CourtWatch

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

2023

THE IMPACT OF THE WEST VIRGINIA SUPREME COURT OF APPEALS ON OUR STATE'S ECONOMY

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 2022 and Spring 2023 Terms of Court and present this report on the impact of those Court decisions on our state's economy to Chamber members.

DISCLAIMER: ***The information in this document is not legal advice. This document was prepared by members of the West Virginia Chamber of Commerce, and it is intended to provide general information regarding recent decisions of the West Virginia Supreme Court of Appeals. As with all guides and documents prepared by the West Virginia Chamber of Commerce, if you have any legal questions, please seek the assistance of legal counsel.***

The West Virginia Chamber of Commerce
CourtWatch Legal Review Team 2023

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Ford Motor Credit Co. v. Ronald Miller
Case No. 22-0007 (May 30, 2023)

What the Court was Asked to Decide:

The West Virginia Supreme Court reviewed the circuit court's decision denying the Petitioner's [Ford Motor Credit Company, LLC ("Ford Credit")] motion to compel arbitration after finding that Ford Credit failed to offer "admissible evidence" in support of its right to arbitration.

What the Court Decided:

The Court reversed the circuit court's decision denying compelled arbitration and remanded the case to the circuit court, reasoning that the circuit court erred in determining that Ford Credit failed to meet the low evidentiary burden required to show the existence of an arbitration agreement.

Facts:

Respondent Ronald Miller bought a Lincoln MKX on credit from Ford Credit. When Mr. Miller failed to make his credit payments, Ford Credit sued him in circuit court for the balance due on the loan. In its complaint, Ford Credit attached a copy of a retail installment contract that Mr. Miller signed which contained an arbitration provision assigning "all" the dealership's "rights, privileges, and remedies" to Ford Credit. When answering the complaint, Mr. Miller asserted a class-action counterclaim for unlawful debt collection practices. Ford Credit responded by moving to compel arbitration and attached the retail installment contract containing the arbitration provision to the motion.

Mr. Miller opposed the motion to compel arbitration, arguing that the arbitration agreement was unconscionable and that Ford Credit waived arbitration by filing suit. Mr. Miller did not deny that he signed the retail installment contract or challenge its authenticity and confirmed that it was an arbitration agreement in an affidavit responding to the motion to compel arbitration. During a hearing on the motion to compel arbitration, Mr. Miller's attorneys argued that Ford Credit failed to prove the assignment and arbitration agreement. Ford Credit responded by arguing that it met its burden of proof to establish the arbitration agreement's existence and filed an additional affidavit authenticating the contract and confirming the assignment from the dealership to Ford Credit.

Mr. Miller moved to strike these filings and the circuit court denied Ford Credit's motion to compel arbitration, holding that Ford Credit "failed to provide evidence that an arbitration agreement exists or was transferred with the right to collect the original debt." Ford Credit appealed this decision.

Holding:

The Court had previously held that a party who seeks to enforce an arbitration agreement must make prima facie showing that an agreement exists; however, that initial burden is a light one. In reversing the circuit court's decision, the Court recognized that Ford Credit met its burden of showing that an arbitration agreement existed between the parties when it attached the signed retail installment contract containing the arbitration agreement and the assignment of all rights from the dealership to Ford Credit to its motion to compel arbitration. Further, the Court reasoned, because Mr. Miller did not contest his signature on the retail installment contract or the contract's authenticity, the existence of an arbitration agreement between the parties was established.

How They Voted:

Justice Armstead authored the majority opinion. Justice Hutchison concurred and filed a separate concurring opinion.

Impact on Business:

This case illustrates the low evidentiary burden that parties need to meet in order to prove that an arbitration agreement exists when attempting to compel arbitration. A party need only file a copy of a valid arbitration agreement as an attachment in order to prove its existence. Further, this case emphasizes the need for parties to challenge the authenticity of arbitration agreements when asking West Virginia courts to deny compelled arbitration. Otherwise, the opposing party can easily establish the existence of an authentic and binding arbitration agreement.

State ex rel. West Virginia-American Water Co. v. Webster
Case No. 22-658 (June 6, 2023)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to grant a writ of prohibition to preclude enforcement of the circuit court's order certifying an "issues" class pursuant to Rule 23(c)(4) of the West Virginia Rules of Civil Procedure.

What the Court Decided:

Facts:

This case involved a water main break and its repair resulting in two separate water service interruptions that caused outages, inadequate water pressure, and boil water advisories affecting approximately 25,000 West Virginia-American Water Company ("WVAWC") customers. Respondents filed a putative class complaint on behalf of the putative class, asserting claims for violation of statute, breach of contract, and common law negligence against WVAWC for its alleged failure to adequately maintain its facilities to prevent and/or mitigate the break.

The circuit court certified an "issues" class to determine "the overarching common issues" as to WVAWC's liability. WVAWC argued that the determination of liability under the causes of action asserted by Respondents required an individualized assessments of the "impact" of the water main break as to each customer, destroying the required elements of commonality, typicality, predominance, and superiority under Rule 23. However, the circuit court found that the specific impact on each class member related to damages and was therefore severable from the underlying issue of whether WVAWC failed to maintain its facilities in such a manner as to comply with its statutory, contractual, and common law obligations to its customers. WVAWC sought a writ of prohibition to preclude the circuit court from enforcing its certification order.

Holding:

The Court held that WVAWC failed to demonstrate that the circuit court's class certification was clearly erroneous and denied the requested writ of prohibition.

As a threshold matter, the Court rejected WVAWC's argument that its liability is dependent upon an assessment of the impact to each customer's service. The Court then turned to the Rule 23(c)(4) issue and Rule 23 requirements. Although the class was certified to determine "liability," the Court characterized the Rule 23(c)(4) issues certified by the circuit court as the "liability issues" of duty and whether WVAWC breached its statutory, contractual, or common law duties to Respondents.

The Court found "no clear error" in the circuit court's finding of commonality, stating that

> all of respondents' claims stem from and require common proof as to WVAWC's alleged actions in failing to prevent or establish mitigation efforts against the water main break and the resultant service disruption—irrespective of the specific degree of any given customer's disruption—thereby establishing commonality as to those issues which it certified for class resolution under Rule 23(c)(4).

Likewise, the Court found "no clear error" in the circuit court's finding of typicality, stating "to the extent that the class members were subject to the same event, precipitated by the same alleged conduct, which they seek to vindicate through the same theories of legal relief, we likewise

find no clear error in the circuit court's conclusion that typicality is present." The Court declined to address superiority finding it unnecessary because it rejected "WVAWC's contention that the certified issue requires assessment of class-wide impact."

How They Voted:

Justice Wooton authored the majority opinion. Justice Armstead dissented and filed a dissenting opinion.

Impact on Business:

The opinion is important for the Court's interpretation of West Virginia Code § 24-3-1 for two significant reasons: 1) The Court approved an "issues" class allowing the jury to decide whether a utility breached a duty with no consideration of whether any customer actually lost service; and 2) The Court acknowledged a highly deferential standard of review to a circuit court's certification rulings which requires "any question as to whether a case should proceed as a class in a doubtful case should be resolved in favor of allowing class certification".

Vaughn Hutchison v. Raytheon Corporation
Case No. 22-ICA-105 (March 20, 2023)

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

Is an employee entitled to workers' compensation for contracting the COVID-19 virus? What if an employee fails to satisfy the six-factor test in West Virginia Code § 23-4-1(f)? In a memorandum decision, the Intermediate Court of Appeals ("the ICA") applied the holding in *PrimeCare Medical of WV, Inc. v. Brittany Foster* (Case No. 22-ICA-138) for the first time, and found that the Board of Review was correct in denying compensability because the claimant failed to satisfy any of the factors in West Virginia Code § 23-4-1(f).

The ICA was asked to determine whether the Workers' Compensation Board of Review's ("BOR") affirmation of the Office of Judge's ("OOJ") order—which determined that claimant's COVID-19 diagnosis was not an occupational disease under the factors of West Virginia Code § 23-4-1(f)—was error.

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

Facts:

Petitioner Vaughn Hutchison ("Mr. Hutchison") was employed by Respondent Raytheon Corporation ("Raytheon") as a builder of aircraft de-icing units at the employer's facility in Union, West Virginia. During the COVID-19 pandemic, Mr. Hutchison and his co-workers were deemed "essential workers" and the Raytheon facility operated at normal capacity. During this time, no social distancing or masking protocols were in place at the facility. Mr. Hutchison alleged that he was exposed to and contracted the COVID-19 virus at his workplace in early October 2020, when he and eight co-workers tested positive. Mr. Hutchison claimed that he interacted with employees in his work area and cafeteria; however, he also admitted that he attended church services multiple times during this time period.

After contracting COVID-19, Mr. Hutchison was hospitalized from October 9, 2020 to October 15, 2020, and was treated for atypical pneumonia from COVID-19 infection and dyspnea. One month later, he returned to the hospital for shortness of breath, viral pneumonitis, and a respiratory tract infection from COVID-19.

On January 13, 2021, Mr. Hutchison completed the West Virginia Workers' Compensation Employees' and Physicians' Report of Occupational Injury or Disease form ("WC-1"). In this form, Mr. Hutchison alleged that he received direct COVID-19 exposure and contracted the virus while at his workplace. On the WC-1, a physician confirmed the COVID-19 diagnosis. On April 16, 2021, the claim administrator issued an order denying Mr. Hutchison's workers' compensation claim based upon a lack of a causal connection between Mr. Hutchison's COVID-19 diagnosis and his work per West Virginia Code § 23-4-1(f), as COVID-19 is a disease of ordinary life to which the public is exposed outside of work. Mr. Hutchison appealed. On April 21, 2022, the OOJ affirmed the order of the claim administrator, concluding that COVID-19 is a disease of life to which the public at large is exposed and Mr. Hutchison's exposure at work did not arise to a level where such exposure could be deemed to have arisen in the course of and resulting from his employment. By final order dated August 19, 2022, the BOR affirmed. Mr. Hutchison appealed this order to the ICA.

On appeal, Mr. Hutchison contended that the BOR erred in finding that his claim was non-compensable. Mr. Hutchison argued that a COVID-19 outbreak occurred at his work, that he was not exposed to this hazard outside of his employment, and that his exposure was incidental

to the character of his work due to having to be around other employees who tested positive for COVID-19.

In rendering its decision, the ICA relied on its recent holding in *PrimeCare Medical of WV, Inc. v. Brittany Foster* (Case No. 22-ICA-138): that "any decisions by the BOR addressing West Virginia Code § 23-4-1(f) must discuss in detail each of the six factors and address whether the claimant has satisfied her or her burden to prove the presence of each factor."

In the case sub judice, the ICA found that Mr. Hutchison failed to satisfy any of the six factors. The BOR's order correctly concluded that Mr. Hutchison's exposure at work did not rise to a level which could be deemed to have arisen in the course of and resulting from his employment. Furthermore, the BOR determined that even if it were to concede factors one, two, and three, that Mr. Hutchison could not satisfy the remaining factors.

Holding:

The ICA concluded that the BOR was not clearly wrong in finding that Mr. Hutchison failed to meet his burden of satisfying the six factors in West Virginia Code §23-4-1(f) and therefore, in accordance with *PrimeCare Medical of WV, Inc. v. Brittany Foster* (Case No. 22-ICA-138), the order of the BOR was affirmed.

How They Voted:

This memorandum decision was concurred in by Chief Judge Greear, Judge Scarr, and Judge Lorensen.

Impact on Business:

This case is the first case to apply the holding in *PrimeCare Medical of WV, Inc. v. Brittany Foster* (Case No. 22-ICA-138) that claim administrators and the BOR must be meticulous in analyzing COVID-19 claims (and that these analyses must be in accord with the six-factor test outlined in West Virginia Code § 23-4-1(f)). As the court system in West Virginia navigates COVID-19 compensability, insurance companies and employers alike should pay close attention to how the Court handles future cases. Depending on how future cases are decided, COVID-19 compensability has the potential to have a significant impact on insurance premiums, labor and employment litigation, and workplace policies and procedures.

PrimeCare Medical of WV, Inc. v. Brittany Foster
Case No. 22-ICA-138 (March 6, 2023)

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

Is an employee entitled to workers' compensation for contracting the COVID-19 virus? In a unanimous 3-0 decision, the Intermediate Court of Appeals ("the ICA") found that because the Board of Review's order failed to include an analysis under West Virginia Code § 23-4-1(f), the order would be vacated and remanded with directions to conduct the aforementioned analysis.

The ICA was asked to determine whether the Workers' Compensation Board of Review's ("BOR") reversal of the claim administrator's order and finding an employee's COVID-19 compensation claim compensable and awarding her temporary total disability benefits—was error.

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

Facts:

Respondent Brittany Foster ("Ms. Foster") was employed by Petitioner PrimeCare as the Health Services Administrator at the Southern Regional Jail in Raleigh County, West Virginia. During the COVID-19 pandemic—from July 27, 2020 to July 31, 2020—Ms. Foster administered COVID-19 tests to inmates and staff in the medical unit of the jail. When performing the tests, Ms. Foster wore full personal protective equipment, including an N95 mask. On July 30, 2020, Ms. Foster attended a management staff meeting. On August 3, 2020, PrimeCare sent all of the meeting attendees home to quarantine due to a number of staff members testing positive for the virus. Ms. Foster was to be quarantined due to possible virus exposure; however, during this time period, Ms. Foster engaged in several non-work related activities including a trip to a drive-through zoo with multiple family members, and a trip to the emergency room. On August 4, 2020, Ms. Foster had a negative COVID-19 test at Summers County Appalachian Regional Healthcare Hospital. On August 11, 2020, Ms. Foster took a second test, which came back as positive for the COVID-19 virus. From August 11, 2020 to August 24, 2020, Ms. Foster was hospitalized for COVID-related pneumonia. Her medical records show that she had a history of several ailments: morbid obesity, recurrent bronchitis, and sinus tachycardia, among others.

On September 22, 2020, Ms. Foster completed the West Virginia Workers' Compensation Employees' and Physicians' Report of Occupational Injury or Disease form ("WC-1"). In this form, Ms. Foster alleged that she received direct COVID-19 exposure while at a work staff meeting on July 30, 2020. On the WC-1, a physician diagnosed Ms. Foster with COVID-19, but answered "N/A" on whether the condition was a direct result of employment. One month later, Ms. Foster completed a second WC-1. On this form, a different physician answered "non-occupational condition" as to whether the condition was a direct result of employment. In March of 2022, the claim administrator denied Ms. Foster's claim for COVID-19. This order was appealed.

