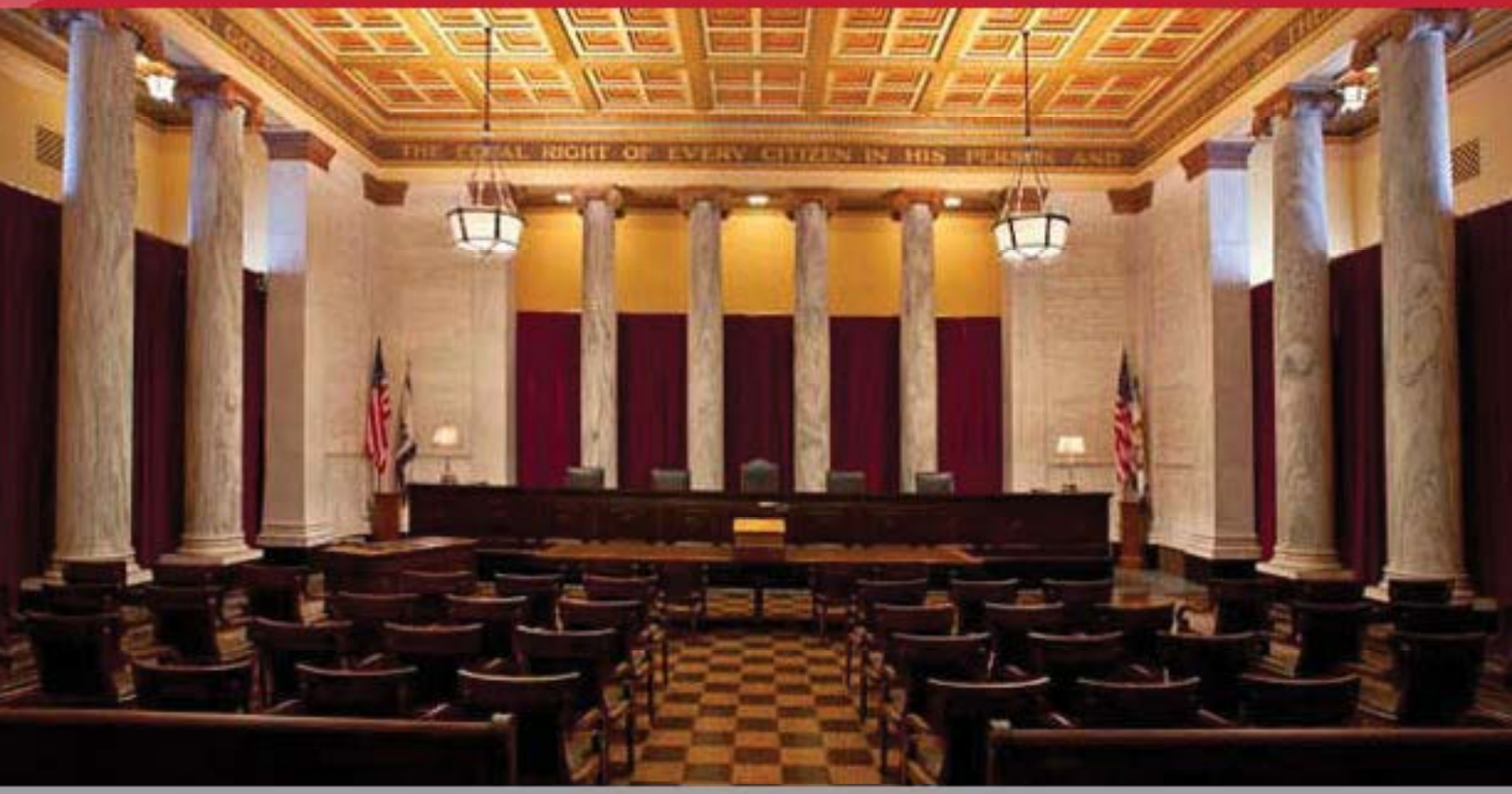
CourtWatch



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

2022

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 2021 and Spring 2022 Terms of Court and present this report on the impact of those Court decisions on our state's economy to Chamber members.

The West Virginia Chamber of Commerce
CourtWatch Legal Review Team 2022

Michaela L. Cloutier
Flaherty Sensabaugh Bonasso PLLC — *mcloutier@flahertylegal.com*

Anna Dailey
Dinsmore & Shohl LLP — *anna.dailey@dinsmore.com*

Mark Dean
Steptoe & Johnson PLLC — *mark.dean@steptoe-johnson.com*

Susan Deniker
Steptoe & Johnson PLLC — *susan.deniker@steptoe-johnson.com*

J. Tyler Dinsmore
Flaherty Sensabaugh Bonasso PLL**C** — *tdinsmore@flahertylegal.com*

Cassie L. Harkins
Dinsmore & Shohl LLP — *cassie.harkins@dinsmore.com*

Clayton T. Harkins
Dinsmore & Shohl LLP — *clayton.harkins@dinsmore.com*

Thomas J. Hurney, Jr.
Jackson Kelly PLLC — *thurney@jacksonkelly.com*

Evan Jenkins
Jenkins Fenstermaker PLLC — *ehj@jenkinsfenstermaker.com*

Alex Kitts
Jackson Kelly PLLC — *akitts@jacksonkelly.com*

Kaitlyn Pytlak-Morra — *pytlak.morra@gmail.com*

Mychal S. Schulz
Babst Calland P.C. — *mschulz@babstcalland.com*

Blair Wessels
Jackson Kelly PLLC — *blair.wessels@jacksonkelly.com*

Marc E. Williams
Nelson Mullins Riley & Scarborough LLP — *marc.williams@nelsonmullins.com*

1. Arbitration

Beckley Health Partners, LTD et al. v. Cynthia F. Hoover
Case No. 20-0680 (June 15, 2022)
Does a medical surrogate—not an attorney-in-fact—have the authority to sign and bind an arbitration agreement on behalf of another person? The West Virginia Supreme Court in a split decision answered that question in the negative and concluded that the individual who was a medical surrogate (and not the attorney-in-fact) lacked authority to bind her mother to the arbitration agreement.

Chancellor Senior Management, Ltd. v. McGraw et al.
Case No. 20-0794 (Mar. 22, 2022)
Is an arbitration provision contained in a residency agreement a valid arbitration agreement when the parties are required to comply with American Health Lawyers Association ("AHLA") rules and procedures? The West Virginia Supreme Court in a unanimous decision held that the arbitration provision in this matter was not enforceable because it was required to comply with AHLA procedures, and it did not.

2. Class Actions

SER Dodrill Heating and Cooling, LLC v. The Honorable Maryclaire Akers, et al.
Case No. 21-0561 (Apr. 22, 2022)
Can language used in a company's business documents be actionable as an injury-in-fact? What if the language is nothing more than a threat? What if injury or resulting damages occur? In a split decision, the West Virginia Supreme Court determined that language made in violation of the West Virginia Consumer Credit Protection Act is an injury-in-fact with or without resulting damage.

SER Surnaik Holdings of WV, Inc. v. The Honorable Thomas A. Bedell, et al.
Case No. 21-0610 (June 8, 2022)
Will the West Virginia Supreme Court grant extraordinary relief in this case for a second time? On its first visit to the Court, the Court granted a writ of prohibition and dissolved the circuit court's former class certification order. Now, Surnaik seeks relief once again for the circuit court's most recent order certifying the case for class action relief. This time, the Court denied extraordinary relief.

SER WVU Hospitals, et al. v. The Honorable David M. Hammer, et al.
Case No. 21-0095 (Nov. 19, 2021)
Did the circuit court err in certifying a class action? Did the class representatives suffer an injury-in-fact when an employee legitimately accessed confidential records? Were the prerequisites for class certification met in this case? WVU Hospitals argued that the class in this case was improperly certified and asked the West Virginia Supreme Court to grant a writ of prohibition prohibiting the circuit court from enforcing its order certifying the class of approximately 7,445 individuals. The Court, in a 3-2 split decision, granted the petition for writ of prohibition.

SER WVU Hospitals, et al. v. The Honorable Phillip D. Gaujot, et al.
Case No. 21-0737 (Apr. 26, 2022)
How will the West Virginia Supreme Court analyze this repeat petition for writ of prohibition? Will the Court decide the case in the same manner as before? Are there enough differences to find a different result? In a 4-1 decision, the Court found that the circuit court did not commit clear legal error, and therefore, refused to issue the writ of prohibition.

3. Contracts

Antero Resources Corp. v. Directional One Services Inc.
Case No. 20-0965 (Apr. 8, 2022)
Should Master Services Agreement ("MSA") and rate sheets be read together as one agreement? What if they involve the same parties, the same subject matter, and are clearly related? In a split decision, the West Virginia Supreme Court explained that the law requires separate documents to be construed together and considered as a single transaction when the parties and subject matter are the same and the relationship between documents is apparent.

Antero Resources Corp. v. L&D Investments, et al.
Case No. 20-0964 & No. 20-0967 (Apr. 26, 2022)
Do the intentions of parties to a contract matter? What do the terms of the contract specify? In a split 3-2 memorandum decision, the West Virginia Supreme Court affirmed the circuit court's decision and disregarded this State's law regarding the unambiguous provisions of a valid contract. The Court looked beyond the plain language, and interpreted the contract in a manner consistent with what it perceived to be the intended result.

Horizon Ventures of West Virginia, Inc. v. American Bituminous Power Partners, L.P.
Case No. 20-0759 (Apr. 18, 2022)
Do ambiguities in underlying contractual agreements preclude a circuit court from granting summary judgment? Under the specific circumstances of this case, the West Virginia Supreme Court found that the ambiguities should have precluded the award of summary judgment.

4. Employment/Labor Law

Amie Miller v. St. Joseph Recovery Center, LLC, et al.
Case No. 20-0755 (Apr. 26, 2022)
Are severance packages "wages" under the West Virginia Wage Payment and Collection Act? Must certain circumstances be met for severance packages to be considered "wages"? In a split decision, the West Virginia Supreme Court determined that the definitions and specific language in employment contracts govern "wages" and "fringe benefits."

Constellium Rolled Products Ravenswood, LLC v. Earl B. Cooper and Workforce West Virginia Board of Review
Case No. 20-0486 (Nov. 5, 2021)
Is a strike at a maufacturing facility—when operations continue—a "work stoppage"? If so, does this keep striking employees from obtaining unemployment benefits? In a 4-1 decision, the West Virginia Supreme Court held that the strike (involving 80% of the facility's workforce and leading to a significant dip in production) was sufficient to constitute a "work stoppage".

Cynthia D. Pajak v. Under Armour, Inc.
Case No. 21-0484 (Apr. 22, 2022)
May an employer that does not meet the West Virginia Human Rights Act definition of "employer" be held liable to its own employee as a "person" as defined in the Act? The West Virginia Supreme Court in a unanimous decision said No.

Fairmont Tool, Inc. v. Adam J. Davis
Case No. 20-0684 (Nov. 22, 2021)
What are deductions for purposes of the West Virginia Wage Payment and Collection Act? Must certain conditions be met for withholding? In a split decision, the West Virginia Supreme Court held that "yes" certain conditions do have to be met for employers to lawfully withhold "assignment of wages."

James C. Justice, II v. West Virginia AFL-CIO et al.
Case No. 21-0559 (Nov. 22, 2021)
Did the Circuit Court of Kanawha County abuse its discretion in imposing an injunction on the new "Right to Work" statute? Should the circuit court have granted the preliminary injunction? Did the Respondents show a likelihood of success on their constitutional claims? In a split decision, the West Virginia Supreme Court determined that the circuit court did abuse its discretion in granting the preliminary injunction and held that West Virginia's "Right to Work" statute was constitutional.

5. Estate

Toni G. Milmoe, Executrix of the Estate of Thelma Marie Sturgeon v. Paramount Senior Living at Ona, LLC
Case No. 21-0183 (June 13, 2022)
Can a non-successor be held liable for the alleged wrongful conduct of a prior operator? What does it take to be considered a successor for purposes of liability? In a unanimous decision, the West Virginia Supreme Court looked at the specific facts at issue and determined that Paramount was not a successor and therefore could not be liable for the actions of the prior operator.

6. Insurance

Auto Club Property Casualty Insurance Co. v. Jessica A. Moser
Case No. 20-0792 (Apr. 25, 2022)
When does an insured individual "incur" medical expenses? Is it when the individual receives the bill? Or is it when the individual actually pays for the medical expenses? The West Virginia Supreme Court in a 3-1 decision held that an insured "incurs" medical expenses when they receive the bill.

Progressive Max Insurance Company v. Christine Brehm
Case No. 20-0850 (Apr. 14, 2022)
Is an insurer required to cover guest passengers with underinsured motorist coverage for injuries sustained while riding in a rented vehicle driven by the insured under West Virginia law, irrespective the language of the applicable automobile insurance policy? The West Virginia Supreme Court answered this questions in the negative, concluding that West Virginia Code §§ 33-6-29(b) and -31(c) do not require the expansion of coverage in such a manner.

Rex Donahue v. Mammoth Restoration and Cleaning and Allstate Insurance Company
Case No. 20-0343 (Feb. 18, 2022)
Is a party bound by representations made by counsel that the party had agreed to settlement? The West Virginia Supreme Court answered this question in the affirmative, concluding that unequivocal consent to settlement by an attorney binds their client to the terms of that agreement.

7. MPLA and Healthcare

Adkins v. Clark
Case No. 21-0300 (June 14, 2022)
Does a health care provider's lack of response toll the statute of limitations? Is a health care provider's request for medical records a demand for mediation? In a unanimous 4-0 decision, the West Virginia Supreme Court answered both of these questions in the negative—to toll the statute of limitations, a plaintiff must strictly comply with the requirements of the Medical Professional Liability Act.

Pledger v. Lynch
5 F.4th 511, 523-24 (4th Cir. 2021)
How are the requirements of the West Virginia Medical Professional Liability Act reconciled with the Federal Rules of Civil Procedure? The Fourth Circuit Court of Appeals, in a 2-1 decision, held that West Virginia's expert witness certification requirements do not apply to medical malpractice claims filed in district court under the Federal Tort Claims Act.

SER WVU Hospitals, Inc. v. The Honorable Cindy S. Scott
Case No. 21-0230 (Nov. 22, 2021)
Does the MPLA apply to corporate negligence claims? If yes, must the claims fit within the MPLA's definition of health care? In a split decision, the West Virginia Supreme Court concluded that "yes" the MPLA applies to corporate negligence claims when the acts or omissions fit within the MPLA's definition of health care.

Tanner and Tanner v. Bryan D. Raybuck, M.D.
Case No. 21-0038 (Apr. 15, 2022)
Does a claimant filing a medical professional liability action need to serve a notice of claim on every health care provider that he or she plans on joining in the action? Does a notice of claim need to be served upon a health care provider before the filing of the complaint? In a split 4-1 decision, the West Virginia Supreme Court held that failure to comply with the provisions of the West Virginia Medical Professional Liability Act deprives the circuit court of subject matter jurisdiction and requires dismissal of the complaint.

8. Oil & Gas

SWN Production Company, LLC, et al. v. Charles Kellam, et al.
Case No. 21-0729 (June 14, 2022)
How will the Court rule on four certified questions from the United States District Court for the Northern District of West Virginia? The questions, seeking clarification on the law in Estate of Tawney v. Columbia Natural Resources, were reformulated by the West Virginia Supreme Court. The Court then determined whether it was appropriate for it to answer the questions as reformulated—which necessarily involved the exploration of contractual language, the possible need for interpretation of said language, and the development of facts to assist either the court or the factfinder.

9. Practice and Procedure

Dan's Car World, LLC v. Caressa Delaney
Case No. 20-0489 (Apr. 8, 2022)
Was the circuit court within its authority to issue sanctions after numerous discovery requests were ignored? Under the specific circumstances of this case, the West Virginia Supreme Court found that the circuit court was within its discretion to issue such sanctions.

Parks v. Mutual Benefit Group
Case No. 20-0065 (Oct. 28, 2021)
Can a party serve requests for admission in Magistrate Court? Is a party required to respond to requests for admission if the rules do not provide for such discovery in Magistrate Court? In a unanimous decision, the West Virginia Supreme Court reiterated that the West Virginia Rules of Civil Procedure for Magistrate Courts provide the exclusive means for discovery—and as currently written—the Rules do not allow parties to serve requests for admission.

SER 3C LLC et al v. The Honorable Eric H. O'Briant
Case No. 21-0441 (June 14, 2022)
Are forum-selection clauses presumed to be enforceable? Can a forum-selection clause be found unreasonable and unjust under certain circumstances? The West Virginia Supreme Court in a unanimous decision held that while forum-selection clauses are presumed to be enforceable, there are certain circumstances where those clauses can be unreasonable and unjust—but they must be specific to the forum-selection clause itself.

