who witnessed her signature indicated that Kruse did not appear intoxicated or confused. Despite signing the form, Kruse claimed she believed she was being discharged. The surgical stents were intended to be supposed to be removed within weeks or a few months after surgery, but when Dr. Farid went to speak with Kruse to schedule a follow-up appointment, she had already left the hospital AMA.

Kruse was admitted to another hospital in acute distress because of blockages to the stents. She then sued Dr. Farid for violating the standard of care by failing to inform her of the need to remove the stents or to provide follow-up medical care. Dr. Farid moved for summary judgment, arguing that Ms. Kruse's departure from the hospital AMA effectively terminated the doctor-patient relationship. The circuit court granted summary judgment, holding that the patient/doctor relation between Dr. Farid and Ms. Kruse ended when she left the hospital AMA.

Holding:

The Court agreed with the circuit court's conclusion that "the act of signing out AMA, itself, signifies the termination of the physician-patient relationship such that the patient has indicated an intention to refuse medical treatment, and, consequently, the physician no longer has a duty to provide medical care to the former patient." The Court also found that the circuit court did not err by concluding that Ms. Kruse departed the hospital AMA. Ms. Kruse did not challenge her competency at the time she signed the AMA form.

The issue of whether Dr. Farid owed a duty of care to Kruse after she left the hospital AMA was an issue of first impression for the Court, which concluded "when a patient voluntarily leaves a health care facility against medical advice and executes a release of liability indicating that he/she understands and assumes the risks of leaving the health care facility against medical advice, the patient thereby terminates the physician-patient relationship such that the released medical providers do not thereafter have a duty of care to the patient." The Court also found that Kruse was not protected by West Virginia's Medical Professional Liability Act ("MPLA") because "by virtue of her discontinuation of the physician-patient relations she had with Dr. Farid when she left the hospital AMA, Ms. Kruse removed herself from the class of individual sought to be protected by the MPLA, i.e. patients." Thus, the Court affirmed the decision of the circuit court granting Dr. Farid's summary judgment motion.

Impact on Business:

This case protects physicians and hospitals from suits brought by patients who have leave the hospital against the advice of physicians and are injured as a result. The Court was clear that the physician-patient relationship is terminated in these circumstances, and medical providers no longer have a duty of care to the patient. Documentation was important because the facts showed Kruse signed the form clearly indicating she was leaving AMA and that it was witnessed.

SER PrimeCare v. Faircloth
Case No. 18-1071 (Nov. 12, 2019)

What the Court was Asked to Decide:

The Supreme Court of Appeals of West Virginia was asked to determine whether the circuit court erred in failing to dismiss an action where the plaintiff failed to serve a notice of claim in violation of the West Virginia Medical Professional Liability Act (the "MPLA").

What the Court Decided:

Because the plaintiff violated the MPLA, the Court granted the writ of prohibition, vacated the circuit court's order denying motion to dismiss, and remanded the case with instructions to enter an order dismissing plaintiff's claims against.

Facts:

This case against multiple defendants arose from the suicide of the plaintiff's decedent while incarcerated at the Eastern Regional Jail and Corrections Facility ("Eastern Regional Jail"). Plaintiff brought a sued the jail, individual officers and PrimeCare which provided medical services at the jail. PrimeCare moved to dismiss because the Estate failed to serve the notice of claim and screening certificate of merit required by the MPLA, W. Va. Code § 55-7B-6(b) (2003). PrimeCare contended that the MPLA applied to the Estate's claims because the Estate accused PrimeCare of medical negligence. The circuit allowed the Estate's time to comply with the statute and did not rule on the motion to dismiss. After the Estate complied with the statute, the circuit court denied PrimeCare's motion to dismiss, finding it suffered no harm from the Estate's late MPLA notice. The circuit court also agreed with the Estate's argument that no affidavit of merit was necessary. PrimeCare filed a petition for writ of prohibition.