During an independent medical examination, it was determined that Ms. Foster's contraction of COVID-19 was an "occupational disease." However, during a subsequent deposition, the physician acknowledged that no medical or scientific test was available to determine the exact source of Ms. Foster's COVID-19 infection. On April 14, 2022, another physician issued a medical review in which he opined that Ms. Foster's COVID-19 infection was not an occupational disease. He noted that she recovered very quickly (based on his review of her pulmonary test results), and opined that any current pulmonary issues were related to conditions that pre-dated her COVID-19 diagnosis.

On August 29, 2022, the BOR reversed the claim administrator and held that Ms. Foster's workers' compensation claim for COVID-19 was compensable. She was awarded temporary total disability benefits. PrimeCare appealed. On appeal to the ICA, PrimeCare asserted that the BOR committed clear legal error in its determination that Ms. Foster's diagnosis of COVID-19 was

causally related to her employment at PrimeCare. PrimeCare argued that COVID-19 is a communicable disease of ordinary life and, thus, is not compensable under workers' compensation.

To properly decide whether the BOR erred in finding Ms. Foster's claim compensable, the ICA first examined the "COVID-19 Job Protection Act," codified at West Virginia Code § 55-19-6. The ICA noted, that while West Virginia Code § 55-19-6 allows for COVID-19 workers' compensation compensability, it does not create a rebuttable presumption of such. In other words, because there is no rebuttable presumption, the determination of COVID-19 compensability is an issue to be determined on a case-by-case basis.

The ICA then examined West Virginia Code § 23-4-1(f), which provides that no ordinary disease of life (to which the general public is exposed outside of employment) is compensable unless it follow as an incident of occupational disease. To determine whether it follows as an incident of occupational disease, a six-factor analysis must be completed, and all factors must be met. West Virginia Code § 23-4-1(f), in part, provides:

> [A] disease is considered to have been incurred in the course of or to have resulted from the employment only if it is apparent to the rational mind, upon consideration of all the circumstances: (1) that there is a direct causal connection between the conditions under which work is performed and the occupational disease; (2) that it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment; (3) that it can be fairly traced to the employment as the proximate cause; (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment; (5) that it is incidental to the character of the business and not independent of the relation of employer and employee; and (6) that it appears to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction[.]

The ICA reviewed the BOR's order and found that it was insufficient in that it failed to discuss each of the six factors outlined in West Virginia Code § 23-4-1(f).

Holding:

The ICA held that "any decisions by the BOR addressing West Virginia Code § 23-4-1(f) must discuss in detail each of the six factors and address whether the claimant has satisfied her or her burden to prove the presence of each factor." Because the BOR did not complete such an analysis with respect to Ms. Foster's underlying claim, the ICA vacated the ordered and remanded the matter for a thorough analysis so that the compensability of Ms. Foster's COVID-19 claim can be determined.

How They Voted:

Chief Judge Greear authored the unanimous majority opinion.

Impact on Business:

This case is the first case to establish what is required for COVID-19 workers' compensation compensability determinations in West Virginia. The ICA made it clear in its decision, that claim administrators and the BOR must be meticulous in analyzing COVID-19 claims (and that these analyses must be in accord with the six-factor test outlined in West Virginia Code § 23-4-1(f)). As the court system in West Virginia navigates COVID-19 compensability, insurance companies and employers alike should pay close attention to how the Court handles future cases. Depending on how future cases are decided, COVID-19 compensability has the potential to have a significant impact on insurance premiums, labor and employment litigation, and workplace policies and procedures.

Craig Blair, President of the West Virginia Senate et al. v. Brunett and McCloud
Case No. 22-070 (June 8, 2023)

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

The West Virginia Supreme Court was asked to reverse a preliminary injunction entered by the Circuit Court of Kanawha County that held that the Charter School Act ("the Act") was invalid under the state constitution.

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

The Court held that the Respondent Teachers lacked standing to seek relief from the Government Petitioners and that the injunction against the Government could not bind the nonparty West Virginia Professional Charter School Board. The Court did not reach the issue of whether the Act violated the state constitution.

Facts:

As stated in the Opinion, in 2021, the Legislature passed House Bill 2012 ("HB 2012") which created the West Virginia Professional Charter School Board ("PCSB"). The PCSB is tasked with authorizing and approving public charter schools. Respondents and public-school teachers Sam Brunett and Robert McCloud ("Respondent Teachers") filed a lawsuit in the Circuit Court of Kanawha County seeking a writ of mandamus and declaratory relief, or, alternatively, injunctive relief seeking to prevent the creation of public charter schools without a majority vote of the citizens of the county or counties in which the charter schools would be located. Respondent Teachers did not sue the PCSB. Instead, they named three defendants: Governor James C. Justice, II ("Governor Justice"), House Speaker Roger Hanshaw, and Senate President Craig Blair (collectively referred to as "Government Petitioners").

The Respondent Teachers filed a motion for a preliminary injunction in the circuit court seeking to enjoin the Government Petitioners from creating charter schools absent a vote of county residents. The circuit court granted Respondent Teachers' motion for a preliminary injunction and denied the Government Petitioners' motion to dismiss. The preliminary injunction enjoined Governor Justice and his executive officers, agents, employees, and any person acting in concert or participation with them from further enforcement of [HB] 2012 in the creation of PCSB-authorized charter schools." The Government Petitioners then appealed the case to the West Virginia Supreme Court.

Holding:

The Court held that Respondent Teachers' alleged injury of being deprived of their constitutional right to vote was not causally connected to Governor's actions, as required for standing. Further, the Court held that the Respondent Teachers' alleged injury was not redressable through injunctive relief against the Government Petitioners, as also required for standing, and that preliminary injunction issued against the Government Petitioners by trial court did not bind the PCSB.

How They Voted:

Justice Armstead wrote the opinion for a unanimous court. It was joined by Chief Justice Walker, Justice Hutchison, Justice Wooton, and Justice Bunn.

Impact on Business:

The decision confirms that the Court will rigorously enforce the rules of standing, which ensure that only the affected plaintiffs and proper defendants are made parties to disputes.

State ex rel. W. Va. Secondary School Activities Comm'n v. Cuomo
Case No. 22-0261 (November 1, 2022)

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

The West Virginia Supreme Court reviewed the circuit court's order granting a preliminary injunction against the West Virginia Secondary School Activities Commission ("WVSSAC") on the basis that the WVSSAC applied the WVSSAC's Waiver Rule, W. Va. C.S.R. § 127-2-2 (2021), in an arbitrary and capricious manner. The circuit court also found that the WVSSAC's Residence-Transfer Rule, W. Va. C.S.R. § 127-2-7.2.a (2021), was facially unconstitutional and violated equal protection. The WVSSAC sought a writ of prohibition prohibiting the enforcement of the injunction.

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

The Court granted the writ, reasoning that the circuit court lacked jurisdiction to review the as-applied challenge to the WVSSAC's Waiver Rule and that, while the circuit court had jurisdiction to determine whether the Residence-Transfer Rule is facially unconstitutional, the circuit court erred in finding it unconstitutional on its face.

Facts:

A.B. was a tenth grader at John Marshall High School for the academic year 2020-2021. She decided to transfer to Wheeling Central Catholic High School and enrolled there in August of 2021, while staying at the same residence. A.B. wanted to try out for the softball and basketball teams at her new school, but she learned that the WVSSAC's Residence-Transfer Rule prevented her from doing so. The Residence-Transfer Rule prohibits transfer students from playing in a sport for 365 days from the date of enrollment without a bona fide change of residence. WVSSAC's Waiver Rule allowed its Board of Directors to waive the Residence-Transfer Rule if "it determines the rule fails to accomplish the purpose for which it is intended or when the rule causes extreme and undue hardship upon the student." The WVSSAC Board explained that the purpose of the rule was to give students time to settle in and focus on academics without the distraction of athletics.

Heather B., A.B.'s legal guardian, sought a waiver from the Board which was denied because the Board found that she did not show undue hardship. Heather, on A.B.'s behalf, sought an injunction claiming the decision under the Waiver Rule was arbitrary and capricious and denied A.B. equal protection of the law. She also alleged that the Residence-Transfer Rule was facially unconstitutional and violated equal protection. The circuit court granted the injunction. The WVSSAC appealed, seeking a writ of prohibition preventing enforcement of the injunction.

Holding:

In reversing the circuit court's order, the Court recognized that the application of WVSSAC rules is not subject to judicial review. Specifically, the application of the Waiver Rule could not be reviewed by the courts because WVSSAC's enforcement of its own rules is beyond judicial jurisdiction. However, judicial review is available when a plaintiff claims that a WVSSAC rule is facially unconstitutional, so the Residence-Transfer rule was subject to review. Because students are not a suspect or quasi-suspect class, the rational basis test applies to the Residence-Transfer Rule.

The Court held that the Residence-Transfer rule met the minimal constitutional threshold necessary to pass the rational-basis test because it found that promoting academics over athletics was a legitimate state purpose. The Court also found that the Residence-Transfer rule did not violate equal protection because states do not violate equal protection just because the classifications of non-suspect or quasi-suspect classes are imperfect. The Court reasoned that this is acceptable

because legislative bodies should be given wide latitude to draw their own lines of classification and judicial intervention should be kept to a minimum regarding school policies. Therefore, the WVSSAC was entitled to a writ of prohibition because West Virginia courts are prohibited from reviewing the application of WVSSAC rules and because the Residence-Transfer rule was neither arbitrary and capricious nor a violation of equal protection.

How They Voted:

Chief Justice Hutchison authored the majority opinion. Justice Wooton deemed himself disqualified and did not participate in the decision of this case. Judge Courrier sat by temporary assignment.

Impact on Business:

This case illustrates the wide latitude given to schools in the application of academic policies. In particular, West Virginia courts generally have a hands-off approach when it comes to the application of administrative rules in high schools. Additionally, the WVSSAC rules themselves cannot be challenged unless they create a constitutional issue and, even then, unless the policy affects a suspect or quasi-suspect class, the rational basis test provides a very low bar for academic policies to meet in order to be valid. (NOTE: This case's ruling will be affected dramatically with the passage of HB 2820, signed by the Governor and effective on June 9, 2023. This new law allows all students to transfer between schools one time without penalty.)

State of West Virginia, Katie Switzer et al. v. Travis Beaver, et al.
Case No. 22-616 (November 17, 2022)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to reverse the order issued by the Circuit Court of Kanawha County that permanently enjoined the Hope Scholarship Act as invalid under the state constitution.

What the Court Decided:

The Court held that the Circuit Court abused its discretion by enjoining the enforcement of the Act because the Act did not facially violate the "free schools" clause contained in the state constitution. The Court therefore reversed and remanded for entry of judgment in favor of the Petitioners.

Facts:

Respondents, parents of public-school students, filed suit against the State, the State Board of Education, and others, seeking declaratory and injunctive relief based on constitutional challenges challenging the constitutionality of the Hope Scholarship Act ("the Act"). The Act created the Hope Scholarship Program under which public funds would be placed in student education-savings accounts to be used for specifically enumerated educational programs and services, including private schools. The Respondents argued that the Act violated the "free schools" clause in the state constitution.

In response, Petitioners, parents of private-school students, moved to intervene, and argued that the Act was constitutional. At the circuit court, one of the main issues addressed was the Hope Scholarship's funding sources and mechanism. Respondents asserted that the Act would decrease enrollment in public schools by incentivizing students "to either not enter public education or to actually leave public education." Because the "majority of the factors" that comprise the State's public education funding formula ("school funding formula") are based on public school enrollment, Respondents alleged that a decrease in enrollment would result in a decrease in public school funding.

While Respondents' motion only sought a preliminary injunction, the circuit court concluded the hearing by announcing that it was "preliminarily and permanently enjoining" the State from implementing the Act based on its finding that the Act was unconstitutional. In a subsequent order, the circuit court put forth five main reasons for finding that the Act was unconstitutional.

Petitioners and the State filed motions to stay the circuit court's order with the Intermediate Court of Appeals ("ICA"). After the motions to stay were denied, Petitioners and the State sought a stay from the West Virginia Supreme Court. Rather than grant the stay, the Court obtained jurisdiction from the ICA and ordered expedited briefing.

Once at the Supreme Court, the Court addressed each of the five main constitutional arguments raised by the parties: 1) whether the "free schools" clause contained in article XII, section 1 of the West Virginia Constitution only permits the Legislature to fund free schools; 2) whether the Act impinges on a child's fundamental right to an education without meeting strict scrutiny; 3) whether the Act improperly directs public funds to be spent on non-public education; 4) whether the Act usurps the West Virginia Board of Education's authority; and 5) whether the Act is a "special law."

Holding:

The Court held that the circuit court erred by finding the Act unconstitutional, and it abused its discretion by permanently enjoining the State from implementing the Act. Moreover, the Act did not facially violate the "free schools" cause because that clause does not require the State to fund and maintain *only* a thorough and efficient system of free schools. The state constitution permits the legislature to enact educational initiatives *in addition* to its duty to provide for a thorough and efficient system of free schools.

How They Voted:

Justice Armstead authored the majority opinion, which was joined by Justices Walker, Wooton, and Bunn. Justice Wooton filed a concurring opinion. Then-Chief Justice Hutchison filed a dissenting opinion.

Impact on Business:

This decision confirms that the legislature has broad flexibility in establishing additional forms of educational choice for students in West Virginia.

Chad Edwards and Matthew Maxwell v. Rhonda Stark, Individually and as Administratrix of the Estate of Robert E. Stark
Case No. 21-0589 (November 17, 2022)

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

Does an employer's workers' compensation immunity under W. Va, Code § 23-2-6 extend to an employer's officer, manager, or employee under § 23-2-6a when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intent per § 23-4-2(d)(2)(A)?

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

The West Virginia Supreme Court found that the City of Shinnston's workers' compensation immunity extended to its employees, Chad Edwards and Matthew Maxwell, who were supervisors of Robert E. Stark, deceased, for all claims other than a so-called "heightened deliberate intent" claim under § 23-4-2(d)(2)(A).

The Court also found, however, that Starks' Estate failed to adequately plead a claim for "heightened deliberate intent" under § 23-4-2(d)(2)(A).

Facts:

Robert Stark died in the course of his job as a public works employee for the City of Shinnston when a trench collapsed on him. Rhonda Stark, his wife, received workers' compensation dependent's benefits.

