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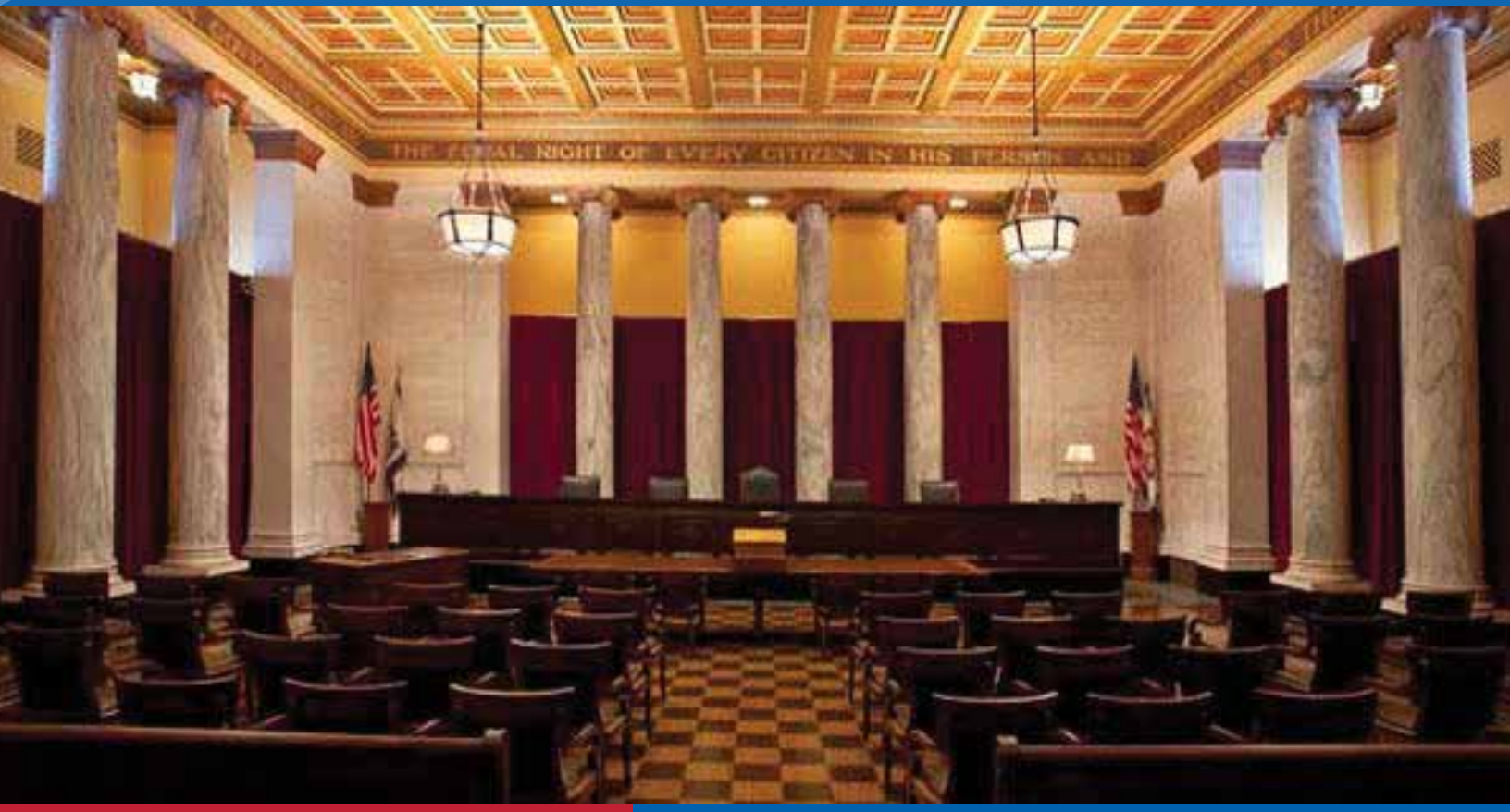

The Impact Of the West Virginia Supreme Court of Appeals On Our State's Economy

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

2021

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 2020 and Spring 2021 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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Frontline Asset Strategies, LLC v. Rutledge
Case No. 20-0395 (May 17, 2021)

What the Court was Asked to Decide:

The Supreme Court of Appeals was asked to overturn the Circuit Court of Raleigh County's denial of Frontline Asset Strategies, LLC's ("Frontline') motion to compel arbitration.

What the Court Decided:

Facts:

In this putative class action, plaintiffs alleged that Frontline's collection letters violated the West Virginia Consumer Credit and Protection Act ("WVCCPA"). The named plaintiffs had received similar letters from Frontline on two separate credit accounts, each of which had fallen delinquent.

Frontline was not the original creditor on either account at issue. Rather, in both instances, Frontline had been retained to perform collection services. Specifically, the original creditors had sold the debts to third parties which, in turn, hired Frontline. This relationship was critical in the Supreme Court of Appeal's analysis because the arbitration provisions at issue were agreed upon between the two consumers and their original creditors.

Ultimately, the Supreme Court of Appeals rejected Frontline's argument that it was acting as the agent of the original creditors. Noting it was "troubled by Frontline's inconsistent descriptions of its status as it relates to the Respondents' debts," the Court determined that the documentation produced by Frontline in support of its motion to compel arbitration was insufficient to prove that Frontline was assigned the right to compel arbitration.

Holding:

Where an arbitration right exists between two contracting parties, that arbitration right will not extend to third-parties acting on behalf of the assignee of such a contract (here a debt obligation) unless there is clear indication that such arbitration rights are assignable and are, in turn, actually assigned.

Impact on Business:

The Court in *Rutledge* was not satisfied with the documentation of assignment of arbitration rights between the original creditor, the subsequent purchasers of the debt, and ultimately Frontline. Thus, in analyzing rights of assignment, which are common in a variety of business transactions, businesses should be intentional in assigning such rights as that to arbitration and expressly document the extension and assignment of such rights.

State of West Virginia ex rel. Troy Group et al. v. Circuit Court Judge Sims, and Nakita Willis
Case No. 20-0007 (November 20, 2020)

What the Court was Asked to Decide:

The West Virginia Supreme Court of Appeals was asked to consider whether the lower court properly denied a motion to compel arbitration in an employment law case where the circuit court refused to compel arbitration claiming the plaintiff had raised enough questions with regard to the authenticity of the arbitration agreement to warrant allowing the case to be heard in state court.

What the Court Decided:

The Court granted Troy Group's writ of prohibition stating that the lower court should have granted the motion to compel arbitration, explaining that when a trial court is required to rule on a motion to compel arbitration under the Federal Arbitration Act, the court's authority is limited to determining two threshold issues: 1) whether a valid arbitration agreement exists; and 2) whether plaintiff's claims fall within the substantive scope of the arbitration agreement. Moreover, under the Rules of Evidence and the facts adduced, the Supreme Court explained a duplicate PDF of a signed arbitration agreement was clearly admissible in lieu of a "wet signature" original and Willis' contentions that Troy's signed arbitration agreement was suspicious were minimal and unpersuasive to overcome the evidence of her signature on the PDF document.

Facts:

Ms. Willis worked for Troy for 4 years before her discharge. After her employment ended she filed a variety of employment law causes of action. Troy moved to compel arbitration given Willis' signing an earlier arbitration agreement. Willis defended initially claiming she could not recall signing the arbitration agreement that clearly covered all her claims, and that it was suspicious since it did not have a wet signature. Troy produced evidence of converting all personnel files to PDF's in an effort to go paperless, that Willis' signature on the PDF matched her other signatures, and all employees at the time of her hire were required to sign arbitration agreements or not be hired by Troy. Willis then filed an affidavit claiming she never signed an arbitration agreement and arbitration could not be compelled when she had thus raised questions of authenticity.

The Court found that Troy had met its burden of a prima facie showing of an arbitration agreement and that Willis had not provided sufficient evidence to put the issue to a jury; the claims Willis made were all covered by the arbitration agreement; and under Rule of Evidence 1003, the duplicate was admissible to the same extent as the original, unless there was a genuine issue about the original's authenticity. The Court explained that not recalling signing a document does not, by itself, create an issue of fact, as to whether a signature is valid and Willis' changing her assertions to later deny signing it, without explanation, made her evidence minimal and unpersuasive, thus not an issue for a jury to decide. Finally, the Court noted that Troy's evidence of converting to a paperless system did not demonstrate any bad faith as to why the original was no longer available.

Holding:

In granting the Writ of Prohibition, the Court found that Troy had met its prima facie burden; that Plaintiff had failed to offer sufficient evidence to rebut Troy's evidence and that her allegations were not persuasive enough to overcome the Rules of Evidence on the admissibility of the duplicate agreement bearing her signature; thus, the trial court should have compelled arbitration.

(Note, the dissent would have allowed the issue of authenticity to go to a jury, as well as allowing Willis to introduce evidence of one or two other arbitration agreements which she believed were also suspicious.)

Impact on Business:

This case is also demonstrative of the current Supreme Court's willingness to apply case law and rules to prevent the unnecessary wasting of resources, of the Courts and putative defendants, or the time of a jury, on what appears to be a frivolous or improbable position.

State of West Virginia ex rel. Surnaik Holdings of WV, LLC v. The Honorable Thomas A. Bedell and Paul Snider, on behalf of himself and a class of others similarly situated
Case No. 19-1006 (November 20, 2020)

What the Court was Asked to Decide:

The Supreme Court of Appeals of West Virginia was asked to grant a writ of prohibition on the issue of whether the circuit court erred in certifying a class action.

What the Court Decided:

The Court granted the writ of prohibition and vacated the circuit court's order certifying the class action because the circuit court failed to conduct a thorough analysis of the Rule 23 class certification requirements, particularly Rule 23(b)(3) predominance and superiority factors, and failed make detailed and specific findings to support its certification determination.

Facts:

On October 21, 2017, a fire erupted at a warehouse owned by Surnaik Holdings of WV, PLLC ("Surnaik") and burned for over a week. Paul Snider ("Mr. Snider") filed a class action complaint, on behalf of himself and others similarly situated, in the Circuit Court of Wood County on October 30, 2017, alleging that the fire "emitted a plume of smoke—consisting primarily of particulate matter and gases—that adversely impacted neighboring property owners and lessees for days, residents as well as businesses and government agencies." In the complaint, Mr. Snider asserted claims for negligence; reckless, willful, and wanton indifference motivated by financial gain; nuisance; trespass; and "class action allegations" and sought to "represent a class that consists of all residents and businesses within an 8.5 mile radius of the warehouse . . .." As for commonality, he alleged "annoyance resulting from the smoke itself, which at certain concentrations is irritating to the nose and throat of most[,] if not all[,] persons."

Snider filed a motion for class certification which defined the class as all owners and lessees of real property located within areas identified on maps attached to the motion and who resided, conducted business, or conducted government operations on the property. Surnaik opposed the motion. After a hearing, the circuit court granted class certification and adopted Snider's class definition. Despite Surnaik's argument that many class members were uninjured, the circuit court concluded that expert testimony established that "everyone with[in] the Class Area . . . suffered the legally cognizable injury of having had their homes or businesses invaded by harmful and noxious levels of smoke negligently released from a fire, whether or not those individuals suffered any bodily injury." Surnaik filed a petition seeking to prohibit enforcement of the class certification order.

