CourtWatch

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

2024

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

West Virginia Chamber®

We express deep appreciation to the attorneys of our Legal Review Team who volunteered their time and expertise to review cases decided by the West Virginia Supreme Court, the Intermediate Court of Appeals, and the federal courts in the Fall 2023 and Spring 2024 Terms of Court and present this report on the impact of those Court decisions on our state's economy to Chamber members.

The West Virginia Chamber of Commerce
CourtWatch Legal Review Team 2024

Jack Cimino
Robinson & McElwee, PLLC
Summer Associate,
WVU College of Law

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

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

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

Jadon Dorsey
West Virginia Chamber of Commerce
Summer Intern,
Elon University

Joseph (Jay) Ford
Spilman, Thomas & Battle PLLC
jford@spilmanlaw.com

Mark H. Hayes
Robinson & McElwee, PLLC
mhh@ramlaw.com

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

Kaitlyn N. Pytlak-Morra
West Virginia Chamber of Commerce
kpytlak-morra@wvchamber.com

Jill Cranston Rice
Dinsmore & Shohl LLP
jill.rice@dinsmore.com

Abbrielle Savage
Robinson & McElwee, PLLC
Summer Associate,
WVU College of Law

Unaiza Riaz Tyree
Bowles Rice LLP
utyree@bowlesrice.com

Danielle Waltz
Dinsmore & Shohl LLP
danielle.waltz@dinsmore.com

Blair Wessels
Jackson Kelly PLL**C**
bwessels@jacksonkelly.com

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

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WV DHHR Office of Health Facilities Licensure and Certification v. Heart 2 Heart Volunteers
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Logan Gen. Hosp. LLC v. Boone Mem. Hosp., Inc.
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Ford Motor Co. v. Tyler
Case No. 22-ICA-208 (Dec. 8, 2023)

State ex rel. Pachira Energy, LLC v. Scott
Case No. 23-142 (Apr. 16, 2024)

What the Court was Asked to Decide:

This case involves the concepts of dissolution and dissociation of a partnership and a circuit court's authority to grant relief not requested by the parties. In response to the plaintiff's motion for a judicial dissolution of the partnership, the Circuit Court of Monongalia County, entered an order for dissociation of the plaintiff from the partnership, and the plaintiff petitioned the West Virginia Supreme Court to issue a writ prohibiting the circuit court from enforcing the order.

What the Court Decided:

Facts:

In 2011, Plaintiff Pachira Energy LLC ("Pachira") entered into an agreement with Defendant Northeast Natural Energy LLC ("Northeast") to establish guidelines for exploiting oil and gas leases and other mineral interests in an area of mutual interest. Pachira and Northeast agreed that all jointly-held leases within the area would be developed with Northeast owning a 75% working interest and Pachira owning a 25% working interest, and they subsequently entered into a Joint Operating Agreement to operate natural gas wells on the leased property, splitting costs and profits using the same 75%/25% ratio. Later, Pachira and Northeast entered into an oral agreement to develop and operate a water system for use in connection with the wells on the leased property. While there was no formal agreement, they split the costs of the water system using the same 75%/25% ratio.

In September 2018, Pachira filed a complaint alleging that Northeast breached the water system agreement and seeking declaratory relief and an injunction as to the water line and handling facilities. Pachira filed a motion wo enjoin Northeast's alleged improper use of the water line and handling facilities, which the circuit court granted, in part, enjoining Northeast from transporting water outside of the mutual interest area or selling water to third parties. In June 2020, the Supreme Court affirmed the preliminary injunction order.

Pachira filed a motion for judicial dissolution of the partnership pursuant to the West Virginia Revised Uniform Partnership Act, which provides a basis for dissolution and winding up of a partnership when "[a]nother partner has engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with that partner." The circuit court found that the parties were in a partnership, but rather than analyzing Pachira's request for dissolution under West Virginia Code § 47B-8-1-5(ii), the circuit court treated the motion as a motion to withdraw and dissociated Pachira from the partnership without a dissolution of the partnership. Pachira then filed a writ of prohibition with the West Virginia Supreme Court.

Holding:

The West Virginia Supreme Court granted the writ of prohibition and held that it was improper for the circuit court to convert Pachira's request for dissolution to an order for dissociation when that remedy was not sought by any party. The Court explained that dissolution and dissociation are distinct partnership remedies governed by the West Virginia Revised Uniform Partnership Act. Dissociation "denote[s] the change in the relationship caused by a partner's ceasing to be associated in the carrying on of the business," which will lead to either a buyout or a dissolution and winding up of the partnership. The Court found that by dissociating Pachira from the partnership,

the circuit court improperly divested Pachira of any rights it would be entitled to as a partner in the dissolution and winding up of the partnership, assuming a partnership existed. The Court further found that the circuit court's order was fatally deficient because it failed to make any findings that would trigger dissociation.

How They Voted:

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

Impact on Business:

This case clarifies the distinct concepts of dissolution and dissociation in the context of a partnership. It further reinforces that circuit courts do not have unfettered discretion to grant relief not sought by the parties.

Todd Jarrell v. Frontier West Virginia, Inc., et al.
Case No. 20-0040 (Nov. 9, 2023)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to decide whether West Virginia Code § 61-3-49b (criminal disruption of utilities) sets forth a substantial public policy to support an employee's common law *Harless* claim of retaliatory discharge.

What the Court Decided:

The Court affirmed the circuit court's order dismissing Jarrell's complaint for failure to state a cognizable claim. The Court held that West Virginia Code § 61-3-49b (eff. 2012) does not constitute a substantial public policy exception to the at-will employment doctrine pursuant to *Harless v. First National Bank in Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

Facts:

Jarrell was employed at Frontier Communications for eight years as a cable technician. During his employment, Jarrell alleged that several coworkers had committed acts that amounted to sabotage of Frontier's equipment and disrupted service for its customers. Such conduct, if proven, would be a misdemeanor or a felony under West Virginia Code § 61-3-49b, which criminalizes disruption of communications or public utility services.

When Jarrell first reported this alleged misconduct to his supervisor, Frontier did not take any action against the coworkers. Frontier initially scheduled to reassign Jarrell to a different service area, but the assistant vice president of human resources canceled the transfer. Thereafter, several of the coworkers Jarrell identified as having a role in the service outages were transferred to other service areas.

Jarrell made his final reports of the misconduct in the fall of 2017. That following spring, Frontier suspended Jarrell from work for five days for calling in to work late. Jarrell had no prior disciplinary record. Jarrell's union filed a grievance on his behalf, which was denied. Shortly thereafter, Frontier asked him to submit to a random drug test because it suspected that he had been using illicit substances several months earlier. Jarrell's union also filed a grievance to challenge the drug test because no other employees in his position had been drug tested.

In 2018, Frontier terminated Jarrell following his unauthorized use of a Frontier bucket truck. Jarrell filed a third grievance to protest his termination, which Frontier denied based upon its assertion of "just cause" for discharging him. Jarrell then filed suit against Frontier for retaliatory discharge claiming that he had been wrongfully terminated for reporting his coworker's misconduct, and the reasons cited by Frontier (i.e., suspension for calling in late, failed drug test, and unauthorized use of company truck) were mere pretextual reasons for his termination. On appeal, Jarrell argued that West Virginia Code § 61-3-49b constitutes a substantial public policy supporting his wrongful discharge claim.

Holding:

The Court held that West Virginia Code § 61-3-49b, which criminalizes disruption of communications or public utility services, does not establish a substantial public policy exception to the at-will employment doctrine pursuant to *Harless*. First, the Court reasoned that the Legislature, in enacting § 61-3-49b, recognized that a crime against property and harm to the public is not required to prove the offense occurred. In other words, the statute contains no express statement of

public policy as it only concerns crimes against property and the specific owners of such property, not the public at large.

Furthermore, a criminal "disruption of communications or public utility services" can be established by proving that the criminal conduct causes either: (1) "disruption … to ten or more households or subscribers," *or* (2) "a loss in the value of the property in an amount of one thousand dollars or more[.]" Thus, the Court found that by its express language, Section 61-3-49b is a property crime that may be violated without impacting anyone other than the owner of the property. Accordingly, it is not sufficiently clear to place an employer on notice that the statute embodies a substantial public policy that would defeat the at-will employment doctrine.

How They Voted:

Justice Bunn delivered the 3-2 opinion of the Court. Justice Hutchison and Justice Wooton dissented and filed a separate opinion.

Impact on Business:

This decision highlights the Supreme Court's cautious approach to identifying new "public policies" that can underpin *Harless* common law retaliatory discharge claims, doing so only when the policy is designed to protect a broad societal interest rather than (as here) the interests of a narrow class of citizens.

SER West Virginia Attorney-General, Medicaid Fraud Unit, et al. v. Hisel Bailey and West Virginia Attorney-General, Medicaid Fraud Unit, et al. v. Hisel Bailey
Case No. 22-779 and Case No. 22-781 (Nov. 9, 2023)

What the Court was Asked to Decide:

In these consolidated proceedings, the West Virginia Supreme Court was asked to decide whether the Circuit Court of Kanawha County erred in: (1) denying Petitioners' motion to dismiss Bailey's § 1983 and whistle-blower claims; and (2) denying Petitioners' qualified immunity from Bailey's § 1983 claims for unreasonable seizure of the person against Lyle.

What the Court Decided:

In case number 22-779, the Court held that the circuit court erred in failing to dismiss Bailey's § 1983 claims against MFCU and Lyle in his official capacity, and Bailey's whistle-blower claim against Lyle. Thus, the Court granted the requested writ of prohibition.

In case number 22-781, the Court reversed the circuit court's denial of qualified immunity to Lyle for Bailey's § 1983 claims. Second, the Court reversed the circuit court's denial of Petitioners' motion to dismiss Bailey's malicious prosecution claim and remanded for additional proceedings. Finally, the Court affirmed the circuit court's determination that Petitioners are not entitled to absolute prosecutorial immunity from the state law malicious prosecution claim.

Facts:

Hisel Bailey, a registered nurse, was employed by Mildred Mitchell-Bateman Hospital ("MMBH"), a psychiatric facility operated by DHHR. In January 2019, M.C., a long-term patient who had a history of self-harm, punched a wall causing himself to bleed and threatened to bite himself. When Bailey tried to prevent M.C. from biting himself, a struggle ensued. Both men fell to the floor where M.C. bit, struck, and kicked Bailey, and forcefully grabbed his testicles. Other employees gained control over M.C. and Bailey escorted him back to his unit. Staff examined M.C. and found a small bump and cut over his eyebrow.