St. Paul Fire & Marine Ins.Co.y v. AmerisourceBergen Drug Corporation, et al.
Case No. 21-0036 (Nov. 15, 2021)
Can the West Virginia Supreme Court preclude parties from prosecuting collateral litigation in other states? In a unanimous 5-0 decision, the Court said "yes" and affirmed the circuit court's power to enter orders precluding such litigation.

10. Tax

John Keener d/b/a Mountaineer Inspection Services, LLC v. Matthew Irby, State Tax Commissioner of West Virginia
Case No. 20-0488 (Nov. 8, 2021)
What is required for services to meet the professional services tax exemption under the West Virginia Code and do our State Rules create a mandatory four-part test necessary to be classified as a "professional"? The West Virginia Supreme Court in a split decision held that the State Rules do not create a mandatory four-part test.

11. Tort/Liability

SER March-Westin Company, Inc. v. The Honorable Phillip D. Gaujot, et al.
Case No. 21-0577 (Mar. 21, 2022)
In a split decision, the West Virginia Supreme Court held that West Virginia Code § 55-7-13 is clear and unambiguous, and concluded that fault may be allocated even when the party identified in the notice of fault may be immune from liability.

Beckley Health Partners, LTD et al. v. Cynthia F. Hoover
Case No. 20-0680 (June 15, 2022)

What the Court was Asked to Decide:

In this case, a daughter (who was her mother's medical surrogate) admitted her mother to an assisted living facility and completed two forms on her mother's behalf. One of these forms was an arbitration agreement that the facility attempted to enforce once a lawsuit was initiated. The circuit court denied the facility's motion to compel arbitration, and as such, the facility appealed. On appeal, the West Virginia Supreme Court was asked to decide whether the circuit court erred in denying the motion to compel and in concluding that the daughter lacked authority to bind the arbitration agreement.

What the Court Decided:

Facts:

In August of 2017, Cynthia Hoover ("Ms. Hoover") arranged for her mother to become a resident at an assisted living facility in Raleigh County. At the time, Ms. Hoover had been appointed her mother's medical surrogate, but she was not her mother's attorney-in-fact. During the admissions process, Ms. Hoover signed two documents on her mother's behalf: a residency agreement and an arbitration agreement. The residency agreement was required for admission to the facility; the arbitration agreement was not. Days after signing the documents, Ms. Hoover obtained her mother's power of attorney.

Nearly two years later, Ms. Hoover filed a lawsuit—in her capacity as her mother's attorney-in-fact—against the facility, alleging that they had not provided her mother with a safe environment nor adequate supervision. In response to the complaint, the facility produced the arbitration agreement and moved the circuit court for an order compelling the parties to arbitration. Ms. Hoover argued that no valid arbitration agreement existed because she lacked authority at the time of execution. The circuit court denied the motion, cited to the Court's decision in *State ex rel. AMFM, LLC v. King*, and concluded that at the time of execution, Ms. Hoover only possessed authority to make healthcare decisions. The facility appealed this decision.

On appeal, the Court was asked to determine whether the circuit court erred in denying the motion to compel arbitration and in concluding that Ms. Hoover lacked authority to bind her mother to arbitration. The Court first examined the validity of the arbitration agreement at issue. To assist in its analysis, the Court turned to *AMFM*. Under *AMF*M, an agreement to submit future disputes to arbitration, which is optional and not required for admission to the facility, is not a health care decision. Applying this logic to the case at hand, the Court concluded that because Ms. Hoover—at the time of execution—only had the authority to make health care decisions on her mother's behalf, she lacked authority to bind her mother to the arbitration agreement.

Holding:

The Court concluded that because Ms. Hoover was not a competent party to the arbitration agreement, the arbitration agreement does not satisfy the conditions necessary to form a valid contract, and therefore, the circuit court was correct in denying the facility's motion to compel arbitration.

How They Voted:

Justice Walker authored the majority opinion. Justice Wooton, Justice Bunn, and Judge Dyer joined in the majority. Judge Dyer was sitting by temporary assignment. Justice Armstead concurred in part and dissented in part. In his concurrence/dissent, Justice Armstead agreed with most of the majority's analysis, but felt that Ms. Hoover was "estopped" from refusing to comply with the arbitration agreement because she (and her mother) obtained benefits under the agreement by residing at the facility. Chief Justice Hutchison, having been disqualified, did not participate.

Impact on Business:

This decision upholds and reinforces the Court's previous decision in *AMFM*, and reiterates the Court's position that for an arbitration agreement to be enforceable and binding, the parties need to have the proper authority at the time of execution. Going forward, companies, businesses, and individuals should be extra vigilant about the authority they have to bind, or not bind, arbitration agreements. Here, even gaining the authority a few days later did not matter. The Court looked to the moment of execution and because Ms. Hoover lacked authority, the entire arbitration agreement was invalid. Be vigilant and be aware of what authority a party has before entering into agreements that have a major influence on dispute resolution—being aware can mean the difference between arbitration and costly litigation.

Chancellor Senior Management, Ltd. v. McGraw, et al.
Case No. 20-0794 (Mar. 22, 2022)

What the Court was Asked to Decide:

In this case, two individuals—daughters of assisted living facility residents—signed a written agreement to arbitrate all disputes arising with the nursing home. After the individuals filed a lawsuit, the facility management company filed a motion to compel arbitration. The circuit court denied the motion to compel, and as such, the facility management company appealed. On appeal, the West Virginia Supreme Court was asked to decide whether the circuit court erred in refusing to enforce the arbitration provision contained in the residency agreements signed by the daughters.

What the Court Decided:

Facts:

In March of 2013, Louise McGraw was admitted to The Villages at Greystone, an assisted living facility located in Beckley, West Virginia. A residency agreement was executed on behalf of Ms. McGraw by her daughter. Likewise, in July of 2014, Charlotte Rodgers was admitted to The Villages at Greystone under a residency agreement executed by her daughter. Both residency agreements contained an arbitration provision. In pertinent part, the provision provided that "[a]ny arbitration conducted pursuant to this Section X shall be conducted in Cabell County, West Virginia in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration." The AHLA rules of procedure set forth certain requirements that must be met in order for a claim to be arbitrated in accordance with AHLA rules.

In November of 2016, the two daughters filed an amended complaint against Chancellor Senior Management (the management company of the assisted living facility) on their own behalf and on behalf of others similarly situated. The complaint alleged that Chancellor defrauded their mothers by making misrepresentations and misleading statements which led them to believe that Chancellor would assess its residents' needs and provide staffing sufficient to meet those needs. After answering the complaint, Chancellor moved to compel arbitration based upon the arbitration provision set forth in the residency agreements. The daughters opposed the motion to compel and alleged that the arbitration provision was invalid as a matter of law because it did not comply with the AHLA rules that Chancellor incorporated into the agreement, the application of which would result in dismissal of any arbitration.

The circuit court found that while the claims asserted would otherwise be subject to arbitration, the arbitration provision could not be enforced because it was contained in the residency agreements, and the AHLA rules required that any arbitration provision be contained in a separate document. Therefore, the court denied the motion to compel arbitration. Chancellor appealed to the Court.

The Court was asked to determine whether the circuit court erred in denying the motion to compel arbitration and in refusing to enforce the arbitration provision contained in the residency agreements. The Court first looked to the language of the arbitration provision. The provision clearly provided that any arbitration conducted pursuant to the provision therein would be "in accordance with" the AHLA rules. The Court examined the AHLA rules at issue, and one of the mandatory conditions was that any arbitration provision must be "set forth in a separate document conspicuously identified as an agreement to arbitrate," among other requirements. The Court concluded that "[e]ven a cursory examination of the arbitration provision at issue reveals that it fails to 'comply with its own stated standards' set forth in the AHLA Rules." Here, the arbitration

provision clearly intended for the AHLA rules to apply, and in direct contravention of the rules, the provision was not set forth in a separate document. Therefore, the arbitration provision could not be enforced in this case.

Holding:

The Court concluded that the circuit court did not err in its determination that the arbitration agreement could not "be enforced as written because it [did] not comply with its own stated standards."

How They Voted:

Justice Wooton authored the majority opinion. Justice Walker, Justice Armstead, Justice Moats, and Judge Ballard joined in the majority. Justice Moats and Judge Ballard were sitting by temporary assignment. Chief Justice Hutchison, having been disqualified, did not participate.

Impact on Business:

This decision is a fairly straight-forward interpretation of an arbitration agreement. While the Court did not issue any new syllabus points, the case does provide another example of the Court looking to the specific language in the arbitration provision and applying the conditions of the provision strictly. Here, the parties agreed to allow arbitration to be guided by the AHLA rules—and that did not happen. Therefore, because the provision was not followed, the Court strictly applied the language and found that it was invalid. As such, this case should stand as a reminder that the language in an arbitration agreement should be chosen and abided by in a careful and thoughtful manner. The language is the first thing the Court will examine when determining whether to uphold or overturn an arbitration agreement.

State ex rel. Dodrill Heating & Cooling, LLC v. Akers
Case No. 21-0561 (Apr. 22, 2022)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to grant a writ of prohibition on the issue of whether the circuit court erred in finding plaintiffs had standing to sue and in certifying a class action based on plaintiffs' claim that language used in documents drafted by defendant violated the West Virginia Consumer Credit Protection Act ("WVCCPA").

What the Court Decided:

The Court granted the writ of prohibition, holding that the circuit court's order failed to provide the requisite thorough analysis of West Virginia Rule of Civil Procedure 23(b)(3)'s predominance and superiority factors. However, rather than reversing the grant of class certification, the Court remanded the case so that the circuit court could undertake a more rigorous analysis under the parameters outlined in *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, 244 W. Va. 248, 852 S.E.2d 748 (2020).

Facts:

Plaintiffs purchased an HVAC unit from defendant Dodrill Heating and Cooling, LLC ("Dodrill") and asserted that after the unit was installed, they had multiple issues with it, requiring Dodrill to return to their home several times to service the unit. When plaintiffs purchased the unit, they signed a proposal/agreement for installation that contained language requiring the buyer to pay reasonable fees incurred by the seller in securing payment for the contract. Plaintiffs signed written work orders containing similar language after having issues with the unit.

Plaintiffs ultimately requested that the unit be removed and later filed suit against Dodrill. Plaintiffs' amended complaint asserted that Dodrill violated the West Virginia Consumer Credit Protection Act by including language in the proposal/agreement and subsequent work orders that plaintiffs would be subject to pay Dodrill's attorney fees. Plaintiffs sought class-wide relief for all individuals who had received the same proposal/agreement and work orders containing that language. The circuit court granted class certification on June 17, 2021, and Dodrill filed a petition for writ of prohibition seeking to preclude certification of the class. Dodrill's writ petition argued that plaintiffs lacked standing because it did not provide the financing for the unit and argued that the circuit court's order failed to comply with the requirements of Rule 23 in certifying the class.

Holding:

The Court determined that plaintiffs had standing due to language contained in their agreements with Dodrill about debt collection, even though it did not provide financing, but granted the petition for writ of prohibition, agreeing with Dodrill that the circuit court failed to undertake the necessary analysis of the predominance and superiority factors required under Rule 23(b). The Court explained that rather than applying the analysis set forth in *Surnaik Holdings*, the circuit court's order "reverts to the less-nuanced, commonality-resembling analysis of the predominance factor as was set forth in *Rezulin*." Because of this, the circuit court's conclusions regarding predominance were conclusory and did not contain any of the "requisite analysis outlined in *Surnaik* as separate and apart from, and more exacting than, a commonality analysis."

The Court also found that the circuit court's analysis of the superiority element was similarly deficient as "[s]uperiority is more than a mere conclusion that class action would suit as a general proposition." Rather than comparing class action with other methods of litigation, or ana-

lyzing the size of the class, anticipated recovery, fairness, efficiency, etc., the circuit court's order merely concluded that class action was an efficient and superior method to resolving the claims stemming from the alleged WVCCPA violations. Ultimately, the Court concluded that the circuit court's order with respect to predominance and superiority was even more conclusory than the analysis conducted in *Surnaik*. Although the Court granted the writ of prohibition with respect to class certification, the Court did not vacate the order and require denial of class certification. Instead, the circuit court was directed to undertake a more thorough analysis of predominance and superiority to determine if class resolution is the appropriate method to adjudicate plaintiffs' claims. Justice Hutchison concurred to point out that the circuit court merely had to provide a more thorough analysis, and stating his view that plaintiffs proved standing and predominance.

How They Voted:

Justice Walker authored the majority opinion. Chief Justice Hutchison concurred and filed a separate opinion. Justice Wooton concurred in part and dissented in part. Justice Armstead, deeming himself disqualified, did not participate in the decision of this case. Justice Moats, sitting by temporary assignment, joined in the majority opinion.

Impact on Business:

In this and other opinions, the Court continues to emphasize the enhanced requirements for granting class certification under Rule 23, particularly with respect to predominance and superiority. But instead of reversing certification where the analysis is deficient, the Court continues to remand the cases to circuit courts for further consideration.

State ex rel. Surnaik Holdings of WV, LLC v. Bedell
Case No. 21-0610 (June 8, 2022)

What the Court Was Asked to Decide:

This is the second writ proceeding in the West Virginia Supreme Court for this case. In the first, *State ex rel. Holdings of WV, LLC v. Bedell,* 244 W. Va. 248, 852 S.E.2d 748 (2020) ("*Surnaik* I"), the Court granted a writ of prohibition and dissolved the circuit court's previous class certification order. After remand, the circuit court again granted class certification, and defendant filed a second writ petition, challenging the appropriateness of the class certification order.

What the Court Decided:

The Court declined to issue the writ of prohibition, finding the circuit court did not commit "clear legal error" in its class certification order, and thus had not exceeded its legitimate powers.

Facts:

In October 2017, a week-long fire consumed a warehouse in Parkersburg, West Virginia, owned by the defendant, Surnaik Holdings WV, LLC ("Surnaik"). Plaintiffs sued, claiming the fire generated a poisonous smoke that blanketed Parkersburg and the surrounding area. Plaintiffs alleged that Surnaik was negligent in allowing the warehouse's fire protection system to fall into disrepair, along with other claims. Plaintiffs sought to certify a class action composed of all residents and businesses within an 8.5-mile radius of the warehouse.

After the circuit court's first order granting plaintiffs' motion for class certification, which adopted plaintiffs' class definition, Surnaik petitioned the Court for a writ of prohibition. The Court granted the writ of prohibition, holding "[a] circuit court's failure to conduct a thorough analysis of the requirements for class certification pursuant to West Virginia Rules of Civil Procedure 23(a) and/or 23(b) amounts to clear error." Because the circuit court failed to thoroughly analyze the predominance and superiority requirements of Rule 23(b), the Court vacated the circuit court's September 2019 order granting class certification.

After remand, plaintiffs sought class certification, and on June 15, 2021, the circuit court again granted class certification. The circuit court gave the same definition to the members of the class as it did in the prior class certification order, defining them by geographic isopleths exposed to certain amounts of smoke-borne particles. On July 30, 2021, Surnaik filed a second petition for writ of prohibition. The Court granted a rule to show cause to review the circuit court's order.

Holding:

The Court held that the circuit court's class certification order did not contain any clear errors of law. In reaching this holding, the Court reiterated its guidelines for Rule 23(b), specifically including the enhanced requirements for assessing predominance:

> When a class action certification is being sought pursuant to West Virginia Rule of Civil Procedure 23(b)(3), a class action may be certified only if the circuit court is satisfied, after a thorough analysis, that the predominance and superiority prerequisites of Rule 23(b)(3) have been satisfied. The thorough analysis of the predominance requirement of West Virginia Rule of Civil Procedure 23(b)(3) includes (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. Syllabus Point 7, *State ex rel. Surnaik Holdings of WV, LLC v. Bedel*l, 244 W. Va. 248, 852 S.E.2d 748 (2020).

The Court noted "the circuit court's order clearly contains the appropriate and thorough analysis of predominance and superiority required by our decision in Surnaik I." The Court rejected Surnaik's arguments that the certified class is facially deficient because the class may include those who have not been injured, explaining that the circuit court's order is focused on geographic areas that were, due to Surnaik's alleged negligence, exposed to identified levels of smoke participles. The Court has previously determined that the invasion of property by dust, smoke, or other noxious elements is actionable. Likewise, in rejecting Surnaik's argument that the circuit court improperly certified a class that cannot be readily identifiable, the Court noted that Rule 23 permits courts to certify classes defined by geography. Finally, the Court did not find any error with the circuit court's conclusion that Surnaik's breach of any applicable duties owed to the class presents at least one common question that predominates over other questions.