Holding:

The Court held that a class action may be certified only if the circuit court is satisfied, after a thorough analysis, that all elements required under Rule 23, particularly predominance and superiority under Rule 23(b)(3), have been satisfied. In analyzing what the circuit court is required to consider in the context of Rule 23(b)(3)'s predominance and superiority requirements, the Court found the weight of federal jurisprudence to be persuasive and adopted a test identical to one established by the United States Court of Appeals for the Eleventh Circuit.

The thorough analysis of the predominance requirement of West Virginia Rule of Civil Procedure 23(b)(3) now includes the following:

(1) identifying the parties' claims and defenses and their respective elements; (2) determining whether these issues are common questions or individual questions by analyzing how each party will prove them at trial; and (3) determining whether the common questions predominate. In addition, circuit courts should assess predominance with its overarching purpose in mind—namely, ensuring that a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. This analysis must be placed in the written record of the case by including it in the circuit court's order regarding class certification

After undertaking this analysis, the Court determined that the circuit court failed to examine any of the essential elements of the causes of action and failed to discuss whether those elements are capable of individualized or even generalized proof. Moreover, the circuit court failed to discuss the actual claims themselves in detail. Finally, the order summarily concluded that the overarching liability issues predominated over any individual questions without any legal or factual analysis as to why.

Impact on Business:

Prior to this decision, West Virginia circuit courts applied a vague, all-things-considered balancing inquiry, set forth in *In re W. Va. Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52 (2003), when determining class certifications. This decision modifies *Rezulin* to establish the difference between commonality and predominance, which makes the class certification requirements more rigid and difficult to satisfy.

State of West Virginia ex rel. Morrisey v. Diocese of Wheeling-Charleston
Case No. 19-1056 (November 16, 2020)

What the Court was Asked to Decide:

The Court was asked to decide whether the Consumer Credit Protection Act's deceptive practices provision was applicable to educational and recreational services.

What the Court Decided:

The Court determined that the West Virginia Consumer Credit Protection Act's deceptive practices provision does not apply to educational and recreational services of a religious institution.

Facts:

In 2019, the West Virginia Attorney General filed a lawsuit against the Catholic Diocese of Wheeling-Charleston. Of his many claims, the Attorney General claimed that the Diocese had violated the deceptive practices provision as it knowingly employed sex abusers which created a danger to consumers of its educational and recreational services. Specifically, the Attorney General alleged that the Diocese made material misrepresentations regarding the safety of the services it provides and "advertised services not delivered" and "failed to warn of dangerous services," In its Amended Complaint, the Attorney General reasserted the claims above, but expanded and alleged that the Diocese had an unfair competitive advantage over other schools and camps because of the material misrepresentation of the safety of the school and camps.

The Diocese filed a motion to dismiss and argued that the West Virginia Consumer Protection Act did not apply to educational and recreational services and that if the law did apply the enforcement of the same would impinge upon the Diocese's constitutional rights. The Circuit Court granted the Motion, stayed the case, and certified two questions of law to the Supreme Court of Appeals of West Virginia.

Holding:

The questions certified by the circuit court, and its answers, are:

1. Do the provisions of Article 6 of the Consumer Credit and Protection Act, respecting unfair methods of competition and unfair or deceptive acts or practices, apply to religious institutions in connection with their sale or advertisement of educational or recreational services? Answer: No.

2. Does the cumulative impact of the entire relationship between Church and State arising from the Attorney General's application of the Act constitute an excessive entanglement of Church and State prohibited by the constitutions of the United States and the State of West Virginia? Answer: Yes.

The Court analyzed the Attorney General's claim under the Consumer Credit Protection Act and the definition of services which "include[ ] . . . 'privileges with respect to . . . education [and] recreation.'" Interpreting the Act, the Court found the term "Privileges" as defined in many dictionary definitions to mean "[a] special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty." The Court determined that in the context of the Act, a service would include "a peculiar legal right with respect to education or recreation."

However, the Court then analyzed the application of these educational and recreational services in light of its apparent conflict with the West Virginia Code Section 18-28-1 to 7. This Statute, titled *Private, Parochial or Church Schools of a Religious Order*, which outlines the re-

quirements for church schools, like the Diocese. These regulations limit the types of laws that can regulate these schools beyond basic fire, safety, sanitation, and immunization laws provided by the State.

The Court determined that it was impossible to apply the Deceptive Act Provisions without violating the limits set by the Legislature with regard to church schools. Essentially, the Court determined that to enforce the Act between the church school and the consumers would require the Court to make determinations about the substance of their educational services. Enforcement under the Act would essentially permit the State to regulate the substance of the education provided by the church school which is strictly prohibited under *West Virginia Code Section 18-28-1 to 7.*

The Attorney General's argument that the Consumer Protection Act is a remedial statute with broad discretion to protect consumers from deceptive practices was well taken by the Court. The Court stated that the Legislature did not account for the conflict that arose between West Virginia Code Section 18-28-1 et seq. and the Act. The Court emphasized that this particular question was extremely narrow and did not discount the authority of the Attorney General. However, absent Legislative clarification, the Court is required to use the tools of statutory authority to determine the Acts application.

Having answered the first Certified Question in the negative, the Court reformed the question to read as follows:

Do the deceptive practices provision of the West Virginia Consumer Credit and Protection Act, West Virginia Code §§ 46A-6-101 to -106 (2015), apply to educational and recreational services offered by a religious institution? Answer: No.

Impact on Business:

With the broad nature of the Consumer Credit Protection Act and attempted expansion of its application, this holding signals the Court's hesitance, absent legislative authority, to broadly apply the Act to businesses that may not have anticipated being subject to the Act until a lawsuit was initiated against them. Essentially, the Court determined that while this Act is a general catch all provision to ensure protection of consumers, there is statutory authority that conflicts with the Act for which the Legislature has not accounted. If a category of business is regulated by statute which conflicts with the nature of the Act, then the Act may not apply absent clarification from the Legislature.

State ex rel. 3M Co. v. Hoke and Patrick Morrisey
Case No. 20-0014 (November 23, 2020)

What the Court was Asked to Decide:

The West Virginia Supreme Court of Appeals was asked to determine whether a circuit court's order granting the Attorney General's motion to amend its complaint and motion to sever the West Virginia Consumer Credit and Protection Act ("CCPA") claim from the tort-based claims for trial was erroneous under section 111(2) of the West Virginia Consumer Credit and Protection Act and Rule 41 of the West Virginia Rules of Civil Procedure.

The order at issue 1) allowed the Attorney General to develop evidence regarding the discovery rule for the purpose of tolling the statute of limitations, 2) determined that the Attorney General was permitted to conduct discovery on the request for civil penalties for each alleged violation of the CCPA, and 3) precluded as irrelevant discovery for petitioners on actual harm caused by a potential violation.

What the Court Decided:

The Court denied Petitioners' writ of prohibition stating that the lower court did not exceed its legitimate powers, nor did it act outside of its jurisdiction when it issued its order granting the Attorney General's motions because its decisions regarding the three central issues under the CCPA were not erroneous and contained no clear error with respect to its interpretation of section 111(2) of the CCPA.

First, the Court determined that the discovery rule, allowing the statute of limitations to be tolled until the Attorney General discovered or should have reasonably discovered the illegal conduct, applies to the CCPA. As a result, the Court decided that the lower court did not err when it allowed the Attorney General the opportunity to develop evidence regarding whether the discovery rule delayed the statute of limitations imposed by the CCPA and have the parties readdress the issue at the summary judgment stage.

Second, the Court determined that the lower court did not err when it allowed the parties to move forward with discovery under the Attorney General's request for civil penalties for each violation because, based on the Court's interpretation, the 1974 version of the statute did permit a separate penalty for each proven willful violation of the CCPA.

Third, the Court found no error with the lower court's decision to limit discovery on the issue of actual harm caused by a potential violation of the CCPA because the monetary penalty permitted under the CCPA is intended to have a deterrent effect and whether West Virginia citizens were in fact damaged by the violation (and by how much) is irrelevant to how much a circuit court may fine a defendant.

Facts:

In August 2003, then Attorney General Darrell McGraw sued Petitioners 3M, Mine Safety Appliances Company, and American Optical Corporation under the CCPA for allegedly designing and manufacturing defective mine respirators and dust masks in the 1970s and 1980s. The masks were alleged to not protect workers from dust-related illnesses when used in mining operations. The crux of the Attorney General's claim under the CCPA was that the defendants knew their masks did not work as advertised. In December 2016, Attorney General Patrick Morrisey moved the court for permission to amend his complaint and for an order severing the CCPA cause of action from the tort-based causes of action for trial. In October 2017, the circuit court held a hearing

on the Attorney General's motions, asked for additional briefing thereafter, and then conducted another hearing in August 2019.

On October 28, 2019 the circuit court entered an order granting Attorney General Morrisey's motion to amend the complaint because it met the standard under Rule 15(a) of the West Virginia Rules of Civil Procedure. The circuit court also granted the Attorney General's motion to sever the CCPA claim from the tort-based claims in order to avoid delay and promote judicial economy. On January 6, 2020, the Petitioners filed a writ of prohibition with the Court to halt enforcement of the lower court's order. The Court's analysis of the lower court's order focuses on the issues related to the Attorney General's CCPA claims.

The Court agreed with the circuit court's interpretations of the CCPA and found that the circuit court's decision to grant the Attorney General's motion were in accordance with section 111(2) and not erroneous.

Holding:

In denying the writ of prohibition, the Court found the reasoning underlying circuit court's order granting the Attorney General's motions to amend the complaint and sever the CCPA claim for discovery and trial were not erroneous and did not exceed the circuit court's legitimate powers.

The Court also added a Syllabus Point regarding the discovery rule as it applies to the CCPA:

> Under the West Virginia Consumer Credit and Protection Act, a cause of action by the Attorney General accrues, and the statute of limitation in West Virginia Code 46A-7-111(2) 1999 begins to run, from the time the Attorney General discovers or reasonably should have discovered the deception, fraud, or other unlawful conduct supporting the action. Determining that point in time is generally a question of fact.

Syl. Pt. 8.

Impact on Business:

The powers of the Attorney General under the CCPA are broader than those of private litigants. An activist Attorney General can pursue claims that are expensive and dangerous for businesses, and this decision precludes a defendant business from seeking to establish that the alleged harm to the state was caused by other entities or actors. This decision reflects the dangers in having no restrictions on an Attorney General's ability to sue under the CCPA.

Russell v. Bayview Loan Servicing, LLC
Case No. 20-0681 (June 23, 2021)

What the Court was Asked to Decide:

Sheryl Russel requested that the Supreme Court of Appeals overturn the Circuit Court of Jefferson County's ruling enforcing a settlement agreement which had previously been negotiated between Russell's counsel and Bayview Loan Servicing, LLC ("Bayview").

What the Court Decided:

Facts:

Russell sued Bayview, her home mortgage loan servicer, alleging violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA") and breach of contract arising from Bayview's servicing of the mortgage. Following dismissal of Russell's WVCCPA claims, counsel for Russell and Bayview began negotiating resolution of Russell's remaining breach of contract claim. Ultimately, the parties came to an agreement on the terms of the settlement, which included a date by which Russell would pay off her remaining mortgage balance. Under the agreement, if Russell did not pay timely off the specified amount, she consented to foreclosure on the property and to vacate the property.