Mrs. Stark also filed a civil action against Maxwell and Edwards in their individual capacities as Public Works Supervisor and City Manager. The Complaint alleged that Maxwell and Edwards were aware of the instability of the trench in which her husband worked and failed to undertake adequate safety measures to avoid the sides of the trench from collapsing. The Complaint alleged that each were " liable for his death based on theories of deliberate intent under West Virginia Code § 23-4-2(d)(2)(A) (2015) and the tort of intentional and reckless conduct."

Holding:

The Court first held that the immunity of the City of Shinnston under W. Va. Code § 23-2-6, as Starks' employer, extended to Maxwell and Edwards as employees of the City per § 23-2-6a. An exception to this immunity, however, exists for claims that assert a "heightened deliberate intent" claim under § 23-4-2(d)(2)(A). This immunity extended to the tort claim for intentional and reckless conduct.

The Court emphasized that, under a "heightened deliberate intent" claim, liability must be proven by "showing that the defendant deliberately formed the intent to cause the specific result of injury or death." This standard is only met with evidence that "an employer [or individual] acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury."

Finally, the Court then determined that the Complaint failed to allege sufficient facts to assert a claim for "heightened deliberate intent" against either Maxwell or Edwards. In doing so, the Court stated:

> We choose to place substance over form; "a plaintiff may not 'fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint.'" While "we counsel lower courts to rarely grant [12(b)(6)] motions," we have also encouraged them to do so if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the complaint." We have reiterated that "a complaint

must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist."

As a result, the Court held that the claims should be dismissed under W. Va. R. Civ. P. 12(b)(6).

How They Voted:

Justice Walker delivered the unanimous opinion of the Court.

Impact on Business:

First, this decision confirms that the workers' compensation immunity for employers is extended to co-employees, supervisors, officers, etc., per § 23-2-6a, except for "heightened deliberate intent" claims.

Second, this decision indicates that the Court may be elevating the allegations pled in a complaint to survive a motion to dismiss under Rule 12(b)(6).

Finally, this decision reiterates the need for employers to have adequate workers' compensation insurance in place so that they and their employees and management are shielded from personal liability for deliberate intent claims under the "lower" five-part test under § 23-4-2(d)(2)(B). This immunity can only be defeated by a subjective intent to cause harm to another person, which is a rarity in the normal course of business.

Chandra Balderson v. Lincare, Inc.
Case No. 21-1765 (4th. Cir. March 15, 2023)

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

Did Lincare, the employer, discriminate against Chandra Balderson, a female employee, when it terminated her employment for violating the employers code of conduct when an allegedly "comparable" male employee was given a final written warning for violating the same code of conduct? And, did the District Court correctly determine that the male employee was "comparable" to Balderson such that Lincare engaged in disparate treatment?

Specifically, did the District Court correctly apply the burdens of proof for Balderson's claim under the West Virginia Human Rights Act, W. Va. Code § 5-11-9 (the "Act"), and did the District Court support its legal conclusions with factual findings to support a claim for gender discrimination under the Act?

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

The United States Circuit Court of Appeals for the Fourth Circuit held that Balderson failed to present any evidence, explicit or implied, that Lincare's decision to terminate her employment was the result of discrimination based on Balderson's gender.

In addition, the Court held that the factual record did not support the District Court's finding that the male employee was truly a "comparator" for purposes of a discrimination analysis because the employees occupied significantly different positions with different job duties, and they engaged in different conduct.

Facts:

Balderson was one of Lincare's most successful sales representatives for the sale of respiratory-therapy products and services. In that position, she worked with medical care providers to "provide guidance as to the information necessary for their patients to obtain coverage for the devices from their insurance companies or from federal programs such as Medicare."

During an internal audit, Lincare discovered that Balderson had violated its Corporate Health Care Law Compliance Program and Code of Conduct, which included specific requirements for ethical employee conduct. Specifically, Balderson used an improper technique of "leading" a physician to include certain language in a patient's medical notes to ensure that insurance or a government-sponsored program would cover the cost of the Lincare product or service sold by Balderson. Lincare's investigation revealed 19 instances in which a physician used a handwritten progress note, signed and dated by the physician, that had actually been written by Balderson.

Jennifer Pederson, who was Lincare's Chief Compliance Officer, led Lincare's investigation into the source of "the handwritten cloned notes found in patient records that had been submitted to Lincare" for the purchases of ventilators. She was assisted by Sandra Moreau, Lincare's Healthcare Services Manager, and Sheila Kalteux, Lincare's Senior Corporation Counsel. During the investigation, they discovered that Chad Brady, Balderson's supervisor, had sent a document entitled "Good Chart Notes Examples" to physicians that provided three (3) "examples" of statements "sufficient to support a ventilator order[.]" Following the investigation, Pederson made the decision to (1) terminate Balderson's employment based upon her use of the template progress notes, and (2) give Brady a "final written warning" because the document he provided to physicians represented inappropriate "coaching" or "leading" of physicians.

Balderson filed a claim for gender discrimination under the Act, and following a bench trial, the District Court found that (1) because Brady was a "comparator" of Balderson and had

been given a less severe punishment (i.e., disparate treatment), such was proof that (2) Lincare discriminated against Balderson on the basis of her gender. Lincare appealed the judgment order.

Holding:

The Court reversed the District Court.

First, the Court examined the burden shifting paradigm for discrimination cases under the Act, which mirrors Federal law under Title VII cases. Notably, the Court found that the facts presented represented a unique situation where (1) the employee could establish a prima facie case of discrimination (i.e., (a) she was a female, and so a member of a protected group; (b) she was discharged from her employment; and (c) a male employee (Brady) was disciplined less severely than her, even though "both engaged in similar conduct); (2) the finder of fact could reject the employer's legitimate, non-discriminatory reason for its decision as "prextual"; yet (3) the employee fails to present enough evidence to meet her burden of gender discrimination.

Second, the Court found that the "sole" reason for the District Court's finding of discrimination was that Lincare treated Balderson and Brady differently, and since Balderson was a female, the "disparate treatment between Ms. Balderson and Mr. Brady was a result of discriminatory animus." In rejecting this reasoning, the Court noted that (1) Balderson testified that during her employment, and even during the investigation that resulted in her termination, "[n]o one ever made any gender-based comments directed at [her]"; and (2) the person who made the decision to terminate her employment, and give a less severe sanction to Brady, was female. The Court emphasized that Balderson herself acknowledged in her trial testimony that there was nothing "about [Lincare's] conduct that led [her] to believe that they were treating [her] differently because of [her] gender."

Finally, the Court meticulously detailed why the District Court erred in concluding that the circumstances of Balderson and Brady were "nearly indistinguishable." The Court found that there was a major difference in job responsibilities, the nature of their positions, and the conduct that was subject to discipline. As a result, Balderson and Brady were not adequate comparators. Even though the conduct was similar, there were multiple reasons that Balderson was subjected to a harsher penalty, including her repeated violations and her commission being directly tied to her misconduct.

Impact on Business:

This case reflects a fairly unique situation where the District Court, as the finder of fact, explicitly found that the "sole" evidence of discriminatory animus was that the employer treated a "comparator" male employee differently than a female employee. Because the disparate treatment represented the sole evidence of gender discrimination, the Court's decision to find that Brady was not a proper "comparator" of Balderson for purposes of a discrimination analysis made it easy to reverse the District Court's decision.

Practitioners will want to note the Court's emphasis that an employee's establishment of a prima facie claim of discrimination is *not* sufficient to support an ultimate finding that the employer discriminated against an employee: "In other words, it is not enough to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination."

Ransom v. Guardian Rehabilitation Services, Inc.
Case No. 22-0094 (June 13, 2023)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to decide whether the lower court erred in determining that an employer's firearm policy did not violate the West Virginia Business Liability Protection Act (the "Act") and that the employee was not wrongfully discharged.

What the Court Decided:

Facts:

Ransom, an occupational therapist assistant, began working for Guardian in Fairmont, in October 2018. A few weeks later, a coworker reported that Ransom had a visible firearm in his car. Ransom's weapon, an AR-15 rifle, with the muzzle leaning up against the seat and the butt of the gun on the car's floorboard which was partially covered with a jacket and laptop case. The Employer asked Ransom to take the firearm home and return to work. Ransom complied but was fired at end of the workday. Guardian told Ransom that he was being terminated for violating a company policy that stated employees "may not bring any of the following onto the business property: Firearms or weapons of any kind[.]"

Ransom sued Guardian claiming the Company violated §61-7-14(d)(3) of the Act, which provides that an employer may not "condition employment" on "[a]n agreement with an employee" prohibiting him "from keeping a legal firearm locked inside or locked to a motor vehicle in a parking lot when the firearm is kept for lawful purposes, Guardian moved for summary judgment relying on §61-7-14(d)(1), which provides that no owner of real property may prohibit an employee "from possessing any legally owned firearm, when the firearm is: …(B) Out of view; …" and since the gun was not out of view there was no violation of the Act. Ransom argued that the provision of the Act relied upon by Guardian was in conflict with his specific rights granted under §61-7-14(d)(3).

In granting summary judgment to the Employer, the circuit court acknowledged that the provisions of the Act were "in conflict" with each other, however the court concluded that even though Ransom's provision did not include the "out of view" requirement, to find otherwise would obviate Guardian's provision and "lead to an absurd result."

Holding:

On appeal, the Court held that the circuit court erred in concluding the provisions of the Act conflict with each other. Instead, the Court reasoned that the provision relied upon by Guardian deals with actual firearm possession on private property while the provision relied upon by Ransom deals with conditions of employment irrespective of actual possession. Additionally, the Court stated that an employer violates the Act by simply conditioning an employee's or prospective employee's employment on an agreement prohibiting him "from keeping a legal firearm locked inside or locked to a motor vehicle in a parking lot when the firearm is kept for lawful purposes." Thus, the Court reversed and remanded the case back to circuit court.

How They Voted:

Chief Justice Walker authored the majority opinion. Justice Hutchison, Justice Armstead, and Justice Bunn joined in the majority opinion. Justice Wooten dissented.

Impact on Business:

The decision illustrates that businesses must adjust firearm policies for employees. Specifically, if an employer has a firearm policy which prohibits employees from keeping legal firearms locked inside or locked to a motor vehicle in a parking lot when the firearm is kept for legal purposes, then their firearm policy will be in violation of the Act. The important takeaway here is that businesses should look at their current firearm policy to ensure that it is in compliance with the Act.

Speedway LLC v. Deborah L. Jarrett, as the Executrix of the Estate of Kevin M. Jarrett
Case No. 21-0215 (June 8, 2023)

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

The West Virginia Supreme Court stated that the "issue is whether the circuit court erred in concluding that Speedway [the employer] engaged in conduct that created an unreasonable risk of harm to others, including Mr. Jarrett [the decedent], thereby triggering a legal duty on the part of Speedway to prevent Ms. Liggett [Speedway's employee] from driving home after work." Specifically, the Supreme Court noted that "[t]he issue before us is whether . . . Speedway's conduct relating to Ms. Liggett created a foreseeable risk of harm to others that Speedway had a duty to guard against."

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

The Court reversed a jury verdict and held that, under the facts presented, Speedway had no legal duty to prevent an employee from driving home from work after she surreptitiously used illegally obtained prescription drugs before or during her work shift.

Facts:

Brandy Liggett began her employment with Speedway on September 13, 2015, and she received training while working at a Speedway store on September 13, 14, and 15. On September 15, Ms. Liggett worked the 6 a.m. to 2 p.m. shift. During that shift, her manager, Bobby Jo Maguire, and another employee, Jennifer Wells, observed Ms. Liggett nod off to sleep. Specifically, Ms. Maguire observed Ms. Liggett appearing to fall asleep a couple of times while watching training videos. Ms. Maguire sent Ms. Liggett outside, believing that the fresh air would wake her up, but then Ms. Maguire and Ms. Wells observed Ms. Liggett nodding her head and appearing to fall asleep while standing next to a trash can outside. Ms. Wells remarked to Ms. Maguire that "something was going on" and that "something might be wrong with" Ms. Liggett.

Nonetheless, as Ms. Liggett approached the end of her shift, she was asked if she would work an extra hour as Speedway needed another person from 2 p.m. to 3 p.m. because of a call off. Neither Ms. Maguire nor Ms. Wells could stay, so Ms. Liggett volunteered to stay that extra hour.

At 3 p.m., Ms. Liggett left the Speedway and drove to her son's middle school to drop off football equipment. Thereafter, she drove home, but on her way home and about five miles from the school, she crossed the center line and struck a motorcycle, killing the driver, Kevin Jarrett. Following the accident, Ms. Liggett tested positive for amphetamines, benzodiazepine, and suboxone, none of which had been prescribed for her. Ms. Liggett pled guilty to driving under the influence causing death, negligent homicide, and driving left of center.

Holding:

In finding that the Speedway did not owe a duty here, the Court noted that, to have such a duty, Speedway "must have engaged in 'affirmative conduct, thereafter realize[d] or should [have] realize[d] that such conduct … created an unreasonable risk of harm to another[,] including Mr. Jarrett.'"

The Supreme Court reasoned:

> Speedway's conduct of allowing Ms. Liggett to continue working her shift and then work an extra hour past her shift and to leave her unsupervised while watching training videos does not constitute "affirmative conduct" that "created an unreasonable risk of harm to

> another." Rather, the evidence was uncontroverted at trial that Ms. Liggett arrived for her shift while already under the influence of drugs and then took more drugs at work surreptitiously. There was no evidence that anyone at Speedway contributed to her state of impairment from drugs by either providing or condoning her consumption of them. Aside from the three instances where Ms. Liggett was observed falling asleep, she exhibited no signs of impairment such as glassy eyes or slurred speech, and she worked the remainder of her shift (including the hour of overtime) without incident. Following the accident, Ms. Liggett tested positive for various and sundry prescription medications that she had illegally purchased "off the street" and she pled guilty to various crimes related to the accident, including driving under the influence causing death. Further, although respondent argues that Ms. Maguire either knew, or should have known, that Ms. Liggett was too "exhausted" to drive herself home, thereby suggesting that fatigue contributed to the accident, she points to no evidence indicating that fatigue was found to have caused or contributed to the accident. In allowing Ms. Liggett to drive her own vehicle home after her shift, Speedway "did no more than acquiesce in [her] determination to drive [her] own car." Indeed, Ms. Liggett testified that she believed she was capable of driving herself home that day, that there were family members she could have called if she needed a ride, that she had money for a cab, and that she would have refused a ride home had anyone from Speedway offered to drive her. The evidence at trial, when viewed in the light most favorable to respondent, failed to demonstrate that Speedway engaged in affirmative conduct that created an unreasonable risk of harm to the motoring public, including Mr. Jarrett. Therefore, Speedway had no duty to exercise reasonable care by preventing Ms. Liggett from driving.