Justice Armstead filed a separate opinion, concurring with "much" of the majority's analysis, but dissenting because "I remain convinced that individual questions of fact predominate in this matter and render class certification inappropriate."

How They Voted:

Chief Justice Hutchison authored the majority opinion, joined by Justices Walker and Wooton. Justice Armstead filed an opinion, concurring in part and dissenting in part. Justice Bunn did not participate.

Impact on Business:

While it continues to emphasize the enhanced requirements for granting class certification under Rule 23, *Surnaik* and other recent opinions show the Court will defer to circuit court's discretion in class action cases. Where the circuit court's order arguably contains a "thorough analysis," the Court is not likely to find the "clear legal error" required in a writ proceeding to reverse class certification.

SER WVU Hospitals, et al. v. The Honorable David M. Hammer, et al.
Case No. 21-0095 (Nov. 19, 2021)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to grant a writ of prohibition to prohibit the Circuit Court of Jefferson County from enforcing its order granting class certification. In deciding this issue, the Court had to determine (1) whether the class representatives had standing to bring the claims asserted in the matter; and (2) whether certain prerequisites to class certification were met.

What the Court Decided:

Facts:

In this case, Angela Roberts ("Ms. Roberts") was hired by WVU Hospitals in February of 2014, as a registration specialist. As part of her duties as a registration specialist, she assisted patients in scheduling appointments with medical providers which required her to access patients' protected health information stored in the electronic record system. Two years after beginning her employment, Ms. Roberts began a relationship with Ajarhi "Wayne" Roberts ("Mr. Roberts") *(no relation; the two were never married)*. Mr. Roberts purportedly convinced Ms. Roberts to use her position as a registration specialist to steal personal information from patient files so that he could use the information to commit bank and credit card fraud.

To obtain this information, Ms. Roberts would wait until a patient contacted the hospital to schedule an appointment and then she would *legitimately* access the records to perform her job duties. While viewing the records, she would simultaneously view the profile and determine whether the individual would be a "lucrative target." If she determined that the individual was a lucrative target, she would then write down the private information or print a copy of the patient's driver's license. In December of 2016, a criminal investigation of Mr. Roberts began, and private information relating to 113 hospital patients was found in his home.

After WVU Hospitals became aware of the investigation, they examined the records accessed by Ms. Roberts during the course of her relationship with Mr. Roberts—it determined that Ms. Roberts legitimately accessed approximately 7,445 patients during that time period. Letters were then sent to those individuals either notifying them (1) that they were one of the 113 victims of identity theft; or (2) that they were not one of the 113, but were being notified out of an abundance of caution.

Thereafter, in February of 2019, a lawsuit was filed by a Ms. Welch, individually and on behalf of all others similarly situated. Ms. Welch's information *was not found* in Mr. Roberts's home. The complaint was amended and a Mr. Roman was added as a named plaintiff. Mr. Roman's information *was found* in Mr. Roberts's home. In August of 2020, Ms. Welch and Mr. Roman filed a motion for class certification consisting of individuals "whose personal information was accessed" in the aforementioned data breach. In December of 2020, following briefing and a hearing, the circuit court entered an order granting class certification and appointing Ms. Welch and Mr. Roman as class representatives.

The Court was tasked with determining whether the circuit court erred in certifying the class action. In answering this question, the Court addressed two issues: (1) standing; and (2) class certification prerequisites. With regard to standing, the Court issued a new syllabus point and expressly held for the first time: "[I]n order to bring a class action lawsuit, at least one named plaintiff must have standing with respect to each claim asserted, and the burden of establishing standing is on the plaintiff(s)." In applying this, the Court concluded that Ms. Welch—who was not

a victim of identity theft and suffered no injury-in-fact—had no standing to assert claims against WVU Hospitals. To the extent that it was undisputed that confidential information pertaining to Mr. Roman was found in Mr. Roberts's apartment, the Court was unable to conclude that he suffered no injury-in-fact. As such, the Court proceeded with determining whether Mr. Roman, and the class he represented, met the prerequisites. The Court focused on "typicality" and determined that there was a lack of evidence establishing whether Mr. Roberts actually accessed Mr. Roman's information because he testified that he never called WVU Hospitals to schedule an appointment, among other things. Because the lack of evidence called into question whether his claims were, in fact, typical of the class he represented, the Court found that Mr. Roman and the class failed to meet the prerequisites required for certification.

Holding:

The Court granted the requested writ of prohibition which prohibits the Circuit Court of Jefferson County from enforcing its order granting class certification. In deciding this issue, the Court concluded (1) Ms. Welch had no standing to represent the class; and (2) Mr. Roman and the class failed to meet the class action prerequisites needed to uphold a class certification.

How They Voted:

Chief Justice Jenkins authored the majority opinion. Justice Walker and Justice Armstead joined in the majority. Justice Hutchison and Justice Wooton dissented and filed a dissenting opinion.

Impact on Business:

This case primarily focused on two areas of class actions: (1) standing; and (2) class certification prerequisites. As to standing, the Court issued a new syllabus point explicitly stating for the first time, that "to bring a class action lawsuit, at least one named plaintiff must have standing with respect to each claim asserted, and the burden establishing standing is on the plaintiff(s)." This statement of law establishes that to sustain a class action, individuals must have standing and the burden of proving such is on the plaintiffs if they wish to keep the class. Secondly, with regard to the class action prerequisites, the Opinion emphasizes the Court's longtime position that the prerequisites are important and *must* be met to sustain certification. When the prerequisites are not met, the Court will not hesitate to decertify the class.

State ex rel. West Virginia University Hospitals, Inc. v. Gaujot
No. 21-0737 (Apr. 26, 2022)

What the Court was Asked to Decide:

This is a repeat writ petition challenging certification of a class in a case over alleged overcharges for producing medical records. The issue was whether the circuit court failed to conduct a sufficiently thorough analysis of the commonality, ascertainably, and predominance factors required for class certification under Rule 23 of the West Virginia Rules of Civil Procedure.

What the Court Decided:

The West Virginia Supreme Court found that the circuit court did not commit the "clear legal error" required to issue a Writ of Prohibition in assessing the commonality and ascertainably factors required for class certification. The Court found the circuit court was not obligated to revisit the predominance analysis or the class definition under the Court's prior mandate.

Facts:

The plaintiffs alleged the fees charged by WVUHS to produce copies of medical records violated West Virginia Code § 16-29-2(a) (eff. 1999) which provided for reimbursement for "for all reasonable expenses incurred" provided that "the cost may not exceed seventy-five cents per page for the copying of any record or records which have already been reduced to written form and a search fee may not exceed ten dollars." (The statute was amended in 2014).

After the circuit court granted class certification, the defendants (collectively WVUHS) filed sought a Writ of Prohibition, which was refused in an unpublished order. *State ex rel. WVU Hospitals v. Gaujot*, No. 14-0611 (W. Va. Aug. 26, 2014). WVUHS then sought a Writ of Prohibition after the circuit court denied its motion to decertify the class, arguing the class was improperly certified because commonality and ascertainability were absent, and the class included plaintiffs (lawyers) who lacked standing. The Court issued the Writ and vacated the circuit court's certification order, and remanded the case, directing the circuit court to conduct a "thorough analysis" of the commonality factor. On remand, after additional discovery was conducted, the circuit court again refused to decertify the class, but in response to the Court's comments, redefined the class to exclude lawyers who paid for records but were not reimbursed by their clients. WVUHS challenged the order in a Writ Petition.

Holding:

The Court held that the commonality requirement for class certification was met because the question of whether WVUHS "violated West Virginia Code § 16-29-2(a) by charging this set fee and by failing to charge only the fees necessary to reimburse them for their reasonable costs incurred *is a question of liability capable of classwide resolution*." The Court also found that the question of damages could be decided on a class-wide basis because the record showed WVUHS performed a time study and created a formula to estimate the amount of time required to produce a patient record after the West Virginia Code § 16-29-2(a) was amended in 2014; the time study/formula had not been in use under the prior statute. Using the time study, the plaintiffs' expert witness calculated an average cost to produce records. Because WVUHS had not calculated costs to produce patient records during the time frame relevant to the class action, the Court found plaintiffs could use the average cost to prove damages across the class.

The Court held that the ascertainability requirement was met because the class was based on "objective criteria" (those who submitted a written request for patient medical records and paid

the fees charged) and WVUHS had identified patients for whom records were requested during the relevant class time frame.

Furthermore, the Court held that under its prior remand order, the circuit court was under no obligation to revisit its predominance analysis, even though it had in the interim issued new guidance in 2020 in *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, 244 W. Va. 248, 852 S.E.2d 748 (2020).

The Court rejected WVUHS argument that the circuit court failed to give careful consideration to ethical issues pertaining to the inclusion of lawyers within the class definition. The Court explained that since the Court's comments were contained in a footnote to its opinion, they were not part of its mandate, or directive, to the circuit court. In any event, the Court found the circuit court excluded lawyers who paid for records and were not reimbursed and that further challenge by WVUHS belonged in the circuit court.

Justice Armstead filed a separate opinion, concurring with the majority as to the circuit court's removal of certain attorneys from the class definition. In his detailed opinion, he dissented because "the circuit court has yet to conduct a sufficiently thorough analysis of commonality or ascertainability for purposes of Rule 23(a) or of predominance for purposes of Rule 23(b)."

How They Voted:

Justice Moats, sitting by temporary assignment, authored the majority opinion. The majority was joined by Chief Justice Hutchison, Justice Wooton, and Judge Nowicki-Eldridge, sitting by temporary assignment. Justice Walker was voluntarily disqualified. Justice Armstead concurred in part and dissented in part, and filed a separate opinion.

Impact on Business:

While the Court's first remand opinion required the circuit court to perform a "thorough analysis" of Rule 23 factors when certifying a class, the second opinion demonstrates that it will defer to the discretion of the circuit court where such an analysis is contained in a class certification order.

Antero Resources Corp. v. Directional One Services Inc.
Case No. 20-0965 (Apr. 8, 2022)

What the Court was Asked to Decide:

Antero Resources Corporation ("Antero") asked the West Virginia Supreme Court to reverse the Business Court Division of the Circuit Court of Tyler County's summary judgment rulings in favor of Directional One Services Inc. ("Directional One").

What the Court Decided:

Facts:

Antero contracted with Directional One to supply it with directional drilling equipment. Antero and Directional One executed two documents: "rate sheets" and Master Services Agreements ("MSA"). The rate sheets outlined Directional One's fees for supplying the directional equipment as well as Directional One's terms and conditions for the work performed, while the MSA outlined the parties' relationship.

Included in the rate sheets were a list of "Replacement/Lost in Hole Prices" that required Antero to reimburse Directional One for any lost, damaged, or destroyed equipment during the drilling process. The MSA allowed Antero to request Directional One to perform "work," which was defined to include equipment or tools, and provided Antero would pay for the work at Directional One's published rates. The MSA, however, did not include any rates.

For three years, Antero paid invoices from Directional One without issue, including invoices for lost and damaged equipment. In 2017, however, Antero refused to pay for lost equipment on two occasions. As a result, Directional One terminated the contract and sued Antero for breach, seeking the cost the lost equipment in accordance with the rate sheet. Antero counterclaimed that Directional One breached the contract by billing Antero for the cost of the equipment.

The case was referred to the Business Court, which granted partial summary judgment in favor of Directional One. The circuit court found that Antero breached the contract with Directional One because the parties' two agreements – the rate sheets and MSA – had to be read together as one agreement. Antero appealed and argued that circuit court erred in concluding that it had breached the parties' agreement because the circuit court improperly ruled that the rate sheets could modify the MSA.

Holding:

The Court agreed with the circuit court's determination that the MSA and rate sheets should be read together as one agreement because they involved the same parties, the same subject matter, and were clearly related. The Court explained that the law requires separate documents to be construed together and considered as a single transaction when the parties and subject matter are the same and the relationship between documents is apparent. This rule applies even when the documents are executed at different times and do not refer to each other.

The Court found that the MSA and rate sheets formed the agreement between Antero and Directional One because the documents involved the same parties and subject matter, were not in conflict, and gave meaning to each other. For this reason, the circuit court properly found that the documents constituted a single transaction and should be construed together as one agreement.

Justice Walker's dissent (joined by Justice Armstead) examined at length the language of the two agreements and concluded that the MSA and rate sheets conflicted and that provisions of the rate attempted to govern parts of the parties' relationship that the MSA controlled. Specifically,

the dissent contends that the MSA required Directional One to incorporate the risk of loss into its per day rates, indemnify Antero against property loss, and insure its own equipment. For those reasons, the dissent would have reversed the circuit court's grant of summary judgment.

How They Voted:

Chief Justice Hutchison authored the majority opinion. Justice Wooton and Justice Moats, sitting by temporary assignment, joined in the majority. Justice Walker and Justice Armstead dissented and filed a dissenting opinion.

Impact on Business:

This decision affirms the "single transaction rule" and highlights the importance of understanding the relationship and implications between agreements involving the same parties and subject matter, even when such agreements were not executed contemporaneously or specifically refer to each other.

Antero Resources Corp. v. L&D Investments, et al.
Case No. 20-0964 & No. 20-0967 (Apr. 26, 2022)

What the Court was Asked to Decide:

Whether the circuit court erred by (1) giving Mike Ross, Inc. ("MRI") a $4 million offset from the amount due under a 2014 agreement Antero Resources Corporation ("Antero"); (2) not awarding interest on Antero's judgment against MRI; (3) releasing the $4 million held in escrow to the plaintiffs; and (4) concluding the 2014 agreement was enforceable.

What the Court Decided:

Facts:

This case stems from a settlement agreement in a quiet title action that L&D Investments, Inc. and others (the "plaintiffs") filed against Antero and MRI. Antero was making royalty payments to MRI, who claimed to be the owner of 80% of the mineral interests to the subject property pursuant to tax deed MRI received at a delinquent tax sale. After the lawsuit was filed by plaintiffs, Antero stopped making royalty payments to MRI. Antero and MRI then entered into a 2014 agreement whereby Antero agreed to resume the royalty payments to MRI and MRI would reimburse Antero for the payments with interest if it was determined that MRI did not own the mineral rights.

The circuit court eventually found that MRI had no ownership interest in the mineral rights. MRI then made an offer of judgment to the plaintiffs for $4 million. Antero filed an amended cross claim against MRI seeking indemnification pursuant to the 2014 agreement plus interest. Antero then reached a settlement with the plaintiffs for $7 million. Antero then took the position that it was not required to pay $4 million of the settlement because MRI agreed to indemnify and reimburse Antero for any overpayment of royalties.

Antero and MRI filed cross motions for summary judgment on Antero's indemnity claim. The circuit court granted, in part, and denied, in part, Antero's motion for summary judgment and denied MRI's motion. The circuit court found the 2014 agreement to be valid and binding and held that Antero was entitled to reimbursement for the entire amount of royalty payments made under the agreement but awarded MRI an offset of $4 million based on its offer of judgment. MRI was ordered to pay Antero nearly $3 million, but denied Antero any interest on the judgment. MRI and Antero appealed.

On appeal, Antero challenged the circuit court's ruling granting MRI an offset from contractual amounts due and by not awarding interest. MRI argued that it was entitled to summary judgment because the 2014 agreement was not an enforceable contract and Antero's indemnity claim was extinguished by MRI's accepted offer of judgment.

Holding:

The West Virginia Supreme Court found that the 2014 agreement was valid and enforceable because MRI received valuable consideration of the continuation of royalty payments when MRI's ownership was in dispute. Thus, the Court affirmed the circuit court's finding that MRI was contractually obligated to reimburse Antero for the entire amount of royalty payments made pursuant to the 2014 agreement. The Court further affirmed the circuit court's finding that MRI was entitled to an offset of $4 million because the offer of judgment partially satisfied the plaintiffs' claims for the misdirected royalty payments. The Court, therefore, affirmed the circuit court's grant of judgment of nearly $3 million to Antero.

The Court, however, held that the circuit court did err by denying Antero interest on that judgment. The Court found that the 2014 agreement clearly provided for the payment of interest. Thus, the Court reversed the circuit court's decision to the extent that it denied interest on the overpayment of royalties.

Finally, the Court affirmed the circuit court's decision ordering the release of the settlement money being held in escrow to the plaintiffs. Antero argued that by offsetting MRI's $4 million offer of judgment from the total it owes Antero under the 2014 agreement, then the circuit court's decision to release the settlement money being held in escrow to plaintiffs must be reversed, otherwise the plaintiffs will receive an $11 million settlement that was never contemplated. The Court disagreed and explained that the settlement agreement lacked any apportionment of the settlement proceeds to the claim for the royalty payments. As such, the Court affirmed the circuit court's decision to release the settlement money being held in escrow.