Bayview signed and submitted a copy of the settlement agreement to Russell's counsel. However, before Russell signed the agreement, time lapsed for payoff of the remaining mortgage balance. Following this delinquency, Russell refused to sign the agreement. Bayview then moved to enforce the terms of the settlement.

In the settlement enforcement proceedings, Russell admitted that she was aware of the settlement terms and, in fact, had discussed them in reasonable detail with her then attorney. Concluding that a formal settlement agreement had been reached, the Circuit Court granted Bayview's motion to enforce the settlement agreement.

The Supreme Court of Appeals made short work of upholding the Circuit Court's ruling, enforcing the terms of the settlement agreement. The Court rejected Russell's arguments that there was no final meeting of the minds, which she claimed was primarily evidenced by the fact that she never signed the final settlement agreement. The Court also disregarded Russell's arguments that her then attorney did not have the requisite authority to affirm the final terms of the agreement.

Holding:

Like other contracts, settlement agreements are finalized when the terms of the agreements have been readily determined and mutual approval to the terms is final in nature.

Impact on Business:

Though perhaps not a revolutionary case in its own right, the *Russell v. Bayview* decision affirms the binding nature of settlement agreements, even where the terms of settlement await transcription into a formal, written, and executed settlement agreement. The decision endorses the importance and expectation that when settlement terms are agreed to, they are final and shall be enforced unaltered. The decision offers businesses leverage in the instance of after-the-fact settlement negotiations or ancillary asks, which were not incorporated into an earlier determined, final agreement.

Boone v. Activate Healthcare, LLC
Case No. 19-1007 (June 11, 2021)

What the Court was Asked to Decide:

The West Virginia Supreme Court of Appeals was asked to consider whether the circuit court properly granted a motion to dismiss on the grounds that plaintiff failed to plead facts sufficient to support a claim of aiding and abetting disability discrimination under the WV Human Rights Act under W. Va. Code § 5-11-9(7) when she sued Activate, a medical provider, as well as her employer, Constellium.

What the Court Decided:

The Court affirmed the lower court's determination that in order to bring a claim of aiding and abetting against Activate, plaintiff must plead facts that show Activate knew plaintiff's employer was engaged in conduct that violated the Human Rights Act and also gave substantial assistance or encouragement to that employer's conduct.

Facts:

Ms. Boone was employed by Constellium, an aluminum manufacturer, which maintained an on-site medical facility run by Activate Healthcare. Among the services Activate provided was issuing Physical Capacity Reports (PCRs) for employees seeking workplace accommodations for disabilities. In 2017, Boone was working in the casting department which required her to operate an overhead crane. By 2018, Boone was assigned to operate the overhead crane. She refused claiming acrophobia (fear of heights) and sought a height limitation from Activate and it issued two different PCRs at Boone's request, with height restrictions (6' & 10'). Activate later issued a PCR restricting Boone only from working in the overhead crane, an apparently less restrictive limitation. Nevertheless, following this PCR, Constellium disqualified Boone from working in the casting department, refusing to accommodate Boone by removing the overhead crane work from her job, since it already had two more senior employees similarly accommodated. Later, the company had an opening in finishing and offered Boone that position three weeks later which she took. Boone sued her employer and Activate, seeking three weeks' pay and consequential damages.

Activate moved to dismiss the lawsuit against it, arguing it had provided Boone with all of the restrictions she had sought and that she had failed to allege that Activate aided and abetted Constellium in wrongful discrimination towards Boone. The circuit court granted Activate's motion and Boone appealed.

Holding:

In upholding the Motion to Dismiss, the Court stated that Boone had failed to allege facts that would state a claim since Boone was required to plead facts that could be construed to show: 1) that Activate knew Constellium intended to wrongfully terminate Boone; and 2) that Activate gave substantial assistance or encouragement to Constellium's actions.

(Note, the dissenting opinion would have allowed the case to proceed through discovery and if plaintiff was unable to adduce evidence to prove her case, then it would deem summary judgment appropriate, regardless of any failures in the pleadings.)

Impact on Business:

This is one of the first WV Supreme Court cases to set forth the allegations and evidence necessary to support a claim of aiding and abetting discrimination. The case is also demonstrative of the Court's willingness to allow Rule 12(b) Motions to be granted when it seems quite clear that to allow the case to proceed further is a waste of resources, both the Court's and the putative defendants. The decision is more like one would anticipate from a federal court.

Motorists Mut. Ins. Co. v. Zukoff
851 S.E.2d 112 (W. Va. November 12, 2020)

What the Court was Asked to Decide:

Whether an exclusion in a commercial liability insurance policy that read, "water that backs up or overflows from a sewer, drain or sump" was inapplicable so that the policy would cover Respondents' loss.

What the Court Decided:

The exclusion applied and there was no insurance coverage for the Respondent's loss. The exclusion should be given its plain and ordinary meaning because it is unambiguous, and the doctrine of reasonable expectation should not be applied.

Facts:

On January 17, 2017, a sewer blockage flooded the building of Accessories Ltd. owned by the Zukoffs in Moundsville, West Virginia. An employee of the Moundsville Sanitary Board was unable to mitigate the sewage clog before significant damage had been done. The Zukoffs and Accessories Ltd. were insured by Motorists Mutual Insurance Company under a general commercial liability policy which contained an exclusion stating that Motorist Mutual would not pay for loss or damaged cause by "[w]ater that backs up or overflows from a sewer, drain or sump[.]"

The Zukoffs brought a declaratory judgment action in Marshall County Circuit Court after the insurance company denied coverage for the damage resulting from the sewer backup.

Both parties moved for summary judgment, and the circuit court granted the Zukoffs' motion, arguing that the term "backup" was insufficiently defined in the insurance policy, thus rendering the language ambiguous and in need of interpretation. Relying on the doctrine of reasonable expectations, the circuit court concluded that because the blockage was not located on the property of Accessories Ltd., it would be reasonable to expect coverage. Therefore, the policy exclusion did not apply.

Holding:

The West Virginia Supreme Court held that in general, the doctrine of reasonable expectations does not apply unless there is an ambiguity surrounding the terms of the insurance contract. Therefore, the first inquiry was whether there is ambiguity in the policy language. The Court concluded that there was not. Simply because the parties disagree on the meaning or because the policy does not define a term does not automatically render that term ambiguous.

Although the WV Supreme Court had not been faced with this specific language, other jurisdictions have addressed similar policy language and have concluded that provisions excepting "water which backs up through sewers or drains," are not ambiguous.

When all parts of the policy are viewed as a whole, as case law in West Virginia requires, the policy exclusion applies to water that "backs up" and water that "overflows." Adopting the conclusion of the California Court of Appeals for the Second District, the terms "backs up" and "overflows" are both unambiguous terms that mean exactly what a layperson would understand them to mean.

In this case, water came up out of the sewer and entered the premises. A plain reading of

the policy exclusion would lead a person to understand that coverage would be denied because water "back[ed] up" and "overflow[ed]" into the premises. "A court should read policy provisions to avoid ambiguities and not torture the language to create them."

Impact on Business:

This decision protects both the insurer and insured by declaring as a matter of law that these certain terms are unambiguous and should be given their ordinary meanings. It further reinforces the principle that an insurer does not need to define every single word in an insurance contract just to resolve any future potential ambiguity. This is another example of the court favoring the written provisions, allowing insurers and policyholders to rely on contract language and have confidence that our Supreme Court will honor the plain meaning of terms. This creates predictability for contracting parties and litigants.

Vinson v. Butcher
851 S.E.2d 807 (W. Va. November 18, 2020)

What the Court was Asked to Decide:

Can a John Doe defendant be held liable for damages in a Section 1983 claim?

What the Court Decided:

No, in a claim filed pursuant to United States Code Title 42, Section 1983, a plaintiff cannot obtain a finding of liability or receive a judgment for damages against a John Doe defendant.

Facts:

Rosa Lee Butcher ("Ms. Butcher") was arrested on September 29, 2013, and transported to the Police Department by Petitioners herein, Officer Scott Vinson ("Officer Vinson") and the Clarksburg City Police Department ("Police Department"). There are differing versions of the underlying events, with Ms. Butcher asserting that she was subdued with a taser, and the Petitioner police officers disputing that fact.

Ms. Butcher filed the underlying civil action asserting negligence and a violation of her civil rights under USC Title 42, Section 1983. She named Officer Vinson, the Police Department, the City of Clarksburg, and various John Does as defendants who allegedly used a taser to subdue her. The police department disclosed the names of the officers who were on duty on the night of her arrest, but she did not depose any of them.

The circuit court dismissed the police department from the case finding that its interests were in line with those of the city. Ms. Butcher then withdrew her negligence claims.

The circuit court, during the course of the trial, also dismissed the City of Clarksburg, finding that there was no *respondeat superior* or vicarious liability for Section 1983 claims.

The trial continued against Officer Vinson and the John Doe defendants. The jury found that Ms. Butcher's civil rights had been violated and awarded her damages, but absolved Officer Vinson of all liability. This left a liability finding only against the John Doe defendants.

The Petitioners moved for judgment as a matter of law pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure, contending that Ms. Butcher could not collect from the John Doe defendants because they were merely placeholders. The circuit court denied this motion relying on the belief that the City's insurance policy would provide coverage for the John Doe defendants because they had been acting in the scope of their employment at the time Ms. Butcher allegedly was tased.

The circuit court awarded Ms. Butcher attorney's fees and costs because she had prevailed on her Section 1983 civil rights claim. The Petitioners appealed, challenging both the circuit court's denial of their Rule 50(b) motion and the award of attorney's fees and costs.

Holding:

The Court first examined the viability of Section 1983 claims against John Doe defendants because the decision on these grounds would be dispositive of the second issue, the order awarding attorney's fees and costs.

The Court held that a John Doe defendant cannot be held liable for an alleged violation of

United States Code Title 42, Section 1983. There is extensive precedent giving rise to the principle of law that a person must have committed the conduct alleged to equate to a Constitutional violation. Many sources point to the fact that a defendant must be *personally involved* in the alleged conduct for a Section 1983 violation to prevail.

For this reason, the Court established a new syllabus point: "To succeed on a claim of an alleged constitutional violation under United States Code title 42, Section 1983, a plaintiff must prove that each government-official defendant, through that official's own individual actions, has personally and directly violated the Constitution, and that such violation caused or contributed to the plaintiff's injuries."

Because of this personal requirement, there is no vicarious liability or *respondeat superior* liability available to a plaintiff alleging a Section 1983 violation, so the Court held that Ms. Butcher could not collect from the insurer of the Police Department.

The Court then assessed whether the circuit court erred in granting attorney's fees and costs. Because the applicable statute, United States Code Title 42, Section 1988(b), allows for the *prevailing party* to collect attorney's fees, and Ms. Butcher did not prevail on her Section 1983 claim, she is not entitled to this award.

Impact on Business:

This decision protects governmental entities and their insurers from being vicariously liable for unnamed defendants or members of an insured in Section 1983 claims.