Notably, the Estate argued that despite Speedway's employees seeing Ms. Liggett fall asleep during the training videos and changing garbage cans, and despite the employees thinking that "something was going on" and that "something might be wrong with" Ms. Liggett, Speedway's supervisor should have either taken her car keys away from her or called either a cab or other family member to take her home. It posited that these "acts of omission" -- i.e., its decisions "not to conduct an investigation of Ms. Liggett's impairment" and "not to fully evaluate [Ms. Liggett] before and after her overtime shift" -- represented "affirmative conduct" for which Speedway could be liable. The Supreme Court rejected this position because the evidence, in its view, "simply did not warrant an investigation or evaluation of Ms. Liggett for drugs and/or fatigue and, thus, a failure to act in this regard did not give rise to a duty on the part of Speedway to protect others by preventing Ms. Liggett from driving home after work."

How They Voted:

Justice Hutchison authored the unanimous majority opinion.

Impact on Business:

The Speedway decision represents a significant win for employers. An adverse decision would have potentially exposed an employer to liability if the employer – and especially front-line supervisors – failed to sufficiently investigate if an employee appeared "off" or just tired at work, and then gets in an accident on the way home from work. This would have put a significant burden on front-line supervisors to do "something" if she observed an employee who is tired or "off" and would have been an ominous extension of an employer's duty of care to the general public.

Still, employers still need to be aware of whether circumstances indicate that an employee is under the influence of a drugs or alcohol, and if circumstances indicate that an employee is under the influence, employers must take affirmative steps to prevent the employee from driving a motor vehicle. In Speedway, for example, had the employee slurred her speech or appeared glassy-eyed, the Supreme Court may have found that such circumstances made it reasonably foreseeable that harm would occur if the employee were permitted to drive herself home. In this way, Speedway represents both a win and a cautionary tale for employers.

Wanda Keener and Katherine Asbury v. Clay County Development Corporation
Case No. 21-0267 (November 3, 2022)

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

The Supreme Court of West Virginia was asked to decide whether "familial status" represents a "protected group" for purposes of an employment discrimination claim under the West Virginia Human Rights Act, W. Va. Code § 5-11-2 (2022) (the "Act").

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

The Court affirmed the circuit court's decision that familial status is not a protected class under the Act, and it cannot be likened to ancestral discrimination solely based upon a familial relationship.

Facts:

Sisters Wanda Keener and Katherine Asbury were longtime employees with the Clay County Development Corporation ("CCDC"). Wanda had worked at the CCDC for 30 years, and Katherine had worked there for 46 years. Their sister, Pamela Taylor, served as the Executive Director of the CCDC.

The Board of the CCDC terminated Pamela from her position as Executive Director after she made a derogatory comment on Facebook towards Michelle Obama, which gained national attention: ""It will be refreshing to have a classy, beautiful, dignified First Lady in the White House [referring to former First Lady Melania Trump]. I'm tired of seeing an Ape in heels [referring to former First Lady Michelle Obama]."

Following the post, the State of West Virginia Bureau of Senior Services and the Appalachian Area Agency on Aging, both of which provided funding to the CCDC, performed an investigation and audit of the CCDC, which discovered numerous issues, including financial misconduct and negligence. As a result, the Board terminated the employment of Wanda and Katherine, the two highest paid employees of the CCDC, whose job duties were absorbed by other employees. They were never replaced.

Wanda and Katherine filed a civil action in which they alleged discriminatory discharge as a result of their familial status and ancestry based upon their sibling relationship with Pamela–meaning that they claimed that they were fired because Pamela was their sister.

Holding:

The Court found that "familial status" did not represent a "protected group" under the Act:

> In the context of employment, familial status is not included among the groups entitled to protection by the Human Rights Act. The petitioners' claim that they were terminated because of their familial status with their sister, Ms. Taylor, is not actionable under the Act because familial status is not a prohibited basis for discrimination in the employment context under the Act and does not fall within the meaning of ancestry as used in the Act.

The Court also noted that ancestorial discrimination cannot be based upon a relationship with one person, but must include an overall relationship with a large social group of people, such as Mexican-Americans, Brazilian-Americans, etc. The Court recognized that ancestral discrimination has never been applied to siblings, and that familial status with a single family member cannot be used to invoke it.

How They Voted:

Justice Wooton authored the majority opinion of the Court, joined by Chief Justice Hutchison, Justice Walker, Justice Bunn, and Judge Hoke (sitting by temporary assignment). Justice Armstead deemed himself disqualified and did not participate in the decision of this case.

Impact on Business:

The Court's decision demonstrated a reluctance to expand the Act's protections beyond the plain language used in statute to describe groups protected by the Act's provisions.

City of Martinsburg v. County Council of Berkeley County
Case No. 21-0579 (October 26, 2022)

What the Court was Asked to Decide:

The West Virginia Supreme Court received an appeal from the Circuit Court of Mineral County, West Virginia. The Supreme Court was asked to examine a dispute between the City of Martinsburg (the "City") and the Berkeley County Council (the "County"). The circuit court has entered an injunction stopping the City from regulating the County's excavation and construction of a parking lot in land the County owned by located within the City's boundaries. The City appealed the injunction to the Supreme Court.

What the Court Decided:

Ultimately, the Supreme Court decided that the dispute on appeal was moot as the County had completed its excavation and construction project prior to justices considering the City's appeal. However, the Supreme Court found that legal questions were raised in the City's appeal involving the dispute that were of great public significance, appear capable of repetition, and could still evade review in the future. Therefore, the Supreme Court wrote that "technical mootness" did not preclude it from still considering the matter. However, review was not proper in this instance because the issues raised were not presented properly.

Facts:

The City operated a municipal separate stormwater sewer system and had a permit under the National Pollution Discharge Elimination System (NPDES) through the DEP. The City had adopted a stormwater management ordinance to regulate stormwater discharges.

The County owned a building located within the City's limits. In January 2021, the County began excavating and reconstructing the building's parking lot. After a City inspection, the it sent notice to the County that it had violated the stormwater management ordinance by failing to obtain a permit or submit plans for the excavation to the City. The City threatened that it would obtain a stop work order regarding the County's excavation. The City also threatened that it might pursue "other civil and criminal penalties."

The County responded to the City's threats by filing an action against the City in circuit court seeking injunctive relief.

On January 29, 2021, the circuit court granted the County a temporary restraining order precluding further action by the City. On June 23, 2021, the circuit court granted a permanent injunction. The City appealed the circuit court's permanent injunction order. However, while the action was pending, the County completed the excavation and construction on the parking lot at issue.

Holding:

Because the County's activities that the City was seeking to regulate had ended any relief provided by the justices would be of no avail. According, the issue appealed by the City is moot. The Supreme Court wrote that the law is clear that courts will not ordinarily decide a moot question.

That notwithstanding, justices recognized that "technical mootness" does not preclude their consideration of moot issues if:

(1) it is a legal question;

(2) of great public import;

(3) that is capable of repetition; and

(4) yet likely to evade review.

In Headnote 3, the Supreme Court reiterated its prior holding in Sly. Pt. 1, *Isreal v. W. Va. Secondary Schools Activities Commission,* 182 W. Va. 454, 388 S.E.2d 480 (1989) of what it will consider when deciding whether to address technically moot issues:

(1) Whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief;

(2) Questions of great public interest ay nevertheless be addressed for the future guidance of the bar and of the public; and

(3) Issues which may be repeatedly presented to the trial court yet escape review at the appellate level because of their fleeting and determinative nature, may appropriately be decided.

However, in this instance, justices found that it could not review the technically moot issue because the appellate lawyer failed to follow the appellate rules and thereby did not provide a proper brief for them to consider.

How They Voted:

Then-Chief Justice John A. Hutchison delivered the Opinion of the Court. Justice Wooton concurred and filed separate opinion.

Impact on Business:

The West Virginia Supreme Court reminds the business community that justices will consider moot issues if they fall under a "technical mootness" analysis. Therefore, a business should consider matters of first impression that can be brought to the appellate court level even if the business believes their matter is moot.

Damon McDowell v. Allstate Vehicle & Prop. Ins. Co.
Case No. 21-0603 (November 17, 2022)

What the Court was Asked to Decide:

Under W. Va. Code § 33-6-7(b), is it material that an insurance application inquired about a 30-day vacancy in the property while the policy issued to the insured incorporated a fire clause contemplating a 60-day vacancy per West Virginia's Standard Fire policy?

What the Court Decided:

The insurance policy at issue incorporated the West Virginia Standard Fire Policy, which states that the insurer shall not be liable for loss occurring when a building is vacant or unoccupied for a period beyond 60 days, but the application only asked about a 30-day occupancy. Because this leaves unresolved questions of material facts, it should be left to the factfinder to resolve any conflicts between the statutory requirements and policy language.

Facts:

In May 2019, Plaintiffs purchased a home for $37,000 in West Virginia and stored personal property in the home. An insurance agent who sold policies for Allstate had a discussion with Plaintiff because he knew Plaintiff was in the business of fixing up houses; Plaintiff indeed intended to remodel this home. Nevertheless, Plaintiff indicated on the application "YES" to the question, "Will the residence be occupied within 30 days?" The agent gave Plaintiff a business card for potential home insurance sales and Plaintiff later contacted him. After their contact, the agent prepared a personalized insurance proposal for Plaintiff, and Plaintiff agreed to purchase an Allstate policy.

One of the major points of contention is that Allstate and Plaintiff both proffered two different versions of the applications. Plaintiff claims that he never saw or signed the application proffered by the agent until months later after Allstate informed him that he made misrepresentations on the application. A few weeks later, Allstate conducted an underwriting review to determine the replacement cost of the home (which was determined to be $84,066 less than what was indicated on the application). Days later, a fire damaged the home and some personal property; police officers determined that the fire was started deliberately with petroleum-soaked rags. Plaintiff made a prompt claim with Allstate. Just a day later, Plaintiff received notice from Allstate that it would deposit $1,000 onto his credit card for fire loss, and Plaintiff later received living expense payments from Allstate as well. A fire inspector later confirmed that the fire was intentionally set. While Plaintiffs received conflicting letters from Allstate, Allstate asserted that because of misrepresentations on the application regarding whether the home would be occupied within 30 days, Allstate would be rescinding the policy and would be returning all premiums paid under the policy. Plaintiffs sued Allstate and the agent for breach of contract and unfair trade practices. The lower court granted Allstate's motion to rescind the policy; Plaintiffs appealed.

Holding:

Insurance misrepresentations are guided by W. Va. Code § 33-6-7, which requires a representation to be "material and false" in order to rescind a policy. To determine materiality, West Virginia applies an objective standard: whether a reasonably prudent insurer would consider a misrepresentation material to the contract. The materiality of a misrepresentation on an application for an insurance policy is ordinarily a jury question unless the evidence excludes every reasonable inference except that the misrepresentation was material, where it then becomes a question of law for the court.

How They Voted:

Chief Justice Hutchison delivered the unanimous majority opinion.

Impact on Business:

Because the courts are providing strong deference to the jury to decide questions of materiality under § 33-6-7, it will likely be more difficult to prevail on issues of materiality at the summary judgment stage. A higher bar is now required to show that a misrepresentation was material as a matter of law, as the evidence must exclude every reasonable inference except that the misrepresentation was material.

Federal Insurance Company v. Jenny Neice, et al.
Case No. 21-0735 (March 3, 2023)

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

What is the role of a state court in ascertaining and applying the common law of another state when the ultimate issue has not yet been addressed by that other state?

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

Facts:

Neice's decedent was killed while working at a coal mine in Pennsylvania that was owned by Dana Mining ("Dana"), a subsidiary of Mepco Holdings LLC. Decedent was employed by Mepco LLC, a sister company of Mepco Holdings LLC, and he was insured under an insurance policy issued by Federal Insurance Company ("Federal"). Dana Mining and Mepco LLC were named insureds by endorsement to the subject policy. Federal denied coverage based on an ELE endorsement, which stated that insurance "does not apply to any damages, loss, cost or expense arising out of any injury or damage sustained at any time by any employee of any insured arising out of and in the course of employment by any insured." (Emphasis added.)

Neice filed a wrongful death action against Dana as the owner and operator of the mine. Federal contended that because of the endorsement, there was no coverage for the claim against Dana. Dana then filed a third-party complaint against Federal to seek declaratory judgment requiring Federal to defend and indemnify under the policy. The parties agreed that Pennsylvania law controlled the determination for coverage. The lower court granted summary judgment for Dana on the basis that Federal was obligated to defend Dana under the policy because of a "separation of insureds" provision in the policy that read, "this insurance applies as if each named insured were the only named insured; and separately to each insured against whom claim is made or suit is brought." The lower court found that the ELE exclusion was also inapplicable to indemnification; thus, the policy provided indemnity to Dana for the wrongful death claim.

Holding:

Under the language of the ELE exclusion, the wrongful death action arose out of the decedent's employment with an insured, and because the policy language is "any insured," the policy therefore excluded coverage for her action against the insured. This reading encompasses the plain meaning of the policy, and Pennsylvania mandates that the terms used within a written insurance policy must be the primary source to discern the intended operation of an exclusion. The language "any" is more broad than "the" and thus the plain meanings of those words must apply.

How They Voted:

Justice Wooton delivered the unanimous majority opinion.

Impact on Business:

This decision could shield employers from liability when employers adopt insurance policies with broad indemnification language. Here, the Court emphasized the policy's inclusion of the phrase "any insured" to conclude that the ELE exclusion was applicable, thus excluding coverage for a plaintiff who fell within the broad definition of "any insured." This case also emphasizes the Court's adherence to a strict textualist approach, where a minute difference in policy language—"the insured" versus "any insured"—can drastically change the scope of an insurance policy.

Greg Allen Ball v. United Financial Casualty Company, et al.
Case No. 22-0155 (November 17, 2022)

What the Court was Asked to Decide:

What amount of motor vehicle liability insurance coverage, if any, must an insurer provide to a non-employee permissive user of an insured vehicle who caused personal injuries to an employee of a named insured under a standard commercial automobile policy issued by the insurer?

What the Court Decided:

The insurer must afford the permissive user with coverage up to the full limits of liability coverage available under the insurance policy for any damages proven.