How They Voted:

This memorandum decision was concurred in by Chief Justice Hutchison, Justice Moats, sitting by temporary assignment, and Judge Gregory L. Howard, Jr., sitting by temporary assignment. Justice Walker and Justice Armstead issued a separate opinion, dissenting from the offset provided to MRI. The dissent argued that MRI's offer of judgment, Antero's settlement agreement, and the 2014 agreement should have been enforced separately.

Impact on Business:

This decision reaffirms the importance of intention of the parties in the construction of a contract. It's important to be mindful that meaning is given to every word, phrase, and clause.

Horizon Ventures of West Virginia, Inc. v. American Bituminous Power Partners, L.P.
Case No. 20-0759 (Apr. 18, 2022)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to decide whether the business court erred in granting summary judgment for both Horizon Ventures of West Virginia, Inc. ("Horizon") and American Bituminous Power Partners, L.P. ("AMBIT") without resolving the ambiguity and relationships of the underlying agreements.

What the Court Decided:

This case involves a rent dispute between Horizon and AMBIT arising from a Lease, a 1996 Settlement Agreement, and a 2017 order of the business court. The Court reversed summary judgment finding that ambiguities in the agreements preclude summary judgment.

Facts:

AMBIT leases property from Horizon in Marion County for the purpose of constructing and operating the Grant Town Power Plant, a coal-fired power plant. Pursuant to the 1989 Lease Agreement, AMBIT's rent is dependent on the type of fuel (local or foreign) it uses and whether the fuel is used for operating or non-operating reasons, which has resulted in numerous disputes.

In a 1996 Settlement Agreement, AMBIT made certain admissions regarding its use of fuel and Horizon reduced the rent. In 2012, AMBIT stopped paying rent, Horizon sued, and AMBIT counterclaimed for overpaid rent. The circuit court granted judgment in favor of Horizon relating to the priority of payment claim and in favor of AMBIT relating to the overpayment of rent claim.

AMBIT appealed to the Supreme Court of Appeals, which reversed the entry of summary judgment and directed that the case to be transferred to the business court division. This led to a 2017 Order where the business court ruled that Horizon breached the Lease by "filing the action to collect rent from AMBIT without seeking the necessary consent of a third-party," and also dismissed AMBIT's overpayment of rent claim without prejudice.

AMBIT then filed a lawsuit against Horizon bringing its overpayment of rent claim that the 2017 Order dismissed without prejudice. Horizon counterclaimed and sought a declaratory judgment that AMBIT had an obligation to pay rent in accordance with the terms of the 1996 Settlement Agreement. AMBIT and Horizon cross-filed motions for summary judgment.

The business court granted AMBIT's summary judgment motion, finding that under the Lease, AMBIT had "bargained for discretion that subjected it only to an arbitrary and capricious standard in determining whether it was using foreign fuel for operating or non-operating reasons. And, AMBIT had used foreign fuel that, in its judgment, was necessary for operating reasons (including economic and quality considerations), making its rent obligation one percent."

The business court also granted Horizon's motion for summary judgment finding "AMBIT was precluded from pursuing overpaid rent from the period of 1996 to 2013 under a waiver and laches analysis" as a result of admissions by AMBIT in the 1996 Settlement Agreement. AMBIT appealed this decision to the Supreme Court.

Holding:

The Court reversed the business court's grant of summary judgment. The Court concluded that the business court erred in granting summary judgment to AMBIT on Horizon's claims and summary judgment to Horizon on AMBIT's claims without resolving the relationship between those documents. The Court explained that the documents are ambiguous and the intent of the

parties is unclear. As such, "it is impossible to find clear meaning in the circular and imprecise language employed in these agreements so as to warrant an interpretation as a matter of law."

How They Voted:

Justice Walker authored the majority opinion. Chief Justice Hutchison, Justice Armstead, and Justice Wooton joined in the majority opinion. Justice Moats, sitting by temporary assignment, did not participate.

Impact on Business:

This case serves as a reminder that while the determination of whether a writing is ambiguous is a question of law decided by the court, the interpretation of that ambiguous writing is a question of fact to be resolved by a jury.

Miller v. St. Joseph Recovery Center, LLC
Case No. 20-0755 (Apr. 26, 2022)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to determine whether the circuit court erred in holding that a former employee was not entitled to severance pay and accrued paid time off under the West Virginia Wage Payment and Collection Act.

What the Court Decided:

The Court held that the severance package guaranteed by the employee's employment contract (under certain circumstances) and payment of accrued leave guaranteed by the employee handbook were "wages" within the meaning of the WPCA as "fringe benefits."

Facts:

Amie Miller appealed the Circuit Court of Wood County judgment order finding that her former employer, St. Joseph Recovery Center, was not obligated to pay her a promised severance package because Miller did not state a "good reason" for her resignation. The circuit court further found that severance pay was not "wages" covered by the West Virginia Wage Payment and Collection Act ("WPCA") because, by its nature, it cannot be earned until after the employee resigns.

Miller was a former nurse at St. Joseph Recovery Center in Parkersburg, West Virginia. The terms and conditions of her employment were governed by a contract which included, among other things, compensation, termination, resignation, and availability of severance pay. Specifically, the contract provided that Miller would be entitled to severance pay if she resigned for "good reason," which the contract defined as a material breach of the contract by the employer. When she was hired, Miller was also given an employee handbook which stated that she would be paid any "accrued, unused paid time off" if she gave at least two weeks' notice before resigning and left "in good standing."

In June 2019, Miller tendered a resignation letter stating that she had received an offer to work elsewhere which was "too exciting to decline" and indicated her last day of work would be in August 2019. Although Miller gave two months' notice, she and the employer ultimately agreed that Miller's employment would only extend two weeks past the date of her resignation letter.

Following her resignation, Miller sued her former employer alleging that she had not been paid her wages timely on four occasions, which breached her employment contract and therefore triggered the "good reason" resignation provision obligating the employer to pay her a severance package – which had not been paid. Miller also claimed that she had not been paid "accrued, unused paid time off" as described in the employee handbook.

The circuit court acknowledged that the employer materially breached the employment agreement by paying Miller late on four occasions, but concluded that Miller was not entitled to a severance package because she did not prove "good reason" to resign given that she did not demand the severance package at the time she presented her resignation, and instead simply stated she was taking another job. The circuit court further found that severance pay cannot be "wages" subject to the WPCA because, by its nature, it cannot be earned until after the employee resigns. Miller appealed.

Holding:

On appeal, the Court first held that Miller was entitled to the severance package because, under the clear and unambiguous terms of the employment contract, the late wage payments were a material breach of the contract. The Court stated that the analysis should have ended there, and that the circuit court erred in "balancing" other reasons for Miller's resignation.

Second, the Court found that both the severance pay and accrued leave were "wages" within the meaning of the WPCA as "fringe benefits," because at the time of the Miller's resignation they were accrued, capable of calculation, and payable directly to her. Accordingly, the employer's failure to pay Miller the severance pay violated the WPCA. The Court remanded the accrued paid leave portion of the case to the circuit court to re-assess Miller's entitlement to it under the employee handbook.

How They Voted:

Chief Justice Hutchison authored the majority opinion. Justice Walker and Justice Wooton joined in the majority opinion. Justice Armstead concurred in part and dissented in part, and filed a separate opinion. Justice Moats, sitting by temporary assignment, did not participate.

Impact on Business:

This decision reinforces that the WPCA is not strictly limited to pay, but also to fringe benefits that are calculable and owed at the time the employment relationship ends. Context is important in reading this case; remember, the entitlement to a particular benefit under the WPCA is not dictated by law, but by the terms of the employment relationship itself. The important takeaway here is that the Court found that the employment contract entitled the employee to severance pay in certain circumstances, that those circumstances were met, and that the severance was calculable at the time of the end of employment. Thus, the employer's failure to pay them violated the WPCA.

Constellium Rolled Products Ravenswood, LLC v. Cooper
Case No. 20-0486 (Nov. 5, 2021)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to determine whether a strike at a manufacturing facility, during which operations at the facility continued due to management employees working bargaining unit jobs, constituted a "work stoppage" disqualifying striking employees from unemployment benefits.

What the Court Decided:

The Court held that, although some operations continued at the facility, the effect of the strike by 80% of the facility's workforce leading to a dip in production by 51% of one product and 37% of another, was sufficient to constitute a "work stoppage" and trigger disqualification of unemployment benefits of striking employees.

Facts:

Constellium appealed a decision of the Workers' Compensation Board of Review, as affirmed by the Kanawha County Circuit Court, that striking employees were eligible for unemployment benefits because there was no "stoppage of work" under the labor dispute provisions of West Virginia's unemployment compensation statute.

In July 2012, the collective bargaining agreement between Constellium and its union workforce expired. The two sides could not come to terms on provisions related to healthcare and at midnight on August 5, 2012, the union members went on strike. The strike involved 680 hourly employees, roughly 80% of Constellium's workforce at the plant. The remaining 180 salaried employees attempted to maintain some level of production, but production on Constellium's main product lines dropped 51% (aluminum coil) and 38% (aluminum plate), respectively. After continued negotiations, Constellium and the union came to an agreement and the union members returned to work on September 24, 2012.

The union members applied for unemployment compensation benefits for the period of the labor dispute. Under West Virginia law applicable at the time, striking employees were disqualified from benefits if the labor dispute resulted in a "stoppage of work," W. Va. Code § 21A-6-3(4) (2012), which the Supreme Court had previously defined as a "substantial curtailment of the employer's normal operations." Constellium contested the unemployment claims, asserting that its operations were "substantially curtailed" as evidenced by decreased production; the union members responded that the plant continued to operate and there was therefore no "stoppage." After a hearing, a Labor Dispute Tribunal decided that although production decreased, Constellium's operations were not "substantially curtailed" such that a "stoppage of work" occurred, and therefore the union members were eligible for benefits. The decision was upheld by the Workers' Compensation Board of Review and Kanawha County Circuit Court.

Holding:

The Court rejected the union members' argument that West Virginia law requires a threshold of 75% to 80% impact on operations to be a "substantial curtailment" as incorrect. Instead, the Court noted that each situation is determined on a case-by-case basis, and further referenced several other state courts which "have recognized that a 20-to 30-percent reduction in production would seem to be the 'critical breaking point . . . sufficient to establish a stoppage.'"

Having rejected the union members' proffered hard threshold of 75% to 80%, the Court recognized that the strike of Constellium involved 80% of its available workforce and led to a production decrease in its main product lines of 51% and 38%, respectively. Ultimately, the Court held that "[t]hose figures . . . demonstrate that Constellium's normal operations were substantially curtailed during the 2012 labor dispute" and the lower tribunals were in clear error in finding otherwise. Accordingly, the union members were disqualified from unemployment benefits for the period of the strike.

How They Voted:

Justice Walker authored the majority opinion. Chief Justice Jenkins, Justice Armstead, and Justice Hutchison joined in the majority opinion. Justice Wooton dissented and filed a separate opinion.

Impact on Business:

This was an important decision for Constellium because employees were denied unemployment benefits for striking, which led to a "substantial curtailment" of Constellium's operations. However, this decision may have little impact on future cases because the West Virginia Legislature amended the statute in 2017 to remove allowance of unemployment benefits to striking employees where the labor dispute did not result in a "work stoppage." The statute now simply provides that an employee is disqualified from receiving benefits for any week "in which he or she did not work as a result of . . . [a] strike or other bona fide labor dispute which caused him or her to leave or lose his or her employment."

Cynthia D. Pajak v. Under Armour, Inc.
Case No. 21-0484 (Apr. 22, 2022)

What the Court was Asked to Decide:

In this case, a discharged employee, attempted to hold her former employer liable under the West Virginia Human Rights Act ("WVHRA") under the statute's definition of a "person" even though the employer did not meet the definition of an "employer." This case came to the Court from the United States District Court for the Northern District of West Virginia on a certified a question regarding the WVHRA and the potential liability of an employer. Specifically, the West Virginia Supreme Court answered the following: May an entity that does not meet the West Virginia Human Rights Act definition of "employer," as set out in West Virginia Code § 5-11-3(d) (eff. 1998), be potentially liable to its own employee as a "person," as defined in West Virginia Code § 5-11-3(a), for an alleged violation of West Virginia Code § 5-11-9(7) (eff. 2016)?

What the Court Decided:

Facts:

In this case, Cynthia Pajak ("Ms. Pajak") was hired by Under Armour in November 2012 to serve as director of Under Armour's East and Canada regions. She worked remotely from Bridgeport, West Virginia. In 2018, Ms. Pajak began receiving reports of incidents of inappropriate workplace conduct from female employees. As such, she collected statements describing the misconduct, and provided them to her superior. She claims her superior minimized the conduct and told her to "move on." In June 2018, Ms. Pajak underwent a mid-year review and there were no concerns about her job performance; however, nine days later, she was asked to voluntarily leave her position. After being placed on a performance improvement plan that she claims did not comport with company policy, Ms. Pajak was dismissed from her employment in December 2018.

Ms. Pajak filed a lawsuit against Under Armour and asserted claims for wrongful discharge, negligent hiring, intentional infliction of emotional distress, and violations of the WVHRA, among other claims. After a series of motions were filed, questions arose as to whether Under Armour was an "employer" as defined in the WVHRA. The district court determined, for purposes of this matter, that Under Armour did not meet the definition of "employer" as it is defined in the WVHRA because Under Armour did not meet the requirement needed to qualify as an "employer" (any person employing twelve or more persons within the state for twenty or more calendar weeks). However, the district court did raise questions as to whether Under Armour could be subject to liability under the WVHRA as a "person." The district court certified its question to the Court.

The Court was tasked with determining, in the context of an employee/employing entity, whether the term "person" as used in the WVHRA was intended by the Legislature to include an entity that does not meet the WVHRA definition of "employer." After a deep dive into the statutory language, the Supreme Court concluded that the Legislature gave the term "employer" a specific definition when used in the WVHRA, and that that definition includes "any person," but only when such person meets the remaining criteria set out in the definition, i.e., "employing twelve or more persons within the state" during the requisite period of time and not being a private club. The plain language of the definition of "employer" excludes a "person" when that person does not meet the remaining elements of the definition, but necessarily includes "any person" that does meet those elements. To find otherwise would ignore a plaintiff's status as an employee and allow such an employee to circumvent the Legislature's plain intent that only employing entities who meet the WVHRA definition of "employer" are subject to liability thereunder.

Holding:

The Court answered the certified question in the negative, and held that an entity that does not meet the WVHRA definition of "employer," as set out in West Virginia Code § 5-11-3(d) (eff. 1998), may not be potentially liable to its own employee as a "person," as defined in West Virginia Code § 5-11-3(a), for an alleged violation of West Virginia Code § 5-11-9(7) (eff. 2016).

How They Voted:

Justice Moats, sitting by temporary assignment, authored the majority opinion. Chief Justice Hutchison, Justice Walker, Justice Armstead, and Justice Wooton joined in the majority.

Impact on Business:

This case limits an employer's liability under the West Virginia Human Rights Act. For an employee to maintain claims against its employer under the WVHRA, the employer must meet the WVHRA's definition of "employer"—there is no loophole where the employer can fail to meet the definition of "employer," but then be held liable for the same behavior under the definition of "person." As the Opinion stated, to do so, would give employees the power to broaden the WVHRA and to circumvent the narrow constraints of the WVHRA intended by the Legislature.

Fairmont Tool, Inc. v. Davis
Case No. 20-0684 (Nov. 22, 2021)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to determine whether the circuit court erred in granting summary judgment in favor of an employee against his employer for unlawful assignments in the form of paycheck deductions.

What the Court Decided:

The Court held that any paycheck withholdings that do not meet the definition of "deduction" under the West Virginia Wage Payment and Collection Act are an "assignment of wages," for which the employer must meet certain conditions to lawfully withhold; in this case, the employer did not meet those conditions.

Facts:

Fairmont Tool, Inc. appealed an order from the Circuit Court of Marion County granting summary judgment in favor of a former employee, Adam Davis, and finding that it had unlawfully reduced his wages in violation of the West Virginia Wage Payment and Collection Act ("WPCA") for withholding deductions for work equipment.

Davis was a former employee of Fairmont Tool who, in 2017, filed a lawsuit alleging that his former employer had unlawfully reduced his wages. During discovery, Fairmont Tool admitted that it had withheld money from employees' paychecks for uniforms, boots, tools, and other equipment since at least 2012. However, there was no record of signed assignments of wages for many of its employees, including Davis. The company did produce some documents entitled "Wage Deduction Authorization Agreement" which stated that the signatory employees understood that Fairmont Tool "may deduct money from my pay from time to time for reasons that fall into the following categories . . . [i]nstallment payments on items purchased on my behalf by the Company (e.g. boots) or cash advances given to me by the Company. . . ." While these writings were signed by an employee, they were not signed by a representative of Fairmont Tool. They also did not contain language limiting the agreement to one year; none specified the total amount to be collected; none stated that three-fourths of the employee's paycheck would be exempt from withholdings; and none were notarized.