Holding:

The Supreme Court found that since the Estate's claims against PrimeCare were covered by the MPLA, the Estate was required to comply with the statutory pre-suit notice. The Court found "the Estate's failure to serve a notice of claim is dispositive" of the case. The Court held that "pursuant to W. Va. Code § 55-7B-6(a) and (b), no person may file a medical professional liability action against any health care provider unless, at least thirty days prior to the filing of the action, he or she has served, by certified mail, return receipt requested, a notice of claim on each health care provider the claimant will join in the litigation."

Finding that PrimeCare's rights were prejudiced by the Estate's failure to give pre-suit notice, the Court further held that "a circuit court has no authority to suspend the MPLA's pre-suit notice requirements and allow a claimant to service notice after the claimant has filed suit. To do so would amount to a judicial repeal of W. Va. Code § 55-7B-6."

The Court granted PrimeCare's writ of prohibition and vacated the circuit court's order denying PrimeCare's motion to dismiss.

Impact on Business:

This case provides protection for medical providers by enforcing the statutory requirement that notice of claim and certificate of merit must be served before suit. The Court also made it clear that circuit courts are not permitted to bend the MPLA's requirements to allow plaintiffs to move forward with claims if plaintiffs fail to serve a notice of claim.

State ex rel. West Virginia Regional Jail Authority v. Webster
No. 19-0595 (Nov. 22, 2019)

What the Court was Asked to Decide:

The Court considered whether to issue a writ prohibiting the circuit court from denying a motion to dismiss negligence and civil conspiracy claims as barred by the applicable statute of limitation.

What the Court Decided:

The Court held that the circuit court was correct in finding that the negligence and civil conspiracy claims were barred by the statute of limitations because claims against a co-defendant were tolled under the provisions of the Medical Professional Liability Act.

Facts:

Bryant, an inmate at the regional jail, was seen by the medical staff of PrimeCare at the regional jail and transferred to Logan Regional Medical Center where she received medical care, including IV antibiotics.

On November 6, 2018, Ms. Bryant, through counsel, served a notice of claim on PrimeCare pursuant to the West Virginia Medical Professional Liability Act ("MPLA"). The notice of claim allegedly contained "[a] statement of intent to provide a screening certificate of merit affidavit within sixty days." Ms. Bryant then provided a detailed notice of claim and screening certificate of merit to PrimeCare on December 28, 2018, within the sixty-day time period. On January 28, 2019, Bryant sued PrimeCare and the West Virginia Regional Jail Authority ("WVRJA"), asserting state law negligence claims against the WVRJA and a medical negligence claim against PrimeCare. She also asserted a civil conspiracy claim against both defendants.

The WVRJA moved to dismiss, arguing that the applicable statute of limitations had expired. Bryant argued that the notice of claim to PrimeCare tolled the statute of limitations with respect to all of her claims because the complaint asserted a civil conspiracy claim against both defendants. The circuit court denied the motion and the WVRJA filed a petition for writ of prohibition.

Holding:

The Court applied the test established in Dunn v. Rockwell, 225 W. Va. 43, 689 S.E.2d 255 (2009), and concluded the claims asserted against the WVRJA were not time barred. Under the first step, the Court determined that a two-year statute of limitations applies to negligence claims in West Virginia pursuant to W. Va. Code § 55-2-12 and, consequently, a two-year limitation period applies to the civil conspiracy claim. Second, the Court noted that the causes of action against the WVRJA occurred on November 16, 2016, when Ms. Bryant was transferred out of the regional jail. Finding that the third and fourth steps did not apply, the Court then focused on the fifth step: whether the statute of limitation period was arrested by "some other tolling doctrine."

The Court stated that the general rule that "if the statute of limitation is tolled as to one defendant in a civil conspiracy, it is tolled as to all alleged co-conspirators." Because the statutory provisions of the MPLA tolled the statutes of limitations as to Primecare, the co-defendant and alleged co-conspirator, the Court agreed with Ms. Bryant and the circuit court that it also served to toll the statute of limitations as to the other co-conspirator, the WVRJA.