Following investigation by independent patient advocate, Legal Aid of West Virginia ("LAWV"), Bailey's employment with MMBH was suspended and then terminated after LAWV substantiated his alleged physical abuse of a patient. An anonymous report to the West Virginia Attorney General's Medicaid Fraud Control Unit ("MFCU") caused it to investigate the incident. In October 2019, MFCU investigator Lyle interviewed Bailey. Bailey alleged that the interview was "custodial" and that he was not advised of his *Miranda* rights.

Thereafter, Lyle authored a report concluding that Mr. Bailey abused, assaulted, and battered M.C., and referred the matter to the Cabell County Prosecuting Attorney's Office. The Prosecutor filed criminal charges against Bailey and a magistrate found probable cause to believe that he had committed the offenses. However, in March 2021, the Prosecutor dismissed all charges against Bailey, without prejudice.

Pertinent to this appeal, Bailey asserted civil rights violations pursuant to 42 U.S.C. § 1983 based on unreasonable and unlawful seizure of the person, malicious prosecution, and violation of the Whistle-Blower Law, West Virginia Code §§ 6C-1-1 to -8. MFCU and Lyle filed a petition for writ of prohibition on jurisdictional grounds as to the § 1983 and Whistle-Blower claims and appealed the circuit court's denial of their motion to dismiss the malicious prosecution claim on qualified immunity grounds. The Supreme Court consolidated the two proceedings.

Holding:

In case number 22-779, the Court first held that a § 1983 claim may not be sustained against a state agency or its official acting in his or her official capacity. Bailey's § 1983 claims against MFCU were not sustainable as it is not a person, and MFCU cannot be vicariously liable for Lyle's alleged violations of § 1983. Thus, Bailey had failed to state a § 1983 claim against either Lyle or MFCU.

Second, in interpreting the statutory construction of the Whistle-Blower Law, the Court found that "an agent of a public body" refers to a person who has *supervisory authority* over the employee. It reasoned that (1) the definition of employer explicitly lists persons who have supervisory authority over the employee making a whistleblower claim; and (2) the conduct prohibited by the statute plainly refers to changes to employment that could only be made by someone with supervisory or administrative authority. Lyle was not employed by DHHR and had no authority to make decisions affecting Bailey's employment, and, therefore, was not his "employer" as defined in the Whistle-Blower Law. Thus, the Court held that Bailey had failed to state a claim against Lyle under the Law.

In case number 22-781, the Court held that Lyle was entitled to qualified immunity in his individual capacity because Bailey's complaint failed to properly allege a constitutional right. The Court reasoned that a § 1983 claim may not be founded on an alleged *Miranda* violation, and the mere "risk" of a loss of liberty is insufficient to establish seizure of the person.

Next, the Court found that Bailey's complaint failed to meet the heightened pleading standard to overcome MFCU and Lyle's qualified immunity for malicious prosecution because he did not sufficiently plead facts supporting that MFCU and Lyle's discretionary functions were "fraudulent, malicious, or oppressive." The Court further noted that the circuit court failed to address whether Lyle was acting within the scope of his employment, which was crucial to determining whether MFCU (as an entity) was entitled to qualified immunity from vicarious liability for Lyle's alleged malicious prosecution.

Finally, the Court affirmed that MFCU and Lyle were not entitled to absolute prosecutorial immunity from the state law malicious prosecution claim because they failed to meet their burden of showing that they performed functions equivalent to those of a prosecutor involved in the judicial phase, rather than investigatory or administrative functions.

How They Voted:

Justice Bunn authored the 5-0 opinion of the Court.

Impact on Business:

For public entities, this decision confirms that a government agency in a §1983 action may not be held vicariously liable for the acts or omissions of its employees. It also confirms that an "agent" of a public body under the Whistle-Blower Law must be someone who has supervisory authority over the plaintiff/employee – though they need not be named as such. Finally, the Court's application of a theory of vicarious liability to qualified immunity is notable – in other words, if an agency employee was not acting within the scope of their employment when they allegedly violated the plaintiff's rights, then that employee's actions may not be imputed to the agency to defeat the agency's assertion of qualified immunity.

Michael D. Ruble and Brenda K Ruble v. Rust-Oleum Corporation, et al.
Case No. 22-0329 (June 12, 2024)

What the Court was Asked to Decide:

Does collateral estoppel attach to a finding made in a West Virginia workers' compensation administrative proceeding so that the issue may not be litigated in a subsequent tort proceeding against a third party?

What the Court Decided:

The West Virginia Supreme Court found that the workers' compensation process involved legal standards and procedural rules that were substantially different from those in a courtroom, and that the process did not afford the plaintiff a full and fair opportunity to litigate whether the third-party manufacturers' chemicals were a cause of his injury. Therefore, collateral estoppel cannot be applied to the Plaintiff's claims to prevent later litigation of a tort claim.

Facts:

Plaintiff Michael Ruble alleged he was injured after being exposed to defective, toxic chemicals at his employer's worksite. Ruble was employed at a chemical manufacturing plant making polyurethane stains, paint strippers, xylene, acetone, and other paint-related products. Ruble began experiencing breathing problems, symptoms of tremors, swollen hands and feet, numbness, weakness, memory problems, and difficulty walking. As a result, he stopped working in May 2018. Subsequently, Ruble filed a product defect lawsuit against the third-party manufacturers of the chemicals, as well as a workers' compensation claim with his employer.

Ruble's workers' compensation claim was rejected by the employer's claims administrator and the West Virginia Workers' Compensation Office of Judges on appeal. The third-party manufacturers then filed a motion to dismiss in the product liability lawsuit on grounds that the doctrine of collateral estoppel precluded Ruble from litigating causation in the courtroom when that issue had been resolved by the workers' compensation administrative decision. The circuit court granted the motion.

Holding:

The Court first noted that collateral estoppel does not apply, and relitigation of an issue in a subsequent proceeding is permitted when there are "differences in the quality or extensiveness of the procedures followed in two courts." Citing the 1995 decision of *State v. Miller*, the Court determined that "issues and procedures are not identical or similar if the second action involves application of a different legal standard or substantially different procedural rules, even though the factual settings of both suits may be the same."

Accordingly, the Court found that the workers' compensation administrative procedure was not an adequate substitute for the judicial procedures in the circuit court. The Court clarified that an administrative decision may have a preclusive effect, but "only if it resulted from a procedure that seems an adequate substitute for judicial procedure," and concluded that West Virginia workers' compensation proceedings make numerous accommodations to economy and celerity that are directly at odds with procedures in the circuit courts. Workers' compensation proceedings are conducted irrespective of the usual common law or statutory rules of evidence. The procedural rules and legal standards utilized in the respective systems are vastly different.

Ultimately, the Court held that these differences meant that Ruble had not been afforded a full and fair opportunity to litigate the causation of his injuries in the workers' compensation process, and that the civil suit against a third party should not be precluded even though he did not receive workers' compensation benefits.

How They Voted:

Justice Hutchison delivered the opinion of the Court. Justice Bunn, deeming herself disqualified, did not participate. Judge Nines sat by temporary assignment. Chief Justice Armstead dissented and reserved the right to file a separate opinion.

Impact on Business:

This case reflects the limitations of collateral estoppel with respect to administrative claims. Defendants should not expect to be able to use findings of an administrative tribunal that utilizes an abbreviated procedure, such as those reached in workers' compensation proceedings, to preclusive effect in later civil litigation.

Jay Longerbeam and Donald Buracker v. Shepherd University
Case No. 22-609, and 22-610 (Apr. 11, 2024)

What the Court was Asked to Decide:

Did the circuit court properly grant summary judgment with respect to Petitioners' asserted claims of wrongful termination and retaliation under the following theories: age and disability discrimination under the West Virginia Human Rights Act ("WVHRA"), a violation of the West Virginia Whistle-Blower Law, and a common law *Harless* retaliatory discharge claim?

What the Court Decided:

In this consolidated proceeding, the West Virginia Supreme Court found that the circuit court committed no error granting summary judgment with respect to Petitioner Donald Buracker's discrimination claim. However, the Court found that the circuit court erred in granting summary judgment with respect to Petitioners' whistle blower and *Harless* claims, and Petitioner Buracker's retaliation claim.

Facts:

Petitioners Jay Longerbeam and Donald Buracker were terminated from their roles as campus police officers at Shepherd University in May 2019. Their termination arose out of two incidents dated October 7, 2018, and January 6, 2019. Shepherd officials contended the termination was a result of misconduct and unprofessionalism.

The first incident took place on October 7, 2018, when Petitioners responded to calls regarding a loud party in a dorm. When Petitioners arrived on the scene, they observed intoxicated, underage students in the stairwell and alcoholic beverage containers outside the dorm room in question. Accordingly, Petitioners made a warrantless, nonconsensual entry into the dorm room. Upon entering the room, Petitioners discovered multiple underage students engaged in dinking, many of whom were student athletes. Buracker noted in his report that preliminary breath tests ("PBTs") were administered and *"then"* they entered the dorm room. However, it is undisputed that PBTs were administered *after* entry into the dorm room. Buracker maintains this was a simple drafting error. The inconsistency in Buracker's report combined with the warrantless, nonconsensual entry led Shepherd to contend that Petitioners engaged in misconduct.

On January 6, 2019, some of the same student athletes were lawfully stopped and arrested by Petitioners. The incident stemmed from a routine traffic stop due to a broken headlight but turned into a DUI arrest upon detection of marijuana. Shepherd officials recognized the lawfulness of the stop but alleged that Petitioners were targeting student athletes, deeming their conduct unprofessional. Shepherd officials received pressure from the parents of student athletes to investigate the incidents, ultimately leading to the termination of Petitioners.

Buracker asserted that his termination resulted partly from a retaliation in violation of the WVHRA. In 2016, Buracker had successfully grieved age discrimination to the West Virginia Public Employee's Grievance Board against Shepherd University when Shepherd did not award Buracker a full-time campus police officer position to which Buracker applied, despite his twenty-nine years of experience working as a part-time campus police officer. As a result of the grievance, Buracker was awarded a full-time position and backpay.