The parties filed stipulations with the circuit court as to how the court should calculate liquidated damages and attorney's fees, if the court found the withholdings to be unlawful wage assignments. The circuit court also certified a class action of current and former employees against Fairmont Tool. Subsequently, the court granted summary judgment in favor of the employees, holding that the employer did not satisfy clear conditions for a wage assignment under the WPCA, and awarded lost wages, liquidated damages, and attorney's fees pursuant to the parties' stipulations.

Holding:

On appeal, the Court recognized that the Legislature made clear that "assignment" means all forms of assignments or deductions from an employee's wages except an "authorized deduction" (which has its own definition). To qualify as an authorized assignment of wages, the Legisla-

ture mandated six unambiguous conditions in West Virginia Code § 21-5-3 that must be satisfied:

1. The assignment must be in writing;
2. It must not be in effect for more than one year;
3. It must specify the total amount due and collectible;
4. It must state that three-fourths of the employee's wages are exempt from withholding;
5. It must be accepted and signed by the employer; and
6. It must be notarized.

The Court found that none of the documents provided by Fairmont Tool met these requirements and, indeed, as to some of the employees there were no documents provided at all. The Court also rejected Fairmont Tool's argument that it had a "private agreement" with the employees to recover these debts through wage withholdings because such an agreement would be in violation of the WPCA and therefore unenforceable.

How They Voted:

Justice Hutchison authored the majority opinion. Justice Walker and Justice Wooton joined in the majority opinion. Chief Justice Jenkins and Justice Armstead dissented and filed a separate opinion.

Impact on Business:

This case illustrates the potential hazards of payroll withholdings for wage advances, work equipment, and other related items such as parking costs and reinforces the rigidity of the WPCA. Employers who withhold wages from a paycheck for any reason should ensure that they are doing so in compliance with the WPCA.

James C. Justice, II, Governor of the State of W. Va. v. W. Va. AFL-CIO, et al.
Case No. 21-0559 (Nov. 22, 2021)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to determine whether a Circuit Court abused its discretion in granting a preliminary injunction against the application of the West Virginia Paycheck Protection Act.

What the Court Decided:

The Court determined that the circuit court abused its discretion because Respondents could not show a likelihood of success on the merits of their constitutional challenges to the Act, nor demonstrate that they would suffer irreparable harm if the Act was enforced.

Facts:

This case concerns the West Virginia Paycheck Protection Act, also known as HB 2009, passed by the Legislature in 2021, which prohibits state employers from deducting union dues and employee association membership fees from public employees' wages. To accomplish its end, the Act amends the definition of "deduction" in the Wage Payment and Collection Act to exclude "any amount for union labor organization, or club dues or fees."

Labor unions, employee associations, and individual members of such groups sought to enjoin the Act's enforcement in the Circuit Court of Kanawha County. They argued that the law violated their constitutional rights to equal protection, freedom of speech and association, and the Contract Clause. They further argued the Act would cause them irreparable harm, and that the harm posed to their constitutional interests far outweighed any de minimis harm to Petitioner, because the only state interest HB 2009 would vindicate was the cost associated with administering the program.

Petitioner, Governor Justice, argued that Respondents were unlikely to succeed on their claims because similar laws had been upheld, in the face of similar attacks, in other state and federal courts, because Respondents failed to support their Contracts Clause argument with any actual contracts, and because prior case law had rejected similar freedom of speech and association claims. Petitioner further argued that Respondents failed to show the harm was irreparable. The circuit court agreed with Respondents, enjoining the Act's enforcement, and the Governor appealed.

Holding:

The Court reversed, finding that the Respondents' likelihood of success on the merits of their constitutional claims was significantly weaker than the circuit court believed and that its issuance of a preliminary injunction was an abuse of discretion.

As to freedom of speech and associational rights, the court noted that federal appellate courts that have considered similar challenges have concluded that such laws are facially neutral. The Court also noted that it had previously considered a similar issue in *Morrisey II*, 243 W. Va. at 86, 842 S.E.2d at 455, and found that West Virginia's right-to-work law did not impair unions' ability to associate with workers.

As to equal protection, the Court agreed with Petitioner that HB 2009 did not implicate heightened scrutiny for purposes of equal protection. Further, the Petitioner's asserted interests in

"avoiding the slippery slope of providing any automatic payroll deduction that an employee may request" and "extricat[ing] itself from a position as intermediary between union and union members" were legitimate. Thus, Respondents could not demonstrate that HB 2009 would likely fail rational-basis review.

As to the Contract Clause, the Court agreed with Petitioner that Respondents had failed to demonstrate the existence of any contracts that might be impaired. The Court noted that HB 2009 does not impact collective bargaining agreements already in effect on the law's effective date. Additionally, the Court reasoned that that the evidence Respondents offered as to widespread historical practices of deducting union dues from public employees' payroll might affect a "long-standing pattern and practice," or "arrangement," as concluded by the circuit court, but would not impair an actual contract.

The Court therefore concluded that the Respondents had failed to show success on the merits of any of their constitutional claims. The Court also concluded that Respondents failed to show irreparable harm because there were numerous alternative methods they could use to collect dues. The Court accordingly reversed the circuit court's order for abuse of direction, dissolved the injunction, and remanded for further proceedings.

How They Voted:

Justice Walker authored the majority opinion. Chief Justice Jenkins and Justice Armstead joined in the majority opinion. Justice Hutchinson was joined by Justice Wooton in dissenting on the basis that the preliminary injunction merely maintained the status quo. They would have allowed the injunction while the case was litigated on its merits, noting that the court's in-depth consideration of the constitutional issues at an early stage would likely have the effect of resolving the case entirely.

Impact on Business:

While the outcome of this case does not directly affect business interests, this decision demonstrates the willingness of the Court to tame the influence of labor unions in accordance with the Legislature's intent. Additionally, its conclusion that prohibitions on union dues payroll deductions are subject only to rational-basis review may have a positive effect on future litigation that more directly involves private interests.

Milmoe v. Paramount Senior Living at Ona, LLC
Case No. 21-0183 (June 13, 2022)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to overturn the Circuit Court of Cabell County's grant of a Motion for Summary Judgment filed by Defendant Paramount Senior Living at Ona, LLC ("Paramount") on the basis that Paramount was not a corporate successor to the prior operator of a senior-care home, Passage Midland Meadows Operations, LLC ("Passage").

What the Court Decided:

The Court affirmed, concluding that Paramount could not be held liable as successor for the alleged wrongful conduct of Passage because Paramount did not purchase any substantial assets from Passage during the transfer.

Facts:

Ms. Milmoe, Plaintiff below, appealed from a decision of the Circuit Court of Cabell County granting summary judgment to defendant Paramount Senior Living at Ona, LLC ("Paramount"). Ms. Milmoe's mother, Ms. Sturgeon, passed away while she was a resident at Passage. Ms. Milmoe sued for negligence and wrongful death, alleging a continuous course of negligence that included repeated slip and fall incidents and an "eloping incident," and which she claimed ultimately caused Ms. Sturgeon's death.

Passage operated the facility during Ms. Sturgeon's residence there. The facility was owned by another entity, Welltower. Passage filed for bankruptcy while Ms. Sturgeon was a resident. Following Ms. Sturgeon's death, Passage entered into certain agreements, including an Operations Transfer Agreement ("OTA"), in which Passage transferred operations of the facility to Paramount. Paramount thereafter began operating the facility.

Plaintiff cited to the mere continuation and lack of good faith exceptions to the innocent purchaser rule in an attempt to hold Paramount liable for negligence and the wrongful death of Ms. Sturgeon. The lower court granted summary judgment on the basis that neither exception applied. Ms. Milmoe appealed, arguing that the circuit court improperly expanded the general rule of nonliability, that two exceptions to the general rule applied, and that the Motion for Summary Judgment was not ripe when it was granted.

Holding:

The Court found that Paramount was not Passage's successor because Plaintiff failed to demonstrate that Paramount purchased significant assets from Passage. Because Paramount was not successor, the successor liability rule did not apply, and the court did not need to consider the rule's exceptions.

The court reiterated the general rule that "the purchaser of all the assets of a corporation [is] not liable for the debts or liabilities of the corporation purchased." Syllabus Point 2, in part, *Davis v. Celotex Corp*., 187 W. Va. 566, 420 S.E.2d 557 (1992). The Court also acknowledged that the general rule has been tempered by a number of exceptions, including in cases of express or implied assumption of liability, where a transaction was fraudulent, when some element of the transaction was not made in good faith, and where the successor corporation is a mere continuation or reincarnation of its predecessor. However, the Court explained that neither of the exceptions that Ms. Milmoe invoked would apply if she could not first show that Paramount was successor to

Passage, which required demonstrating that Passage transferred all or substantially all of its assets to Paramount.

The Court concluded that the OTA was not a purchase agreement, though some nominal assets—characterized as facility supplies and including items such as linens, medical supplies, and food—did transfer to Paramount as part of the transaction. The Court emphasized that merely hiring a former corporation's employees and serving its prior clientele is insufficient. The transfer between Passage and Paramount was insufficient to create successor liability because it did not involve the transfer of all or substantially all assets from a predecessor company to a successor company.

Though the circuit court had granted summary judgment on the basis that neither exception to the general rule of nonliability applied, the Court affirmed the grant of summary judgment on the basis that Plaintiff failed to demonstrate that Paramount fell within the general rule of successor liability at all. The Court also disagreed with Ms. Milmoe's assertion that the Motion for Summary Judgment was not ripe. The Court therefore affirmed the circuit court's grant of summary judgment.

How They Voted:

Justice Armstead authored the majority opinion in this case. Chief Justice Hutchison, Justice Walker, and Justice Wooton joined in the unanimous majority opinion. Justice Bunn did not participate in the decision of this case.

Impact on Business:

This case provides useful analysis of successor liability in West Virginia, on which there has previously been a dearth of case law, as evidenced by the Court's repeated citations to case law from other jurisdictions in this decision. This decision is also favorable to businesses in that it provides certainty that successor liability will not apply in West Virginia in the absence of a transfer of substantial assets.

Auto Club Property Casualty Insurance Co. v. Jessica A. Moser
Case No. 20-0792 (Apr. 25, 2022)

What the Court was Asked to Decide:

In this case, an individual was insured under an automobile policy that included medical payments coverage. The policy states that the insurance company would pay medical expenses "incurred" by the insured. The West Virginia Supreme Court was asked to decide whether an individual—who never became personally responsible for a medical bill—actually "incurred" the expense.

What the Court Decided:

Facts:

Jessica Moser ("Ms. Moser") had an automobile insurance policy with Auto Club. The policy also included a medical payments coverage that afforded Ms. Moser with up to $5,000 in reasonable medical expenses "incurred" by her for bodily injury sustained in a collision while occupying a motor vehicle. In October of 2018, Ms. Moser was injured when her vehicle was struck by another vehicle in a rear-end collision. The driver of the other vehicle was determined to be at fault. Ms. Moser received immediate medical care, and then visited various medical providers for follow-up treatment. The expenses from those medical visits were paid for by Ms. Moser's health insurer, West Virginia Medicaid.

Ms. Moser hired an attorney who began pursuing a claim against the driver who caused the collision. The attorney also sent a medical bill to Ms. Moser's automobile insurer, Auto Club, seeking reimbursement under the medical payments provision of the insurance contract. The medical bill (~$2,100) was for a series of physical therapy appointments attended by Ms. Moser for injuries related to the collision. Ms. Moser demanded that Auto Club pay her this amount. Auto Club responded and refused to pay Ms. Moser and declared that she was not entitled to the money. Auto Club reasoned that because Ms. Moser's medical expenses were paid by Medicaid, Ms. Moser never "incurred" the medical expenses.

In October of 2019, Ms. Moser settled with the other driver and then, filed an action against Auto Club, seeking, among other things, clarification on the medical payments provision. Ms. Moser asked for an order requiring Auto Club to provide medical payments coverage for the $2,100 physical therapy bill she "incurred." The circuit court found that the term "incurred" in the medical payments provision was clear and meant "'to become liable or subject to.' 'Incurred' does not mean 'legally liable' to pay."

The Court was asked to determine whether the circuit court's interpretation of the term "incurred" was error. The term was not defined by Auto Club's insurance contract nor were there any statutory requirements governing medical payments coverage. As such, the Court looked to the insurance policy for guidance. Ultimately, the Court agreed with the circuit court's ruling and concluded that a typical consumer would understand that a medical expense is "incurred" at the time the services are rendered—regardless of whether insurance or some other party pays. To support its decision, the Court examined similar decisions in other jurisdictions where "incurred" in insurance policies also was interpreted as "at the time services are rendered" not when the expenses are actually paid.

Holding:

The Court agreed with the circuit court's interpretation of the word "incurred" and therefore, affirmed the circuit court's order in favor of Ms. Moser.

How They Voted:

Chief Justice Hutchison authored the majority opinion. Justice Walker and Justice Wooton joined in the majority. Justice Armstead dissented and filed a dissenting opinion. Justice Moats, sitting by temporary assignment, did not participate.

Impact on Business:

This decision interpreted the term "incurred" in a manner that undermines this State's law regarding damages and compensation. As stated in the dissent authored by Justice Armstead, medical payments coverage exists to protect insureds from having to pay out-of-pocket expenses. However, under the Court's interpretation of the word "incurred," insureds can recover expenses *that he or she never paid*—essentially allowing insureds to recover twice. Stated another way, now, an insured can collect monies from his or her insurance company once services are rendered, *even if* the medical bill is paid by someone else. This conclusion is in direct contravention of this State's longstanding policy of reasonable compensation, and potentially opens the door for windfalls and overcompensation.

Progressive Max Insurance Company v. Christine Brehm and Progressive Max Insurance Company v. Amber R. Hess
Case No. 20-0850 (Apr. 14, 2022)

What the Court was Asked to Decide:

In this consolidated appeal, two passengers sought to recover against the driver of a rental car's automobile insurance policy's underinsured motorists coverage for injuries sustained while riding with the driver. The circuit court granted the passenger's request, finding that West Virginia Code §§ 33-6-29(b) and -31(c) expanded the definitions of the policy such that the passengers were covered by the underinsured motorists coverage even though the rental car was not listed on the automotive insurance policy. On appeal, the West Virginia Supreme Court was asked to decide whether the circuit court erred in denying the insurer's motion for summary judgment and in granting the passengers' reciprocal motion.

What the Court Decided:

Facts:

Christina Brehm ("Ms. Brehm") and Amber R. Hess (Ms. "Hess") were passengers in a rental car both driven and rented by Susan Bindernagel ("Ms. Bindernagel"). Another motorist rear-ended the rented vehicle, injuring Ms. Brehm, Ms. Hess, and Ms. Bindernagel. The other motorist's insurer offered, and Ms. Brehm, Ms. Hess, and Ms. Bindernagel accepted, $50,000, split three ways, in exchange for their execution of releases. The $50,000 offer was the policy limit under the other motorist's automobile insurance policy. As the $50,000 did not fully compensate Ms. Brehm, Ms. Hess, or Ms. Bindernagel for their injuries, the three made claims under Ms. Bindernagel's underinsured motorists coverage (the "UIM Coverage"), which was part of her automobile insurance policy issued by Progressive Max Insurance Company ("Progressive", and the "Progressive Policy"). Notably, Ms. Bindernagel was the only insured listed on the Progressive Policy and the rental car was not listed as a vehicle covered by the policy. Progressive denied coverage to Ms. Brehm and Ms. Hess.

Both Ms. Brehm and Ms. Hess filed actions in the Circuit Court of Monongalia County seeking declarations of coverage under the UIM Coverage. Progressive answered and counterclaimed for declarations of no-coverage. In its motions for summary judgment, Progressive argued that Ms. Brehm and Ms. Hess were not insured persons under the UIM Coverage as the rented vehicle was not a "covered auto" as defined within the Progressive Policy. Further, Progressive argued that Ms. Brehm and Ms. Hess did not meet the definition of "insured" as found within the Progressive Policy or West Virginia Code § 33-6-31(c). West Virginia Code § 33-6-31(c) defines "insured" as 1) the named insured and his or her spouse and resident relatives or 2) individuals injured or damages by an uninsured or underinsured while using "the motor vehicle to which the policy applies". Since the rented vehicle was not listed on the Progressive Policy, Progressive contended that Ms. Brehm and Ms. Hess were not insureds under West Virginia Code § 33-6-31(c) as the rented vehicle was not a motor vehicle to which the UIM Coverage applied.