State of West Virginia ex rel. Health Plans v. Nines
852 S.E.2d 251 (W. Va. November 19, 2020)

What the Court was Asked to Decide:

Whether participation in the national BlueCard program with MedTest constituted purposeful availment by out-of-state Blue Cross Blue Shield Plans (the "Blues") for purposes of asserting specific personal jurisdiction.

What the Court Decided:

The mere fact that the Blues participated in the BlueCard program, does not, by itself, constitute purposeful availment as required for the exercise of specific jurisdiction.

Facts:

Highmark sued MedTest, a laboratory testing company in West Virginia, alleging that MedTest billed Highmark for services they did not perform. MedTest filed an answer and counterclaimed, which named the Blues as third-party defendants and asserted four causes of action against Highmark and the Blues: (1) fraudulent misrepresentation; (2) civil conspiracy; (3) joint venture; and (4) unjust enrichment.

MedTest asserted that the Blues entered into a "series of contracts" that require Highmark to pay MedTest when MedTest provides a service to an out-of-state member of the Blues. Thereafter, one of the Blues will reimburse Highmark. MedTest asserted that the circuit court had jurisdiction over the Blues because of their significant contacts with West Virginia through the BlueCard program because MedTest provided services to members of the Blues, and because the Blues conspired with Highmark WV.

The circuit court denied the Blues' motion to dismiss for lack of personal jurisdiction because the court concluded that the series of contracts required performance in West Virginia, thus satisfying West Virginia's long-arm statute. The circuit court also concluded that the Blues purposefully availed themselves of the privilege of conducting business in West Virginia by listing MedTest as an in-network provider on their website, thus establishing minimum contacts for the purposes of federal due process.

Holding:

Even if a health plan is willing to reimburse for services delivered to its members in other states, the members' choices in seeking out that out-of-state treatment do not equate with the health plan directing commercial activity at the other forum.

The Blues' listing MedTest as an in-network provider on their websites does not constitute purposeful availment because it was passive and not directly or purposefully targeting West Virginia.

This conclusion is not altered by the fact that the Blues and Highmark were alleged to have engaged in a conspiracy, and the Court rejected that argument.

Impact on Business:

A health plan may contract with service providers for performance to occur in a forum state without the health plan exposing itself to the possibility of being hauled into court in that forum state. Simply listing in-network out-of-state providers on a website does not equate to purposefully targeting business in that forum state for purposes of establishing specific jurisdiction.

Margaret L. Reeves, Administratrix of the Estate of Pamela Sue Reeves v. Camden Clark Memorial Hospital Corporation and Adam Kaplan, M.D.
Case No. 20-0353 (June 23, 2021)

What the Court was Asked to Decide:

The Supreme Court of Appeals of West Virginia was asked to overturn the circuit court's denial of the plaintiff's motion challenging its grant of summary judgment. After the trial court excluded plaintiff's sole expert witness, which left the plaintiff with no expert testimony supporting her claims, it granted summary judgment to the defendants.

What the Court Decided:

The Court affirmed a decision of the Circuit Court of Wood County denying the plaintiff's motion to alter or amend the summary judgment order, finding the circuit court did not abuse its discretion in excluding the plaintiff's expert and granting summary judgment.

Facts:

Plaintiff Margaret L. Reeves, as Administratrix of the Estate of her daughter, Pamela Reeves, filed a Medical Professional Liability Act action claiming her daughter died because of hypoxic brain injury following a hysterectomy, subsequent laparotomies, and intubation. She sued Camden Clark Memorial Hospital Corporation and Dr. Kaplan (who was included later following amendment of the complaint).

The circuit court issued an amended scheduling order, requiring Ms. Reeves to identify her trial experts by October 1, 2018, and to provide details of their expected testimony by October 31, 2018. Trial was scheduled for March 2019. Ms. Reeves identified one expert, Dr. Charash, and included a summary of his anticipated testimony that was limited to defendants' alleged failure to properly remove and reattach an abdominal binder that was placed after surgery.

Before the discovery deadline of January 18, 2019, Dr. Kaplan requested the deposition of Dr. Charash on at least five occasions between October 16, 2018 and December 11, 2018, before filing a motion to compel the deposition which ultimately occurred on February 21, 2019. Dr. Charash testified that he did not receive and review Ms. Reeve's expert disclosure until the night before the deposition, which was the first time he had spoken to Ms. Reeves's counsel since reviewing the file. He testified the disclosure contained a "highly incomplete" representation of his opinion.

Dr. Charash expanded the opinions from the disclosure and testified the application of the binder was a substantial factor in causing the decedent's respiratory arrest which resulted in her death. He testified her death was not related to cardiac arrest, as stated in the prior expert disclosure. Defendants moved to exclude Dr. Charash's testimony.

The circuit court granted defendants' motion, stating that Dr. Charash testified to new, previously undisclosed opinions, and that his opinions were inconsistent with the plaintiff's amended complaint. The court further found that Ms. Reeves's counsel offered Dr. Charash's opinion without input from Dr. Charash, resulting in a finding that the disclosure was made in bad faith. As a result, because Ms. Reeves lacked the required expert support for her MPLA claim, the circuit court granted summary judgment to the defendants.

Holding:

The Supreme Court of Appeals of West Virginia affirmed, finding the circuit court did not abuse its discretion when it excluded Dr. Charash's testimony and then dismissed the case on

summary judgment. Ms. Reeves argued the exclusion of her expert was too extreme a sanction because there was no pending trial date and plenty of time to cure any prejudice to defendants. She also argued the expert should have been permitted to opine on Dr. Kaplan's failure to order pulse oximetry monitoring to the decedent because that opinion was disclosed. Ms. Reeves also argued the sanction should have directed to counsel and not Ms. Reeves, citing *Anderson v. Kunduru* where the Supreme Court held that "justice compels that a sanction be directed toward the dilatory attorney, not the dilatory attorney's client." 215 W. Va. 484 (2004).

The Court found *Anderson* did not apply because the sole expert witness was the physician that plaintiff consulted when formulating her theory of the case. Despite the delay in producing the expert's report, the underlying theory of the case had not changed. In *Reeves*, however, the Court found the plaintiff's theory changed after the close of discovery and less than one month before trial. Thus, defendants relied on a theory that was not formulated by a medical expert and was inconsistent with what Ms. Reeves intended to pursue at trial. As to the argument that Dr. Charash should have been allowed to give some opinions, the court found the theory was offered for the first time during Dr. Charash's deposition. To cure this deficiency, the Court found that since the parties would need to undergo considerable discovery on the new theory of liability, the circuit court did not commit error in enforcing its scheduling order.

Impact on Business:

The opinion is favorable because it affirms the enforcement of scheduling deadlines and requires that experts cannot be identified as offering opinions that later change close to trial.

State of West Virginia ex rel. Hope Clinic, PLLC et al. v. Judge McGraw et al.
Case No. 20-0410 (May 17, 2021)

What the Court was Asked to Decide:

The Supreme Court of Appeals of West Virginia was asked, on a Writ of Prohibition, whether a party can cure the failure to file pre-suit notice of claim and certificate of merit as required by statute (MPLA) after filing a complaint.

What the Court Decided:

The Court held that the trial court could not overlook a party's failure to adhere to the MPLA pre-suit notice requirements and deny a subsequent motion to dismiss on the same grounds. The Court made clear that circuit courts do not have subject matter jurisdiction in MPLA cases where plaintiffs fail to serve notice of claim and certificate of merit. And opportunities to cure pre-suit deficiencies are permitted only in limited circumstances.

Facts:

On September 12, 2018, the Shrewsburys filed a civil action alleging medical negligence, pharmacist negligence, and loss of consortium. They claimed that Mr. Shrewsbury was injured in a motor vehicle accident. He sought medical treatment and medication from the defendants. Plaintiffs claimed defendants prescribed and filled prescriptions for controlled substances causing Mr. Shrewsbury to become addicted to opioid medication.

Plaintiffs filed but did not serve their complaint on the defendants. Instead, on November 21, 2018, the plaintiff served a Notice of Claim. One week later, plaintiff served a second Notice of Claim. By January 2019, because the complaint was not served, plaintiffs sought and received an extension of time to effectuate service. On January 9, 2019, their lawyer executed an "Affidavit of Counsel," asserting a Certificate of Merit was not necessary (despite previously stating a Certificate of Merit would be provided in their first Notice of Claim). Then, on January 28, 2019, plaintiff's counsel stated a Certificate of Merit would be provided within sixty days. They also filed a third Notice of Claim on some defendants, and a fourth Notice of Claim on all defendants, finally including the required Certificates of Merit. Service of the Summons and Complaint was initiated in July 2019.

Defendants moved for dismissal on various grounds, primarily for lack of subject matter jurisdiction because the Shrewsburys failed to comply with the MPLA's pre-suit requirements. The trial court heard oral argument and by order dating March 13, 2020, denied the motions to dismiss, finding the Shrewsburys complied with the MPLA's pre-suit requirements, and the parties that did not respond to the Notice of Claim and Certificate of Merit waived seeking dismissal of the Complaint.

Holding:

The Supreme Court of Appeals for West Virginia found that the trial court erred by failing to dismiss the plaintiffs' claims against defendants. Compliance with the MPLA is jurisdictional and a circuit court has no authority to suspend the pre-suit notice requirements and allow a claimant to service notice after a suit has been initiated. The Court restated the importance of the MPLA's pre-suit notice requirement, finding the MPLA is "clear and unambiguous, and thus should be applied as written." The Court further held that a party seeking to proceed with an MPLA claim that does not require a certificate of merit, a statement must be provided within the statutory deadline for serving a Certificate of Merit. The Court was clear that a party could not cure the failure to

timely service a Certificate of Merit by simply maintaining for the first time, after the deadline has passed, that no Certificate of Merit is required. Accordingly, the Court granted a writ of prohibition and vacated the trial court's order denying the defendants' motions to dismiss.

Impact on Business:

The Shrewsbury decision highlights the importance for plaintiffs to strictly adhere to the pre-filing procedures of the MPLA. The holding that a circuit court does not have subject matter jurisdiction absent compliance significantly strengthens those requirements.

State of West Virginia ex rel. Chalifoux v. Cramer
Case No. 20-0929 (June 14, 2021)

What the Court was Asked to Decide:

The Supreme Court of Appeals of West Virginia was asked for a writ of prohibition against the Circuit Court of Marshall County to prohibit it from enforcing an order denying a motion to include non-parties on the verdict form in a medical professional malpractice.

What the Court Decided:

The Court determined that Dr. Chalifoux had not met the requirements for a writ of prohibition and therefore could not proceed on this relief, but could bring this matter via a direct appeal.

Facts:

In April 2017, Plaintiff Joseph Moellendick began treatment with Dr. Chalifoux at Valley Pain Treatment in Marshall County, West Virginia. The treatment included the insertion of two spinal cord stimulators into the epidural space in his back. Moellendick complained of pain and presented the following day for stimulator removal. Following Moellendick leaving the treatment center, he went to the emergency room at the Weirton Medical Center after passing a blood clot in his urine. He was given a CT scan and discharged home.