Impact on Business:

This decision may be limited to its facts, as it contains no new syllabus points. However, allowing a late filed suit against a defendant to survive because of a conspiracy claim may make it difficult to obtain early dismissal based on the statute of limitations, even when it has clearly expired.

SER Ferrell v. McGraw
Case No. 19-0658 (March 10, 2020)

What the Court was Asked to Decide:

The Supreme Court of Appeals of West Virginia was asked to issue a writ of prohibition to halt the litigation of Respondents' breach of contract and related tort claims in the Circuit Court of Wyoming County due to lack of venue.

What the Court Decided:

Finding that the entirety of the business relationship between the parties giving rise to the cause of action took place in Kanawha County, and that Respondents failed to meet their burden to prove any connection between the causes of action asserted and Wyoming County sufficient to establish venue, the Supreme Court of Appeals granted the writ of prohibition. Opinion by Justice Walker.

Facts:

This Writ proceeding arose from a contractual dispute between American Staffing, Inc. ("American Staffing") and Employers' Innovation Network ("EIN") over EIN's acquisition of American Staffing's customer list, customer relationships, and goodwill. After some of the terms were allegedly not performed, EIN and Mullins sued American Staffing and others in the Circuit Court of Wyoming County, alleging fraud and other claims. They claimed venue was proper in Wyoming County because the parties conducted business in Wyoming County. American Staffing moved to dismiss for lack of venue, contending that (1) Wyoming County was not a proper venue under West Virginia Code § 56-1-1 because all of the Defendants, except one, resided or had a principal place of business in Kanawha County; (2) the parties executing the Purchase Agreement resided or had their a principal places of business in Kanawha County; (3) the Purchase Agreement was executed in Kanawha County; and (4) the operative business relationship between the entities took place entirely within Kanawha County. The circuit court denied the motion to dismiss for lack of venue because 82 employees to whom EIN would have provided services were residents of Wyoming County.

Holding:

The Supreme Court of Appeals granted the writ of prohibition. The Court found that "conducting business" as defined for venue purposes in W. Va. Code § 56-1-1(a)(2) applies only where the corporate entities don't have a principal office or an officer who doesn't reside in West Virginia. Since all the defendants resided in Kanawha County, except one who resided in Kentucky, and the corporate entities were organized West Virginia law with principal offices in Kanawha County, venue in Wyoming County was not appropriate.

EIN and Mullins argued venue was proper because the American Staffing's breach of contract caused EIN to lose 82 employees who were residents of Wyoming County, and it also lost the administrative fees generated by those employees. the Court found the effect on the residents are "tangential" to the underlying contractual dispute and he loss of fees was peripheral. The Court found that Defendants' principal places of business were in Kanawha County, the contract negotiations took place in Kanawha County, and the Purchase Agreement was executed in Kanawha County. Applying the statutory language, the Court held that venue for the contract-based claims lies in Kanawha County.

Impact on Business:

This decision affirms that suits must be brought in the proper venue as required by West Virginia Code § 56-1-1. Businesses cannot be sued in counties with little or no relation to the dispute. The Court also makes clear that when venue is challenged, the burden lies with plaintiffs to establish proper venue for the civil action in the county in which the litigation is pending.

State ex rel. Municipal Water Works v. Swope, et al.
No. 19-0404 (Nov. 5, 2019)

What the Court was Asked to Decide:

On a petition for a writ of prohibition of the circuit court's certification of a class, the West Virginia Supreme Court of Appeals determined (1) whether the circuit judge should have disqualified himself prior to granting a motion for class certification when he was a potential class member and (2) whether the certification order, containing only a general analysis of the four prerequisites under Rule 23(a) of the West Virginia Rules of Civil Procedure, sufficiently demonstrated the basis for the certification.

What the Court Decided:

The Court determined that the circuit judge had a duty to disqualify himself in order to avoid an appearance of impropriety, and that the circuit court failed to undertake a sufficiently thorough analysis of whether the four prerequisites for class certification were satisfied. Accordingly, the Court vacated the certification order.