Conversely, Ms. Brehm and Ms. Hess argued that they were "insureds" under the UIM Coverage of the Progressive Policy because West Virginia Code § 33-6-29(b) extended the Progressive Policy, and therefore the UIM Coverage, to the rented vehicle, which would, in turn, mean Ms. Brehm and Ms. Hess were "insureds" under West Virginia Code 33-6-31(c). West Virginia Code § 33-6-29(b) requires that every motor vehicle insurance policy must cover the insured in-

dividual while operating a motor vehicle he or she is permitted to use. Ms. Brehm and Ms. Hess argued that because of the language of West Virginia Code § 33-6-29(b), the Progressive Policy necessarily covered the rented vehicle, which would, in turn, mean the rented vehicle was a "motor vehicle to which the [UIM] policy applies". The circuit court granted summary judgment in favor of Ms. Brehm and Ms. Hess, adopting the position that West Virginia Code §§ 33-6-29(b) and -31(c) require a guest passenger in a rental vehicle to be afforded underinsured motorist coverage under a policy of insurance that provides coverage to the rental vehicle in which the passenger is a lawful passenger.

On appeal, the Court was asked to determine whether West Virginia Code § 33-6-29(b) extended UIM coverage to all guest passengers in any non-listed vehicles regardless of the language of the policy if lawfully driven by the listed insured. The Court found in favor of Progressive, first determining that the UIM Coverage did not cover Ms. Brehm and Ms. Hess, and further finding that West Virginia Code §§ 33-6-29(b) and -31(c) do not expand the definition of "insured person" such as to cover passengers in vehicles not covered under an automobile insurance policy. Specifically, the Court found that just because West Virginia Code §§ 33-6-29(b) required that the Progressive Policy cover Ms. Bindernagel's operation of the rented vehicle, there is no requirement in statute that the UIM Coverage must therefore be extended to cover Ms. Brehm and Ms. Hess.

Holding:

The Court rejected the circuit court's interpretation of West Virginia Code §§ 33-6-29(b) and -31(c) and found that these statutes do not expand the definition of "covered auto" under the Progressive Policy such to mandate coverage for Ms. Brehm and Ms. Hess under the UIM Coverage. Accordingly, the Court reversed the opinion of the circuit court and remanded with instruction to enter orders granting summary judgment in favor of Progressive.

How They Voted:

Justice Walker authored the majority opinion. Chief Justice Hutchinson, Justice Armstead, and Justice Wooten joined in the majority, and Justice Wooten filed a concurring opinion to address "what some may perceive as an apparent inequity of the law".

Impact on Business:

This decision limits the scope of West Virginia Code §§ 33-6-29(b) and -31(c), reinforcing the weight that the Court will give to the language of the applicable policy and coverages being considered before it. For a claimant to successfully recover against an insured, the Court will be hesitant to allow claimants to intentionally read statutes to create loopholes and exceptions to the plain language of an applicable policy. As made particularly clear in Justice Wooten's concurrence, any inequities from the Court's decision lie with the West Virginia Legislature, not the Court, and the Court will not intentionally read into statutes what those statutes do not say to remedy any perceived inequities.

Rex Donahue v. Mammoth Restoration and Cleaning and Allstate Insurance Company
Case No. 20-0343 (Feb. 18, 2022)

What the Court was Asked to Decide:

In this appeal, a settlement had been reached between a homeowner, a restoration company who had remediated water damage to the homeowner's property, and the homeowner's insurer, to settle claims brought by the restoration company to recover the amount owed for work done. However, when it came time to execute the settlement agreement, the homeowner refused, and instead tried to amend his complaint to include additional claims against the insurer. The circuit court enforced the settlement. On appeal, the West Virginia Supreme Court was asked to decide whether the circuit court erred in granting the motion to enforce settlement and denying the homeowner's motion to amend.

What the Court Decided:

Facts:

In January 2018, Rex Donahue ("Mr. Donahue") made a claim against his insurer, Allstate Insurance Company, pursuant to a Landlord's Package Policy for damages to rental property he owned in Ona, West Virginia, related to water damage caused by pipes that froze and then burst. Allstate denied the claim on the grounds that the Policy in question contained an exclusion for property damage caused by failure to maintain adequate heat in the residence. Mammoth Restoration and Cleaning ("Mammoth") was hired to remediate the property. When Mr. Donahue refused to pay, Mammoth filed suit on July 24, 2018, in the Magistrate Court of Cabell County for the amount owed: $6,301.11. Mr. Donahue then filed a third-party action against Allstate, alleging that they improperly denied coverage. On June 18, 2019, Allstate removed the action from magistrate court to the circuit court due to the amount in controversy.

On June 27, 2019, email from Mr. Donahue's counsel stated that Mr. Donahue "would release All-State (sic) from the 3rd party complaint and bad faith claim surrounding this lawsuit" in exchange for Allstate paying Mammoth's claim. Further, that same day counsel for Mr. Donahue left a voicemail for Allstate's counsel again stating that Mr. Donahue would "drop any suit against Allstate involving that claim on the home and lost property" in exchange for payment of Mammoth's claim. The next day, on June 28, 2019, counsel for Allstate circulated an email memorializing the terms of a three-way settlement agreement. Those terms included Mr. Donahue releasing "all claims against Allstate arising out of the subject water loss claim made in January 2018" in exchange for Allstate paying Mammoth. Counsel for Mammoth confirmed the agreement; crucially, so did counsel for Mr. Donahue. On July 25, 2019, Allstate circulated two settlement agreements based on these discussions; one releasing Mr. Donahue from claims made by Mammoth, the other releasing Allstate from claims made by Mr. Donahue. Mr. Donahue signed the settlement agreement between himself and Mammoth, but refused to sign the agreement with Allstate. On November 22, 2019, following months with no signature from Mr. Donahue, Allstate filed a motion to enforce the settlement. Mr. Donahue argued he had not agreed to settle the claims against Allstate and filed a motion to amend his complaint to add claims for $54,000 in water damages and for bad faith.

The circuit court granted Allstate's motion to enforce settlement and denied Mr. Donahue's motion to amend. The circuit court reasoned that Mr. Donahue's counsel had clear authority to bind his client, and that Mr. Donahue's counsel had unequivocally given consent, on behalf of his client, to the terms of the agreement. Further, the circuit court found that Allstate's payment of Mammoth's claims was valuable consideration adequate for the release of claims.

On appeal, the Court was asked to decide two issues: whether the circuit court erred in enforcing the settlement and whether the circuit court erred in denying Mr. Donahue's motion to amend. The Court found in favor of Allstate. The Court observed that Mr. Donahue did not challenge whether his attorney had authority to enter the agreement or the evidence presented by Allstate. Further, the Court found that the evidence of emails and a voicemail from Mr. Donahue's counsel firmly established Mr. Donahue's agreement to dismiss all claims—including bad faith claims—against Allstate. The Court found that there had been a meeting of the minds and affirmed the circuit court's decision to enforce settlement. When turning to the denial of Mr. Donahue's motion to amend, the Court affirmed the circuit court's decision denying that motion on the basis that, because the settlement was being enforced, the motion to amend was moot.

Holding:

The Court agreed with the circuit court's interpretation of West Virginia law surrounding contracts and settlement agreements. Accordingly, the Court affirmed the decision of the circuit court to enforce settlement and dismiss the matter.

How They Voted:

Chief Justice Hutchinson authored the majority opinion. Justice Walker, Justice Armstead, and Justice Wooton joined in the majority.

Impact on Business:

This decision reinforces that attorneys act as representatives of their clients and that the things attorneys say can result in their clients being bound. As such, this case provides establishes that attorneys and their clients should be clearly communicating expectations, strategy, and decisions surrounding settlement specifically, and surrounding litigation more broadly, as this decision limits the ability to challenge the enforceability of agreements in the face of clear statements from counsel indicating agreement. It also establishes that parties will be able to enforce settlements against an opposing party when that party's attorney represents that a settlement has been reached.

Helen Adkins v. Carolyn Clark, M.D.
Case No. 21-0300 (June 14, 2022)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked whether the failure of a healthcare provider to unequivocally decline pre-suit mediation in a response to a notice of claim tolls the statute of limitations beyond the statutorily prescribed time periods set forth in the Medical Professional Liability Act ("MPLA"), W. Va. Code § 55-7B-6(i).

What the Court Decided:

Facts:

On March 22, 2018, Dr. Carolyn Clark performed surgery on Helen Adkins ("Ms. Adkins"). Ms. Adkins alleges that Dr. Clark caused injury, requiring her to undergo a subsequent procedure on March 28, 2018. Nearly two years later, Ms. Adkins sent Dr. Clark a notice of claim dated February 27, 2020, stating that she discovered her injury "on or after March 22, 2018" and indicating that she needed an additional sixty days to obtain a screening certificate of merit, consistent with W. Va. § 55-7B-6(d). Due to an Administrative Order issued by the Court in response to the COVID-19 pandemic, "[s]tatutes of limitations and statutes of repose that would otherwise expire during the period of judicial emergency between March 23, 2020, and May 15, 2020, shall expire on May 18, 2020." As such, Ms. Adkins' deadline to obtain a screening certificate of merit was extended to May 18, 2020.

On May 18, 2020, Ms. Adkins sent Dr. Clark a revised notice of claim, together with a screening certificate of merit—this was received by Dr. Clark on May 26. However, on May 13, before receiving the aforementioned documents, Dr. Clark's counsel requested medical records "to determine whether or not pre-suit mediation is advantageous." On August 31, 2020, Dr. Clark forwarded medical records to Ms. Adkins' counsel that she had obtained through the provided authorization. No other communication occurred between the parties until November. On November 13, 2020, Ms. Adkins' counsel inquired whether Dr. Clark was requesting pre-suit notification. By letter dated November 17, 2020, counsel responded that Dr. Clark had chosen not to request pre-suit mediation under the MPLA and had not responded to the revised notice of claim and screening certificate of merit within thirty days. Because the MPLA provides that the complaint had to be filed thirty days after that failure to respond, Dr. Clark's counsel stated that the statute of limitations had expired and that the claim was now untimely. Nevertheless, Ms. Adkins filed her complaint on November 23, 2020, and Dr. Clark responded with a motion to dismiss, arguing that the statute of limitations had expired.

The circuit court granted Dr. Clark's motion and dismissed the claim with prejudice. On appeal, the Supreme Court examined the language of the MPLA and concluded that under W. Va. Code §55-7B-6(i), there are three circumstances that begin the thirty-day clock to file the complaint if the statute of limitations has expired: (1) receipt of a response from the health care provider; (2) no response from the health care provider after 30 days; and (3) notification from a mediator that settlement was unsuccessful.

Ms. Adkins argued that Dr. Clark's May 13 request for medical records gave the impression that Dr. Clark was considering mediation. As such, she chose to respect Dr. Clark's right to mediation and therefore, chose not to file her complaint until Dr. Clark elected or declined mediation. For that reason, Ms. Adkins argued that her complaint was timely filed because it was filed within thirty days of Dr. Clark unequivocally declining mediation in her November 17, 2020 letter.

The Court rejected Ms. Adkins argument. While it is true that the MPLA gives a healthcare provider an absolute right to mediation, the MPLA *does not* require any specific response regarding mediation, nor does it require any response at all. Rather, the only requirement regarding mediation is that the plaintiff must wait thirty days to give the healthcare provider the opportunity to request it. Here, the relevant thirty-day time frame began on the date Dr. Clark received the amended notice of claim and screening certificate of merit—May 26, 2020. Under W. Va. Code § 55-7B-6(f), Dr. Clark had thirty days from May 26 to respond—she did not. Her non-response triggered the "no response from the health care provider after 30 days" circumstance, which would have required Ms. Adkins to file her complaint within thirty days from the date a response would have been due. The statute of limitations ran in late July 2020, and Ms. Adkins did not file her complaint until November. As such, Ms. Adkins' complaint was untimely, and the circuit court was correct in dismissing it.

Holding:

The failure of a healthcare provider to unequivocally decline pre-suit mediation in a response to a notice of claim does not serve to toll the statute of limitations beyond the statutorily prescribed time periods set forth in the provisions of West Virginia Code § 55-7B-6(i).

How They Voted:

Justice Walker authored the unanimous majority opinion. Chief Justice Hutchison, Justice Armstead, and Justice Wooton joined in the majority opinion. Justice Bunn did not participate in the decision of this case.

Impact on Business:

This case illustrates the Court's recent trend of enforcing and upholding strict compliance with the pre-suit notice requirements of the MPLA. Failure to comply with the pre-suit notice requirements deprives the circuit courts of subject matter jurisdiction, and complaints will be dismissed.

Pledger v. Lynch
5 F.4th 511, 523–24 (4th Cir. 2021)

What the Court was Asked to Decide:

Whether the pre-filing certificate required in the Medical Professional Liability Act, West Virginia Code § 55-7B-6, is displaced by the Federal Rules of Civil Procedure, making it inapplicable in cases filed in federal courts.

What the Court Decided:

The Fourth Circuit found that the Rules 8, 9, 11, and 12 of the Federal Rules of Civil Procedure do not require a medical malpractice plaintiff to provide a certificate of merit to state a claim for medical negligence, and thus found it "impossible to reconcile certificate requirements like West Virginia's with the requirements of the Federal Rules of Civil Procedure." And because the requirement is "procedural," it also does not apply in cases brought against the United States under the Federal Tort claims Act (FTCA).

Facts:

Pledger sued the United States and a West Virginia hospital for medical negligence and other constitutional claims arising from medical treatment received while incarcerated. The District Court dismissed his medical professional liability claims because he did not serve a notice of claim and certificate of merit before filing suit as required by West Virginia Code § 55-7B-6. Plaintiff appealed to the Fourth Circuit.

Holding:

The Fourth Circuit reversed the dismissal of the action because of the conflict between the pre-filing certificate requirement in West Virginia Code § 55-7B-6. Under United States Supreme Court precedent, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, 559 U.S. 393 (2010), where state law conflicts with the federal rules, it is not enforced. Here, West Virginia Code § 55-7B-6 is procedural law, and, therefore it did not apply under FTCA which incorporates state substantive, and not procedural laws.

How They Voted:

Judge Harris wrote the majority opinion joined by Judge Gregory. Judge Quattlebaum dissented in a separate opinion.

Impact on Business:

Plaintiffs do not have to comply with West Virginia Code § 55-7B-6 in MPLA actions filed in federal court, whether under the FTCA or not. This deprives health care providers of the benefit of pre-filing notice of the claims supported by expert testimony and the corresponding right to demand pre-suit mandatory mediation.

State ex rel. West Virginia University Hospitals, Inc. v. The Honorable Cindy Scott
Case No. 21-0230 (Nov. 22, 2021)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked, on a writ of prohibition, to find clear error in the Circuit Court of Monongalia County's denial of a Motion to Dismiss for Lack of Jurisdiction and a Petition for Declaratory Judgment, both arguing that corporate negligence claims by a hospital fall under the MPLA.

What the Court Decided:

The Court determined that the MPLA applies to corporate negligence claims based on acts or omissions that fit within the MPLA's definition of "health care," or that are contemporaneous to or relate to a "health care" claim and occur in the context of providing care. When claims fit within this definition, a circuit court should grant a Petition for Declaratory Judgment on that basis. Further, when a Plaintiff fails to comply with the MPLA's pre-suit requirements for such claims, the circuit court lacks jurisdiction to hear them.

Facts:

Petitioner West Virginia University Hospitals (WVUH) brought this case before the Supreme Court on a writ of prohibition after the Circuit Court of Monongalia County denied its Motion to Dismiss and Strike the Plaintiff's Amended Complaint and its Petition for Declaratory Judgment.

The incident at the heart of the action involved the alleged introduction of air bubbles to Plaintiff Sarah F.'s newborn child, A.F., while both were hospitalized at Ruby Memorial Hospital following A.F.'s birth. The air bubbles ultimately caused neurological impairment. Plaintiffs, A.F. and Sarah F. and Daniel F., individually and as next friends of A.F., alleged that A.F.'s injury was the result of the negligence of a WVUH-employed nurse who failed to properly prime the intravenous tubing, pump, and/or equipment. They also alleged corporate negligence claims against WVUH including negligent hiring, negligent staffing, negligent failure to train, negligent failure to supervise, negligent failure to have proper protocols, failure to protect, and failure to correct. WVUH sought a declaratory judgment that the MPLA applied to the corporate negligence claims.

Before the circuit court ruled on the declaratory judgment, Plaintiffs filed an Amended Complaint, adding additional corporate negligence claims: failure to purchase and utilize air filters, failure to document, spoliation, and failure to report. WVUH sought to dismiss and strike the Amended Complaint on the basis that the Plaintiffs had failed to comply with the MPLA's pre-suit requirements for the new claims. The circuit court denied the Petition for Declaratory Judgment and the Motion to Dismiss. Before the Court, WVUH argued that the circuit court committed clear error in denying both.