Facts:

On October 25, 2016, employees of Milton Hardware ("Milton") were performing construction work at an individual's home in West Virginia when the owner of Milton authorized the individual to move one of the company's trucks out of the driveway. When the individual was moving the truck, he struck a Milton employee who suffered serious injuries and required hospitalization.

Milton had a commercial automobile liability insurance policy through United Financial Casualty Company ("United") for liability coverage of $1 million to Milton and any person using Milton's vehicles with its permission. The owner of Milton requested to be indemnified for the injuries, claiming that the injuries were a result of the individual's negligence. United denied coverage and commenced an action against the insureds to seek declaratory judgment, arguing that it had no obligation to cover the individual's liability against the injured party (under a workers' compensation and employee indemnification exclusion).

The injured party filed a crossclaim against United seeking declaratory judgment that the workers' compensation and employee indemnification exclusions did not apply and furthermore violated W. Va. Code § 33-6-31(a). The district court granted United's motion, holding that because the injured party sustained injuries while working within the scope of his employment, the injuries fell within the scope of the worker's compensation exclusion; thus, he was barred from liability coverage under the policy. The court rejected the argument that § 33-6-31(a) required United to extend its liability coverage to a non-employee individual as a permissive user of a vehicle.

On appeal, the Fourth Circuit vacated the district court's judgment and remanded for further proceedings, holding that because the negligence claim against the individual was a claim against a third-party—and not against his employer for workers' compensation—the workers' compensation exclusion did not apply. The Fourth Circuit also concluded that the employee indemnification exclusion was inoperable because it contravened § 33-6-31(a).

On remand back to the district court, the parties disagreed as to what level of coverage United was required to provide in light of the Fourth Circuit's declaration that the employee indemnification exclusion was unenforceable. United argued that the exclusion was unenforceable up to a $25,000 minimum required by W. Va. Code § 17D-4-2(b) but not as to any amount above the statutory minimum. The injured party argued that the exclusion was entirely unenforceable under § 33-6-31(a) and thus United was required to provide coverage up to the full $1 million afforded by the policy. Ultimately, the court entered summary judgment, upholding United's position that the indemnification exclusion was unenforceable up to the minimum statutory amount of $25,000.

The injured party then appealed a second time to the Fourth Circuit on the issue of the amount of the liability coverage. Because no controlling West Virginia authority definitively answered the question, the Fourth Circuit certified the question to the West Virginia Supreme Court.

Holding:

The plain language of W. Va. Code § 33-6-31(a) unambiguously requires that permissive users be insured against liability for injuries caused while negligently operating an insured vehicle under the policy. When an exclusion in a motor vehicle insurance policy violates § 33-6-31(a) by denying coverage to a permissive user of an insured vehicle, the exclusion is void and the insurance policy must provide coverage to the permissive user up to the full limits of liability coverage available under the policy. Here, the employee indemnification exclusion violates § 33-6-31(a) by attempting to exclude coverage for a broad category of individuals whose negligence may cause death or bodily injury as a result of the operation or use of the insured vehicle.

How They Voted:

Chief Justice Hutchison authored the majority opinion of the Court. Justice Walker concurred and filed a separate concurring opinion. Justice Armstead dissented and filed a separate dissenting opinion. Justice Bunn deemed herself disqualified and did not participate in the decision of the case. Judge Sadler sat by temporary assignment.

Impact on Business:

This decision preserves the ability, and almost encourages, plaintiffs to bring cases against third-parties when injuries occur from permissive vehicle use. Plaintiffs now affirmatively have the potential access up to the full limits of liability coverage under these policies.

Katrib v. Herbert J. Thomas Memorial Hospital Association and Thomas Health System, Inc.
Case No. 21-0843 (March 27, 2023)

What the Court was Asked to Decide:

Plaintiff, whose privileges to practice at a hospital were suspended, filed suit against the hospital *after* the hospital filed for Chapter 11 bankruptcy protection. The Circuit Court of Kanawha County held that the doctor's claims against the hospital were discharged in the bankruptcy because all were based on facts that occurred prior to the bankruptcy and were therefore discharged and enjoined. Claiming to be a "known creditor" entitled to specific notice, the physician appealed, asking the West Virginia Supreme Court to decide whether the Circuit Court erred in concluding that the doctor's claims of tortious acts by the hospital were dischargeable and enjoined as a result of the hospital's Chapter 11 bankruptcy.

What the Court Decided:

Facts:

Dr. Katrib was a self-employed medical doctor who held privileges at Thomas Hospital for 34 years. In 2019, his privileges were suspended in May and then revoked in September concerns about a standard-of-care issue arising from Dr. Katrib's treatment of a patient in September 2018. Dr. Katrib requested a hearing which was not scheduled.

In January 2020, the hospital and its subsidiaries filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of West Virginia. In its petition, the hospital did not list Dr. Katrib as a creditor, and Dr. Katrib was not provided with actual notice of the filing and claims bar date. Yet, in July 2020, the hospital provided public notice of the bankruptcy proceedings in several WV newspapers, as well as a national newspaper. The bankruptcy proceedings led to a Chapter 11 reorganization plan which was approved in August 2020. Through its bankruptcy plan, the hospital was released from liabilities occurring before January 2020.

Despite the bankruptcy, Dr. Katrib filed a complaint in the Circuit Court of Kanawha County in May 2021 asserting five causes of action related to the suspension of his clinical privileges, including violation of medical staff bylaws, retaliation, discrimination, tortious interference, and intentional infliction of emotional distress. The hospital, in turn, filed a Notice of Bankruptcy and Discharge of Proceedings and a motion to dismiss, claiming that Dr. Katrib's allegations were discharged in the hospital's bankruptcy and that the claims were permanently enjoined as a consequence of the discharge injunction. Dr. Katrib claimed that since he was in a privileges dispute with the hospital, he was a "known creditor" and the hospital's failure to provide actual notice to him precluded dismissal due to the bankruptcy.

The Circuit Court granted the hospital's motion to dismiss, finding the complaint presented sufficient facts to resolve the hospital's bankruptcy discharge affirmative defense, that because Dr. Katrib was an "unknown creditor," he was not entitled to actual notice. His claims were therefore permanently enjoined and discharged because the hospital's alleged conduct occurred prior to the filing of the bankruptcy petition. Dr. Katrib appealed the dismissal.

Holding:

The Supreme Court of Appeals of West Virginia held that the Circuit Court did not err in ruling that Dr Katrib's claims were "subject to the discharge, release, and injunction provisions of [the hospital's] Chapter 11 bankruptcy confirmation order and reorganization plan." The Court found that Dr. Katrib was an "unknown creditor" and was not entitled to actual notice of the bank-

ruptcy. Therefore, the hospital's "notice by publication was constitutionally sufficient," because Dr. Katrib.

How They Voted:

4-1 Opinion. Chief Justice Walker wrote the majority opinion. Justice Armstead deemed himself disqualified, and Circuit Judge Nines sat by temporary assignment. Justice Wooton concurred in part and dissented in part. While Justice Wooten agreed with the majority's conclusion that Dr. Katrib's claims against the hospital were dischargeable in the hospital's bankruptcy, Justice Wooten wrote that the claims were not actually discharged in the bankruptcy "under the facts and circumstances of this case." Justice Wooten further dissented on the grounds that the hospital's post-petition failure to provide Dr. Katrib with a hearing was not discharged in the hospital's bankruptcy.

Impact on Business:

The Court's affirmance of the circuit court's finding that the plaintiff was an "unknown creditor" is important because a dispute over hospital privileges was not enough to put the hospital on notice of a lawsuit. The Court's recognition that the bankruptcy issue could be determined on a motion to dismiss was also significant as it permitted the hospital to immediately challenge the claim providing an end to litigation that was barred by the bankruptcy.

State ex rel. Charleston Area Medical Center, Inc. v. Thompson
Case No. 22-0439 (June 12, 2023)

What the Court was Asked to Decide

After the plaintiffs' child was stillborn, they retained a funeral home to attend to the funeral arrangements and disposition of the fetal remains. The funeral home's employee was in Charleston on her day off and picked up the fetal remains in her personal vehicle and took them to the funeral home. Her spouse later posted a video on social media describing the process of transporting the fetal remains. The plaintiffs filed suit against the hospital and funeral home. The Circuit Court denied the hospital's motion to dismiss for failure to comply with the pre-suit requirements of the Medical Professional Liability Act (MPLA). On appeal, the West Virginia Supreme Court was asked to decide whether the MPLA applied to the alleged tortious acts involving fetal remains.

What the Court Decided:

Facts:

In May 2018, Petitioners ("the Lesters") presented to Charleston Area Medical Center ("CAMC"), where their child was stillborn. After the stillbirth, CAMC was in possession of the fetal remains, which were placed in the hospital's morgue. The Lesters retained a funeral home in Mingo County, WV, to attend to the funeral arrangements for the fetus. The funeral home's employee, who was in Charleston with her husband on her day off work, was contacted by the funeral home and asked to return to Mingo County with the fetal remains. Escorted to her car by a CAMC employee, the funeral home employee placed the fetal remains on her husband's lap in her personal vehicle, returning to Mingo County with them.

Several months later, the funeral home employee's husband posted a video on multiple social media accounts "describing the process of loading the fetal remains into the vehicle, as well as transporting … the remains." The husband also claimed, wrongfully, that Ms. Lester had voluntarily terminated her pregnancy. The Lesters subsequently viewed the video, becoming aware of the way in which the fetal remains were handled and transported.

In 2021, the Lesters filed a complaint in Mingo County Circuit Court, naming as defendants the funeral home and the funeral home employee who transported the fetal remains to Mingo County. Later in 2021, the Lesters amended their complaint to include CAMC as a defendant. The amended complaint alleged four separate counts of negligence against CAMC: 1) general negligence; 2) negligent infliction of emotional distress; 3) negligent mishandling of a corpse; and 4) negligent supervision [of an employee].

CAMC filed a motion to dismiss for lack of subject matter jurisdiction, arguing that under the MPLA, CAMC was a health care provider and that, consequently, the MPLA applied to the Lesters' claims. Thus, the Circuit Court lacked subject matter jurisdiction because the plaintiffs did not provide CAMC with the pre-suit notice of claim and certificate of merit required in the MPLA. The Circuit Court concluded that the MPLA did not apply to the Lesters' claims because the fetal remains were not a "patient" of CAMC and denied the motion. The Circuit Court also found that the plaintiffs' complaint stated a claim for privacy violations against CAMC based on unauthorized disclosure of medical information.

Holding:

The Supreme Court of Appeals of West Virginia found all of the plaintiffs' claims arose "in the context of the alleged mishandling of the fetal remains as health care services to Ms. Lester"

and were thus governed by the MPLA. Because the MPLA applied, the plaintiffs were required to provide CAMC with pre-suit notice of claim and certificate of merit under W.Va. Code §55-7B-6. Because plaintiffs failed to do so, the Circuit Court lacked subject matter jurisdiction. The Supreme Court further ruled that the MPLA "also applies to any alleged unauthorized disclosure of medical information," because the privacy claim was "contemporaneous" with the Lesters' "anchor claim"—the alleged mishandling of fetal remains.

The Court granted CAMC's petition for a writ of prohibition, vacated the Circuit Court's order denying CAMC's motion to dismiss, and remanded the case directing the Circuit Court to issue an order dismissing the Lesters' claims.

How They Voted:

3-2 Opinion. Justice Bunn authored the majority opinion of the Court. Justices Hutchison and Wooton each issued dissenting opinions. Justice Hutchison reasoned that CAMC did not commit the alleged tortious acts in the process of giving healthcare, and therefore the MPLA did not apply to the Lesters' claims. Justice Wooton wrote that the majority should not have extended the MPLA "to acts of common, ordinary negligence merely because they involve a health care provider."

Impact on Business:

State ex. Rel. Charleston Area Medical Center, Inc. v. Thompson follows precedent in finding a lack of subject matter jurisdiction where plaintiffs fail to comply with the pre-suit requirements of W.Va. Code §55-7B-6. Moreover, the Court provided a broad reading of the MPLA's applicability, consistent with the 2015 amendments and legislative intent, precluding plaintiffs from "pleading around" its mandatory requirements.

State ex rel. West Virginia Division of Corrections and Rehabilitation v. Honorable Alfred E. Ferguson
Case No. 22-777 (June 8, 2023)

What the Court was Asked to Decide:

When incarcerated in a West Virginia jail, plaintiff's decedent was diagnosed with several medical and psychiatric issues, including vomiting, opiate abuse, and suicidality, and was placed in a holding cell under suicide watch. The morning after her intake, she was found deceased in her cell. The estate filed suit against the Department of Corrections (DCR) alleging, among other claims, a failure to provide adequate medical care. The DCR moved to dismiss, arguing plaintiff's claims were for "medical professional liability," and that "only a health care provider as defined by the MPLA can be sued for medical professional liability." Because the DCR was not a "health care provider" as defined by the MPLA, it argued the complaint should be dismissed. The Circuit Court denied DCR's motion, and it appealed, asking the Supreme Court to decide whether the estate's claims fell within the MPLA's definition of "medical professional liability" and should have been dismissed.

What the Court Decided:

Facts:

In 2017, Deanna McDonald ("Decedent") was a pre-trial detainee at the West Virginia DCR's Western Regional Jail. Upon intake, she was interviewed by an employee of Prime Care Medical, which contracted with by DCR to provide medical care to inmates in DCR facilities. Decedent was diagnosed as being suicidal and running fevers, vomiting, abusing opiates daily, and suffering from seizures. She also disclosed that she recently had been treated for psychiatric issues. Accordingly, Decedent was designated with a "special management" status and placed in a holding cell under suicide watch. Nonetheless, as alleged by plaintiff, Decent did not receive follow-up care or an evaluation and, according to another inmate, no staff centered Decedent's cell to check on her. The following morning, Decedent was found in her cell, dead.

After her death, Decedent's estate filed suit against DCR. Prime Care was not named as a defendant but was mentioned in the body of the complaint. Among other claims, the complaint alleged medical professional negligence. DCR filed a motion to dismiss and arguing that Decedent failed to state a claim upon which relief could be granted because her claims sounded in medical professional negligence. DCR argued that Decedent's medical negligence claims could only be asserted against a health care provider under the MPLA. Since it was not a health care provider, DCR argued the complaint should be dismissed.