Both Petitioners alleged that their termination and additional disparate treatment are related to their protected whistle-blowing activities in violation of the West Virginia Whistle-Blower Law. In 2017 and 2018, each officer had expressed concern about a deal between Shepherd University and the magistrate court which established an "extra-judicial procedure" where Shepherd students were given alternative dispositions of criminal matters through automatic community service rath-

er than the typical criminal process. Further, in 2018, Buracker filed a complaint with the West Virginia Ethics Commission against a fellow officer for personal use of a police vehicle.

Petitioners also alleged ongoing disparate treatment regarding their job duties and responsibilities from the time of the triggering whistle-blower activities. This included less favorable assignments, enhanced responsibilities, regular inspections and maintenance of police vehicles, required use of body cameras, required reports of every contact, timeliness, etc. Petitioners assert these standards were not upheld uniformly and claim that other officers who engaged in misconduct were not disciplined or terminated as a result.

Finally, Petitioners asserted a *Harless* claim, contending that their termination was in direct opposition to a substantial public policy because the State must allow its laws to be enforced by law enforcement.

Holding:

First, the Court held that the circuit court erred in finding Petitioners' whistle-blower claims and Mr. Buracker's HRA retaliation claim were not of sufficient temporal proximity to the protected whistle-blower activities from 2017 and 2018 and Mr. Buracker's 2016 grievance. The Court concluded that caselaw holds temporal proximity is required to establish a prima facie case of retaliation *only* "[] absent other evidence tending to establish retaliatory motivation[.]" The Court found that Petitioners protected whistle-blower activities and alleged ongoing disparate treatment offered more than sufficient "other evidence" upon which a trier of fact could infer retaliation, making temporal proximity irrelevant.

Next, the Court held that the circuit court failed to construe Petitioners' whistle blower evidence in their favor and in accordance with the statutory criteria under West Virginia Code §6C-1-3. The Court further noted that a "good faith report" under the whistle-blower law constitutes a disclosure, and that there is no requirement for a whistle-blower to articulate with precision "an exhaustive legal basis for their report of wrongdoing or waste."

Next, the Court concluded that the circuit court erred in finding Petitioners failed to establish a prima facie case of retaliation and that there were no genuine issues of material fact sufficient for trial. It noted that rather than crediting Petitioners established and sufficient evidence, the circuit court summarily accepted Shepherd's reasons for termination as legitimate and failed to properly analyze pretext.

The Court affirmed the circuit court's summary judgment with respect to Mr. Buracker's disability discrimination claim.

Finally, the Court determined that because there are disputed issues of material fact with respect to Petitioners' statutory claims, those same factual disputes permeate their *Harless* claims. Therefore, the circuit court erred in granting summary judgment with respect to the *Harless* claims.

How They Voted:

Justice Wooton delivered the unanimous opinion of the Court. Justice Bunn deemed herself disqualified and did not participate in the decision of the case. Judge Jason Wharton sat by temporary assignment.

Impact on Business:

This case is an important reminder that claims of protected activity under the Whistle-Blower Law require only that an employee have "reasonable cause to believe" the report of wrongdoing or waste is true. In other words, it is not a defense to assert that the alleged occurrence of wrongdoing did not actually exist; the employee is protected so long as the complaint is made in good faith. It also reiterates that lack of temporal proximity alone is not a defense to retaliation claims if there is "other evidence" of a retaliatory motive.

Westfield Ins. Co. v. Sistersville Tank Works, Inc.
Case No. 5:18-cv-00100-JPB (N.D.W. Va. Feb. 6, 2024)

What the Court was Asked to Decide:

The Court was asked to answer a certified question from the Fourth Circuit asking "'[a]t what point in time does bodily injury occur to trigger insurance coverage for claims stemming from chemical exposure or other analogous harm that contributed to the development of a latent illness.'" This certified question was being asked in the context of commercial general liability ("CGL") policies.

What the Court Decided:

For the first time, the Court held that the "continuous trigger" theory applies when an insurance "policy is ambiguous as to when coverage is triggered." Under the continuous trigger theory, the Court held an insurance policy will be triggered when any of the following occur: (1) "an individual is initially exposed to what the policy calls a 'harmful condition' such as a chemical or analogous toxic, injurious substance"; (2) "when the individual suffers from 'exposure in residence,' that is, the development period after exposure when the injury is latent and hidden"; or (3) "when the sickness, disease, or other bodily injury manifests."

Facts:

Sistersville Tank Works ("STW") has a facility in Sistersville and "manufacture[d], install[ed], and repair[ed] various types of tanks at industrial sites throughout the world." STW had a CGL policy with Westfield Insurance Company ("Westfield"). These policies were first obtained in 1985 and were renewed every year for 25 years "with the last policy (with extensions) expiring on April 15, 2010." "In the insuring agreement, Westfield promised to provide a legal defense for STW and to pay 'those sums that the insured become legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies.'" Bodily injury was defined as "'bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.'"

The insuring agreement also included three qualifying provisions. First, the insuring agreement only applied to bodily injuries or property damages "which occur[ed] during the policy period." Second, the injury or damage must have been the result of an "occurrence." "[T]he policy define[d] an 'occurrence' as 'an accident, including continuous or repeated exposure to substantially the same general harmful conditions.'" Third, the occurrence must have "take[n] place in the 'coverage territory.'"

After the expiration of the insuring agreement, three former employees of STW brought suit, alleging "that STW had carelessly manufactured, installed, inspected, repaired, or maintained tanks at a chemical plant in the Mid-Ohio Valley region of West Virginia" and they "were repeatedly exposed to cancer-causing chemical liquids, vapors, or fumes that escaped from the tanks" while they were employed from 1960 to 2006. As a result, "[t]he claimants alleged the cancers were, in some part, caused by STW's tanks."

STW attempted to use the defense and indemnification provisions from its insuring agreement with Westfield because the "alleged toxic exposures . . . may have happened during the Westfield policy periods." Additionally, "STW . . . took the position that the lawsuits alleged 'latent' diseases under the policies, that is, during the policy periods from 1985 to 2010, the men's cancers may have been 'hidden or concealed.'"

Westfield responded, seeking declaratory relief from the Northern District of West Virginia, asserting it did not have a "duty to provide either a defense or indemnification to STW because

the state-court claimants were diagnosed four years or more after the expiration of the last CGL policy," so there was no occurrence that triggered the policy during the relevant coverage period.

Even though the West Virginia courts had not addressed this issue, the Northern District of West Virginia held that the continuous trigger theory applied, and Westfield did have a duty to provide coverage. Westfield appealed to the Fourth Circuit saying that the "manifestation" theory should apply instead of the continuous trigger theory. Because the West Virginia courts had not addressed this, the Fourth Circuit certified the question.

Holding:

Interpretation of insurance policies is based on the principles of contract law. If an insurance policy is clear and unambiguous, the terms of the policy should be applied to their full effect. But if the terms are subject to two reasonable interpretations, the policy is considered ambiguous, and the policy should be applied in the insured's favor. Here, the ambiguity was how to define occurrence for "long-tail claims"; these are claims where there is a latency period between when the injury occurred and when the injury manifested.

There are two theories on how to define occurrence. First, the manifestation theory holds that there is an occurrence when an injury manifests; "a claimant's disease can be said to occur only when the disease was first diagnosed, that is, when it became manifest." Second, the continuous trigger theory holds that coverage is triggered during each phase of the disease process, "from first exposure to progression to final manifestation."

Here, the Court held that the continuous trigger theory applied for four reasons. First, the history of CGL policies supports the theory that the continuous progression of a health condition is included in defining an occurrence. Second, the history of CGL policies rejects the manifestation theory. Third, the majority of courts use the continuous trigger theory. Fourth, the language in Westfield's policy supports the use of the continuous trigger theory.

First, the first drafters of CGL policies intended to include continuous progression of a health condition into the definition of occurrence. The occurrence language developed so that coverage decisions were focused "on the occurrence of the bodily injury or property damage, rather than on the liability-inducing conduct" and so that "insureds coverage for bodily injury or property damage sustained as a result of gradual processes resulting from repeated or continuous exposures to harmful substances." Specific change occurred to the language in 1966, which signaled that what was important was the occurrence of the injury or damage and that insidious diseases would be provided coverage.

> The conclusion to be drawn from these contemporaneous explanations of the meaning of "occurrence" is that a CGL policy provides coverage for gradual bodily injury and property damage. Further, those gradual injuries or damages would be encompassed by the language of the CGL policy, even if they progress over a substantial period of time before they became manifest. (citation omitted). Most importantly, "[f]rom the perspective of policyholders, one of the most attractive features of the 1966 CGL policy was the fact that in cases involving progressive or repeated injury, multiple policies could be called into play."

Second, the first drafters of CGL policies rejected the manifestation theory. When the drafters of the 1966 policy were developing the language, they specifically removed language about coverage for manifestation. "[T]he drafting committee had concluded 'that the manifestation trigger was not viable because it would not be possible to "telescope" into one policy period all damages resulting from a continuous injury.'"

Third, 16 courts throughout the United States follow the continuous trigger theory. The Court was unable to find one court that followed the manifestation theory.

Fourth, Westfield stated in its agreement that it would provide coverage "against damages from bodily injury 'occurring' during the policy period, whether in the form of a physical injury, sickness, or disease, and even if caused by continuous or repeated exposure to harmful conditions." Therefore, language of the agreement supports that coverage was to be provided when the injury happened and not when the injury manifested.

Impact on Business:

This case signals that the Court will apply the continuous trigger theory when it comes to questions of when an injury or damage has occurred for long-tail claims and the language of the policy is ambiguous. If insurers want coverage to only be triggered when an injury or damage manifests, that must be clearly and unambiguously stated in the policy.

Wingett v. Challa
Case No. 22-567 (Nov. 8, 2023)

What the Court was Asked to Decide:

The West Virgina Supreme Court was asked whether parties who are dismissed from an action brought under the Medical Professional Liability Act ("MPLA"), but who did not settle their claims with the plaintiff, may be considered by the jury in apportioning fault under West Virginia Code § 55-7B-9(b).

What the Court Decided:

Yes. Under West Virginia law, the term "alleged parties" encompasses those originally named as a party in the complaint having contributed to the plaintiff's injuries irrespective of whether they remain parties to the litigation at the time of trial.