Facts:

Plaintiffs filed a putative class action against Municipal Water Works ("Municipal Water"), alleging illness to customers caused by exposure to pollutants in the water supply. The plaintiffs "defined two sub-classes in their complaint: 1) customers who suffered and were treated for adverse health effects, and 2) customers who require medical monitoring for adverse health effects."

In their motion for class certification, the plaintiffs asserted that the proposed class "potentially consists of thousands of [sic] who were exposed to carcinogenic water provided by [Municipal Water] between 2016-2018, including not only those who suffer from adverse health effects, but also those who appear to be healthy but seek medical monitoring relief." Municipal Water opposed the motion, arguing that the plaintiffs failed to meet the four prerequisites contained in Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation. In so arguing, Municipal Water noted that limited discovery had occurred and only one plaintiff alleged an actual injury by the alleged polluted water. Ultimately, the circuit court granted class certification.

Municipal Water filed a petition for a writ prohibiting enforcement of the circuit court's class certification order. Subsequently, the circuit court judge advised the Court that Municipal Water had previously filed a motion for his disqualification and, further, that he wished to recuse himself from the matter. The Court thereafter granted the motion for disqualification.

Holding:

First, the Court concluded that because Municipal Water supplies water to the circuit judge's home and workplace, he is a potential class member and must disqualify himself from the case. The Court explained that the judge had "more than a de minimis interest" in the proceeding and that his "potential financial interest creates an appearance of impropriety." Because the judge granted the class certification prior to his disqualification, the Court held that the certification order must be vacated.

The Court also held that the circuit court's certification order must be vacated because it "did not describe in specific detail the legal and factual foundations underlying the class." Instead, the order contained only brief, general, non-specific statements concluding that the plaintiffs had satisfied each of the four requirements under Rule 23(a). Since the class certification order did

not contain a "rigorous analysis" of the Rule 23(a) factors, the Court issued the writ and vacated class certification.

Impact on Business:

Important to judicial independence, the decision affirms that judges cannot preside over cases in which they have a potential pecuniary interest, whether a party to the suit or not. Importantly, the Court also required the judge to perform a "rigorous analysis" of the elements of class certification, finding that a brief order was insufficient. This approach is more in the mainstream treatment of class certification.

Monongahela Power Company v. Buzminsky
No. 19-0228 (Nov. 2, 2020)

What the Court was Asked to Decide:

The Supreme Court of Appeals of West Virginia considered whether the circuit court correctly denied a motion to dismiss on the grounds that statutory immunity for "duly qualified emergency services workers" under W. Va. Code § 15-5-11(a) does not include corporate entities or employers. The Court also addressed whether a corporate entity or employer may vicariously benefit from the immunity of its employees acting as "duly qualified emergency services workers."

What the Court Decided:

The Court affirmed the circuit court's determination that a private corporation or employer is not entitled to immunity afforded to "duly qualified emergency services workers" under W. Va. Code § 15-5-11(a). Further, the Court held that an employer cannot benefit from statutory immunity bestowed on its employee.

Facts:

In 2016, the Greenbrier River flooded and, consequently, a state of emergency was declared. The City of Ronceverte's ("City") wastewater treatment plant flooded as a result, causing an interruption in electrical service. After the floodwaters abated, Monongahela Power Company ("Mon Power") restored power to the plant, upon request of a City employee. After the initial restoration of power, the plant experienced a "loss of phase on the power service." MonPower left the plant energized. The City hired HSC LLC ("HSC") to repair the equipment and it sent its employee, Buzminsky, to perform the repairs. Buzminsky allegedly wore no personal protective equipment and was electrocuted. Mr. Buzminsky then sued against Mon Power and others, alleging that Mon Power negligently left the plant energized.