The Estate filed an amended complaint removing claims of medical negligence but asserting claims of intentional and negligent infliction of emotional distress, a failure to provide adequate medical care, and a claim of failure to protect Decedent from disease. DCR moved to dismiss the amended complaint.

The Circuit Court denied the motion to dismiss, and DCR petitioned for a writ of prohibition. In its petition, DCR argued that the allegations contained in the amended complaint fell under the definition of "medical professional liability," and that "only a health care provider as defined by the MPLA can be sued for medical professional liability."

Holding:

The Supreme Court of Appeals of West Virginia held that: 1) DCR was not a "health care provider" or a "health care facility" subject to the MPLA; and 2) DCR was not entitled to a writ of prohibition.

The Supreme Court stated that the case before it "presents a question of statutory interpretation," and accordingly looked to the MPLA's definitions of "medical professional liability," "health care provider," and "health care facility." The Supreme Court held that DCR was neither a "health care facility" nor a "health care provider" and that the MPLA applies only when two conditions are satisfied: 1) when a plaintiff sues a "health care provider" or "health care facility" for 2) "medical professional liability" as those terms are defined under the MPLA.

How They Voted:

4-1 Opinion. Justice Hutchison wrote the majority opinion. Justice Armstead dissented, writing that Decedent's complaint alleged "a textbook medical negligence claim."

Impact on Business:

The majority opinion is consistent with precedent in determining that the definitions of the MPLA determine its applicability. The dissent's argument that the claims were "textbook" medical negligence brings into play whether plaintiff avoided the MPLA's requirements by suing only the DCR and not the medical provider. This opinion has somewhat limited effect on business as it addressed claims against a state agency,

Robert L. Toler v. Cornerstone Hospital of Huntington, LLC
Case No. 21-0830 (June 15, 2023)

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

Plaintiff while visiting his girlfriend in the hospital fell in her room sustaining injuries. There was a dispute over what happened. While being treated immediately after the fall, plaintiff told his medical providers that his leg had given way when he stood up from a chair. Plaintiff later sued the hospital, alleging that his fall was caused by a roll of tape left on the floor of the hospital room. In discovery, the man sought the nurse's incident report, but the Circuit Court of Cabell County ruled that the incident report was protected by West Virginia's statutory peer review privilege, W. Va. Code §30-3C-3. The case went to trial where a jury found in favor of the hospital. Plaintiff appealed, asking the West Virginia Supreme Court to decide whether the Circuit Court had erroneously excluded from discovery the hospital's incident report.

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

Facts:

In January 2019, plaintiff was visiting his girlfriend, a patient in Cornerstone Hospital. Mr. Toler fell, breaking his femur. Two nurses heard the fall; after checking on him, one of the nurses reported the incident to the house supervisor, who drafted an incident report documenting the fall. Mr. Toler told medical personnel that "his leg gave way and that he thought it was a charley horse."

Later, Mr. Toler instead claimed he fell as a result of a roll of tape left on the floor of the hospital room. However, none of the medical professionals who examined and treated Mr. Toler after his fall reported in their notes anything about a roll of tape left on the hospital room's floor. Rather, the contemporaneous medical records uniformly indicated that Mr. Toler reported that his leg had given way, causing him to fall.

Plaintiff sued Cornerstone sought to discovery the incident report written by the house supervisor, arguing it would corroborate his account of the fall. Cornerstone asserted the report was protected by the peer review privilege. Plaintiff filed a motion to compel disclosure of the report, but the Circuit Court ruled the peer review privilege applied, as the report was a document intended to "better [Cornerstone's] healthcare." During the jury trial, the Circuit Court permitted the nurse who prepared the incident report to testify regarding his personal knowledge of the circumstances surrounding the fall. That testimony did not include discussion of a roll of tape on the floor. In September 2021, the jury returned a verdict in favor of Cornerstone, and the Circuit Court entered judgment in Cornerstone's favor.

Plaintiff appealed, arguing that Cornerstone's incident report was not protected by peer review privilege. He also argued that the Circuit Court erred by continuing to exclude the report when Cornerstone "opened the door" to the document's disclosure during trial.

Holding:

The Supreme Court of Appeals of West Virginia held that the Circuit Court did not err in ruling that the incident report was protected by peer review privilege, because plaintiff failed to rebut Cornerstone's assertion of the peer review privilege. The Court also held that plaintiff was not entitled to relief under the "open door" doctrine, because it was plaintiff's counsel, not Cornerstone's, who elicited testimony that he claimed "opened the door" to the report's disclosure at trial.

How They Voted:

3-2 opinion. Justice Bunn authored the opinion for the majority, and Chief Justice Walker and Justice Wooton dissented. The dissent wrote that the majority's opinion would incentivize hospitals in which an adverse event has occurred, to argue that the peer review privilege applied to the incident report, because the report was intended to "better healthcare."

Impact on Business:

The Court's decision provides a level of certainty that incident reports, drafted to improve future healthcare, will be protected under the peer review privilege in West Virginia Code §30-3C-3.

War Memorial Hospital v. West Virginia Health Authority
Case No. 21-0901 (March 27, 2023)

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

In this case, a West Virginia hospital sought a Certificate of Need exemption pursuant to West Virginia Code section 16-2D-11(c)(27), from the West Virginia Health Care Authority for the hospital's purchase of a Magnetic Resonance Imaging ("MRI") scanner which cost less than $750,000. The hospital planned to use the MRI scanner in its medical office building in Martinsburg and not at its primary address location in Berkeley Springs. The WVHCA found that because the MRI scanner would not be used at the hospital's primary location, the hospital did not qualify for a Certificate of Need exemption. The hospital appealed the decision to the WVHCA's Office of Judges, which affirmed the denial of the exemption application. The hospital appealed the Office of Judges' decision to the Circuit Court of Kanawha County, which affirmed the decision. On appeal, the Supreme Court of West Virginia was asked to determine whether the Hospital met the statutory requirements for a Certificate of Need exemption.

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

Facts:

In December of 2019, War Memorial Hospital, Inc. ("the Hospital"), a West Virginia licensed critical access hospital located in Berkeley Springs, WV, applied to The West Virginia Health Care Authority ("WVHCA") for an exemption from obtaining a Certificate of Need ("CON"). The Hospital sought the exemption for its acquisition of a Magnetic Resonance Imaging ("MRI") scanner to be used in the hospital's medical office building located in Martinsburg, WV. The Hospital argued that West Virginia Code section 16-2D-11(c)(27) provides hospitals are exempt from the CON process when acquiring an MRI scanner "with a purchase price up to $750,000."

The WVHCA denied the Hospital's exemption application, finding that the Hospital did not intend to use the MRI scanner at its Berkeley Springs, WV location. Rather, the Hospital intended to use the MRI scanner at its Martinsburg, WV location. The WVHCA stated that, "[I]n creating W. Va. Code § 16-2D-11(c)(27) the Legislature …did not intend for hospitals to purchase and utilize [MRI] scanners in medical office buildings" which were not part of the hospital's "primary location." The WVHCA stated that it did not "find it credible that the Legislature intended an exemption that would result in such an unchecked duplication of services."

The Hospital appealed, and the WVHCA Office of Judges affirmed the denial of the CON exemption application. The Hospital subsequently appealed the Office of Judges' decision to the Circuit Court of Kanawha County. The Circuit Court affirmed the Office of Judges' denial of the Hospital's CON exemption application, reasoning that the Legislative intent of the exemption "was that the MRI device would be acquired and used by the hospital in the acquiring hospital's facility," rather than in a medical office building located in another county.

Holding:

The West Virginia Supreme Court ("the Supreme Court") concluded that the Circuit Court erred in upholding the WVHCA's finding that the CON exemption in West Virginia Code section 16-2D-11(c)(27) applied only if the acquisition and utilization of an MRI scanner occurred at a hospital's primary location. The Court held that the WVHCA's decision was "clearly wrong, arbitrary, and capricious" because the "clear language" of West Virginia Code section 16-2D-11(c)(27) contained no location-specific requirement applicable to the Hospital's CON exemption application. The Court reversed the Circuit Court's decision, remanding the case to the Circuit Court and directing it to enter an order approving the Hospital's CON exemption request.

How They Voted:

3-2 decision. Justice Wooton authored the majority opinion. Chief Justice Walker and Justice Bunn dissented, reasoning that the "plain language of the CON article" provides that the exemption at issue should only apply to a hospital facility, rather than a medical office.

Impact on Business:

The Supreme Court applied the plain language of the statutory provisions and did not defer to the Health Care Authority's determination. The decision provides hospitals with more flexibility in utilizing the statutory exemption related the acquisition and utilization of an MRI scanner, including where equipment is placed.

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State ex rel. West Virginia University Hospitals, Inc. v. Hon. Phillip D. Gaujot
Case No. 21-0458 (March 31, 2023)

What the Court was Asked to Decide:

The decedent presented to an urgent care facility with chest and neck pain and was transferred to WVU Hospital where he was treated by two physicians, were employed by the university's Board of Governors and not the hospital, and then discharged. The following day, the man died of an aortic dissection. The decedent's estate filed suit against WVUH and the two physicians who treated him, claiming both were agents of the hospital. The hospital moved to dismiss under W. Va. Code §55-7B-9(g) asserting the doctors were not its employees and had adequate insurance. The Circuit Court denied the motion to dismiss. The hospital filed an interlocutory appeal asking the Supreme Court to decide whether the man's estate had a viable "ostensible agency" claim pursuant to West Virginia Code § 55-7B-9(g).

What the Court Decided:

Facts:

The decedent Morris presented to MedExpress with "acute onset of chest and neck pain" in November 2019 and was then transferred to the emergency department at West Virginia University Hospital ("WVUH"), where he was treated by Dr. Tadros, a faculty physician with the West Virginia University School of Medicine ("WVUSOM"), and Dr. Polinski, a non-resident physician. After being discharged from the WVUH emergency room, Morris died the next day of an aortic dissection.

Morris' estate filed suit against Doctors Tadros and Polinski, alleging they failed to recognize a potential aortic dissection, and should have ordered imaging and undertaken a surgical intervention to prevent Morris' death. The estate also sued WVUH on a theory of ostensible agency, claiming it "held out" both physicians as its agents, even though both were employed by the WVU Board of Governors.

WVUH filed a motion to dismiss based on West Virginia Code section 55-7B-9(g), which precludes liability for "ostensible agency" claims "unless the alleged agent does not maintain professional liability insurance coverage . . . of at least $1 million for each occurrence." WVUH argued that there had only been one "occurrence" and, there was $1.5 million in coverage for the physicians provided through the West Virginia Board of Risk Management ("BRIM") policy that provided coverage for BOG and its employees. Plaintiff argued that each physician had to maintain $1 million in coverage for the statute to apply.

The Circuit Court denied the motion to dismiss (after converting it to a motion for summary judgment) and certified as a final order under Rule 54(b) of the West Virginia Rules of Civil Procedure. WVUH then filed an interlocutory appeal.

Holding:

The Supreme Court of Appeals of West Virginia held that the Circuit Court's reading of West Virginia Code § 55-7B-9(g) as applied to the parties was clear error, because the Circuit Court failed to reconcile that code section with West Virginia Code §§ 55-7H-1 to -6 relating to the coverage required for employees of the BOG like the two defendant physicians. The Supreme Court found that since the BRIM statutes contained a higher level of specificity as to the required coverages, those statutes controlled over more general provision in the MPLA. Moreover, the

Supreme Court held, the BRIM statutes clearly dictated that the WVUH physicians had "requisite [insurance] coverage by legislative design." The Supreme Court (after converting WVUH's interlocutory appeal to a writ of prohibition) granted the writ.

How They Voted:

5-0 Opinion. Chief Justice Walker wrote the majority opinion.

Impact on Business:

By finding that the statutorily required coverage for the physicians (as employees of the Board of Governors) was sufficient for purposes of precluding an argument that both were "ostensible agents" of the hospital under West Virginia Code § 55-7B-9(g), the Court deferred to the legislature's intent in providing adequate insurance for state employees and limiting liability of hospitals for non-employees.

Equitrans, L.P. v. Pub. Serv. Comm'n of W. Va.
Case No. 22-0293 (November 15, 2022)

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

The West Virginia Supreme Court reviewed the order of respondent Public Service Commission of West Virginia ("PSC") which required petitioner Equitrans, L.P. ("Equitrans") to permit the respondent Hope Gas to connect a natural gas field tap on the property of respondents Ronald and Ashton Hall ("the Halls") to Equitrans's gathering line. Equitrans's appeal is based on the argument that the PSC lacked subject matter jurisdiction over this action, claiming that the PSC divested itself of jurisdiction over gathering facilities by legislative rule.

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

The Court affirmed the PSC's order, finding that the PSC properly exercised jurisdiction in this matter because Equitrans could be classified as a public utility.

Facts:

Equitrans is a natural gas interstate pipeline company that owns and operates pipelines ("gathering lines") transporting natural gas between wells, a central gathering facility, and an interstate pipeline. Equitrans does not provide utility gas distribution services; however, utilities like Hope Gas and Mountaineer Gas regularly tap into Equitrans' gathering lines, buy the gas, and distribute it to their customers. The line at issue in this case was used by Hope Gas to distribute natural gas to rural customers.

In 2019, Equitrans attempted to divest itself of its gathering facilities by making an application to the Federal Energy Regulation Commission ("FERC" – regulator of operators of interstate pipelines) to abandon and sell them, which was approved. At the same time three complaints were filed with the PSC to stop Equitrans from divesting itself and to force it to continue its natural gas services. One of these complaints was related to a request by the Halls to re-enable natural gas service to their residence via Hope Gas. Hope Gas denied the Halls' request because Equitrans refused to reestablish a service connection to the residence, relying on its approval from FERC to abandon the line. The Halls then filed a complaint with the PSC against Hope Gas.

In 2021, the PSC added Equitrans as a respondent to the relevant complaint. Equitrans argued that the PSC lacked jurisdiction over its gathering facilities that would establish service to the Hall residence. An administrative law judge ("ALJ") found that the PSC had jurisdiction because of the service obligations Equitrans adopted from its former parent company Equitable Resources in Case No. 07-0098-GT-G-PC. Specifically, this obligation came from the affidavit of Randall Crawford which evidenced that affiliates or subsidiaries of Equitable Resources cannot discontinue service from their distribution systems without obtaining permission from the PSC.