Facts:

Petitioner Darrell Wingett was admitted to Thomas Memorial Hospital and was diagnosed with symptomatic sick sinus syndrome by Dr. Challa, who recommended a permanent pacemaker, which Dr. Ratnani implanted. Mr. Wingett subsequently developed an MRSA infection, leading to the pacemaker's removal and the discovery that it had been non-operational. Mr. Wingett filed a lawsuit in May 2019 naming Dr. Challa, Dr. Ratnani, South Charleston Cardiology Associates ("SCCA"), and Professional Cardiothoracic Surgery, PLLC ("PCS") as defendants in the complaint. Due to service issues, Mr. Wingett dismissed Dr. Ratnani and PCS without prejudice. Mr. Wingett then filed a motion in limine to prevent Dr. Challa from attributing fault to Dr. Ratnani and PCS, arguing Dr. Challa did not establish an independent case against them. Dr. Challa countered, citing expert testimony critical of Dr. Ratnani's care, and arguing that Dr. Ratnani and PCS were "alleged parties" by virtue of being named in the complaint. The circuit court certified the question of whether the jury should consider the fault of dismissed parties to the Supreme Court, which accepted the question for review.

Holding:

The Supreme Court held that a healthcare provider named in a complaint but later voluntarily dismissed is still considered an "alleged party" under West Virginia Code § 55-7B-9(b). Although the MPLA does not define "alleged parties," the Court explained that "[w]here a definition is not legislatively provided, we presume that the Legislature intended the term to have its common usage . . ." As such, when applying the common meaning of the words "alleged" and "parties," the Court concluded that Dr. Ratnani and PSC were "alleged parties" under West Virginia Code § 55-7B-9(b) because they were named by the plaintiff in the complaint. Whether the parties were later dismissed does not change the fact that the plaintiff alleged they contributed to his injuries: "[I]n the context of the MPLA, 'alleged parties' must embrace, at minimum, those alleged tortfeasors who were named in the complaint by plaintiff." Accordingly, the Court held that the jury must be allowed to consider the fault of alleged parties, even if the parties were dismissed.

How They Voted:

Justice Walker authored the majority which was joined by three other Justices. Justice Armstead filed a concurring opinion.

Impact on Business:

This case illustrates how health care providers, even if initially dismissed from lawsuits, can still be deemed "alleged parties" for purposes of calculating damages, exposing providers to continuing liability. As a result, providers must be vigilant of this potential exposure to liability even without being a named party to the litigation.

Eldercare of Jackson Cnty., LLC v. Lambert
Case No. 22-0362 (June 12, 2024)

What the Court was Asked to Decide:

The Supreme Court was asked to determine whether the circuit court erred in denying various healthcare defendants' motions to dismiss to failure to state a claim when defendants claimed statutory immunity under the COVID-19 Jobs Protection Act ("the Act"), as well as whether the circuit court correctly defined "actual malice" in the context of the Act as "require[ing] proof that the defendant acted with the intent to injure or harm the plaintiff and/or decedent[.]"

What the Court Decided:

The Supreme Court concluded the factual allegations in the complaint sufficiently pled that the defendant nursing home engaged in intentional conduct with actual malice in connection with the decedent's death from COVID-19. Thus, the Court affirmed the circuit court's order with respect to the nursing home defendant; however, the Court reversed the order as it applied to the defendant hospital and defendant doctor, as the factual allegations against these defendants were insufficient to establish the statutory exception to the limitations on liability afforded under the Act.

Facts:

Plaintiffs filed suit against Eldercare Health and Rehabilitation ("Eldercare"), Jackson General Hospital, and Irvin John Snyder, D.O., following the death of their father. The decedent contracted COVID-19 while a resident at Eldercare and died while under the care of Jackson General and Dr. Snyder. Plaintiffs alleged that Eldercare had a history of failing to establish and maintain effective infection control policy at its facilities, including failing to inform staff about whether residents had tested positive for COVID-19 and failing to quarantine residents. After plaintiffs removed the decedent from Eldercare, he was taken to the emergency room at Jackson General, where he was diagnosed with a head injury; he also tested positive for COVID-19. Despite the decedent's respiratory distress, hospital records failed to properly document his treatment and status. Plaintiffs' complaint alleged claims of fraud, misrepresentation, and fraudulent concealment (Count 1); civil conspiracy (Count 2); breach of duties of care (Count 3); elder abuse (Count 4); violations of the West Virginia Patient Safety Act (Count 5); and invalidity of an arbitration clause (Count 6).

Defendants moved to dismiss the complaint, claiming absolute immunity from liability for healthcare services related to the pandemic under COVID-19 Jobs Protection Act. Plaintiffs countered that the Act's liability limitations do not apply to intentional conduct with actual malice, and their complaint included such allegations. The circuit court denied defendants' motions to dismiss, defining "actual malice" as the intent to injure or harm the plaintiff and concluding that plaintiffs' alleged sufficient facts to survive dismissal. Defendants appealed this decision.

Holding:

West Virginia Code § 55-19-7 of the COVID-19 Jobs Protection Act provides that the limitations on liability specified in the Act "shall not apply to any person, or employee or agent thereof, who engaged in intentional conflict with actual malice." Proof of actual malice requires evidence that "the person, or employee or agent acted with the deliberate intent to commit an injury, as evidenced by external circumstance." The Court clarified that the intent to cause harm does not need to be aimed specifically at the plaintiff/decedent to be excepted from the limited liability protections. The Court found that pursuant to this definition of "actual malice," plaintiffs provided sufficient evidence in the record that Eldercare engaged in intentional conduct through its repeated mismanagement of COVID-19 safety measures. The Court reached the opposite conclusions re-

garding the allegations against Jackson General and Dr. Irvin, which did not rise to the level of actual malice.

How They Voted:

Justice Hutchison authored the majority opinion in which he was joined by three other Justices. Justice Armstead filed an opinion concurring in part and dissenting in part.

Impact on Business:

This case clarifies that exceptions to the limitations of liability under the COVID-19 Jobs Protection Act specifically apply to actions committed with the intention to cause harm generally. Thus, plaintiffs do not have the burden of proving that such intent was aimed individually at harming them to seek redress.

Boyce v. Monongahela Power Co.
Case No. 22-0292 (Nov. 8, 2023)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to decide whether the circuit court erred when it found that Boyce's actions were negligent and served as the only proximate cause of the incident and whether Boyce's actions constituted an intervening and superseding cause of the incident and alleged injuries. Additionally, the Court was asked to consider whether proximate cause, foreseeability, and intervening cause involve questions of fact that should be decided by a jury, meaning the circuit court erred in granting summary judgment in favor of the Respondent companies.

What the Court Decided:

The Court found that Boyce's actions were an intervening cause of the incident and his injuries. And, while there was a dispute as to the Respondents' negligence, the Court determined that the operative packs regarding how the incident occurred were not in dispute.

Facts:

On April 11, 2014, Eugene Boyce was working as a boom truck operator in the course of his employment for Lowe's. Boyce was attempting to deliver construction materials to a residential customer, Brandon Tucker, in Morgantown, West Virginia. When he arrived at Tucker's residence, Boyce encountered low-hanging communication lines in Tucker's driveway that blocked the path of his boom truck. The communication lines were owned by Frontier Communications and Atlantic Broadband. The Monongahela Power Company ("Mon Power") owned two electrical lines, one energized and one neutral, that ran above the communication lines.

Initially, Boyce had asked Tucker to assist him by using a wooden board to push the communication lines upward. When this did not solve the problem, Boyce climbed on top of his truck, wrapped shrink-wrap around the communication lines and contacted the energized electrical line with his hand. He was shocked upon contacting the energized electrical line and suffered serious injuries, including the amputation of his right hand.

Following the incident, Boyce filed negligence claims naming these three defendants: Frontier, Atlantic, and Mon Power. He alleged that Frontier and Atlantic were negligent because their communication lines were below the height clearance requirements set forth in applicable laws and regulations, including the National Electric Safety Code ("NESC"). He asserted that Mon Power was negligent because the neutral electrical line was installed above the energized electrical line in violation of applicable laws and regulations.

Mr. Tucker testified at the trial that when he walked around the side of Boyce's truck, Boyce had already wrapped some of the shrink wrap around the lowest wire and as soon as he grabbed it to lift it up, it started electrocuting him. Tucker also said that prior to doing so, Boyce told Tucker that "he was going to try something else with this shrink wrap" and that "he did it before." Tucker admitted that since Boyce said he had done that before, Tucker figured that "he knew what the heck he was doing."

Mr. Boyce testified that he did not remember the accident or the events leading up to it. He did state that "during the time he has driven a boom truck, he had occasionally moved utility lines to allow his truck to pass under them by shrink-wrapping the lines in the same manner that he used in the instant case." He stated that he was "self-taught" in this regard and never received any training to identify or handle electrical or communication lines but stated that he "had the understanding that the power line was always on top." He also testified, "I would never touch a power line knowing that it was power."

Holding:

The West Virginia Supreme Court held that Boyce's actions were the sole proximate cause of his injuries because it is not reasonably foreseeable that when confronted with low-hanging wires, a delivery truck driver without any training in the electrical field would climb on top of his truck, shrink-wrap communication lines, and contact the electrical line with his bare hand.

Although the Court has previously explained that those who operate and maintain wires charged with dangerous voltage of electricity, such as utility providers, are required to exercise a degree of care proportionate with the dangers posed, they are not liable for every injury that consequently results. Thus, in this case, the defendants are not liable because there was no claim that the height of the electrical line was in violation of applicable regulations and Boyce's actions could not have been reasonably anticipated.

Additionally, the Court held that even if there was a dispute as to whether the Respondents were negligent, Boyce's actions were an intervening cause that broke the causal chain and relieved the Respondents of liability. Boyce's actions were voluntary, willful, and operated independently from any potentially negligent acts committed by the Respondents which broke the chain of causation between the Respondents' alleged negligence and Boyce's injury.

How They Voted:

Justice Armstead authored the majority opinion. Justice Hutchison and Justice Wooton dissented and reserved the right to file dissenting opinions.

Impact on Business:

This decision has significant implications for businesses, particularly utility providers. The case establishes that a utility provider is not liable for negligence when an individual suffers an injury engaging in actions that could not be reasonably anticipated. Also, just because a similar incident has occurred in the past does not make a future one reasonably foreseeable.