Mon Power moved to dismiss, arguing it was statutorily immune to liability under W. Va. Code § 15-5-11(a) which extends immunity to emergency service workers. MonPower argued that since the City "order[ed]" it to restore power to the plant, it was acting at the City's direction in providing emergency services and was, therefore, immune under the statute. The circuit court denied the motion, finding that a corporate entity, such as Mon Power, does not qualify as an "emergency services worker" under the statute because such term is defined to include only an "employee."

Holding:

In holding that the statutory immunity under W. Va. Code § 15-5-11(a) does not extend to corporate entities or employers, the Court found that the statute's language is unambiguous and, thus, declined to analyze the statute's policy and purpose. Instead, the Court applied the plain meaning of the statute's terms.

Next, the Court considered the statutory definition of "duly qualified emergency services workers," which applies only to "[a]ny duly qualified full or part-time paid, volunteer or auxiliary *employee* of this state…" The Court noted that there is no language in the statute purporting to make the employee's private employer or corporate entity similarly immune, particularly given the absence of the word "person," which would have included "any individual, corporation, voluntary organization or entity… organized or existing under the laws of [a] state or country[.]" Ultimately, the Court recognized that the inclusion or exclusion of specific terms was a knowing choice and "evidences the Legislature's intention regarding the reach of the immunity provided."

The Court also determined that immunities provided to employees do not extend to employers, unless otherwise provided by law. The Court stated, "[i]n a joint action of tort against master and servant, the plaintiff may dismiss the servant for a reason not going to the merits, without impairing his right to proceed against the master, although the latter is liable only under the doctrine of respondeat superior." Thus, the Court reasoned that, similarly, "an agent's immunity from suit negates neither his tortious conduct nor the vicarious liability of his principal which results—it merely renders him personally beyond the reach of the courts to answer for it."

Impact on Business:

The Court declined to extend the statute beyond its terms, leaving the decision to the Legislature whether to provide immunity to private corporations like Mon Power. Unless the legislature clearly provides for immunity under the circumstances, a negligent party, whether an individual, corporation, or entity, should not anticipate immunity.

Saleh v. Damron
Case No. 18-1112 (Nov. 22, 2019)

What the Court was Asked to Decide:

The Supreme Court of Appeals was asked to decide the following Certified Questions from the United States District Court for the Southern District of West Virginia: "A. Does West Virginia recognize a cause of action for pre-conception torts, [which] is an action brought by or on behalf of a person for injuries alleged to have resulted from negligent acts or omissions [that] occurred prior to the person's conception?" and "B. Does the term 'person' as used in the West Virginia Wrongful Death Statute (W. Va. Code §§ 55-7-5 and 55-7-6)[,] and interpreted in the Supreme Court of Appeals of West Virginia's opinion in *Farley v. Sartin,* 195 W. Va. 671, 466 S.E.2d 522 (1995), encompass an ectopic embryo/fetus?"

What the Court Decided:

The Court answered Certified Question B in the negative, holding that the term "person" as used by the Wrongful Death Statute does not include an ectopic embryo or ectopic fetus. The Court then concluded that in so answering question B, question A was rendered moot. Justice Armstead dissented.

Facts:

Ms. Damron was an obstetrics patient of Dr. Saleh. After he delivered Ms. Damron's second child by cesarean, Ms. Damron did not wish to have any more children, and asked him to perform a tubal ligation. She was later diagnosed with an ectopic pregnancy. Because the embryo had implanted in Ms. Damron's fallopian tube, the parties agreed that the embryo could not have survived to term and if allowed to live would have resulted in Ms. Damron's death.

Ms. Damron and her husband filed suit in federal court against Dr. Saleh on behalf of themselves and the ectopic embryo designated "Baby Damron" asserting two claims. The first, that Dr. Saleh failed to provide Ms. Damron with sufficient information to obtain her informed consent to the tubal ligation is unrelated to the Court's decision.

The Damron's second claim, a wrongful death claim on behalf of Baby Damron, was the impetus for the questions addressed to the Court.