Equitrans replied by filing exceptions to the ALJ's recommended decision, arguing that it was only subject to regulation by FERC and that the PSC did not have the jurisdiction to force Equitrans to allow Hope Gas to have access to their distribution system. Despite the exceptions described, the PSC adopted the ALJ's decision and in March of 2022 ordered that the PSC did have jurisdiction over Equitrans's lines because the lines had "served rural field tap customers for decades," making Equitrans a company "dedicated to public service." Equitrans appealed that order, once again arguing that the PSC lacked jurisdiction over its gathering facilities based on the PSC's promulgation of a legislative rule stating that gathering facilities are not public utilities.

Holding:

The Court made two main determinations. First, it held that the PSC properly exercised jurisdiction over Equitrans's interstate pipeline under the PSC's jurisdiction parameters laid out in W. Va. Code §§ 24-2-1(a) and 24-1-2 (2018) because it was operating as a public utility. The Court reasoned that Equitrans was acting as a public utility because its lines were the sole source of natural gas for thousands of rural customers that had no alternative for gas service. The Court further held that the fact that the line has been historically used (and continues to be used) to serve those rural consumers for decades, makes Equitrans a company dedicated to public service, solidifying Equitrans' facilities as a public utility.

Second, since Equitrans's distribution line was mixed-use, the Court held that, under W. Va. Code § 24-3-3a(c), the PSC could not exempt Equitrans from the jurisdiction of W. Va. Code §§ 24-2-1(a) and 24-1-2 (2018). The Court reasoned that this was because W. Va. Code § 24-3-3a(c) only allows exemptions for facilities which are "solely dedicated to storage, or gathering, or low-pressure distribution of natural gas." Equitrans provided both gathering and distribution services, so the PSC could not divest itself of jurisdiction.

How They Voted:

Justice Wooton authored the majority opinion of the Court. Justice Bunn deemed herself disqualified and did not participate in the decision of this case. Judge Sadler sat by temporary assignment. Justice Armstead concurred and filed a separate concurring opinion.

Impact on Business:

In affirming the PSC's order, the Court recognized that a company operating natural gas pipelines with a history of serving people in rural communities or those with no other choice in natural gas can be classified as a public utility providing a public service. This holding could have a significant impact on any businesses providing natural gas or other utility services to rural communities in West Virginia because there is now precedent declaring that they are likely subject to PSC regulations, even if they are merely providing the infrastructure for other companies to provide those services.

Butner v. Highlawn Memorial Park Co., et al.
Case No. 21-0387 (November 17, 2022)

<u>What the Court was Asked to Decid</u>**e:**

This case involves what evidence a circuit court may consider in ruling upon a motion for summary judgment and the proper application of the open and obvious doctrine in W. Va. Code § 55-7-28. The Circuit Court of Fayette County, West Virginia granted summary judgment in favor of defendant in a premises liability matter, and the plaintiff appealed that decision to the West Virginia Supreme Court.

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

Facts:

In July 2017, Joey Butner ("Mr. Butner") stopped at Highlawn Memorial Park to visit the gravesite of his brother-in-law, when the ground beneath him gave way and he fell, resulting in an injury to his right shoulder. Mr. Butner testified that he saw no holes, voids, or other indication that the gravesite was not firm. The following day, Mr. Butner's niece took a photograph of the gravesite, which showed three holes, only one of which had been created by Mr. Butner's fall.

Following the close of discovery, defendants filed motions for summary judgment, arguing that the claims were barred by the open and obvious doctrine reflected in W. Va. Code § 55-7-28(a) and further that Mr. Butner failed to present any evidence of negligence on the part of defendants. In his response, Mr. Butner submitted interrogatory answers in which he detailed the anticipated testimony of two witnesses relative to what defendants knew, or should have known, of the dangers presented by the holes and voids at the gravesite, and if so, what the defendants did or didn't do to address those dangers. Significantly, Mr. Butner did not verify these interrogatory answers as required by Rule 33 of the West Virginia Rules of Civil Procedure. Mr. Butner also included an undated, unsigned, and unverified transcript of a telephone conversation between one of his lawyers and one of the witnesses identified in the interrogatory answer.

The circuit court granted defendants' motions and held that Mr. Butner's claims were barred by the open and obvious doctrine reflected in W. Va. Code § 55-7-8 and further held that Mr. Butner had failed to present any evidence of defendants' negligence. The circuit court explained that the holes and voids were open and obvious because if a jury concluded that the holes depicted in the photograph were present at the time Mr. Butner visited the gravesite, then there would be no duty to protect Mr. Butner from them, and if a jury concluded that the holes were not present at the time of Mr. Butner's incident, then defendants could not have known of the holes or voids and, therefore, the dangers were as well known to Mr. Butner as they were to defendants. Additionally, while the circuit court considered the anticipated testimony reflected in the unverified interrogatory answer and other material presented by Mr. Butner, the court nevertheless concluded that Mr. Butner failed to produce any evidence of negligence on the part of the defendants. Mr. Butner then appealed the order to the West Virginia Supreme Court.

Holding:

The West Virginia Supreme Court held that the circuit court erred in its application of the open and obvious doctrine, but nevertheless affirmed the court's grant of summary judgment to defendants because none of the evidence produced by Mr. Butner in response to defendants' motions showed that there was a genuine issue for trial.

The Court explained that under the circuit court's analysis of the open and obvious doctrine, a plaintiff could never succeed on a premises liability claim. Accordingly, the Court reaffirmed its prior holdings that the statutory provision of W. Va. Code § 55-7-8 relating to dangers that are "as well known to the person injured as they are to the owner or occupant" only comes into play when there is evidence that the owner or occupant knew of the dangers.

The Court went on to explain that the only evidence presented by Mr. Butner that would support a finding that defendants had actual or constructive knowledge of the holes and voids was the unverified interrogatory answers regarding witnesses' anticipated testimony and the undated, unsigned, and unverified transcript of the telephone conversation that served as the basis for the interrogatory answers. The Court held that such materials were insufficient to preclude summary judgment and established:

> Unsworn and unverified documents are not of sufficient evidentiary quality to be given weight in a circuit court's determination of whether to grant a motion for summary judgment. However, in its discretion the court may consider an unsworn and unverified document if it is self-authenticating under West Virginia Rule of Evidence 902 or otherwise carries significant indicia of reliability; if it has been signed or otherwise acknowledged as authentic by a person with first-hand knowledge of its contents; or if there has been no objection made to its authenticity.

How They Voted:

Justice Wooton authored the majority opinion, which was joined by Chief Justice Hutchison, Justice Walker, and Justice Bunn. Justice Armistead concurred and authored a separate opinion to clarify that he believed the circuit court properly applied the open and obvious doctrine and that W. Va. Code § 55-7-28(a) "does not require a court to consider the knowledge of the owner or occupant when considering whether a danger is open, obvious, or reasonably apparent[,]" and "that where the facts show that the danger was as 'well known' to the injured party as to the owner or occupant, such owner or occupant owes no duty to the injured party."

Impact on Business:

This case clarifies what materials may be relied upon by court in deciding a motion for summary judgment and makes clear that with limited exceptions, unsworn and unverified documents provide an insufficient basis to preclude summary judgment.

Goodman v. Auton
Case No. 21-0578 (November 3, 2022)

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

This case involves the scope of an employee's immunity from liability under W. Va. Code § 23-2-6a, and specifically, whether an employee under the influence of drugs or alcohol loses such immunity. The Circuit Court of Mercer County, West Virginia denied the employees' motion for summary judgment, and the employees appealed that order to the West Virginia Supreme Court.

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

Facts:

On March 28, 2018, Adam Goodman ("Mr. Goodman"), Paul Underwood ("Mr. Underwood"), and Blake Auton (and "Mr. Auton") were employed by the City of Bluefield collecting garbage. Mr. Goodman was driving the garbage truck, and Mr. Underwood and Mr. Auton were riding on the back of the truck, picking up garbage. At some point, Mr. Goodman placed the truck in reverse, backed up at approximately five miles per hour, and struck something, which knocked Mr. Auton off the truck and into the road. Mr. Goodman then backed the truck over Mr. Auton and dragged him approximately thirty feet, resulting in significant injuries. After the accident, Mr. Goodman tested positive for opiates, oxycodone, and hydromorphone.

Mr. Auton applied for, and received, workers' compensation for injuries. Mr. Auton also filed negligence claims against Mr. Goodman and Mr. Underwood, who subsequently filed motions for summary judgment asserting that they were immune from tort liability under the workers' compensation statutes and the West Virginia Governmental Tort Claims and Insurance Reform Act. Mr. Auton argued that because Mr. Goodman was under the influence of drugs, he was acting outside the scope of his employment and therefore was not entitled to workers' compensation immunity. Mr. Auton further argued that Mr. Underwood was slow to inform Mr. Goodman that Mr. Auton had fallen off the truck. The circuit court denied the motions, finding that there was a material issue of fact as to whether Mr. Goodman was operating the truck under the influence, and therefore outside the scope of his employment. The circuit court further held that additional discovery was necessary to determine Mr. Underwood's culpability. Mr. Goodman and Mr. Underwood then appealed that order to the West Virginia Supreme Court.

Holding:

The West Virginia Supreme Court held that the defendants were immune from tort liability under W. Va. Code § 23-2-6a. The Court explained that in analyzing whether an employee is entitled to workers compensation immunity pursuant to W. Va. Code § 23-2-6a, the question is not whether the employee was acting in the scope of his or her employment, but whether the employee "was acting in furtherance of the employer's business." The Court noted that Mr. Goodman and Mr. Underwood "were performing tasks that promoted and advanced the work assigned to them by their employer." The Court further held that the fact Mr. Auton alleged that the defendants were performing these tasks in a negligent manner, or that Mr. Goodman was under the influence of drugs or alcohol, does not remove their work from the realm of furthering their employer's business. Accordingly, the Court reversed and remanded the decision to the circuit court to enter an order granting summary judgment to defendants.

How They Voted:

Justice Armstead authored the majority opinion joined by Chief Justice Hutchison, Justice Walker, Justice Bunn, and Justice Wooton.

Impact on Business:

This case makes clear that if an employee is acting "in furtherance of the employer's business," then the employee is entitled to the workers' compensation immunity under W. Va. Code § 23-2-6a, unless the employee inflicts an injury with deliberate intention. The case further clarifies that an employee who is under the influence of drugs or alcohol doesn't lose that immunity *solely* because the employee was under the influence at the time of the injury.

State ex rel. Historic Arms Corporation v. The Honorable C. Carter Williams, et al.
Case No. 22-0217 (October 26, 2022)

What the Court was Asked to Decide:

This case involves the exercise of personal jurisdiction over a foreign corporation with its principal place of business outside of West Virginia. The Circuit Court of Hardy County, West Virginia denied the corporation's motion to dismiss for lack of personal jurisdiction, and the corporation petitioned the West Virginia Supreme Court to issue a writ prohibiting the circuit court from enforcing the order and exercising personal jurisdiction over the corporation.

What the Court Decided:

Facts:

In September 2019, Darrick J. Gust ("Mr. Gust"), an employee of Panthera Training, LLC ("Panthera"), was conducting training for Drug Enforcement Agency ("DEA") employees in Hardy County, West Virginia. Part of the training required Mr. Gust to detonate an explosive. Mr. Gust asserted that the explosive malfunctioned and detonated while in his hand, resulting in serious injuries.

Panthera was a Virginia limited liability company with its principal place of business in Hardy County. The sole member of Panthera was Historic Arms Corporation ("Historic Arms"), a Virginia corporation with its principal place of business in Cape Charles, Virginia. Robert Starer ("Mr. Starer") served as the managing member of Panthera and Vice President of Historic Arms.

In June 2021, Mr. Gust and his wife asserted a variety of claims against Mr. Starer, Historic Arms, and other defendants. The Gusts claimed that Panthera manufactured and assembled the explosives for the training with black powder and fuse assemblies (the "Fuses") provided by Historic Arms and/or Mr. Starer.

Mr. Starer moved for summary judgment on the claims asserted against him individually, arguing that he was immune from such claims pursuant to W. Va. Code § 23-2-6 in the same manner as Panthera because he was employed by Panthera at the time of the incident. The circuit court agreed and granted Mr. Starer's motion, noting that "Mr. Starer brought the [F]uses to the [Hardy County facility] specifically for use in the explosive devices that were necessary tools in the . . . training offered by Panthera." The circuit court further stated that it could "discern no alternative, practical or logical reason for Mr. Starer's (the manager's) actions regarding the [Fuses] other than acting in furtherance of Panthera's business…" The circuit court further found, however, that "[c] learly, Defendant Starer may have been wearing more than one hat during the time in question" as he "was not only the manager of Panthera . . . but also Historic Arms' [sic] Vice President."

Historic Arms moved to dismiss the claims against it based on a lack of personal jurisdiction, citing an affidavit of Mr. Starer stating that Historic Arms did not do business in West Virginia nor was Historic Arms in the business of manufacturing, assembling, distributing, testing, or using explosives. Historic Arms further claimed that under the doctrine of issue preclusion/collateral estoppel, the circuit court's finding that Mr. Starer was acting for Panthera when he transported the Fuses into West Virginia precluded the court from finding that Mr. Starer was acting as an agent of Historic Arms at the same time. The Gusts responded with testimony showing that Historic Arms had supplied the Fuses to Panthera. The circuit court denied the motion, reasoning that Historic Arms had possessed, supplied, and distributed the Fuses before they entered West Virginia. The circuit court further found that Historic Arms had placed the Fuses in the stream of commerce by distributing them to Mr. Starer who brought them to West Virginia, thereby establishing minimum

contacts with the State. Historic Arms then petitioned the West Virginia Supreme Court to prohibit the circuit court from enforcing its order denying the motion to dismiss.

Holding:

The West Virginia Supreme Court denied Historic Arm's writ. The Court explained that the application of collateral estoppel is discretionary, and as such, a writ of prohibition would not be issued on the basis that the circuit court abused its discretion in failing to enforce the doctrine. Moreover, the Court noted that the circuit court's finding that Mr. Starer transported the Fuses into West Virginia in his capacity as manager of Panthera was "not determinative of the question of whether he *also* acted as agent of Historic Arms at some point in the journey of the Fuses to the Hardy County training facility."