The ruling distinguishes this case from previous cases where the Court found that a utility provider may be liable for a victim's accidental contact with a power line. In this current case, the intentional nature of Mr. Boyce's action created a distinction from cases where contact with a power line was accidental or inadvertent. Businesses should be aware that actions of third parties that could not have been reasonably foreseeable *may* not result in liability.

Duff v. Kanawha County Commission
Case No. 23-43 (Apr. 22, 2024)

What the Court was Asked to Decide:

The Court was asked to determine if "apportionment" under West Virginia workers' compensation law was appropriate under the specific circumstances of the case.

What the Court Decided:

Ultimately, the Court concluded that the ICA erred and that "apportionment" was not appropriate under the facts of the case. Furthermore, in doing so, the Court held that "[u]nder West Virginia Code § 23-4-9b (2003), the employer has the burden of proving apportionment is warranted in a workers' compensation case. This requires the employer to prove the claimant 'has a definitely ascertainable impairment resulting from' a preexisting condition(s). This requires that employer prove that the preexisting condition(s) contributed to the claimant's overall impairment after the compensable injury and prove the degree of impairment attributable to the claimant's preexisting condition(s)."

Facts:

The Petitioner, David Duff II, was a Kanawha County Deputy Sheriff in the Department's bomb squad. On June 15, 2020, Duff injured his back while working on the job, when he lifted a bomb detector robot out of the back of a truck. Thereafter, Duff applied for workers' compensation benefits and the workers' compensation carrier for the Respondent, the Kanawha County Commission, found the injury compensable. However, the workers' compensation carrier awarded Duff only a 13% Permanent Partial Disability ("PPD") award, based upon a medical report by Prasadaroa Mukkamala, M.D. ("Dr. Mukkamala"), in which Dr. Mukkamala found that while Duff did have a 25% whole person impairment, 12% of the whole person impairment was apportioned to an alleged preexisting condition. Thus, only 13% of the 25% whole person impairment was found to have resulted from the work-related injury.

Following the workers' compensation carrier's 13% PPD award, Duff protested the award to the West Virginia Workers' Compensation Board of Review ("BOR"). In doing so, Duff produced a differing medical evaluation by Bruce Guberman, M.D. ("Dr. Guberman") that showed he was entitled to a full 25% PPD award, as no apportionment was indicated. Specifically, Dr. Guberman opined in his report that the entire impairment should be attributed to the work-related injury, as prior to that injury Duff's lumbar spine pain did not radiate into his legs and he did not have numbness, tingling, or weakness in his legs due to low back pain.

The BOR affirmed the 13% PPD award, concluding that "the evidence on record indicates that apportionment should occur and is proper." In accepting Dr. Mukkamala's report over Dr. Guberman's, the BOR found that medical reports submitted established that Duff had a preexisting back condition with a "definite ascertainable functional impairment," and that Dr. Mukkamala's report was most "in accordance" with the evidentiary record.

After the BOR affirmed the 13% PPD award, Duff appealed to the Intermediate Court of Appeals of West Virginia. The Intermediate Court of Appeals affirmed the BOR's decision. Gibbs then appealed the Intermediate Court of Appeals' decision to this Court.

Holding:

On appeal, the West Virginia Supreme Court held that the Intermediate Court of Appeals erred in affirming the BOR 13% PPD award to Gibbs. Specifically, the Court first stated that under West Virginia Code § 23-4-9b, "the employer has the burden of proving apportionment is warranted in a workers' compensation case." Next, the Court found that Dr. Mukkamala's report "plainly lacks any reasoning and rationale supporting or explaining his decision to apportion, especially in a 50-50 proportion." The Court emphasized that "to be substantial evidence, a medical report must indicate the reasoning behind the doctor's opinion." Dr. Mukkamala's opinion, the Court said, lacked "probative value and does not constitute substantial evidence." The Court stated that Dr. Guberman's medical report, which was the differing report obtained by Gibbs, thoroughly explained his decision not to apportion, and applied the *AMA Guides* as mandated by the statute. Thus, the Court reversed the judgment of the Intermediate Court of Appeals and remanded the case to the West Virginia Workers' Compensation Board of Review to award for a total PPD award of 25%.

How They Voted:

Justice Hutchison authored the majority opinion for the Court. Chief Justice Armstead concurred in part and dissented in part. Justice Walker concurred. Justice Bunn concurred in part and dissented in part.

Impact on Business:

This West Virginia Supreme Court opinion adds a constraint on employers who are trying to utilize an apportionment statute in a workers' compensation claim. The Court in this case emphasized that the burden is on the employer to prove that apportionment is warranted. Specifically, the employer must prove that the claimant "has a definitely ascertainable impairment resulting from" a pre-existing condition.

Blackrock Enterprises, LLC v. BB Land, LLC
Case No. 22-0407 (June 6, 2024)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to decide whether the Business Court Division committed multiple errors during a bifurcated trial, including its handling and construction of the jury's special verdict findings, its determination that the parties were engaged in a common law mining partnership, and its rulings as to damages and partnership valuation.

What the Court Decided:

The Court found that the business court erred in its construction of the first material breach doctrine. The Court also issued three new Syllabus Points on issues related to special verdicts and the first material breach doctrine.

Facts:

On May 18, 2013, Blackrock and Jay-Bee executed a Lease Acquisition Agreement ("LAA") under which Blackrock agreed to acquire mineral leases in an "area of mutual interest" (the "AMI") in Pleasants County, West Virginia, and assign them to Jay-Bee for the purpose of drilling horizontal Marcellus and Utica wells. Under the LAA, Blackrock was required to perform abstracting work related to the leases, obtain title insurance, provide lease packets (containing executed leases from the mineral owners among other information), and maintain updated maps reflecting its leasing efforts. Shortly after the LAA was executed the parties' working relationship began to deteriorate, each party maintaining that the other was not complying with its obligations under the LAA. Jay-Bee argued at trial that Blackrock's material breach of the LAA was "early, often and continuing[,]" and included its acquisition of leases which it did not offer to Jay-Bee, failure to timely provide maps, and failure to participate in or adhere to procedures outlined in the LAA regarding the purchase of additional interests in the AMI leases.

On January 11, 2018, Jay-Bee filed the underlying complaint asserting a variety of causes of action against Blackrock. The "phase one" jury trial on liability began on March 2, 2021, lasting ten days. "Phase two" of the proceedings commenced thereafter with briefing on the existence of a mining partnership between the parties. On September 22-23, 2021, a bench trial was conducted, and additional evidence presented regarding the legal and equitable remedies available to Jay-Bee as contract damages and/or relief under the West Virginia Revised Uniform Partnership Act ("RUPA"). On April 25, 2022, the business court entered its final judgment order granting judgment for Jay-Bee, concluding that "as the first material breacher, Blackrock is not entitled to any monetary damages or affirmative relief from Jay-Bee." Finally, the court made additional findings regarding Blackrock's breach of the LAA in its acquisition of lease interests which were not offered to Jay-Bee and required Blackrock to quit-claim certain interests to Jay-Bee as specific performance. Blackrock appealed.

Holding:

The Court reversed and remanded, in part, and vacated, in part, the business court's decision. Regarding the first material breach doctrine, the Court found that the jury instruction given on this issue was incomplete. The Court went on to issue a new Syllabus Point on the first material breach doctrine: "[T]he general rule that a breaching party's uncured, material failure of performance discharges the other party's duty to perform does not apply when the non-breaching party, with knowledge of the facts, either performs or indicates a willingness to do so despite the breach or insists that the breaching party continue to render future performance."

Once the Court reached this conclusion, the Court turned to the issue of whether the business court erred in refusing to include a special interrogatory on the defenses of waiver, ratification, and reaffirmation to the jury. The Court found that the pleadings and evidence demonstrated Blackrock's reliance on these defenses; therefore, they were material issues necessary to fairly resolve the case and should have been submitted to the jury pursuant to Rule 49(a) of the West Virginia Rules of Civil Procedure. The Court issued two Syllabus Point on this issue:

> The determination of whether a material issue raised by the pleadings or evidence has been unfairly omitted from a special verdict rendered pursuant to West Virginia Rule of Civil Procedure 49(a) is reviewed de novo. Where a trial court makes findings on such omitted issues, or findings are deemed to have been made consistent with its judgment on the special verdict, those findings will be reviewed for clear error.
>
> To determine whether a material issue has been unfairly omitted from special findings requested under West Virginia Rule of Civil Procedure 49(a), the court must consider whether 1) when read as a whole and in conjunction with the general charge and instructions, the questions submitted adequately presented the contested issues to the jury; 2) the submission of the issues to the jury was fair; and 3) the ultimate questions of fact were clearly submitted to the jury.

After the Court concluded that material issues were unfairly omitted, the Court concluded that the only way to adequately remedy the errors presented is with a new trial.

How They Voted:

Justice Wooton delivered the 5-0 opinion for the Court.

Impact on Business:

This decision provides clarity on the use and application of Rule 49(a) of the West Virginia Rules of Civil Procedure.

Shears v. Ethicon, Inc.
Case No. 23-192 (June 11, 2024)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to answer three certified questions from the Fourth Circuit Court of Appeals:

1. Whether Section 411 of the *West Virginia Pattern Jury Instructions for Civil Cases,* entitled "Design Defect—Necessity of an Alternative, Feasible Design," correctly specifies the plaintiff's burden of proof for a strict liability design defect claim pursued under West Virginia law.

2. More specifically, whether a plaintiff alleging a West Virginia strict liability design defect claim is required to prove the existence of an alternative, feasible product design—existing at the time of the subject product's manufacture—in order to establish that the product was not reasonably safe for its intended use.

3. [I]f so, whether the alternative, feasible product design must eliminate the risk of the harm suffered by the plaintiff, or whether a reduction of that risk is sufficient.

What the Court Decided:

In response to the certified questions: the Court answered as follows:

1. No.

2. Yes.

3. As part of a prima facie case of strict product liability based upon a design defect, a plaintiff is required to prove that an alternative, feasible design existing at the time the subject product was made would have substantially reduced the risk of the specific injury suffered by the plaintiff.