Holding:

The Court granted the writ of prohibition, agreeing with WVUH that the corporate negligence claims in both the original complaint and the amended complaint were governed by the MPLA.

The Court explained that "major changes made to the MPLA" in 2015 broadened the definition of "health care" and "medical professional liability," illustrating "the Legislature's intent for the MPLA to broadly apply to services encompassing patient care…." To fall under the MPLA, each claim must be an "anchor claim," which fits the definition of health care, or an "ancillary

claim" that is contemporaneous or related to an anchor claim and, "despite being ancillary, [is] still in the context of rendering health care."

The Court concluded that the claims in the original complaint which Plaintiffs attempted to characterize as corporate negligence—negligent hiring, negligent staffing, negligent failure to train, negligent failure to supervise, negligent failure to have proper protocols, failure to protect, and failure to correct—were each an "anchor" claim because they fell under the definition of "health care" under W. Va. Code § 55-7B-2(e)(3). The Supreme Court concluded that the circuit court ignored the plain language of the MPLA and the Petition for Declaratory Judgment should have been granted.

The court also concluded that the claims added by the Amended Complaint were governed by the MPLA. Failure to purchase and utilize air filters and failure to document were "anchor" claims, falling under the statute's definition of "health care," and spoliation and failure to report were "ancillary" claims. In concluding that the first two claims fell within the definition of health care, the court considered primarily whether the adjudication of the claim would require expert testimony about the standard of care. In concluding that the second two claims were ancillary claims, the court considered primarily whether WVUH was acting as a health care provider when the allegedly negligent acts occurred. Because the MPLA governed the claims, the Plaintiffs' failure to comply with the statute's pre-suit requirements was dispositive. The circuit court therefore lacked subject matter jurisdiction and the amended complaint should have been dismissed.

How They Voted:

Chief Justice Jenkins authored the majority opinion. Justice Walker, Justice Armstead, and Justice Hutchison joined in the majority opinion. Justice Wooton concurred in part and dissented in part. He agreed with the majority's decision regarding the claim based on WVUH's failure to purchase and utilize air filters, but concluded that the remaining amended allegations—failure to properly document the cause of death, failure to report a sentinel event, and spoliation—amounted to "after-the-fact" corporate wrongdoing, and were not contemporaneous or related claims arising in the context of rendering health care services under the MPLA. Construing the allegations in the light most favorable to the Respondents, he would have allowed those claims to proceed.

Impact on Business:

This decision will provide a strong basis for future motions to dismiss based on failure to comply with the MPLA's pre-suit notice requirements, even when plaintiffs attempt to characterize claims as corporate negligence. It also provides further explanation about the broadened definition of "health care" under the 2015 MPLA, and examples of corporate decisions that fall within that definition.

Tanner v. Raybuck
Case No. 21-0038 (Apr. 15, 2022)

What the Court was Asked to Decide:

If a plaintiff files suit and then provides a certificate of merit under the West Virginia Medical Professional Liability Act ("MPLA"), West Virginia Code § 55-7B-6, does the circuit court have subject matter jurisdiction over the complaint?

What the Court Decided:

No. Failure to comply with provisions of West Virginia Code § 55-7B-6 deprives the circuit court of subject matter jurisdiction and requires dismissal of the complaint.

Facts:

Plaintiff served a notice of claim (seeking additional time to secure a certificate of merit) on the defendant physician and provided a certificate of merit, but after filing the complaint alleging negligence related to implantation of a cardiac device. The circuit court dismissed the complaint finding plaintiff failed to produce a "valid" certificate of merit because its author didn't have experience treating "diagnosing or treating injuries or conditions similar to those of the patient" as required by West Virginia Code § 55-7B-7(a)(6).

Holding:

The West Virginia Supreme Court reversed, finding the circuit court lacked subject matter jurisdiction over Petitioners' claims because they failed to comply with the pre-suit notice requirements of West Virginia Code § 55-7-6(b) by filing their Complaint before serving a screening certificate of merit – deficient or otherwise." "Providing the screening certificate of merit post-suit is insufficient to cure the jurisdictional deficiency created by Petitioners' failure to comply with the pre-suit notice requirements of the MPLA. The lack of subject matter jurisdiction the circuit court lacked jurisdiction to consider whether the certificate of merit was valid or sufficient – here, whether the certificate of merit author was qualified." In analyzing the facts, the court also determined plaintiff's claims came within the definitions in the MPLA. Because the case was dismissed for lack of subject matter jurisdiction, the dismissal was without prejudice, meaning the plaintiff has an opportunity to cure the deficiency and refile the action. But the Court "declined to hold that dismissal with prejudice is never proper where a plaintiff fails to comply with the pre-suit notice requirements of the MPLA."

Chief Justice Hutchison concurred to express his opinion that plaintiff's certificate of merit expert was "more than qualified." Justice Wooton concurred with the Court's decision to vacate the dismissal with prejudice, but dissented to the majority's decision regarding subject matter jurisdiction because it was not argued in the circuit court.

How They Voted:

Justice Armstead authored the majority opinion joined by Justice Walker and Justice Moats, sitting by temporary assignment. Chief Justice Hutchison filed a concurring opinion, and Justice Wooton filed a separate opinion in which he concurred in part and dissented in part.

Impact on Business:

West Virginia health care providers continue to benefit from the Court's requirement of strict compliance with the pre-filing requirements of West Virginia Code § 55-7-6(b), with failure requiring dismissal. Dismissal without prejudice is consistent with precedent in MPLA and other cases, but the Court also made it clear that dismissal with prejudice can be appropriate, depending on the facts.

SWN Production Company, LLC v. Kellam
Case No. 21-0729 (June 14, 2022)

What the Court was Asked to Decide:

The United States District Court for the Northern District of West Virginia, Judge John Preston Bailey, certified, on his own motion, four questions to the West Virginia Supreme Court: (1) Whether *Estate of Tawney v. Columbia Natural Resources, LLC.,* 219 W. Va. 266, 633 S.E.2d 22 (2006) remains good law in West Virginia; (2) What is meant by the "method of calculating" the amount of post-production costs to be deducted; (3) Is a simple listing of the types of costs which may be deducted sufficient to satisfy *Tawney*; and (4) If post-production costs are to be deducted, are they limited to direct costs or may indirect costs be deducted as well?

What the Court Decided:

Facts:

The Kellams' lease states that the lessee agrees to pay the lessor "as royalty for the oil, gas, and/or coalbed methane gas marketed and used off the premises and produced from each well drilled thereon, the sum of one-eighth (1/8) of the price paid to Lessee per thousand cubic feet of such oil, gas, and/or coalbed methane gas so marketed and used . . . less any charges for transportation, dehydration and compression paid by Lessee to deliver the oil, gas, and/or coalbed methane gas for sale."

The Kellam lease is very similar to the lease considered in *Young*, where the Fourth Circuit Court of Appeals reversed Judge Bailey and, focusing on the requirement that a lease "indicate the method" calculating the amount of post-production costs to be deducted, held that the lease clearly and unambiguously allowed the deduction of post-production expenses. In expressly rejecting Judge Bailey's reasoning that the lease in *Young* did not contain sufficiently explicit language about the method of calculating deductions, and therefore did not comply with *Tawney*, the Fourth Circuit noted that "*Tawney* doesn't demand that an oil and gas lease set out an Einsteinian proof for calculating post-production costs. By its plain language, the case merely requires that an oil and gas lease that expressly allocates some post-production costs to the lessor identify *which costs* and *how much* of those costs will be deducted from the lessor's royalties." *Young,* 982 F.3d at 208.

In certifying the questions to the West Virginia Supreme Court, Judge Bailey relied on his similar reasoning in Y*oung,* which the Fourth Circuit had previously rejected.

Holding:

The Court answered the first Certified Question affirmatively—holding *Tawney* is still good law in West Virginia. The Court further reformulated the latter three questions into one succinct question: "What level of specificity does *Tawney* require of an oil and gas lease to permit the deduction of post-production costs from a lessor's royalty payments, and if such deductions are permitted, what types of costs may be included?" However, the Court declined to answer the reformulated question as it required contract interpretation and the development of facts to assist in the interpretation.

In deciding that *Tawney* is good law, the Court distinguished the holding in *Leggett,* which the Petitioner relied on. The Court held that *Wellman* and *Tawney* are still good law and that Leggett only dealt with the interpretation of leases subject to West Virginia Code § 22-6-8. Further, the Court clarified that the criticism of *Wellman* and T*awney* by the *Leggett* Court was obiter dicta.

Additionally, the Court also rejected the applicability of the implied covenant of marketability because, if the lease expressly provides for the deduction of certain post-production costs, there would be no gap to fill and the implied covenant of marketability is inapplicable. In this respect, the Court upheld the freedom of contract—holding that the parties are free to contract to share post-production costs.

Finally, the Court was persuaded by *stare decisis,* finding that there was no serious judicial error in the W*ellman* and *Tawney* decisions and that the decisions are consistent with decades of oil and gas jurisprudence. Similarly, the Court found that overruling the cases would result in "instability and uncertainty" for the thousands of leases executed since the opinions were published.

With regard to the Court's reformulated question, it declined to specifically answer the question. Instead, it noted the importance of looking at the individual lease, along with other relevant evidence, to determine whether the lease complies with *Tawney*. The Court viewed this as contract interpretation and therefore outside of its purview. The Court expressly declined to create a "hard and fast rule" to determine whether a lease was particular enough because, in its view, the lease's compliance with Tawney is tied to both the language in the lease and the parties' intent.

Imperatively, the majority opinion in *Kellam* neither criticized nor refuted the reasoning and holding in *Young v. Equinor USA Onshore Properties, Inc.*, 982 F.3d 201, 203–04, 207 (4th Cir. 2020), finding that the oil and gas lease was language sufficient to indicate the method of calculating the amount to be deduced as required by Tawney.

How They Voted:

Justice Wooton authored the majority opinion. Judge Howard and Judge Alsop, both sitting by temporary assignment, joined in the majority opinion. Chief Justice Hutchison concurred and filed a separate opinion. Justice Walker dissented and filed a separate opinion. Justice Armstead and Justice Bunn both deemed themselves disqualified and did not participate in the decision of this case.

Impact on Business:

As the Court notes, thousands of leases were written with *Tawney* compliance in mind; however, litigation over royalty provisions has persisted. The Court's failure to provide clarity in *Kellam* means courts will likely continue to grapple with and reach opposite conclusions to questions concerning the second and third requirements of *Tawney*: i.e., whether the lease sufficiently identifies with particularly the deductions to be taken and what language sufficiently indicates the method of calculating the amount of post-production costs to be deducted. Moreover, the Court's unwillingness to articulate a rule as to what sufficiently "indicate[s] the method" of calculating the post-production costs to be deducted, especially in light of the Fourth Circuit's ruling in *Young*, makes establishing compliance with West Virginia law even more difficult and West Virginia royalty law more opaque. This will further perpetuate litigation, including class actions, and reduce the likelihood of companies curtailing their litigation expenses by resolving matters early through negotiation or success at a motion to dismiss stage.

Dan's Car World, LLC v. Delaney
Case No. 20-0489 (Apr. 8, 2022)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to review the Circuit Court of Monongalia County's order denying Petitioner Dan's Car World's ("DCW") motion for a new trial or judgment as a matter of law and awarding attorney fees to Respondent Caressa Delaney ("Delaney"). Specifically, the Court was asked to consider whether the circuit court erred or abused its discretion by: (1) denying DCW's motion for summary judgment, (2) striking DCW's defenses, (3) awarding attorney fees and costs, (4) permitting the jury to award damages for a misrepresentation claim, (5) permitting the jury to award punitive damages, and (6) awarding prejudgment interest for general or punitive damages.

What the Court Decided:

The Court found that circuit court acted within its discretion by issuing the sanction, approving the jury's verdict, and ordering DCW to pay attorney fees and costs. However, the Court found that the circuit court erred by applying prejudgment interest to the entire verdict, and, therefore, reversed that portion of the circuit court's order. On remand, the Court directed the circuit court to assess DCW with Delaney's attorney fees and costs in defending the appeal.

Facts:

In February 2017, Delaney purchased a used vehicle from DCW. After having trouble with the vehicle, Delaney sued DCW alleging breach of express warranty, breach of implied warranty, misrepresentation, breach of the Magnuson-Moss Warranty Act, violation of the West Virginia Consumer Credit Protection Act ("WVCCPA"), revocation of acceptance, breach of the duty of good faith, and unconscionability.

During discovery, Delaney served DCW with discovery requests. DCW never responded resulting in Delaney filing a motion to compel. DCW partially answered the discovery requests shortly before a hearing on Delaney's motion, so Delaney agreed to forgo the hearing in exchange for DCW's fully answer the discovery request. The circuit court entered an order reflecting the parties' agreement. Despite the circuit court's order, DCW never supplemented its answers to the discovery request. Delaney then filed a second motion to compel. DCW neither responded to the motion to compel nor appeared for the hearing on it. The circuit court sanctioned DCW by ordering it to pay Delaney's attorney fees.

After the sanction, DCW supplemented its answers to the discovery request. Delaney asked DCW to clarify its responses. Delaney also sought to schedule the deposition of its managing member and controller. Again, DCW never responded. Delaney then subpoenaed DCW's managing member and controller and certain documents. DCW objected to the document subpoena and the deposition dates and venue. Delaney agreed to reschedule the subpoenaed depositions, but DCW never responded. So, Delaney subpoenaed the witnesses and documents again. When Delaney finally deposed the controller, DCW again objected to the document subpoena, but during the deposition, the controller testified that DCW possessed subpoenaed documents and that DCW's counsel instructed her not to bring it.

On October 25, 2019, Delaney filed a motion to strike DCW's defenses as a sanction for its continued discovery misconduct. Before that motion's scheduled hearing, DCW filed a motion for summary judgment and attached as an exhibit unproduced documents that the circuit court's discovery order required it to produce.

The circuit court denied DCW's motion for summary judgment, granted Delaney's motion

to strike DCW's defenses, and scheduled the case for trial. The circuit court directed verdicts for Delaney on her breach of warranty, Magnuson-Moss Act, revocation of acceptance, WVCCPA, and misrepresentation claims. The circuit court allowed both parties to present evidence for the jury to determine damages. The jury awarded Delaney damages, and the circuit court awarded prejudgment and post-judgment interest on all damages. The circuit court also ordered DCW to pay Delaney attorney fees and other litigation expenses since she prevailed on her Magnuson-Moss Act and related claims.

Holding:

The Court held that the circuit court acted within its discretion by striking DCW's defenses since Delaney acted in good faith and DCW's misconduct required Delaney to expend significant resources to obtain discovery that DCW should have voluntarily disclosed. The Court further held that attorney fees were warranted because Delaney prevailed on her Magnuson-Moss Act claim because she received relief on the merits of her claims when the circuit court directed verdict in her favor at trial and the jury awarded damages for each claim.

How They Voted:

Justice Walker authored the majority opinion. Chief Justice Hutchison, Justice Armstead, and Justice Wooton joined in the unanimous majority opinion. Justice Moats, sitting by temporary assignment, did not participate.

Impact on Business:

This case should serve a warning of the potential severe consequences of discovery misconduct.

Parks v. Mutual Benefits Group
Case No. 20-0065 (Oct. 28, 2021)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to reverse the Circuit Court of Monongalia County's entry of a final order granting judgment as a matter of law on the basis that Petitioner Eric Parks ("Parks") failed to respond to requests for admissions that Respondent Mutual Benefit Group ("MBG") served on Parks in magistrate court.

What the Court Decided:

The Court held that the circuit court erred in granting judgment as a matter of law because the West Virginia Rules of Civil Procedure for Magistrate Courts provide the exclusive means of discovery in magistrate court and do not provide for parties to serve requests for admission. Thus, Parks was denied the opportunity to present evidence before the circuit court in support of his position. The Court, therefore, reversed the circuit court and remanded for further proceedings.

Facts:

On October 23, 2017, Parks and Renee Dillow ("Dillow") were involved in an automobile accident. MBG was Dillow's insurer and paid her for the damage to her vehicle. MBG then sued in magistrate court to recover the money it paid Dillow and for Dillow's deductible.

The Magistrate Court conducted a bench trial and found in favor of MBG. Parks appealed to circuit court, which resulted in a trial de novo before the circuit court. Following the close of MBG's case before the Circuit Court, MBG moved for directed verdict on the grounds that Parks did not respond to requests for admission that were served in magistrate court. Parks objected to the circuit court entering judgment because magistrate court has very limited discovery. Nonetheless, the circuit court agreed with MBG, deemed the requests admitted, and granted MBG's motion for judgment as a matter of law.