Days later, Moellendick presented at Akron City Hospital and received an MRI. The MRI showed that he suffered from a spinal hematoma. He underwent surgery that revealed "thoracic diffuse bleeding due to aspirin and Plavix and thoracic subdural hematoma causing severe spinal cord compression."

Moellendick filed suit against Dr. Chalifoux alleging that he breached the standard of care during his treatment of Moellendick for his spinal cord stimulator. Dr. Chalifoux countered alleging he discovered breaches of the standard of care while Moellendick was being treated at the Akron City Hospital. Subsequently, Dr. Chalifoux filed a notice of alleged non-party fault and motion to place the Akron City Hospital on the verdict form. The Circuit Court denied the motion and stated that there was case law predating the change in several liability which did not allow for health care providers to avoid liability for the entirety of any verdict rendered. Furthermore, the Circuit Court found the phrase "all alleged parties" utilized by Dr. Chalifoux in his argument did not include health care providers who were not actual parties to the lawsuit.

Holding:

This matter was before the Supreme Court to determine whether a writ of prohibition should be permitted relating to Dr. Chalifoux's argument that he should be entitled to the notice of non-party fault and have the Akron City Hospital on the verdict form. The Supreme Court determined that the Circuit Court's order did not rise to the level of clear error to support a writ of prohibition but rather the issues can be raised on direct appeal.

The Medical Professional Liability Act was modified in 2016 to broaden the language in the apportionment of fault to all alleged parties. Prior to the 2016 amendment, West Virginia Code Section 55-7B-9 stated:

> [i]n assessing percentages of fault, the trier of fact shall consider *only the fault of the parties in the litigation at the time the verdict is rendered and may not consider the fault of any other person who has settled a claim with the plaintiff arising out of the same medical injury.*

The language in the amended section stated:

> (b) The trier of fact shall, in assessing percentages of fault, consider the fault of *all alleged parties*, including the fault of any person who has settled a claim with the plaintiff arising out of the same medical injury.

Since the amendment was part of the 2015 tort reforms, Dr. Chalifoux argued that broadened the parties who could be allocated with fault. The Court determined that the Circuit Court was correct in its determination that the statutory language in West Virginia Code Section 55-7B-9 was plain and should interpreted using its plain meaning to apply to "parties." The Court determined that the Circuit Court supported its decision by arguing that Moellendick did not name the Akron City Hospital and therefore it was not an alleged party.

While the Court determined that a writ of prohibition should not be granted, Justice Armstead's dissent demonstrated some argument that could impact this matter and similar matters before the Supreme Court of Appeals.

Justice Armstead was the sole dissenter who agreed that the notice of non-party fault statute should extend to medical malpractice suits but stated that he believed the language was not intended to mirror the non-party fault statue as the language had been included since 2003. Justice Armstead's argument is that the majority in this Memorandum Opinion did not rule on whether the West Virginia Code Section 55-7-13d applied to the MPLA. Justice Armstead's view of the Majority's opinion was that they assumed that a broad statutory provision did not apply in the case.

Rather, Justice Armstead stated that the statutes should be read in *pari materia* His statement that the statutory scheme between the two statutes is to establish several liability to get rid of joint and several liability. As a result of the common scheme, the two statutes should be read in *para materia* based on the fact that West Virginia Code Section 55-7-13d does not limit its application to the MPLA and states that it applies to "all causes of actions." While the public policy considerations identified by the Majority were well taken by Justice Armstead, he found the application of the non-party fault statute of all matters, but not MPLA matters, defied logic.

Impact on Business:

Although this case is a memorandum decision, there is little case law on both the West Virginia Code Section 55-7B-9 discussing several liability under the Medical Professional Liability Act *and* West Virginia Code Section 55-7-13(d) *Determination of Fault*. While the underlying question in this matter was whether a writ of prohibition should be entered, this case signals the Supreme Court of Appeal's readiness to begin ruling on the new tort reform statutes. Furthermore, this analysis spotlights the issues that health care providers and their businesses may face in the future when dealing with potential non-parties and their respective fault.

State of West Virginia ex rel. Morgantown Operating Co. v. Gaujot
Case No. 20-0940 (June 11, 2021)

What the Court was Asked to Decide:

The Supreme Court of Appeals of West Virginia was asked to grant a writ of prohibition on the issue of whether the circuit court erred in denying a motion to dismiss based on the Medical Professional Liability Act's ("MPLA") one-year statute of limitations for actions against nursing homes, W. Va. Code § 55-7B-4(b), instead, the circuit court applied the two-year statute of limitations found in the Wrongful Death Act, W. Va. Code § 55-7-6. The Court summarized the issue as whether the MPLA or the Wrongful Death Act supplies the statute of limitations for wrongful death causes of action that sound in medical negligence.

What the Court Decided:

The Supreme Court of Appeals, in a 3-2 decision, upheld the circuit court's decision and denied the Petitioner's writ of prohibition, finding no clear error in the circuit court's application of the Wrongful Death Act, finding that actions for death that fall under the purview of the MPLA also fall under the purview of the Wrongful Death Act.

Facts:

On April 24, 2018, Ms. Cowell was moved to a nursing home operated by Petitioner (and Defendant below) Morgantown Operating Company, LLC d/b/a Morgantown Health and Rehabilitation Center ("Morgantown Health"). She was transported to the Emergency Department at Ruby Memorial Hospital on June 17, 2018, after developing a decubitus ulcer on her coccyx. She died on June 25, 2018 due to sepsis and osteomyelitis. Her daughter, as administratrix of her estate, pursued a wrongful death claim against Morgantown Health. She served notice of claim and certificate of merit pursuant to the MPLA on January 29, 2020, and when Morgantown Health did not respond, filed suit on May 15, 2020.

Morgantown Health moved to dismiss, arguing the claim was barred by the one-year statute of limitations in the MPLA. Because Ms. Degler filed the notice of claim and certificate of merit one year and seven months, and the complaint one year and ten months, after Ms. Cowell's death, it was too late. The circuit court denied Morgantown Health's motion to dismiss, concluding that the MPLA and the Wrongful Death work in concert where there is a death that results from medical negligence. Because of this, the statute of limitations for causes of action for wrongful death against medical providers is governed by the Wrongful Death Act. Morgantown Health filed a petition for writ of prohibition, arguing the circuit court erred in applying the two-year statute of limitations under the Wrongful Death Act instead of the one-year limitation contained in the MPLA.

Holding:

The Supreme Court upheld the circuit court's decision. The Court found there are different "classes" of medical professional liability claims brought under the MPLA. The Court characterized Ms. Degler's claim as an action filed by the representative of a decedent's estate alleging that negligent medical care caused the death of the decedent. In describing the different classes, the Court noted that there is a distinction between personal injury claims and wrongful death claims, and that the Wrongful Death Act works in concert with the MPLA.

The Court rejected Morgantown Health's argument the MPLA is the "exclusive remedy" for medical professional liability cases based on the decision in *Gray v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005). Although the Court agreed that the MPLA applies to all actions alleging

medical professional liability, it found the *Mena* decision does not prohibit the application of the Wrongful Death Act in appropriate cases. Rather, the MPLA must interact with the Wrongful Death Act where a death has occurred resulting from allegedly negligent medical care because a right of action for "death" did not exist at the common law. Therefore, claims such as Ms. Degler's are not legally actionable or practically triable without the Wrongful Death Act.

The Court also rejected Morgantown Health's argument that the language in *Miller v. Romero,* 186 W. Va. 523, 413 S.E.2d 178 (1991) regarding the statutory construction of W. Va. Code § 55-7B-4 did not apply because *Miller* was overruled in *Bradshaw v. Soulsby*, 210 W. Va. 682, 558 S.E.2d (2001). The Court explained the *Bradshaw* decision did not overrule the portion of *Miller* where the Court found the Wrongful Death Act's statute of limitations applies to actions for death caused by medical negligence.

Finally, rejecting Morgantown Health's argument that the West Virginia Legislature intended the word "injury" in W. Va. Code § 55-7B-4 to include both injury and death, the Court held that if the Legislature had such intention, it could have amended the statute to include "medical injury," as it did with other sections of the MPLA. Based on how the statute is written, however, the Court did not find that the circuit court committed a clear error of law in applying the Wrongful Death Act's statute of limitations to actions for death alleging medical negligence.

Impact on Business:

This opinion means that nursing homes cannot assert the one-year statute of limitations as a bar to a medical professional liability claim for wrongful death. Instead, those claims are subject to a two-year statute. The Court reached this result by harmonizing the MPLA and Wrongful Death statutes, but also closely hewing to the language of both. The opinion leaves open a legislative solution.

Corder v. Antero Resources Corporation. – FEDERAL CASE
Civil Action No. 1:18-cv-30 (N.D.W. Va., May 12, 2021)

What the Court was Asked to Decide:

The Court held that the 2018 amendment to W. Va. Code § 22-6-8 (the "Flat Rate Statute") "clearly does not apply retroactively" to alter the way that royalties are paid for wells drilled on a flat rate lease before May 31, 2018, when the 2018 amendment became effective.

What the Court Decided:

Facts:

Numerous individuals who owned mineral interests on property in Harrison County and Doddridge County sued Antero Resources Corporation ("Antero"), which had leased, been assigned, or otherwise acquired those interests, alleging that Antero improperly deducted post-production costs from royalty payments due under oil and gas leases.

Specifically, Antero operated 9 wells on the Plaintiffs' properties and paid royalties to the mineral interest owners. One of the leases at issue represented a so-called "flat rate" lease, under which the lessee (Antero) was required to pay "$100 per year for each and every gas well obtained on the premises[.]"

Flat rate leases are governed by the Flat Rate Statute, originally enacted in 1982 and amended numerous times since then. In *Leggett v. EQT Prod. Co.*, 800 S.E. 850 (W. Va. 2017), the Supreme Court of Appeals of West Virginia interpreted the Flat Rate Statute as allowing a lessee to deduct or allocate post-production expenses incurred by the lessee, and permitted a lessee to use the "net-back" or "work-back" method to calculate royalties owed to a lessor under a lease subject to the Flat Rate Statute.

The West Virginia Legislature amended the Flat Rate Statute in 2018, after the *Leggett* decision, to require that a lessee, in order to obtain certain permits, provide an affidavit that the lessee will pay the lessor "not less than one eighth of the gross proceeds, free from any deductions for post-production expenses, received at the first point of sale to an unaffiliated third-party purchaser in an arm's length transaction for the oil or gas so extracted, produced or marketed before deducting the amount to be paid to or set aside for the owner of the oil or gas in place, on all such oil or gas to be extracted, produced or marketed from the well."

In *this case* the Plaintiffs argued that the 2018 change to the Flat Rate Stature should be applied retroactively to prohibit Antero from deducting post-production expenses from the Plaintiffs' royalties. Antero argued that the 2018 change should apply prospectively only, and that the version of the Flat Rate Statute in effect when a well was permitted governs Antero's royalty obligations.

Holding:

The Court held that the 2018 amendment to the Flat Rate Statute applied prospectively only; hence, Antero could continue to deduct post-production expenses for leases that were permitted before the 2018 amendment became effective.