Facts:

The Shears ("Petitioners") sued Ethicon as part of a multi-district litigation proceeding ("MDL") styled *In re: Ethicon, Inc., Pelvic Repair System Products Liability Litigation*, No. 2:12-md-02327, pending in federal District Court in Charleston before Judge Goodwin. Petitioners claim that Ethicon's Tension-Free Vaginal Tape ("TVT"), a mesh sling used to treat stress urinary incontinence, caused Mrs. Shears "renewed incontinence, urinary tract infections, pelvic pain, and urinary frequency and urgency." Petitioners' design expert testified in deposition that there were "safer alternative mesh material[s] for treatment of stress urinary incontinence than Ethicon's TVT Prolene mesh." Moving under *Daubert*, Ethicon "argued [the expert]'s opinion fell short of the requirement that the alternative, feasible design would have 'eliminated the risk that injured [Mrs. Shears],'" relying in part on West Virginia Pattern Jury Instruction § 411. "The district court agreed, granted Ethicon's motion, and barred [the expert] from testifying about alternative mesh designs." Petitioners went to trial on their strict liability claim pursuant to a malfunction theory but at the close of their case in chief, the district court granted Ethicon's motion for judgment as a matter of law on the claim. Then, the jury returned a verdict for Ethicon on the Petitioners' negligence claim, and they appealed. The matter was fully briefed; after oral argument, the Fourth Circuit certified two questions to the West Virginia Supreme Court of in an order dated April 10, 2023:

1. Whether Section 411 of the West Virginia Pattern Jury Instructions for Civil Cases, entitled "Design Defect—Necessity of an Alternative, Feasible Design," correctly specifies the plaintiff's burden of proof for a strict liability design defect claim pursued under West Virginia law.

2. More specifically, whether a plaintiff alleging a West Virginia strict liability design defect claim is required to prove the existence of an alternative, feasible product design—existing at the time of the subject product's manufacture — in order to establish that the product was not reasonably safe for its intended use. And if so, whether the alternative, feasible product design must eliminate the risk of the harm suffered by the plaintiff, or whether a reduction of that risk is sufficient.

Holding:

The Court rejected the argument that the West Virginia Pattern Jury Instructions specifies a plaintiff's burden of proof for strict liability design defect. The Court did not agree that the alternative design had to "eliminate the risk of harm." Instead, the Court held that "[a]s part of a prima facie case of strict product liability based upon a design defect, a plaintiff is required to prove that an alternative, feasible design existing at the time the subject product was made would have substantially reduced the risk of the specific injury suffered by the plaintiff." The Court stated,

> Based upon these considerations, we answer the final certified question by holding that, as part of a prima facie case of strict product liability based upon a design defect, a plaintiff is required to prove that an alternative, feasible design existing at the time the subject product was made would have substantially reduced the risk of the specific injury suffered by the plaintiff. By adopting this standard, we reject the definition of a design defect set out in the Restatement (Third) of Torts: Prod. Liab. § 2 (Am. L. Inst. 1998).

The Court also overruled *Ford Motor Co. v. Tyler*, 249 W. Va. 471, 896 S.E.2d 444 (Ct. App. 2023) which had adopted the Restatement (Third) test, stating "[t]o the extent that the West Virginia Intermediate Court of Appeals recently adopted the Restatement's standard for design defect claims in *Ford Motor Co. v. Tyler*, 249 W. Va. 471, 896 S.E.2d 444 (Ct. App. 2023), it is overruled."

How They Voted:

Justice Bunn delivered the 5-0 opinion for the Court.

Impact on Business:

This case clearly establishes a plaintiff's burden of proof for a strict production liability action under West Virginia law and requires plaintiffs to demonstrate that an alternative, feasible design would have substantially reduced the risk of the specific injury suffered by plaintiff. Notably, although the parties briefed the issue of whether the Court ever formally adopted the Pattern Jury Instructions, the Court did not reach that issue. This is a point for litigants to keep in mind for the future if they are relying on an argument based on the Pattern Jury Instructions.

Robert Hood v. Lincare Holdings, Inc.
Case No. 21-0754 (Nov. 8, 2023)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to examine a decision of the Workers' Compensation Board of Review that affirmed previous rulings rejecting the claimant's allegations that he should be compensated for an injury that occurred while working. The Board concluded that although the injury occurred during work, the claimant failed to show that his work caused the injury. On appeal, the Court was tasked with reviewing the workers' compensation award denial.

What the Court Decided:

The Court ultimately affirmed the August 23, 2021 order from the Board of Review. The Court concluded that while Mr. Hood's injuries occurred while working, it was not a result of his employment. Mr. Hood's claim lacked a causal connection between his injury and his employment.

Facts:

In May of 2020, Robert Hood was delivering medical supplies for his employer, Lincare Holdings, Inc. On his third delivery of the day, Mr. Hood was descending a short set of stairs from a customer's porch when he felt a pain in his right knee. He decided to make another delivery before returning his work vehicle and driving himself to the hospital. He did not slip, trip, or fall, and he was not carrying anything when he felt the knee pain. Mr. Hood was diagnosed with a right knee sprain and his physician reported that he did not aggravate a prior injury or disease.

Mr. Hood then made a claim for workers' compensation benefits. The claim was denied by the claim administrator because "Mr. Hood did not sustain an injury in the course of and as a result of his employment." Mr. Hood appealed the decision to the West Virginia Workers' Compensation Office of Judges. In February of 2021, an Administrative Law Judge with the Office of Judges affirmed the claim administrator's decision and concluded that Mr. Hood did not show evidence that the injury was a result of his work. Mr. Hood then appealed the decision to the Board of Review who affirmed the decision and rejected the claim.

Holding:

On appeal, the Court noted that there was no dispute that Mr. Hood's knee injury occurred in the course of his employment when he was delivering medical supplies. The issue in contention is whether the injury "resulted from" that employment. Thus, while an employee need not establish fault, he must establish a connection between his work and his injury.

To assist in determining the connection between Mr. Hood's employment and his injury, the Court held in a new syllabus point that "there are four types of injury-causing risks commonly faced by an employee at work: (1) risks directly associated with employment; (2) risks personal to the claimant; (3) mixed risks; and (4) neutral risks." If an employee sustains an injury when engaging a neutral risk, the increased-risk test may be used to decide if the claim is compensable under West Virginia Code § 23-4-1(a)(2018). Using the increased-risk test the claim may be compensable even if the risk is not qualitatively particular to employment as long as the employee faced an increased quantity of risk.

West Virgnia Code § 23-4-1(a) requires a claimant to show by a preponderance of the evidence that he received an injury in the course of and resulting from his employment. To de-

termine if the injury resulted from employment a causal connection between the injury and the employment must be shown to have existed. The increased risk test may be used to prove a claim compensable.

In the case *sub judice*, the Court gave deference to the ALJ who found no causal connection between Mr. Hood's work and his injury. Here, Mr. Hood simply took a step down a stair and, coincidentally, his knee "blew out" and began hurting. Mr. Hood did not slip, trip, or fall, and he was not carrying any materials related to his employment. The Court concluded that Mr. Hood's risk of being injured while descending a short set of stairs was not qualitatively peculiar to the employment, nor did he face an increased quantity of a risk.

How They Voted:

Chief Justice Walker authored the opinion of the Court. Justice Hutchison concurred in part and dissented in part and wrote separately. Justice Wooton dissented and wrote separately.

Impact on Business

The Court held in a new syllabus point that there are four types of injury-causing risk commonly faced at work: (1) risks directly associated with employment; (2) risks personal to the claimant; (3) mixed risks; and (4) neutral risks. However, in holding this, the Court also acknowledged that each case is different and that an injury occurring during the time of work is not necessarily caused by the scope of employment.

Lee Ann Sommerville, et al. v. Union Carbide Corp.
Case No. 2:19-cv-00878 (S.D.W. Va. Mar. 20, 2024)

What the Court was Asked to Decide:

The District Court was asked to determine whether a Plaintiff can recover damages for medical monitoring due to chronic exposure to ethylene oxide ("EtO"). The District Court was also asked to decide whether the Plaintiff alleged sufficient facts for a medical monitoring claim and whether the claim satisfied Article III requirements for ripeness and standing.

What the Court Decided:

Facts:

This case involved a claim for medical monitoring due to EtO exposure for a putative class of residents who lived adjacent to Union Carbide's plant in South Charleston. The United States Environment Protection Agency has acknowledged that EtO is a known carcinogen, and that long-term exposure can cause certain cancers of the white blood cells. Union Carbide has owned and operated the South Charleston Plant since 1977. Covestro began operating polyol facilitates in the plant in 2015. According to the plaintiff, UCC and Covestro operated the plant without sufficient pollution controls to limit or eliminate the emission of EtO, resulting in exposure to thousands of local residents for over 40 years.

Holding:

Because the Court's subject matter jurisdiction is based on diversity of citizenship, West Virginia substantive law is applicable. West Virginia recognizes a cause of action for medical monitoring. Despite this, Article III justiciability requires more than mere recognition of a cause of action by a state court. As justiciability is a question of federal law, plaintiffs must comply with Article III requirements for standing and ripeness.

The Court held that Ms. Sommerville did not satisfy Article III standing and ripeness requirements to maintain her suit.

A. Standing

Standing requires that Ms. Sommerville prove three elements: that she suffered an injury-in-fact that is both concrete and particularized, as well as either actual or imminent; that Union Carbide/Covestro likely caused her injury; and that her injury is redressable by judicial relief. An injury-in-fact is particularized if it affects Ms. Sommerville or a member of the putative class in a personal and individual way. Further, an injury is actual if it has already occurred. Finally, an injury is concrete if it is real and not abstract. Intangible harm can be sufficiently concrete under federal law to satisfy Article III standing requirements if Congress has weighed in on the matter or if the harm in question is grounded in traditional common law.

The Court found that Ms. Sommerville met the particularity requirement for Article III standing but could not meet the concreteness or actual/imminency requirements. As such, the Court held that Ms. Sommerville lacked standing to maintain her claim against Union Carbide and Covestro.

B. Ripeness

In addition, the Court determined that Ms. Sommerville's claim was not ripe. Ripeness answers the question of when somebody may sue. The Court opined that the ripeness doctrine

ensures that the issues before the court are definite and concrete, not contingent or hypothetical. In determining whether an issue is ripe for decision, a Court must weigh the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration.