Holding:

The Court concluded that the Wrongful Death Statute, W. Va. Code §§ 55-7-5 and 55-7-6, was vague with respect to the use of the word "person." The Court noted that it previously addressed this issue in *Farley v. Sartin,* 195 W. Va. 671, 466 S.e.2d 522 (1995), where it concluded that a wrongful death act could be maintained on behalf of a nonviable unborn child who was killed in a vehicular accident. The Court distinguished *Farley* because in the there was no chance of a resulting live birth due to the ectopic pregnancy. Further, the *Farley* court twice stated that its decision was limited to children that were en ventre sa mere (in the womb), thus excluding ectopic pregnancies which reside outside of the womb.

The Court further reasoned that nearly twenty-five years of legislative silence on the issue in the wake of *Farley* showed legislative acquiescence to the Court's limitation of the term "person" under the Wrongful Death Statute to include only unborn children in the womb. Indeed, the Court pointed out that the Pain-Capable Unborn Child Protection Act, W. Va. Code § 16-2M-2, defines "fetus" as "the developing young in the uterus, specifically the unborn offspring in the post-

embryonic period from nine weeks after fertilization until birth." Similarly, the the Unborn Victims of Violence Act, W. Va. Code § 61-2-20(c), refers to a fetus or embryo carried in the womb. Finally, the Court noted that while no other jurisdiction has allowed wrongful death actions to be brought on behalf of an ectopic embryo or fetus, many of the jurisdictions that allow wrongful death claims to be brought on behalf of nonviable unborn children have expressly limited recovery to children in the womb.

Justice Armstead dissented, arguing that the majority's restriction of the definition of person in light of statutory ambiguity is inconsistent with its holding in *Farley*, where the court noted that in the face of such ambiguity the most liberal means of recovery should be imposed. Justice Armstead contended that the distinction drawn by the majority between a nonviable unborn child within and outside of the womb is inexplicable.

Impact on Business:

Because the Court's holding is relatively limited, distinguishing unborn fetuses or embryos carried outside the womb from those carried within the womb, its impact on business should be minimal. The case is likely to have greatest impact among those providing obstetrical services and their insurers. There, the Court's holding limits exposure to wrongful death claims to the extent that they are brought on behalf of ectopic embryos or unborn fetuses.

State ex rel. Maxxim Shared Services, LLC v. McGraw
No. 19-0415 (Nov. 14, 2019)

What the Court was Asked to Decide:

Upon petition for a writ of prohibition of the circuit court's order denying a motion to dismiss, the West Virginia Supreme Court of Appeals decided (1) whether a co-worker relationship can satisfy the "closely related" requirement for a negligent infliction of emotional distress claim and (2) whether the same alleged conduct can support both a claim of negligence and negligent infliction of emotional distress.

What the Court Decided:

The Court issued a writ of prohibition finding the plaintiffs' negligent infliction of emotional distress claim failed as a matter of law because there was no familial relationship or marital bond between plaintiff and his co-worker. The Court denied the writ as to the common law negligence claim, finding that the claims for a negligent infliction of emotional and negligence arose from different facts.

Facts:

Charles Blankenship, an underground mine operation employee, enlisted the help of his co-worker, Donald Workman, to repair guarding at a shaft pump station. They travelled to the site and began the repair. At some point, Blankenship stepped away from the guarding and heard a "jet engine" sound coming from the shaft. Blankenship then turned toward the shaft and saw a methane explosion. Workman was propelled into the air and, subsequently, died as a result of his injuries.

Mr. Blankenship filed a complaint asserting common law negligence and negligent infliction of emotional distress against Maxxim Shared Services, LLC and ANR, Inc. as entities that "oversee and manage" the mine. Maxxim and ANR filed a motion to dismiss arguing (1) that Mr. Blankenship's complaint failed to state a claim for negligent infliction of emotional distress arising from witnessing injuries to an unrelated co-worker and (2) that Mr. Blankenship's claim for negligence was duplicative of his claim for negligent infliction of emotional distress.