The Court's analysis started with the "presumption that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and ef-

fect." *Martinez v. Asplundh Tree Expert Co.,* 239 W. Va. 612, 803 S.E.2d 582, Syl. Pt. 2 (W. Va. 2017). Moreover, the Court acknowledged that "[t]here is a long-standing principle under West Virginia law that '[n]o statute, however positive, is to be construed as designed to interfere with existing contracts, rights of action, or suits, and especially vested rights, unless the intention that it shall so operate is expressly declared.'" *Rogers v. Lynch,* 44 W. Va. 94, 29 S.E. 507, Syl. Pt. 3 (W. Va. 1897).

Finding that neither the 2018 amendment to the Flat Rate Statute nor the legislative record reflects that the West Virginia Legislature intended for the 2018 amendment to be applied retroactively, the Court found that the 2018 amendment applied prospectively, only.

Impact on Business:

Businesses crave certainty in both the legal environment in which they operate and in the expectations that they have in a bargained-for contract. The Court's decision in this case, while obviously most applicable to oil and natural gas producers, represents a win for all businesses that depend upon the certainty of their contractual arrangements, even in the face of a statutory change that may impact those contractual arrangements. Here, the Court adhered to the long-standing principle that a statutory change should not be applied retroactively to change the terms of a contract.

Note, however, that this decision in the United State District Court for the Northern District of West Virginia simply anticipates what the Supreme Court of Appeals of West Virginia would do. That court will likely address this issue in the coming years.

SWN Production Company, LLC v. Conley
Case No. 19-0267 (Nov. 2, 2020)

What the Court was Asked to Decide:

The Supreme Court of Appeals of West Virginia was asked to review a circuit court's order denying SWN Production Company, LLC ("SWN")'s second motion to intervene in an action seeking to quiet title to a parcel of property brought by Respondent and plaintiff below, Corey Conley.

What the Court Decided:

The Court held the circuit court abused its discretion in determining that SWN's motion to intervene was untimely and, thus, erred as a matter of law.

Facts:

This action arose from a dispute over the oil and gas interests in a property first deeded in 1959 subject to later lease agreements and subdivided into smaller tracts. In 2000, Mr. Conley obtained the surface and mineral rights, excepting coal, from James Lee and Beatrice S. Milliken (the "Milliken Deed") to a 3.763-acre parcel (the "Conley Parcel") carved out of the original 1959 tract.

When a dispute arose, Conley filed an action to quiet title to the oil and gas interests under the Conley parcel. The suit proceeded against various parties and in June 2016, Conley filed a motion for summary judgment, requesting that the circuit court find the Milliken Deed to be unambiguous and to determine ownership status of the oil and gas rights. The Defendants filed cross-motions for summary judgment, arguing they had ownership or interest in the oil and gas under the language of the Milliken Deed.

On July 21, 2016, SWN first moved to intervene, arguing that its interests in other properties comprising the remainder of the original 161.53-acre tract would be affected by any construction of the Milliken Deed. The circuit court denied SWN's motion to intervene, finding that it was untimely, SWN had no interest relating to the Conley parcel, and therefore the disposition of the action would not impair its interest, and SWN's interests were adequately represented by Mr. Conley.

The circuit court denied the cross-motions for summary judgment finding language of the Milliken Deed was ambiguous regarding intent requiring a jury determination. Prior to this order, SWN entered into a lease with Mr. Conley on May 7, 2017, which was recorded on June 2, 2017. Then, SWN filed a second motion to intervene, arguing that it should be permitted to intervene because it had a leasehold in the oil and gas rights underlying the Conley parcel. By order entered February 22, 2019, the circuit court again denied SWN's motion to intervene, finding that SWN's attempt to create interest nearly a year and half after entering the lease was untimely. SWN appealed the circuit court's order.

Holding:

Rule 24 of the West Virginia Rules of Civil Procedure governs the ability of a non-party to a lawsuit to intervene in a pending action and provides for intervention of right, permissive intervention, and the procedure for intervening. Applicants for intervention must make timely requests, and the timeliness of an intervention is a matter of discretion with the trial court. In discussing the various standards of review applicable in this case, the Court held that a circuit

court's decision on an applicant's request for permissive intervention under Rule 24(b) is reviewed under an abuse of discretion standard. With respect to mandatory intervention as a matter of right pursuant to Rule 24(a)(2), the Court held that the standard of review of circuit court rulings on the elements governing a timely motion to intervene as a matter of right under Rule 24(a) is de novo.

SWN's second motion to intervene was based on intervention as a matter of right pursuant to Rule 24(a)(2). The Court explained that the threshold issue is whether SWN's motion was timely. The determination of whether an applicant's motion is timely is not a "mechanistic inquiry" - there is no bright line rule delineating the point at which the passage of time, without more, is a bar to intervention as a matter of right. The Court took issue with the circuit court's sole focus on the age of the case when addressing SWN's timeliness. The Court found it compelling the no scheduling order had been entered, no trial date had been set, and no discovery deadline imposed.

The Court further reasoned that "Rule 24 is designed, in part, to be a practical procedural tool promoting efficiency of the courts by resolving related issues in a single lawsuit while also protecting the interests of both the original parties and the non-parties." There was no evidence to suggest that SWN's intervention would result in prejudice to the Respondents, but there was evidence that SWN's interests may be prejudiced if not permitted to intervene. The Court concluded that the circuit court abused its discretion in finding that SWN's motion to intervene as of right was untimely.

Turning to the other factors an applicant must satisfy to intervene, the Court found that SWN had a direct and substantial interest because it was undisputed it had an ownership interest in the Conley parcel. The Court also found the disposition of the action would affect SWN's ability to protect its interest. Further, SWN's intervention would not unduly complicate or delay the action. The Court last concluded that SWN's interests different from Conley because of the nature of its business and its intent to invest in the development of gas and oil.

The Court concluded that SWN's motion to intervene was timely; SWN had an interest in the property; the disposition of the quiet title action may have impaired SWN's ability to protect its interests; and SWN's interest was not adequately represented by an existing party. The circuit court's order denying SWN's motion to intervene was reversed, and the case was remanded back to circuit court for further proceedings.

Impact on Business:

The Court set out clear standards of review for motions to intervene. With these standards, parties will be better equipped to determine if a motion to intervene is plausible. And the opinion means that where parties have an interest in the case, circuit courts must perform a thorough analysis of Rule 24(a)(2) intervention.

Courtland Co. v. Union Carbide Corp.. – FEDERAL CASE
2020 U.S. Dist. LEXIS 229653 (S.D.W. Va., December 8, 2020)

What the Court was Asked to Decide:

Did the 180-day period within which a defendant must serve a notice under W. Va. Code § 55-7-13d(a) of designation of at-fault nonparties apply to actions in Federal Court? And must the notice under § 55-7-13d exactly track the language of § 55-7-13d(a)(2)?

The Court denied motions to dismiss that sought to strike a defendant's notice under W. Va. Code § 55-7-13 because the 180-day notice period does not apply to actions pending in Federal Court, and a notice under § 55-7-13d(a)(2) does not need to track the exact language of the statute to be valid.

What the Court Decided:

Facts:

The Courtland Company, Inc. ("Courtland"), owned real property near Davis Creek in Kanawha County. It filed civil actions against Union Carbide Corp. ("Union Carbide"), which owned adjacent pieces of property, alleging that Union Carbide stored hazardous and toxic materials that leaked onto Courtland's property.

Union Carbide initially filed a notice of designation of at-fault nonparties pursuant to W. Va. Code § 55-7-13d(a), by which it provided notice that, "on information and belief," an unknown number of unnamed nonparties "may be" wholly or partially at fault for the claims brought by Courtland. Union Carbide stated in the notice that, because discovery was just beginning, it had not yet identified the nonparties, but it requested that the Court direct the factfinder to consider the fault of all nonparties and proportionally reduce Courtland's recovery against Union Carbide for the fault chargeable to the nonparties. *See* § 55-7-13d.

Notably, Union Carbide filed its initial notice within the 180-day service of process of the pleading that gives rise to the right to file a notice under § 55-7-13d(a)(2). Later, after expiration of the 180-day period, Union Carbide filed a supplemental notice that identified three nonparty entities that it asserted may be wholly or partially at fault for the claims alleged by Courtland, whose names were revealed in the deposition testimony of a corporate representative of Courtland. This supplemental notice also stated that, on "information and belief," an additional number of unknown parties "may also be" at fault for the damages claimed by Courtland.

Courtland moved to dismiss both the original notice and the supplemental notice because it failed to include the exact language in § 55-7-13d(a)(2). It also moved to dismiss the supplemental notice because it was served more than 180-days after service of the complaint.

Holding:

The Court denied Courtland's motions to dismiss and held that, in Federal Court, a notice under § 55-7-13d(a) may be filed after the 180-day period because the Federal Rule of Civil Procedure, and not § 55-7-13d(a)(2), governs the timing of a notice. The Court also rejected Courtland's argument that a notice must strictly comply with the exact wording in § 55-7-13d(a)(2) to be valid.

In reaching its conclusion, the Court phrased the question to be decided as this: "When must a defendant notify the plaintiff of its belief that nonparties are wholly or partially at fault for contributing to the plaintiff's damages so that the nonparties' fault may be considered by the trier of fact?"

Under § 55-7-13d(a)(2), a notice must be filed "no later than" 180-days after service of process of a complaint or other pleading that triggers the right to file a notice. The Court determined, however, that "the Federal Rules of Civil Procedure provide a different answer."

Specifically, the Court found that Fed. R. Civ. P. 12 provides the time limits by which a defendant is to raise defenses, including that a nonparty is at fault for some or all of the damages claimed by a plaintiff. Likewise, Rule 15 governs an amendment of pleadings, including an amendment to an answer that raises additional or modified defenses, such as what Union Carbide attempted in its supplemental notice. In short, the Court found that the 180-day limit to serve a notice under § 55-7-13d(a)(2) directly conflicted with the Federal Rules of Civil Procedure, which meant that the Federal Rules control the timing for filing notices under § 55-7-13d in Federal Court. For that reason, the Court denied the motions to dismiss because the notices filed by Union Carbide complied with the Federal Rules of Civil Procedure.

The Court also addressed Courtland's argument that the substance of the notices did not comply with § 55-7-13d(a)(2), which requires that a party "give[] notice . . . that a nonparty was wholly or partially at fault" (emphasis added). The notices filed by Union Carbide, however, stated that others "*may be* wholly or partially at fault." The Court rejected this contention and noted that the language of § 55-7-13d(a)(2) "does not include a requirement that the notice employ talismanic phrases such as 'was at fault' or only non-speculative language regarding the nonparty's fault[.]"

Impact on Business:

Businesses sued in a variety of circumstances -- product liability, nuisance, medical malpractice, premises liability, etc. -- frequently seek to add other potentially responsible parties to share in the cost of a potential settlement or jury verdict. The West Virginia Legislature fundamentally changed the legal fault landscape in civil lawsuits in 2015 with the passage of § 55-7-13d(a)-(d), which largely abolished joint and several liability and substituted a comparative fault standard of liability.

The Court's decision in *Courtland* establishes that the 180-day period to file a notice of fault of a non-party applies only to actions in state courts. If a business wishes to file a notice in Federal court, then it may ignore the 180-day requirement and file the notice within the time limits contained in the Federal Rules of Civil Procedure, which likely provide more leeway than strict adherence to the 180-day period in the statute.