The issues presented by Ms. Sommerville were not ripe for adjudication because no expert could say whether class members would develop cancer from Union Carbide's or Covestro's actions or omissions. Rather, because Ms. Sommerville's claims rested on the proposition that putative class members could recover for medical monitoring due to a theoretical level of exposure that could place one at a higher risk of possibly developing certain cancers at some point in the future, her claims were speculative.

How They Voted:

Judge Goodwin was the only judge sitting on this case.

Impact on Business:

Claims for medical monitoring have always been problematic for businesses in West Virginia because a plaintiff can recover without an existing injury. This case limits the ability of marginal plaintiffs to prevail by applying stricter pleading standards required in federal court. Under this line of jurisprudence, any putative plaintiff wishing to sue for medical monitoring in federal court must satisfy Article III requirements of standing and ripeness. To succeed on a medical monitoring claim, plaintiffs must show that any injury is attributable to a specific and verifiable injury that can cause a significantly increased risk of contracting a condition. This presents a significant hurdle for plaintiffs for this type of action, at least if brought in or removed to federal court.

Loper Bright Enterprises et al. v. Raimondo et al.
Together with Relentless, Inc. et al. v. Department of Commerce et al.
U.S. Supreme Court, Case Nos. 22-451 and 22-1219 (June 28, 2024)

What the Court was Asked to Decide:

The United States Supreme Court was asked to decide whether *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984)—which set forth a two-part test to resolve challenges to an agency's interpretation of a statute the agency administers that required federal courts to give deference to the agency's reasonable interpretation if the statute was ambiguous—should be overruled or clarified.

What the Court Decided:

The Court overruled *Chevron* and held that the Administrative Procedure Act ("APA") requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority and may not defer to the agency's interpretation of the law simply because the statute is ambiguous.

Facts:

The case arose out of a dispute under the Magnuson-Stevens Fishery Conservation and Management Act ("MSA")—a statute that was passed to protect from overfishing. The Act authorizes regional councils to set standards for fishing of the Coast of the United States. Vessels may be required to carry an "observer" who monitors fishing activity and makes sure all standards are followed.

The MSA expressly names three groups that must cover the costs associated with observes. The Act does not name Atlantic herring fisherman as one of these groups, the National Marine Fisheries Service ("NMFS"), adopted a rule that required Atlantic herring fishermen to pay the fees for the observers as well.

Businesses that operate in the Atlantic herring fishery challenged the rule in two federal district courts. Their main argument was that because the statute listed three categories of vessels that must pay for observers, the agency didn't have authority to add another to the list. The rule was upheld by both District Courts.

The United States Court of Appeals for the First and D.C. Circuits affirmed those decisions. Both relied, in varying degrees, on the *Chevron* Doctrine. The doctrine takes its name from a 1984 Supreme Court case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which held that if a court concluded that a statute was silent or ambiguous (Step One), it must defer to an agency's permissible construction of the statute (Step Two).

Holding:

The Court found that the Administrative Procedure Act "incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions." The Court rejected the "presumption" of agency expertise. It stated that resolving statutory ambiguity is within a court's, not an agency's competency. Further, it noted that to the extent there are facts within an agency's expertise, the court is free to seek guidance from the agency or other experts through briefing and testimony.

Finally, the Court rejected the notions that *Chevron* should be upheld based upon *stare decisis* principles and that overruling the doctrine will negatively impact the ability of the law to

develop uniformly. The Court also emphasized that in its view, "there is little value in imposing a uniform interpretation of a statute if that interpretation is wrong. We see no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts." And while the Court overruled the *Chevron* doctrine, Chief Justice Roberts was careful to clarify that prior cases that relied on the Chevron framework were not overruled *per se*.

How They Voted:

The majority opinion, authored by Chief Justice John Roberts, was joined by Justices Thomas, Gorsuch, Kavanagh, and Barrett. Justices Thomas and Gorsuch also wrote separate concurring opinions.

Justice Kagan, who authored a dissent, was joined by Justice Sotomayor and, with respect to *Relentless, Inc*., Justice Jackson.

Impact on Business:

The decision significantly increases the ability of businesses to successfully challenge regulations. This is largely being considered a victory for the business community considering the increase in burdensome regulatory schemes and administrative agencies that have expanded their rulemaking authority and gained increased power—potentially exceeding their statutory authority.

On the other hand, in the wake of this decision, there is also significant uncertainty around agency rulemaking, and the new standard for reviewing agency actions may result in inconsistent interpretations of the law which would create complex and patchwork regulatory requirements for businesses, particularly those operating in highly regulated industries.

Bond v. United Physicians Care, Inc.
Case No. 23-ICA-118 (May 29, 2024)

What the Court was Asked to Decide:

The Intermediate Court of Appeals ("ICA") was asked to decide whether qualified or statutory immunity bars a civil action, specifically, whether Salem Family Healthcare's ("Salem") COVID-19 Program falls within the West Virginia COVID-19 Job Protection Act's scope of immunities.

What the Court Decided:

The ICA held that Salem was immune from suit. When a statute is clear and unambiguous, under West Virginia's laws of statutory construction, it will not be interpreted by the courts, but simply applied. However, Salem's motion to dismiss was improperly granted, based solely on immunity with no consideration of the actual malice exception to immunity in the Act.

Facts:

Ms. Melissa Bond was hired by Salem as a medical assistant in June 2016. In 2021, Salem implemented a "COVID-19 Vaccination Program," which required employees to show proof of past vaccination or to apply for and receive a medical or religious exemption, with a deadline of March 15, 2022. This program was created in response to the West Virginia COVID-19 Job Protection Act ("the Act"). The Act embodies a very broad immunity provision, which states that there is no claim against a person or entity arising from COVID-19 or from COVID-19 impacted care. By the required deadline, Ms. Bond sought a medical exemption from obtaining a vaccination. She filled out the form with the assistance of her doctor, Paul Davis, who testified that Ms. Bond had negative reactions to vaccines previously. Salem denied the medical exemption request. Ms. Bond appealed the decision, and Salem also denied the appeal. By the deadline of March 5, 2022, Ms. Bond had not received a vaccination. On March 23, 2022, an Employee Corrective Action Form was sent to Ms. Bond as a final warning for her noncompliance with the vaccination policy. On March 29, 2022, Salem terminated Ms. Bond's employment.

Ms. Bond filed a civil action in the Circuit Court of Harrison County, asserting two claims under the West Virginia Human Rights Act: disability discrimination and failure to accommodate. Ms. Bond alleged that due to her prior adverse reactions to vaccinations, she had a disability and that Salem had knowledge of her disability. Ms. Bond claimed that Salem's discrimination violated the West Virginia Human Rights Act, in addition to claiming that Salem failed to provide her with reasonable accommodations and failed to have proper policies in place regarding employees with disabilities. Lastly, she claimed that Salem's acts were willful, wanton, malicious, and reckless in disregard of her civil rights.

Salem moved to dismiss for failure to state a claim under Rule 12(b)(6) of West Virginia Rules of Civil Procedure. Salem claimed it was entitled immunity under the Act. The circuit court granted Salem's motion. The circuit court found that Ms. Bond's claims arise due to a natural consequence of Salem's implementation of policies designed to prevent or minimize the spread of COVID-19. Ms. Bond appealed.

Holding:

Because Ms. Bond's claims are premised on Salem's implementation of a policy that falls under the scope of the Act, Salem is immune from suit. The key focus in this case is on the "arising from COVID-19" language embodied in the Act. The qualifying language requires that any act be caused by a natural, direct, and uninterrupted consequence of COVID-19. This court concludes

that the plain language of the Act is clear and unambiguous and will be applied as written. Here, the Act explicitly sets forth the exact situation that Ms. Bond is suing Salem for. Salem's policy was implemented as a natural, direct, and uninterrupted consequence of COVID-19, per the Act's language. The Act sets forth a list of examples, and this situation is one plainly listed.

However, the ICA reversed and remanded to the circuit court to further consider the "intentional conduct with actual malice" exception under the Act, and its applicability to this specific case. The Act does not bar suits that involve actual malice. Ms. Bond asserted that because Salem knew that Ms. Bond would be risking her health, terminating her for vaccine refusal constituted actual malice. The circuit court did not consider the issue of actual malice in this case, so the order is reversed and remanded for consideration on this issue only. If the court determines that the actual malice issue is sufficiently pled, the court must determine whether there is a genuine issue of material fact in the context of the COVID-19 Act.

How They Voted:

Chief Judge Scarr issued the unanimous majority opinion.

Impact on Business:

Although this case is limited to a COVID-19 issue, businesses should be cautious about denying an individual a medical exemption to a vaccination policy. Doing so could expose the business to potential liability, especially if there are no statutory immunity provisions in place as with the COVID-19 Job Protection Act.

Lisa Daniels v. DAL Global Servs.
Case No. 23-ICA-212 (June 5, 2024)

What the Court was Asked to Decide:

Whether the Circuit Court of Kanawha County erred in: (1) rejecting Plaintiff's failure to accommodate claim and retaliation claim under the West Virginia Human Rights Act ("WVHRA"); (2) rejecting Plaintiff's private cause of action under the West Virginia Cannabis Act ("WVMCA") and her claim for violation of public policy; and (3) finding that the employer's return-to-work drug testing did not violate Plaintiff's right to privacy.

What the Court Decided:

The Intermediate Court of Appeals ("ICA") affirmed the Circuit Court of Kanawha County's order granting DAL's motion for summary judgment and dismissing the case.

Facts:

Lisa Daniels began working for DAL in 2011 as a customer service agent at Yeager Airport. Her job duties included checking passengers' bags and identification, asking passengers safety screening questions, scanning boarding passes, rebooking passengers, interacting with the pilots in the cockpit, monitoring passengers for signs of intoxication or other safety concerns that would prohibit them from boarding the plane, and ensuring compliance with federal safety regulations. Daniels resided in Ohio during her employment for DAL.

Daniels obtained a medical marijuana card to use medical marijuana in Ohio from her Ohio-based physician. However, she never received certification to use marijuana under West Virginia's medical marijuana statute ("WVMCA"). All DAL employees were subject to a policy which required all employees who were on leave from work for more than thirty days to submit to drug testing upon their return to work. This policy prohibits the use of all illegal drugs, both on and off duty, and states that a violation of this policy will result in termination.