The circuit court denied the motion to dismiss, finding "[t]o strictly require a blood or marital relation is overinclusive in that it allows recovery whether the biologically linked parties are close or not [and] is underinclusive in that it arbitrarily denies justice to those that can prove a functionally close relationship." The circuit court also held that the complaint was sufficient to sustain a negligence claim. Maxxim and ANR filed a petition for a writ of prohibition, challenging the circuit court's rulings.

Holding:

The Court held that Blankenship's failure to allege any familial or marital relationship between him and Workman, beyond that of co-worker and friend, was fatal to his claim. Citing Heldreth v. Marrs, 188 W. Va. 481, 425 S.E.2d 157 (1992), the Court noted that a right to recover for negligent infliction of emotional distress in the context of bystander liability "is premised upon the traditional negligence test of foreseeability." Recognizing that "the relationship between the plaintiff and the injured victim is valuable in determining foreseeability," the Court emphasized that this is an essential element in establishing liability. As such, the Court reversed the circuit court's conclusion that Mr. Blankenship and his co-worker met the "closely related" requirement.

As for the common law negligence claim, the Court acknowledged that "[a] plaintiff may not recover damages twice for the same injury simply because he has two legal theories." Nonetheless, the Court determined that the claims were not duplicative because the damages claimed for negligent infliction of emotional distress arose from Mr. Blankenship witnessing his friend suffer a critical injury that resulted in death, whereas his damages for negligence arose from "psychiatric injuries" with "physical and bodily effects" resulting from witnessing the methane explosion.

Impact on Business:

This decision emphasizes the significance of witnessing a closely related person injured or killed by the negligence of another. As the Court noted, those individuals closely related to the injured or killed victim will undoubtedly experience "more profound emotional trauma than [an individual] who has no relationship with the injured victim."

Estate of Gomez by and Through Gomez v. Smith
845 S.E.2d 266 (2020)

What the Court was Asked to Decide:

The Supreme Court of Appeals of West Virginia reviewed the circuit court's order granting the defendants' motion to dismiss the non-attorney executor's conversion complaint on the basis that the executor was not a "real party in interest" and that he was not authorized to practice law.

What the Court Decided:

The Court affirmed the circuit court's order, reasoning that a non-attorney executor cannot engage in litigation on behalf of a decedent's estate because an executor is not a real party in interest under West Virginia Rule of Civil Procedure 17(a) and that, in bringing the action, the executor was engaged in the unlawful practice of law

Facts:

Less than two years after the death of his wife, Dr. Rafael Gomez executed a will leaving everything to three of his children (Mark, Robert, and David) and disinheriting his two other children (Andrea and Matthew). After Dr. Gomez's death, believing that he died intestate, Andrea had herself appointed administratrix of her father's estate. However, within 48-hours, Mark went to the courthouse and filed his father's will, which appointed Mark as executor and revoked Andrea's appointment.

Subsequently, Mark filed a conversion complaint against Andrea, claiming that she took possession of their mother's jewelry that was intended to go to their brother, Robert. Of significance, Mark signed and filed the complaint as "Executor, Estate of A. Rafael Gomez" despite the fact that Mark is not licensed to practice law in West Virginia. Andrea and other named-defendants filed motions to dismiss Mark's conversion complaint alleging that Mark was engaged in the unlawful practice of law. The circuit court granted Andrea's motion to dismiss and Mark appealed, contending that he was authorized to bring suit as the executor of his father's estate.

Holding:

In affirming the circuit court's order, the Court recognized that Rule 17(a) of the West Virginia Rules of Civil Procedure allows circuit courts to hear only those suits brought by persons who possess the right to enforce a claim and who have a significant interest in the litigation. However, an executor does not have a significant interest in the estate's claim because any recovery is payable to the estate—not the executor. The Court also was guided by reference to other states, which have all held that a non-lawyer executor of an estate cannot represent the estate in court proceedings. Therefore, the filing of the conversion complaint constituted the unlawful practice of law because Mark, as executor, did not have a significant interest in the litigation and was likewise not licensed to practice law in West Virginia,

Impact on Business:

Most states' rules regarding who is authorized to practice law are complex and, often, inconsistent. West Virginia is no exception. As this case illustrates, non-attorneys are extremely limited in their ability to perform acts that may fall under the definition of the "practice of law". With very limited exceptions, corporations may not appear in court or prepare legal documents through their agents without the direct involvement and supervision of a licensed attorney. A good practice would be to obtain an attorney's opinion on whether actions taken by a business in a legal capacity might constitute the unauthorized practice of law.