Holding:

The Court held that "[t]he plain language of Rule 13 of the Rules of Civil Procedure for the Magistrate Courts of West Virginia provides the exclusive methods of discovery in West Virginia's magistrate courts. Requests for admission are not a proper form of discovery in magistrate courts."

How They Voted:

Justice Armstead authored the majority opinion. Chief Justice Jenkins, Justice Walker, Justice Hutchison, and Justice Wooton joined in the unanimous majority opinion.

Impact on Business:

Read the rules. Know the rules.

SER 3C LLC, and Justin Journay v. The Honorable Eric H. O'Briant, et al.
Case No. 21-0441 (June 14, 2022)

What the Court was Asked to Decide:

This case involves a business dispute rooted in a contract between 3C LLC and Tri-State Wholesale, Inc. In 2020, Tri-State Wholesale, Inc. filed a complaint against 3C LLC and its sole member, Justin Journay, in the Circuit Court of Logan County, West Virginia, even though their contract requires any lawsuit to be filed in the Circuit Court of Hamilton County, Indiana. On appeal, the West Virginia Supreme Court was asked to decide whether the circuit court erred by denying 3C LLC's motion to dismiss based on the forum-selection clause.

What the Court Decided:

Facts:

3C LLC ("3C") is a manufacturer of hemp-derived vaping cartridges, and Tri-State Wholesale, Inc. ("Tri-State") is its distributor. The two entities entered into a contract, but the business arrangement quickly deteriorated, and in October of 2020, Tri-State filed suit against 3C and its sole member, Justin Journay, in the Circuit Court of Logan County, West Virginia. In response, 3C filed suit against Tri-State in the Circuit Court of Hamilton County Indiana, adhering to the contract's forum-selection clause.

In the West Virginia action, Tri-State claimed that it expended considerable time and money to establish a network for 3C's products in West Virginia and Kentucky. However, in August of 2020, the DEA issued an interim final rule that called into question whether it was legal to sell their products. 3C then posted a notice to its website stating that the DEA made the sale of its product illegal. Tri-State claimed that this notice made the sale of the product financially infeasible. Furthermore, Tri-State alleged that 3C did not believe the potential illegality, but issued the notice on its website in an effort to prevent Tri-State from being able to distribute the product, essentially, creating a scheme to defraud.

3C moved to dismiss Tri-State's case with prejudice, contending that Tri-State failed to comply with the dispute resolution provision and forum-selection clause of the contract. In response, Tri-State argued that the forum-selection clause was invalid for reasons of fraud and overreaching, and that its enforcement would be unreasonable and unjust. After a hearing, the Circuit Court of Logan County denied the motion to dismiss, and concluded that in taking the fraud allegations as true, enforcement of the contract provisions—including the forum-selection clause—would be unreasonable and unjust. 3C and Justin Journay petitioned the Court requesting that it enter a writ of prohibition preventing the circuit court from continuing any further proceedings.

The Court was asked to determine whether the circuit court's order, denying the motion to dismiss, was clearly erroneous. To begin its analysis, the Court examined this State's law on forum-selection clauses. The Court noted that in Caperton v. A.T. Massey Coal Company, 225 W. Va. 126, 690 S.E.2d 322 (2009), this Court devised a four-part inquiry for determining whether to dismiss a claim based on a forum-selection clause. Based on a review of the circuit court's order, the Court determined that the circuit court failed to examine the fourth Caperton factor: whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing the enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. While the forum-selection clause is presumptively enforceable, the main inquiry in front of the Court was whether Tri-State could overcome its burden to prevent enforcement of the clause.

The Court concluded that the circuit court failed to properly examine the four-part Caperton test, and held, in a new syllabus point that "[a] forum-selection clause may be found unreasonable and unjust if (1) the complaining party will for all practical purposes be deprived of a day in court because of the inconvenience or unfairness of the selected forum, (2) the chosen forum may deprive the plaintiff of a remedy, or (3) its enforcement would contravene a strong public policy of the forum state." Additionally, the Court also held that "[i]n order to rebut the presumption of enforceability of a forum-selection clause on the ground of fraud, the fraud alleged must be specific to the forum-selection clause itself. General allegations of fraud with respect to the inducement of the contract as a whole are insufficient to invalidate its forum-selection clause."

Holding:

The Court granted the writ of prohibition and remanded the case to the circuit court to determine whether Tri-State can rebut the presumption of enforceability of the contract's forum-selection clause.

How They Voted:

Justice Walker authored the majority opinion. Chief Justice Hutchison, Justice Armstead, and Justice Wooton joined in the majority opinion. Justice Bunn did not participate in the decision of the Court.

Impact on Business:

This decision clarifies West Virginia's stance on the enforceability of forum-selection clauses. While the ultimate decision on the enforceability of the clause in this case is unknown (as it was remanded to the circuit court), this opinion does give future litigants guidance. No longer can litigants attempt to use veiled allegations of fraud to invalidate mutually agreed upon forum-selections clauses. Parties have the freedom to contract as they see fit. To overcome the presumption of enforceability on the ground of fraud, a party has to allege fraud specific to the forum-selection clause itself.

St. Paul Fire & Marine Ins. Co. v. Amerisourcebergen Drug Corp.
Case No. 21-0036 (Nov. 15, 2021)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to consider whether the Circuit Court of Boone County erred in issuing an anti-suit injunction precluding the prosecution of collateral litigation in another state.

What the Court Decided:

The Court affirmed the circuit court's power to enter an order precluding a party from instituting or prosecuting collateral litigation in another state. However, the Court reversed the circuit court and remanded the case to permit the circuit court to reconsider the scope of its order because anti-suit injunctions must be narrowly tailored to protect the circuit court's authority while respecting the other state court.

Facts:

Plaintiff AmerisourceBergen Drug Corporation ("ABDC") is a wholesale distributor of prescription opioid medication in West Virginia and across the United States. In 2012, the West Virginia Attorney General filed a lawsuit seeking to hold ABDC liable for the prescription opioid epidemic in West Virginia. After the Attorney General reached settlements in 2016, several state agencies, counties, cities, hospitals, individuals, and others sued ABDC in West Virginia. Thousands of comparable lawsuits were filed nationwide.

On March 17, 2017, ABDC filed a complaint in Circuit Court against five insurance companies seeking to establish coverage under several insurance policies. The complaint generally alleged that the West Virginia lawsuits raised claims within the scope of policy coverage but that the insurance companies had breached the insurance contracts by refusing to provide defense costs or liability coverage to ABDC. The lawsuit specifically sought a declaratory judgment construing primary, umbrella and excess comprehensive general liability policies issued by Defendants St. Paul Fire & Marine Insurance Company ("St. Paul") and Ace American Insurance Company and Ace Property and Casualty Insurance Company ("Ace American").

On November 5, 2020, St. Paul filed a competing insurance coverage action in California state court against ABDC and its corporate subsidiaries and affiliates. St. Paul's California complaint alleged that St. Paul issued various insurance policies to ABDC, but sought a declaratory judgment that St. Paul had no duty to defend or indemnify ABDC in any opioid lawsuit filed against ABDC nationwide.

On November 19, 2020, ABDC filed a motion with the circuit court seeking an "anti-suit injunction" asking the circuit court to enjoin St. Paul and all other parties from proceeding with the California lawsuit or from instituting any further collateral lawsuits regarding the issues pending before the circuit court. St. Paul contended that no injunction was necessary because the California complaint exempted the West Virginia lawsuit. In response, ABDC argued that the broad language of the California complaint necessarily subsumed and addressed the coverage questions pending in West Virginia.

On January 7, 2021, the circuit court granted ABDC's motion for an anti-suit injunction and prevented all of the parties from pursuing collateral insurance litigation involving ABDC, in California or elsewhere. The circuit court determined that the California action involved the same parties as the West Virginia action, and involved the same policy language contained in the insurance policies at issue in West Virginia.

Holding:

The Court held that "an anti-suit injunction is an order barring parties to an action in this state from instituting or prosecuting substantially similar litigation in another state. Whether the foreign state action is substantially similar involves assessing (1) the similarity of the parties; (2) the similarity of the issues; and (3) the capacity of the action in this state to dispose of the foreign state action." The Court further held that "the principle of comity requires that a circuit court enter an anti-suit injunction cautiously and with restraint."

How They Voted:

Justice Hutchison authored the majority opinion. Chief Justice Jenkins, Justice Walker, Justice Armstead, and Justice Wooton joined in the unanimous majority opinion.

Impact on Business:

West Virginia courts are empowered to issue injunctions to prevent parties from proceeding with parallel or duplicative litigation in a sister state. This can be a powerful tool to avoid the delay, inconvenience, and expense of multi-state litigation over substantially similar claims.

John Keener d/b/a Mountaineer Inspection Services, LLC v. Matthew Irby, State Tax Commissioner of West Virginia
Case No. 20-0488 (Nov. 8, 2021)

What the Court was Asked to Decide:

In this case, a home inspector appealed an order from the circuit court which determined that home inspectors do not meet the professional services tax exemption and that home inspection services are not professional services pursuant to the West Virginia Code of State Rules. On appeal, the Supreme Court was asked to decide (1) whether the Code of State Rules Section 110-15-8.1.1.1 ("Rule 110") creates a mandatory, four-part test; (2) whether a four-year degree is required to be deemed a professional; and (3) whether home inspectors meet the criteria to be classified as professionals.

What the Court Decided:

Facts:

Mountaineer Inspection Services, LLC is a single-member limited liability company in Taylor County, West Virginia. John Keener ("Mr. Keener") is Mountaineer's sole member, and is certified by the West Virginia State Fire Marshal to perform home inspection services. For a period of time between 2011 and 2015, Mr. Keener failed to collect and remit consumers sales and service taxes to the West Virginia Tax Department. Once he received notice from the Tax Department that he owed approximately $36,000, Mr. Keener filed a petition for reassessment with the Office of Tax Appeals ("OTA") and maintained that he was exempt from collecting consumers sale and service taxes because he and his home inspection company provided professional services—an exemption detailed in West Virginia Code Section 11-15-8.

The OTA affirmed the Tax Department's assessment, concluding that home inspection services are not professional services. However, the OTA rejected the notion that the Rule 110 required a four-year degree for an activity to be considered professional, and further concluded that Rule 110 was not a mandatory four-part test, but a balancing test. Both parties appealed to the circuit court. The circuit court concluded that (1) home inspection services do not qualify as professional services; (2) a four-year college degree is required to be classified as a professional service; and (3) Rule 110 is a mandatory four-part test. Mr. Keener appealed the circuit court's decision.

The West Virginia Supreme Court was asked, first and foremost, to determine what is required for services to meet the professional services tax exemption in West Virginia Code Section 11-15-8. The Court first looked at the language of the tax code relevant to this case—it does not define the term "professional services." As such, the Court turned to the legislative regulations pertinent to the consumers sales and service tax. Rule 110 contains a list of services deemed to be "professional" and a list of services deemed to be "nonprofessional." Home inspection services is not in either list. When non-listed services are being considered, the Tax Department "will consider" the criteria expressly authorized by the Legislature in Rule 110: level of education; the nature and extent of nationally recognized standards, the licensing requirements, and the continuing education requirements.

Holding:

Ultimately, the Court concluded that an individual seeking to be classified as a professional—for purposes of the tax exemption in West Virginia Code section 11-15-8—must not satisfy all

four factors set forth in Rule 110; however, the Tax Department *must consider* the four factors at a minimum, and not to the exclusion of additional factors that may arise over time. Additionally, the Court found that the four-year degree requirement was a permissible exercise of the Tax Department's rule-making authority, and as such, upheld that decision of the circuit court. In applying the above to Mr. Keener's case, the Court concluded that home inspection services do not provide professional services for purposes of the professional services tax exemption in West Virginia Code 11-15-8.

How They Voted:

Chief Justice Jenkins authored the majority opinion. Justice Walker and Justice Armstead joined in the majority. Justice Hutchison and Justice Wooton concurred in part and dissented in part and filed a separate opinion. In the concurrence/dissent, Justice Hutchison and Justice Wooton agreed with the majority's determination that home inspection services are not professional services for purposes of the tax exemption, but disagreed that the Tax Department can require a four-year degree to be considered "professional."

Impact on Business:

This decision has the potential to impact businesses—not just those businesses providing home inspection services—but all businesses from a tax perspective. All businesses should be aware of potential tax exemptions and whether or not they provide services that could be considered tax exempt. Knowing whether a tax exemption applies is a smart financial move for all businesses. As evidenced by the Court's decision, be careful to read the language of the applicable statutes and state rules to determine whether your business is eligible to benefit from a tax exemption.

State of West Virginia ex rel. March-Westin Company, Inc. v. Gaujot
Case No. 21-0577 (Mar. 21, 2022)

What the Court was Asked to Decide:

In an action brought by an employee against a non-employee defendant, may that defendant include the employer in a notice of fault filed under West Virginia Code § 55-7-13d without alleging or proving deliberate intent under West Virginia Code § 23-4-2?

What the Court Decided:

Facts:

In *State of West Virginia ex rel. March-Westin Company, Inc v. Gaujot*, No. 21-0577 (W. Va. March 21, 2022), the employee sustained personal injuries during the course of his employment with the Monongalia County Commission when he assisted in work performed by March -Westin Company, a contractor retained by the County Commission to perform the work. After settling his workers' compensation claim, the employee sued March-Westin for negligence. March-Westin filed a notice pursuant to West Virginia Code § 55-7-13d that identified the County Commission as a party that was wholly or partially at fault. The circuit court granted the employee's motion to strike March-Westin's notice because: (1) the County Commission was immune from liability for a deliberate intent claim per West Virginia Code § 29-12A-5, (2) even if not immune under § 29-12A-5, March-Westin had not proven "deliberate intent" under § 23-4-2; and (3) apportioning fault to the County Commission would result in a "double reduction" because of the right of an employer (or its workers' compensation insurer) to recover workers' compensation benefits from any settlement reached with March-Westin. March-Westin then filed a writ of prohibition to prohibit the circuit court from enforcing its order.

Holding:

The West Virginia Supreme Court reversed the circuit court's order for a number of reasons.

First, the Court granted the writ and found that *fault* may be allocated under West Virginia Code § 55-7-13d even when the party identified in the notice of fault may be immune from *liability* for any reason. The Court found that West Virginia Code § 55-7-13d(a)(1) specifically states that "in assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged damages regardless of whether the person was or could have been named as a party to the suit[.]" The Court held that West Virginia Code § 55-7-13d addresses findings of fault -- not liability -- and that the jury could not accurately assess fault of March-Westin, the named party, without also weighing the fault of any non-parties, regardless of whether the non-parties could be held liable.

Second, the Court determined that March-Westin did not have to prove "deliberate intent" by the County Commission in order to establish the County Commission's fault under § 55-7-13d. Specifically, the Court held that a party must simply establish that the employer (or any immune entity) breached a legal duty of some kind that proximately caused the employee's injury or death:

> Accordingly, we hold that when a defendant seeks to have fault assessed to a nonparty employer pursuant to West Virginia Code § 55-7-13d (eff. 2016), the defendant need not show that the nonparty employer's fault would satisfy the "deliberate intention" standard contained in West Virginia Code § 23-4-2 (eff. 2015). It is sufficient, rather, for the defendant to show that the nonparty employer's act or omission was a proximate cause of the

> employee's injury or death and was a breach of a legal duty of some kind. . . . Such a showing allows the defendant to present evidence as to the non-party's degree of fault in order to offset the defendant's degree of fault.

In reaching this conclusion, the Court again emphasized that § 55-7-13 addresses fault, which is distinctly different from whether a party may be held liable as a result of that fault.

Finally, the Court found the language in § 55-7-13 to be clear and unambiguous; hence, if application of § 55-7-13 resulted in some kind of "double reduction" or other unintended consequence, that was for the Legislature to address. The role of the Court is to apply the clear and unambiguous language of the statute.

How They Voted:

Justice Armstead authored the majority opinion. Justice Walker and Justice Wooton joined in the majority opinion. Chief Justice Hutchison concurred in part and dissented in part, and filed a separate opinion. Justice Moats, sitting by temporary assignment, did not participate in the decision of this case.

Impact on Business:

This decision will benefit business by allowing a defendant to file a notice of fault under § 55-7-13 against all at-fault parties, regardless of whether an at-fault party may actually be liability or not. This decision ensures that the liability scheme adopted in West Virginia remains intact, such that a party found liable to a plaintiff should only pay damages that are proportionate to that party's faults.

WEST VIRGINIA CHAMBER

1624 Kanawha Blvd. East • Charleston, WV 25311
Phone: 304.342.1115 • Fax: 304.342.1130

wvchamber.com