With respect to Historic Arms's contact with West Virginia, the Court noted that "the question of Historic Arms's role as the owner, and so supplier or distributor of the Fuses to Panthera Training, remains open." The Court cited testimony showing that the Fuses had been stored in Historic Arms's facility before being brought to West Virginia and that the Fuses were transported to West Virginia "for the specific purpose of assembling flash bang explosives, which Panthera needed—but could not obtain, otherwise—to fulfill its obligations under the DEA contract." The Court explained that the analysis to determine whether due process is satisfied is neither "mechanical" nor "quantitative." Viewing the evidence in the light most favorable to the Gusts, the Court reasoned that even if Historic Arms's involvement was limited to storing the Fuses before they were transported to West Virginia, it did so knowing that the Fuses would come to West Virginia and be assembled into explosive devices to be detonated as part of Panthera's training in Hardy County. The Court reiterated "that when it comes to determining whether a nonresident has sufficient contact to the forum state, '[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way.'"

How They Voted:

Justice Bunn authored this Memorandum Decision, which was concurred in by Chief Justice Hutchison, Justice Walker, Justice Armstead, and Justice Wooton.

Impact on Business:

The case highlights the potential pitfalls of having an individual act as an agent of multiple entities. This case also serves as a reminder that the due process analysis in connection with whether a West Virginia court may exercise personal jurisdiction over a nonresident defendant is neither "mechanical" nor "quantitative." A defendant arguing for dismissal based on a lack of personal jurisdiction must go beyond demonstrating that it has a limited number of contacts with West Virginia and further show how those limited contacts fail to connect the defendant to West Virginia in a meaningful way.

Glacier Northwest, Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174
U.S. Supreme Court, Case No. 21-1449 (January 10, 2023)

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

The Supreme Court of the United States (the "Supreme Court") was asked to decide whether a union's actions were protected by the National Labor Relations Act ("NLRA") when the union intentionally destroyed the company's concrete during a labor dispute.

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

Facts:

Glacier Northwest, a construction company in Washington State, delivers concrete to customers using "ready-mix" trucks that have rotating drums. The rotating drums prevent the concrete from hardening during transit as concrete is highly perishable. Knowing this, the union called for a work stoppage after the collective bargaining unit expired. The work stoppage came during a morning where Glacier Northwest was in the midst of mixing substantial amount of concrete, loading batches into ready-mix trucks, and making deliveries. The union was aware of the company's planned deliveries instructing its members to ignore Glacier Northwest's instructions to finish the deliveries in progress. At least 16 drivers who had already set out for deliveries returned with fully loaded trucks. This caused Glacier Northwest to initiate "emergency maneuvers" to offload the concrete. By doing this, Glacier Northwest prevented significant damage to its trucks, however, all concrete mixed that day was lost.

In response, Glacier Northwest sued the union for damages in state court, claiming that the union intentionally destroyed the concrete, entitling them to damages for common-law conversion and trespass to chattels. The union moved to dismiss the claims on the grounds that the NLRA preempted the state tort claims. The union argued that their activity was protected under the NLRA as the NLRA protects an employees' right "to self-organization, to form, join, or assist labor organizations, … and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The Washington Supreme Court agreed with the Union, reasoning that "the NLRA preempts Glacier Northwest's tort claims related to the loss of its concrete product that loss was incidental to a strike arguably protected by federal law."

Holding:

The Supreme Court held that the NLRA did not preempt Glacier Northwest's tort claims as the allegations were that the Union intentionally destroyed the company's property during the labor dispute. While the NLRA protects the right to strike that right is not absolute; the Act has never protected strikers when they failed to take reasonable precautions to protect their employer's property from foreseeable, aggravated, and imminent danger due to the sudden cessation of work. The Supreme Court stated that Unions do not simply forfeit NLRA protection when a work stoppage would be a foreseeable loss of perishable products. However, here, the situation involved much more than conduct that could be reasonably foreseeable to an Employer since the workers reported to duty pretending as if they would deliver the concrete prompting the creation of the perishable product.

The Court also acknowledged that a union's decision to initiate the strike during the workday and its failure to give specific notice was not what rendered the conduct unprotected by the NLRA. Rather, the nature of the Union's actions are a relevant consideration in evaluating whether strikers took reasonable precautions to avoid imminent and foreseeable harm to the Employer's property.

How They Voted:

Justice Amy Coney Barrett authored the majority opinion of the Court which was joined by Chief Justice John Roberts, Justice Sonia Sotomayor, Justice Elena Kagan, and Justice Brett Kavanaugh. Justice Clarence Thomas, Justice Samuel Alito, and Justice Neil Gorsuch all concurred in judgment. Justice Kentanji Brown Jackson dissented.

Impact on Business:

The decision illustrates that while the right to strike is broad, it is not unlimited as union workers who intentionally damage company property as a form of protest will not be protected by the NLRA. Instead, these workers could be held personally liable for damage caused to employers.

National Pork Producers Council v. Ross
U.S. Supreme Court, Case No. 21-468 (May 11, 2023)

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

Whether a California law (Proposition 12) that prohibits the sale in California of pork products when the seller knows or should know that the meat came from the offspring of a breeding big that was confined "in a cruel manner" violates the dormant Commerce Clause.

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

The Court concluded that the California law did not violate the dormant Commerce Clause because it did not purposefully discriminate against out-of-state economic interests. It also held that the law did not impose a substantial burden on interstate commerce.

Facts:

Approved by California voters in 2018, Proposition 12 bars the sale in California of pork products when the seller knows or should know that the meat came from the offspring of a breeding pig (also known as a sow) that was confined "in a cruel manner." This means, among other things, that sows must have at least 24 square feet of living space, about the size of two bath towels.

The National Pork Producers Council and the American Farm Bureau Federation went to federal court to challenge Proposition 12. They argued that the law violates a doctrine known as the dormant Commerce Clause, the idea that the Constitution's delegation of power over interstate commerce to Congress precludes states from passing laws that discriminate against that commerce. In particular, they argued, states like California cannot require out-of-state businesses to operate in a particular way to sell their products in California. After the U.S. Court of Appeals for the 9th Circuit upheld the law, the appealed to the Supreme Court.

Holding:

The Court held (1) there is no per se rule under dormant Commerce Clause forbidding enforcement of state laws that have practical effect of controlling commerce outside the State, when those laws do not purposely discriminate against out-of-state economic interests; that (2) the California law was not subject to any balancing test to assess whether burden imposed on interstate commerce was clearly excessive in relation to putative local benefits; and (3) that the law did not impose substantial burden on interstate commerce.

How They Voted:

The Court was badly splintered. The judgment was announced by Justice Gorsuch and he delivered a majority opinion, which different justices joined only in certain parts. Specifically, Justice Gorsuch announced the judgment of the court, and delivered the opinion of the court with respect to Parts I, II, III, IV–A, and V, in which Justices Thomas, Sotomayor, Kagan, and Barrett joined, an opinion with respect to Parts IV–B and IV–D, in which Justices Thomas and Barrett joined, and an opinion with respect to Part IV–C, in which Justices Thomas, Sotomayor, and Kagan joined. Justice Sotomayor filed an opinion concurring in part, in which Justice Kagan joined. Justice Barrett filed an opinion concurring in part. Chief Justice Roberts filed an opinion concurring in part and dissenting in part, in which Justices Alito, Kavanaugh, and Jackson joined. Justice Kavanaugh filed an opinion concurring in part and dissenting in part.

Impact on Business:

The decision confirms that the U.S. Supreme Court will not block, as a violation of the Commerce Clause, the broad commercial regulatory authority of individual States simply because a particular State's law has an effect beyond the boundaries of that State. Although five Justices in the majority ruled that Proposition 12 did not "discriminate purposefully against out-of-state economic interests," Justice Gorsuch's majority opinion noted that the National Pork Producers did not argue that the law had a discriminatory purpose. Accordingly, the majority did not comment on how the law would have fared against such a claim, and highlighted that antidiscrimination "lies at the core of our dormant Commerce Clause jurisprudence."

Axon Enterprises, Inc. v. Federal Trade Commission et al.
Together with *Securities and Exchange Commission et al. v. Cochran*
U.S. Supreme Court, Case Nos. 21-86 and 21-1239 (April 14, 2023)

What the Court was Asked to Decide:

Can defendants challenge the constitutionality of an administrative agency's actions in federal district court? Or are defendants required to first use administrative processes? In a unanimous 9-0 decision, the U.S. Supreme Court ("the Supreme Court") held that "[t]he statutory schemes set out in the Securities Exchange Act ("Exchange Act") and Federal Trade Commission Act ("FTC Act") do not displace a district court's federal-question jurisdiction over claims challenging as unconstitutional the structure or existence of the SEC or FTC."

In this consolidated case, the Supreme Court was asked to decide whether a federal district court has jurisdiction to consider claims challenging the constitutionality of the Securities and Exchange Commission's (or Federal Trade Commission's) administrative proceedings?

What the Court Decided:

Facts:

In *Cochran*, the SEC brought an enforcement action against Ms. Cochran, a certified public accountant. During that proceeding, an ALJ found that Ms. Cochran failed to comply with auditing standards, in violation of the Securities Exchange Act. After that decision, the Supreme Court found that the SEC's ALJs had been improperly appointed. In accordance with that decision, the SEC ordered a new hearing. Before the new proceedings could begin, Ms. Cochran sued the SEC in federal district court, asserting jurisdiction under §1331 (federal-question jurisdiction). In the lawsuit, Ms. Cochran argued that although the SEC ALJs may be constitutionally *appointed*, they remained unconstitutionally insulated from Presidential *removal* power because of their multiple layers of "for cause" removal protections.

Similarly, in *Axon*, the FTC brought an enforcement action against Axon Enterprise, a company that makes and sells policing equipment. In its complaint, the FTC alleged that Axon's purchase of its closest competitor violated the FTC Act's ban on unfair methods of competition. Similar to the lawsuit in *Cochran*, Axon brought suit against the FTC in federal district court premised on federal-question jurisdiction. Like in *Cochran*, Axon asserted that the FTC's ALJs could not constitutionally exercise governmental authority because of their dual-layer protection from removal. Additionally, Axon claimed that the combination of prosecutorial and adjudicative functions in the FTC renders all of its enforcement actions unconstitutional.

Both Cochran's and Axon's suits met an identical fate in district court: dismissal for lack of jurisdiction. The district court in Cochran's case held that the review scheme specified in the Exchange Act— "administrative review followed by judicial review in a federal court of appeals"— "implicitly divest[s] district courts of jurisdiction" over "challenges to SEC proceedings." Likewise, the district court in Axon's case found that the FTC Act's comparable review scheme displaces §1331 (federal-question) jurisdiction for claims concerning the FTC's adjudications.

On appeal, the United States Court of Appeals for the Fifth and Ninth Circuits heard arguments in these cases. The Fifth Circuit, in the *Cochran* matter, affirmed the district court's decision. However, the Fifth Circuit, sitting *en banc*, reversed and held that Cochran's constitutional challenge was "wholly collateral" to the SEC's administrative proceedings and, thus, within the jurisdiction of the district court. In *Axon*, the Ninth Circuit affirmed the district court and acknowl-

edged that while a statutory review scheme precluding district court jurisdiction might not extend to every type of claim, Axon's challenges in this case did fall within the scheme.

In *Cochran*, the SEC appealed to the Supreme Court, and in Axon, Axon Enterprise appealed. In a 9-0 decision, the Supreme Court held that the Securities Exchange Act and the FTC Act do not displace district courts' federal-question jurisdiction to hear the respondents' claims. The Court relied on three considerations identified in T*hunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), to determine whether Congress intended to limit district court jurisdiction to hear these types of claims. The Court ultimately concluded that all three factors weighed against such limitation.

The *Thunder Basin* factors are: 1) whether a finding of preclusion could "foreclose all meaningful judicial review"; 2) whether the claims at issue are "wholly collateral" to a statute's review provisions; and 3) whether the claims are "outside the agency's expertise." When the answer to all three questions is yes, the Court presumes that Congress did not intend to limit jurisdiction.

In its analysis of the three factors, the Supreme Court found the following:

- With regard to the first factor, the Court made clear that adequate judicial review does not usually demand a district court's involvement. However, in the cases *sub judice*, the harm the parties allege being subjected to is a "proceeding by an unaccountable ALJ." That harm is a "here-and-now injury" which is impossible to remedy once the proceeding is over. The grievance is subjection to an illegitimate proceeding, led by an illegitimate decisionmaker—a grievance that an appellate court can do nothing about. As such, precluding the parties from the district court (in these circumstances) would "foreclose all meaningful judicial review."
- Under the second factor, the Court held that collateralism favors Axon and Cochran because they are challenging the Commissions' power to proceed at all, rather than actions taken in the agency proceedings. This distinction led the Court to find that the claims are "wholly collateral" to the statutes' review provisions.
- Lastly, and perhaps bluntly, the Court held that the claims at issue were "outside the agency's expertise." As the opinion stated, "[t]he Commission knows a good deal about competition policy, but nothing special about the separation of powers."

Because all three *Thunder Basin* factors were met, the Court concluded that the district court does have jurisdiction to review Cochran's and Axon's claims that the structure, or even existence, of an agency violates the Constitution.

Holding:

The Supreme Court held that "[f]or the reasons given above, [Cochran's and Axon's] claims cannot receive meaningful judicial review through the FTC Act or Exchange Act. They are collateral to any decisions the Commissions could make in individual enforcement proceedings. And they fall outside the Commissions' sphere of expertise. Our conclusion follows: The claims are not 'of the type' the statutory review schemes reach…A district court can therefore review them."

How They Voted:

Justice Kagan authored the unanimous opinion of the Court, in which Chief Justice Roberts and Justices Thomas, Alito, Sotomayor, Kavanaugh, Barrett, and Jackson joined. Justice Thomas filed a concurring opinion. Justice Gorsuch filed an opinion concurring in the judgment.

Impact on Business:

The decision in the consolidated *Axon Enterprise, Inc. v. FTC and SEC v. Cochran* cases is being heralded as a major victory for the business community. Administrative procedures can be both timely and costly for businesses. However, with the handing down of this decision, businesses will be able to challenge some of these procedures in federal court. In other words, constitutional claims can now be raised directly in federal court, without going through the administrative process.

Over the years, agencies have gained more power as they expand their rulemaking authority into areas that exceed their statutory authority. This has led to an impartial and overly-burdensome system. For example, according to the U.S. Chamber of Commerce, "the FTC sides with its own complaint 100% of the time … Over the last 25 years, the FTC's commissioners have affirmed every single case where its ALJ has ruled for the FTC and overturned every single case where its own ALJ ruled for the defendant."

With this decision, the Supreme Court has made it easier for businesses to challenge the regulatory power of federal agencies and has curtailed the unwieldy authority of administrative agencies. As a result of this decision, businesses will be able to protect their rights in a more timely, cost-effective, and less-burdensome manner.

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