Stiltner v. Wal-Mart Stores, Inc.
2020 WL 4355066 (W. Va. July 30, 2020)

What the Court was Asked to Decide:

The Supreme Court of Appeals of West Virginia reviewed the circuit court's order granting Wal-Mart's summary judgment motion against the Plaintiff's deliberate intent claim[1].

What the Court Decided:

The Court, in a memorandum decision, affirmed the circuit court's order granting Wal-Mart's summary judgment motion, finding that the plaintiff did not offer evidence that Wal-Mart had violated a written industry standard or guideline, as required by statute.

Facts:

Plaintiff, an assistant manager for Wal-Mart, sustained a broken arm and severely injured shoulder, back, and hip during a co-worker's attempt to apprehend a suspected shoplifter. During the event, the co-worker summoned the Plaintiff to assist her and the Plaintiff was subsequently knocked to the ground by the suspect, causing injuries. As a result, the Plaintiff filed a deliberate intent action against Wal-Mart.

Plaintiff retained an expert witness who offered an opinion that Wal-Mart violated a basic industry standard in retail loss prevention by failing to ensure that the Plaintiff's co-worker was adequately trained before working unsupervised and that Wal-Mart knew or should have known that this lack of training created a dangerous work environment. However, the Plaintiff's expert conceded that no industry standard exists regarding training associates on how to conduct shoplifting detention.

Wal-Mart filed a motion for summary judgment, arguing that the Plaintiff failed to identify any written specific safety standard that was violated by Wal-Mart in how Wal-Mart deals with shoplifters. The circuit court granted Wal-Mart's motion and reasoned that Plaintiff's expert failed to present evidence that his opinion was based on evidence of written safety standards within the industry and that Wal-Mart violated those standards by developing Wal-Mart's asset protection policy ("policy"). As such, the Plaintiff appealed, contending that summary judgment was inappropriate because, among other reasons, Wal-Mart's policy constituted a breach of the commonly accepted and well-known safety standard and also the industry consensus standard.

Holding:

In upholding the circuit court's order, the Court observed that the Plaintiff's expert testified repeatedly that there are no written industry standards that apply to training programs for loss prevention. The Court likewise acknowledged that internal policies of an employer, such as Wal-Mart, do not ordinarily satisfy the third required element of a deliberate intent claim. Accordingly, the Court held that Wal-Mart's policy did not constitute a commonly accepted and well-known safety standard within the industry or business of the employer.

Impact on Business:

This case was brought alleging that the defendant employer violated the 2005 version of West Virginia's "Deliberate Intent Statute" [WV Code §23-4-2]. This version of the statute required a showing that the employee prove five separate facts, including that the employer allowed

1 By statute, an injured employee can bypass an employer's workers compensation immunity and bring an action against his/her employer, by establishing that an injury was caused by an employer's "deliberate intent" of exposing employees to unsafe working conditions.

an unsafe working condition that violated a "commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines…" In this particular case, the plaintiff failed to prove such a violation.

The West Virginia Legislature amended the Deliberate Intent Statute in 2015. In addition to the five separate facts required to be proven under the 2005 version, the statute now requires evidence that the employer had objective actual knowledge of the existence of the unsafe working condition. This amendment's effect is to make deliberate intent claims much more difficult to prove. Businesses should be cautioned to consult with an attorney both before any accident occurs and immediately after a work injury to ascertain compliance with statutory and regulatory requirements and potential defenses to actions.

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