Otto v. Catrow Law, PLLC
Case No. 19-0361 (November 2, 2020)

What the Court was Asked to Decide:

Plaintiffs in a legal malpractice case asked the Supreme Court of Appeals to set aside the trial court's grant of summary judgment to Catrow Law PLLC, on the grounds that the trial court improperly rejected the testimony of Plaintiffs' expert and disregarded evidence that bulletins warning of the dangers of phishing scams established a duty owed to Plaintiffs.

What the Court Decided:

The Supreme Court of Appeals held that the trial court did not err in rejecting the testimony of Plaintiffs' expert because the expert stated that he could not give an opinion on the standard of care applicable in West Virginia. Summary judgment was therefore proper because petitioner failed to provide evidence that the lawyers ever received industry bulletins warning of the phishing scam and therefore the bulletins could not establish the duty element of Petitioners' malpractice claim.

Facts:

The Ottos contracted with Frum, a real estate agent, to find and purchase a home in the Berkeley County area. They made a cash offer on a home and retained Catrow Law PLLC ("Catrow") to handle the closing. Catrow sent wiring instructions to Frum, the Ottos' agent, via encrypted e-mail. Ms. Frum forwarded the email to the Ottos' via unencrypted email. A chain of e-mails from an unidentified scammer, which on their face appeared to be from Ms. Frum, directed the Ottos to transfer the closing funds to the scammer's account. The Ottos unwittingly wired more than $266,000 to the scammer which has not been recovered. The Ottos subsequently filed suit in the Circuit Court of Berkeley County against Ms. Frum, the agency that employed her, and Catrow.

The Ottos argued that Catrow breached duties owed to them by not advising them to call Catrow's office to confirm the wiring instructions, failing to ensure that Ms. Furm's and the Ottos' e-mails were secure prior to sending written instructions, and neglecting to warn the Ottos of the prevalence and dangers of wire fraud schemes. However, the trial court found that the Ottos' expert, T. Summers Gwynn, was not competent to render an opinion as to Catrow's standard of care under West Virginia law because he had placed a disclaimer stating as much in his retainer agreement. Accordingly, the trial court granted summary judgment for Catrow and held that, as a matter of law, the Ottos failed to establish that Catrow breached a duty.

Holding:

The Court affirmed dismissal of the law firm. The Court first found that under West Virginia law, an attorney's standard of care is determined in comparison to that exercised by members of the legal profession in similar circumstances. Because the Ottos' expert stated that he could not say what should have been done by a practicing lawyer in West Virginia, the Court held that the trial court did not abuse its discretion in refusing to accept his testimony.

The Court next addressed the claim that industry bulletins (published by a title insurance company) received by Catrow, which warned of the dangers of phishing scams, established a duty. Though the Court agreed that a lawyer has a duty to disclose anything known to him or her that might affect the client's interest, the Court found the Ottos failed to prove that Catrow actually received or knew of the bulletins. Because the Ottos failed to produce any evidence that Catrow had received the bulletins in response to Catrow's motion for summary judgment, the Court concluded that summary judgment was appropriate.

Impact on Business:

Otto v. Catrow should serve as a warning as to the prevalence and dangers of wire fraud and other phishing schemes. Businesses should be aware of these dangers and take proactive measures to address them.

State of West Virginia ex rel. Amerisourcebergen Drug Corporation, et al. v. The Honorable Alan D. Moats, Lead Presiding Judge, Opioid Litigation, Mass Litigation Panel, et al., AND State of West Virginia ex rel. Johnson & Johnson, et al. v. The Honorable Alan D. Moats, Lead Presiding Judge, Opioid Litigation, Mass Litigation Panel, et al.
Case Nos. 20-0694 and 20-0751 (June 11, 2021)

What the Court was Asked to Decide:

The Court was asked 2 questions: 1) Whether Defendants had to try the equitable claims before the trial court or were entitled to a jury trial on both the equitable and legal claims of Plaintiffs when there were common issues and the ultimate relief or remedy involved substantial sums of money; and 2) Whether Defendants were allowed to assert a fault of a non-party or an "empty chair" defense as to Plaintiffs' public nuisance claims.

What the Court Decided:

The Court ruled Defendants were entitled to have any common legal and equitable claims decided first by a jury. As to the empty chair defense to the public nuisance claims, the Court ruled the 2015 comparative fault amendments did not apply to any public nuisance claims.

Facts:

This case involved 80 lawsuits brought by various state and local governments and hospitals against various drug manufacturers known commonly as the Opioid Litigation, which litigation had been referred to the Mass Litigation Panel ("the Panel"). Plaintiffs brought equitable claims of public nuisance and a variety of legal claims, including negligence and intentional conduct. The Panel sought to have the parties agree that the equitable claims be tried first by the Court, which would determine liability on those equitable claims and leave the issue of legal claims and damages to a jury. The drug companies refused to agree and also asserted an "empty chair" defense (comparative negligence against various non-parties) which defense Plaintiffs opposed. The Panel entered two orders at issue before the Court: 1) trial would be to the Panel first on the equitable claims; and 2) Defendants' notices of non-party fault as a defense to the equitable claims were stricken. Defendants filed motions with the WV Supreme Court seeking extraordinary relief from these two rulings.

Holding:

The 5 Supreme Court Justices issued 4 separate opinions, all on June 11, 2021, consistent with the Court's new procedure for issuing dissenting or concurring opinions simultaneously with the majority. Justice Walker authored the Court's majority opinion. While all justices agreed that Defendants *may* be entitled to have any equitable and legal claims tried to jury where the claims arise from the same or common facts or issues, especially given substantial money damages being sought as a remedy, the Justices varied widely on how the Court should rule, including a Wooten dissent, arguing such a decision at this stage was too premature and interfered with the Panel. Justice Walker relied on the Court's earlier *Tenpin Lounge* case and said where there are overlapping issues among both the equitable claim of public nuisance and the legal claims, *there is a "danger that a prior judicial determination of the equitable claim effectively may well defeat the jury trial right on the legal claims because the determination of the claims equitable aspects would prevent any re-litigation of those issues, either through res judicata or collateral estoppel, whichever doctrine bears on the particular legal claim."* Justice Walker concluded that *"to the extent that the Plaintiffs public nuisance liability determination and their legal claims present common issues, the order of trial must be that the jury first determines the common issues."* This effectively granted in part and denied in part the writ on this issue.

Justices Armistead and Jenkins agreed these claims should first go to a jury trial on the common issues, especially given the claims for damages. Justice Hutchison agreed with Justice Walker's analysis but believed the case was not far enough along to know what the common issues were and, as such, the opinion was more advisory in nature, something the Court should avoid.

Meanwhile, Justice Wooten who also viewed the Court's granting in part the motion regarding a jury trial as premature said he would not have granted the motion at this stage and found doing so invaded too much the flexibility granted to the Panel to decide the question later, after discovery had better defined the issues. Wooten and Hutchison's opinions referred to what they saw as Defendants' "tactics" designed to delay the cases.

On the issue of comparative fault, Justice Walker ruled that the public nuisance claims are not subject to the 2015 amendments on comparative fault, and therefore Defendants' "empty chair" defense was properly stricken as to those claims. This time Hutchison and Wooten agreed with Walker. However, Armistead and Jenkins dissented. They would have granted the writ enjoining the Panel from precluding application of the 2015 comparative fault amendments to allow for notices of non-party fault aka "empty chair defendants". Their reasoning was the Plaintiffs were clearly seeking substantial monetary damages as their legal remedy rather than any specific performance or any action on the part of Defendants be enjoined or abated, which is more in line with a comparative fault action for money damages.

Impact on Business:

While this opioid litigation and its final outcome impacts businesses, communities, and citizens alike, perhaps the biggest impact on business from these 4 opinions is a better understanding of the predilections of the 5 justices and the analysis each brought to these 4 opinions, with Justice Walker appearing to be the centrist.

Jordan v. Jenkins
Case No. 19-0890 (June 15, 2021)

What the Court was Asked to Decide:

The Court rejected the Circuit Court's 60:1 punitive damages multiplier and remanded the punitive damages award for further consideration.

What the Court Decided:

Facts:

Following an automobile accident, the Plaintiffs sued the tortfeasor as well as the tortfeasor's insurer, Safeco Insurance Company of America ("Safeco"). Although Safeco prevailed on three of the claims asserted by the Plaintiffs, the jury found Safeco liable for the tort of conversion and awarded $1,000 of compensatory damages and a punitive damages verdict of $60,000. The trial court denied Safeco's motion to reduce the amount of the award, holding that the award was proper under W. Va. Code §55-7-29 which provides

> The amount of punitive damages that may be awarded in a civil action may not exceed the greater of four times the amount of compensatory damages or $500,000, whichever is greater.

Because the $60,000 punitive damages award was less than $500,000 (the greater of $500,000 or four times $1,000), the circuit court considered the award to be appropriate.

On appeal, in its first substantive analysis of the new punitive damages statute, the Supreme Court held that a defendant's due process rights are not protected when a trial court simply considers whether a punitive damages award is less than the statutory cap. Instead, the Supreme Court confirmed that trial courts must conduct a "meaningful and adequate review" of the award by considering several common law factors. These factors, as detailed in *Garnes v. Fleming Landfill, Inc*., 186 W. Va. 656, 413 S.E.2d 897 (1991), *TXO Production Corp. v. Alliance Resources Corp*., 187 W. Va. 457, 419 S.E.2d 870 (1992) and their progeny, include whether there is a reasonable relationship to the harm likely to occur and the harm that actually occurred; whether there is reprehensibility of the conduct; and whether the defendant profited from the conduct. Further, according to *Garnes*, "As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages."

Holding:

The Supreme Court's decision confirms that while W. Va. Code §55-7-29 creates one cap on punitive damages awards in West Virginia, the statute does not abrogate decades of common law due process precedent requiring judicial review of punitive damage awards.

Impact on Business:

West Virginia trial courts must engage in a substantive analysis of punitive damages awards and their relationship to any underlying compensatory damages award. While punitive damages cannot now exceed the statutory cap in West Virginia, not every award less than the cap satisfies a defendant's due process rights. Under this case, businesses can anticipate a more rigorous review of any punitive damages award made against them.

Antero Resources Corporation v. Dale W. Steager, as State Tax Commissioner of West Virginia
Case No. 18-1106 (November 17, 2020)

What the Court was Asked to Decide:

Whether, for sales and use tax purposes, Antero, a natural gas and oil producer, could claim the direct use exemption for its purchases of certain items of tangible personal property and services used in its business.

What the Court Decided:

The Court reversed, in part, and affirmed, in part, the administrative decision of the West Virginia Office of Tax Appeals (OTA), so that, as a result of the Supreme Court's Order, Antero was held to be entitled to assert sales and use tax exemptions for its purchases of items for work crew housing quarters and related equipment, of portable toilets, sewage systems, related water systems, and of septic cleaning services, but could not assert the exemption for its rentals of trash trailers or waste receptacles.

Facts:

This matter arose from an audit of the books of Antero by the West Virginia State Tax Department (STD) for the three-year period of January 1, 2011, through December 31, 2013. Based on its finding that Antero had improperly asserted the "direct use" exemption for its purchases and rentals of goods and purchases of services for worker crew quarters and related equipment, of portable toilets, sewage systems, related water systems, of septic cleaning services and of trash trailers and waste receptacles, the STD assessed Antero additional sales and use taxes of over one million dollars ($1,000,000). Shortly, thereafter, Antero paid the assessment in full and filed a timely appeal with OTA, challenging the assessment in its entirety.

In its administrative decision, based on its application of the statutory exemption for purchases of goods and services "directly used or consumed in … the production of natural resources …" (W.Va. Code §11-15-9(b)(2), OTA set aside the assessment as to all but a small portion ($25,613.82) of it. The STD, then exercising its statutory option, appealed the OTA decision to the Circuit Court of Kanawha County and there gained a full reversal of the OTA decision and a reinstatement of its entire assessment. As is often its practice, the Circuit Court's reversal order was entered without even allowing oral argument, much less considering new evidence. In fact, the Circuit Court based its holding on the view that the OTA decision was sharply at odds with that Court's understanding of the applicable tax laws which, it asserted, OTA essentially "re-wrote" in so broadly rejecting the STD's assessment.

Holding:

Based on its application of the statutory standards of review to which the Circuit Court's review of the OTA decision was subject, the Court, in an unanimous decision, overruled most of Circuit Court's decision, and reinstated most parts of the OTA decision in favor of Antero.

Specifically, the Court, after acknowledging in its opinion the general statutory presumption that, for sales and use tax purposes, all sales are presumed taxable, went on to examine the language of the specific statutory exemptions which apply to overcome that general presumption of taxability. Generally, those exemptions are for purchases of goods and services that are "directly used or consumed … in the … production of natural resources" because they are "integral and essential" and not "simply incidental, convenient or remote" to such production. W.Va. Code §§ 11-15-9(b)(2) and 11-15-2(b)(4)(A).

For example, it held, among other things, that the statutory reference to "personal comfort of personnel" for which an expenditure is automatically disqualified for the "direct use exemption," did not apply to the on-site quarters and related equipment for housing Antero's production crews. W.Va. Code §11-15-2(b)(4)(B). That was because, in the particular context of Antero's production operations at issue, the Court held that such expenditures were, instead, integral and essential due to being needed so that such crew members could remain on-site 24/7 while performing tasks critical to the efficacy of the production operations.

Likewise, the Court rejected the STD's argument that the statute's express use of the term "otherwise" at the end of the list describing expenditures eligible for application of the direct use exemption had to be interpreted by reference to the other items in that list. See, W.Va. Code §11-15-2(b)(4)(A)(xiv). Instead, the Court, citing its precedents which require straight-forward application of clear and unambiguous statutory terms without resort to rules of interpretation, held that "otherwise" clearly meant expenditures of a nature which were not already described in earlier parts of the list, but which were also "integral and essential" to natural resource production.

Thus, based on such a careful reading of the governing statute, the Court found to be exempt purchases/rentals of crew housing quarters and related equipment and of portable toilets, sewage systems, related water systems, and of septic cleaning services. However, by consistently focusing on the clear language of the controlling legislative rule, which expressly includes, in application of the direct use exemption, expenditures for storage of waste "directly resulting from … the production of natural resources," the Court agreed with the Circuit Court that Antero could not assert the exemption for its rentals of standard trash trailers or waste receptacles which did not store such waste. WVCSR §110-15-123.3.1 (1993).

Impact on Business:

Beyond the largely favorable substantive outcome of this decision for the natural resources industry, all businesses should celebrate the willingness of the current Court, acting unanimously, to carefully read and apply the express language of the statutes governing application of the tax laws, and to do so in a manner which is fully independent of the STD's own interpretations.

Monongahela Power Company v. Buzminsky
Case No. 19-0228 (November 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 the 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 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.

Wal-Mart Stores East, L.P. v. Ankrom
Case No. 19-0666 (November 18, 2020)

What the Court was Asked to Decide:

The Supreme Court of Appeals of West Virginia was asked to determine whether the circuit court committed reversible error relating to its decision not to enter judgment as a matter of law for Wal-Mart in a trial involving a customer injured by a fleeing shoplifter. Wal-Mart argued that the evidence at trial clearly showed the shoplifter's decision to flee from its employees was the sole, proximate cause of Ms. Ankrom's injuries. Wal-Mart also requested that the Supreme Court determine whether the circuit court committed reversible error when it refused to instruct the jury on the law of intervening cause, whether it erred in precluding Wal-Mart from using allegations from plaintiff's Complaint to impeach her and her daughter's credibility and whether it erred in awarding prejudgment interest on her medical expenses. On cross appeal, plaintiff challenged the reduction of her damage award due to apportionment of fault (70%) on the shoplifter under West Virginia Code § 55-7-24 (2005).

What the Court Decided:

The Supreme Court of Appeals, in a 3-2 decision, upheld the circuit court's rulings on all assignments of error identified by both Wal-Mart and Ms. Ankrom. The Court declined to reverse the finding of duty and causation, and the jury's resulting verdict. Most significantly, the Court decided that West Virginia Code § 55-7-24 (2005) applies to require apportionment of fault to third-party defendants. Also, the plaintiff is not required to forego the collateral source doctrine to recover prejudgment interest. Justice Walker wrote the majority with Chef Justice Armstead and Justice Jenkins concurring in part and dissenting in part.

Facts:

After being apprehended by Wal Mart employees and returned to the store, a shoplifter fled and collided with Ms. Ankrom's shopping cart, causing her to fall and sustain severe injuries. Ankrom sued Wal-Mart and the case went to trial. At the conclusion of the evidence, the circuit court denied Wal-Mart's request to give the jury an instruction that the shoplifter's actions could be an intervening/superseding cause. The jury found for plaintiff and awarded approximately $16.9 million in damages. The jury apportioned 30% of the fault for Ms. Ankrom's injuries to Wal-Mart and the remainder to the shoplifter, who was Wal-Mart sued by third-party complaint.

After trial, Ankrom filed a motion seeking entry of the entire judgment against Wal-Mart, leaving it to recover the shoplifter's portion through contribution. The court then entered judgment severally against the shoplifter ($11,845,400) and Wal-Mart ($5,076,600). The court also awarded four percent, simple interest on past medical expenses ($2,500,000) apportioned between Wal-Mart and the shoplifter.

In post-trial motions, Wal-Mart challenged the jury's findings through its Motion for Judgment as a Matter of Law; in the alternative, Wal-Mart requested a new trial. On appeal, Wal-Mart reasserted its arguments and Ankrom filed a cross-assignment of error regarding the court's denial of her Motion for Entry of Judgment.

Holding:

The Supreme Court upheld the circuit court's decisions relating to each of Wal-Mart's and Ms. Ankrom's assignments of error.

Wal-Mart argued that the circuit court should have granted its Motion for Judgment as a Matter of Law because the undisputed, overwhelming testimony at trial established that it did not owe Ms. Ankrom a duty and that the shoplifter's actions were the proximate cause of Ms. Ankrom's injuries, not those of Wal-Mart's employees. The Supreme Court disagreed. First, it found the "Shopkeeper's Privilege" statute (W. Va. Code § 61-3A-4 (1981)) did not apply. The statute provides immunities to shopkeepers for actions taken to stop and detain shoplifters; it does not protect against injuries sustained by third-party bystanders during the store's attempt to stop and detain a shoplifter.

The Supreme Court rejected Wal-Mart's argument that it owed no duty to plaintiff because its employees were authorized to investigate and detain shoplifters under the store's shoplifting policy. "[A] person does not [generally] have a duty to protect others from deliberate criminal conduct of third parties," but a duty of protection may arise "when the person's affirmative actions or omissions have exposed another to a foreseeable high risk of harm from the intentional misconduct."

The Court also rejected Wal-Mart's argument that, "even if its employees did expose Ms. Ankrom to a foreseeable high risk of harm," the shoplifter's decision to flee inside the store was superseding and the sole, proximate cause of Ms. Ankrom's injuries. The Court found "an intervening cause . . . must be a negligent act, or omission, which constitutes a new, effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury." Thus, "even where a third person's acts intervene in the causal chain leading to injury," the intervening act does not relieve the "first link in that chain from liability 'if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct.'"

The Court also found circuit court did not abuse its discretion in refusing Wal Mart's jury instruction regarding intervening causes.

Wal-Mart's challenge to the circuit court's decision to prevent it from utilizing allegations set forth in Plaintiff's Complaint to impeach her credibility at trial was also rejected as harmless error. The Court found that "even if the circuit court abused its discretion, it was not "reasonably probable that Wal-Mart's inability to impeach Ms. Ankrom with the [complaint's] allegations affected or influenced the jury's verdict because Wal-Mart effectively impeached Ms. Ankrom on this issue in other ways."

Last, the Court rejected Wal-Mart's challenge to the court's decision to award prejudgment interest because a third party paid the medical expenses incurred by the time of trial and she was not obligated to pay any medical bills. The Supreme Court held that, "[r]egardless of who pays the bill for expenses prior to trial, someone is losing the use of that money. Injured plaintiffs should not have to forego the collateral source rule merely to recover prejudgment interest."

Ankrom challenged the circuit court's refusal to enter her proposed of judgment against Wal-Mart for the full amount of the jury verdict, leaving it the right to contribution from the shoplifter. Ankrom argued because the shoplifter was a *third-party* defendant, he was not a "defendant" for purposes of West Virginia Code § 55-7-24 (2005).

The Supreme Court found the plain language West Virginia Code § 55-7-24 included third-party defendants. The "Legislature's choice to use 'party' in § 55-7-24(a)(1) further demonstrates its intent that the statute apply to the tortious conduct of more than one defendant—including those in the litigation in a third-party capacity."

The Court found that under West Virginia Code § 55-7-24(a)(2), a circuit court must "[e]nter judgment against each defendant found to be liable on the basis of the rules of joint and sev-

eral liability . . ..” The Supreme Court identifies that the “statute then tempers that rule for ‘any defendant [that] is thirty percent or less at fault’—not just those whom the plaintiff has chosen to sue”—by determining that the liability of any defendant that is determined by the factfinder to be thirty percent or less at fault will “be several and not joint and he or she shall be liable only for the damages attributable to him or her, except as otherwise provided in this section.” If Ms. Ankrom’s proposed interpretation of the statute was adopted, “it would undo § 55-7-24, because the statute’s application would always depend” on whether a plaintiff chose to sue one or more tortfeasors and, at that point, “the Legislature might as well not have enacted the statute at all.”

Impact:

West Virginia Code § 55-7-24 was repealed and replaced in 2015, so this case deals with the 2005 version of the statute. The confirmation that the plain language indicates that it is applicable to all defendants, including third-party defendants brought in by a party other than the plaintiff, remains significant. The decisions about duty and jury instruction show the court’s deference to trial judges. The Court discussed case law related to shoplifting and determined there is no bright-line rule regarding the reasonableness of a store’s attempt to catch and detain a shoplifter or when a shoplifter’s criminal decisions will be considered foreseeable. This suggests that cases with such allegations are more likely to proceed to jury trial. The court continues to enforce the collateral source rule absent statutory change.

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