In 2020, Daniels returned to work from a medical leave of absence. When Daniels went to get her drug screen, she contacted her supervisor and asked if her test could be delayed because she used marijuana within the past two weeks. Her supervisor told her that a refusal to test would be considered a failed drug screen, so she proceeded to give a urine sample. Daniels tested positive for Tetrahydrocannabinol ("THC") and was discharged under DAL's policy prohibiting illegal drug use.

Ms. Daniels filed a claim against DAL alleging: (1) wrongful termination in violation of the WVHRA by failing to provide her a reasonable accommodation; (2) wrongful termination in violation of the WVHRA by committing retaliation; (3) wrongful discrimination and termination in violation of the WVMCA, which bars adverse employment action based upon her status as an individual using medical marijuana; and (4) that DAL violated Ms. Daniels' right to privacy by requiring her to submit to a drug screen without legal justification.

Holding:

First, the ICA held that Ms. Daniels's use of marijuana is not a reasonable accommodation invoking protection under the ADA, the WVHRA, or the WVMCA. Ms. Daniels's failure to accommodate claim failed because her use of medically approved marijuana, which occurred in Ohio and in accordance with Ohio law, constituted illegal drug use in West Virginia and prevented her from meeting the WVHRA's definition of "disabled." Nothing in the WVHRA prevents drug testing for illegal drugs.

The ICA noted that the ADA similarly excludes an individual "currently engaging in the illegal use of drugs" from its protections. Under federal law, marijuana is a schedule I narcotic and medical marijuana use is therefore not protected under the ADA. Under West Virginia law, the use of marijuana is only afforded legal protection if used in accordance with the WVMCA, which Ms. Daniels did not do. Thus, under both West Virginia and federal law, marijuana was an illegal drug at the time of the drug testing. Accordingly, its use by Ms. Daniels was not protected by the WVHRA.

Second, the ICA found that Ms. Daniels failed to establish evidence that she was terminated for asking to be excused from the drug test, and thus, she failed to satisfy the but-for element of a WVHRA retaliation claim.

Third, the ICA held that Ms. Daniels was not afforded protections under the WVMCA and could not establish that she was a member of the protected class. To be afforded the protections under the Act, an individual must be a resident of this state. Ms. Daniels was not a resident of West Virginia nor did she obtain her medical cannabis under the WVMCA; thus, she was not a "patient" under the Act. Further, the marijuana she used was not "medical cannabis" or "certified medical use" authorized under the Act.

Next, the ICA held that Ms. Daniels could not sustain a private cause of action for a violation of public policy under *Harless*, because she failed to present evidence that her dismissal would jeopardize the public policy of allowing *lawful* use of medical marijuana for West Virginia License holders.

Finally, the ICA held that drug test required by DAL fell within the public safety exception of *Twigg v. Hercules Corp.* because Ms. Daniel's job involved public safety and the safety of others, despite her arguments to the contrary.

How They Voted:

Judge Greear delivered the unanimous opinion of the Intermediate Court of Appeals.

Impact on Business:

This decision is notable that it confirms, for the first time, that medical cannabis use is protected in West Virginia only under the provisions of the West Virginia Medical Cannabis Act – not the medical cannabis laws of other states. Thus, medical cannabis use that is outside the WVMCA is illegal under current state and federal law and therefore cannot constitute a reasonable accommodation under the WVHRA.

Scafella v. Erie Ins. Co.
Case No. 22-ICA-173 (Nov. 14, 2023)

What the Court was Asked to Decide:

Whether Erie Insurance Company's ("Erie") policy covered certain real property lost in a fire even though the policy contained provisions stating coverage would not be provided for real property used for business purposes.

What the Court Decided?

Erie's policy did not allow for coverage of the lost real property. The policy was clear that it would not cover structures used for business purposes. The lost structure, the large barn with milk house, was used for a retail store and, therefore, excluded from coverage.

Facts:

Mark Scafella ("Scafella") had real property located in Terra Alta, West Virginia; his property "included a residential home, a large barn with an adjacent milk house, several sheds or smaller barns, and a small country church." Scafella obtained homeowners insurance from Erie. The homeowners' insurance policy included a provision that excluded coverage for business pursuits (the "Other Structure" provision). Specifically, the policy did not cover structures "used in whole or in part for 'business' purposes" or any structure "used to store 'business property.'" However, if the owner of the business property was someone that Erie covered, the policy would provide insurance coverage for that structure.

At one time, Scafella and his fiancé obtained two insurance quotes from Erie, "one including an incidental farming endorsement and one without the endorsement." Scafella picked the insurance quote that did not include incidental farming endorsements.

Additionally, Scafella started to operate a business out of the milk house called Olivia's LLC; it "was a retail store selling meat, cheese, and sandwiches." He had future plans of using the large barn that was physically attached to the milk house as a wedding venue, catering hall, and restaurant.

On February 2, 2019, a fire damaged the large barn and many pieces of personal property. Scafella alleged that the milk house was not damaged during the fire. Scafella filed a claim after the fire, and Mr. Geho was assigned the claim and performed an investigation of the property. Geho described the milk house and large barn as one structure during his investigation. Scafella received $67,640.80 for the personal property that was located in the large barn, but he was "denied the portion of the fire loss claim for the structure of the large barn" because it was excluded from coverage under the Other Structures provision. Scafella filed a complaint against Erie and Mr. Geho. The circuit court granted summary judgment for Erie and Mr. Geho because the milk house was a part of the large barn structure, and there was no support for Scafella's claim. Scafella appealed.

Holding:

West Virginia contract law governs the interpretation of insurance policies. A clear and unambiguous insurance policy must be applied according to its meaning. An insurance policy is ambiguous if there can reasonably be two interpretations of the same policy. If the Court determines a policy is ambiguous, it can interpret the meaning of it.

Here, the ICA held there was no ambiguity in the policy from Erie. The "Other Structure" provision clearly stated only property used for residential purposes would be covered and any property used for business purposes would not be covered. Additionally, the ICA held that the structure containing the large barn and milk house was a single structure. The ICA looked to other courts and found that, because the large barn and milk house were in close proximity and physically shared walls, it was a singular structure.

Scafella attempted to argue that Erie waived the business purpose provisions in the insurance policy because Erie was aware Scafella was using the property for business purposes when the parties signed the insurance policy. The ICA did not accept this argument because, when Scafella signed the insurance policy, he signed that there were no "'business or occupational pursuits on the insured premises.'"

Additionally, Scafella attempted to argue there should be coverage under the policy because the structure was owned by someone covered under the policy. However, the ICA did not accept this argument either because Scafella was attempting to reclassify personal property as personal business property in order to obtain more money under the policy.

How They Voted:

Chief Judge Daniel W. Greear delivered the 3-0 opinion of the Intermediate Court of Appeals.

Impact on Business:

This case is an example of the court applying policy language that is clear and unambiguous. Insurers and policyholders rely on the predictability of the terms of their contracts.

West Virginia Nat'l Auto. Ins. Co. v. Dobbins
Case No. 23-ICA-101 (Apr. 22, 2024)

What the Court was Asked to Decide:

Whether the circuit erred by tolling the notice requirements contained in West Virginia Code § 33-6-31(e) and West Virginia National Auto Insurance Company's policy to find uninsured coverage for an insured following their motor vehicle accident, despite not reporting the accident to policy within the time frame proscribed by the statute or the policy.

What the Court Decided?

Yes, the circuit court should not have tolled the notice requirements because the statute and policy language are clear. The notice requirements under West Virginia Code § 33-6-31(e) and West Virginia National Auto Insurance Company's policy require that those seeking coverage under uninsured motorist policies must report the accident to "'police, peace, or other judicial officer' within [24] hours after the accident or the insured discover[s], but only if the insured or someone on his or her behalf is 'physically able to report the occurrence of [the] accident.'" Additionally, in this case, because the provisions of the insurance policy were clear, the meaning of the policy should have been applied.

Facts:

The Dobbins family obtained uninsured motorists insurance coverage from West Virginia National Auto Insurance Company. On February 15, 2019, Mr. Dobbins was involved in an auto accident when a truck struck the rear passenger side of Mr. Dobbins's truck. The truck fled the scene. Mr. Dobbins did not immediately report the accident or seek medical treatment for injuries. Mrs. Dobbins stated that Mr. Dobbins was not emotional distraught, physically injured, or otherwise rendered incapable of reporting the accident.

West Virginia National Auto Insurance Company was notified of the accident four days later, on February 19, 2019. The Dobbins family allegedly reported the accident to the police around the same day, but the police advised they had waited too long to report it. On April 5, 2019, West Virginia National Auto Insurance Company denied the Dobbins' claim because they did not report the accident to the police within 24 hours of the accident. West Virginia Code § 33-6-31(e) and a specific provision in the insurance policy required the Dobbins family to report the accident with an uninsured motorist to an officer within 24 hours. The Dobbins family filed suit against West Virginia National Auto Insurance Company and the unnamed motorist. The circuit court held that the notice requirements were tolled under West Virginia Code §§ 2-2-1 and 2-2-2. West Virginia National Auto Insurance Company appealed.

Holding:

West Virginia Code § 33-6-31(e) clearly and unambiguously requires that

> it is the duty of insured seeking [uninsured motorist] coverage to report any bodily injury or property damage caused by an unknown party in a motor vehicle accident to "police, peace, or to a judicial officer" within [24] hours after the accident or the insured discover, but only if the insured or someone on his or her behalf is "physically able to report the occurrence of [the] accident."

Here, the Dobbins family did not notify any officer within the required period. Additionally, there was "no evidence in the record to conclude that Mr. Dobbins was not physically able to

report the occurrence of the accident to police within twenty-four hours following said accident." Therefore, the Dobbins family was required by statute to report the accident within 24 hours.

The circuit court attempted to toll the notice requirement based on West Virginia Code §§ 2-2-1 and 2-2-2, but the ICA held that these specific provisions are inapplicable. Specifically, they allow for notice to be tolled for "summons, court proceeding, or a notice fixing a designated time to hold court or do an official act." Thus, the 24-hour notice requirement applied to the Dobbins.

Additionally, even without the statutory requirement, West Virginia National Auto Insurance Company's policy required the insured to report accidents within 24 hours. West Virginia contract law governs the interpretation of insurance policies. A clear and unambiguous insurance policy must be applied according to its meaning. An insurance policy is ambiguous if there can reasonably be two interpretations of the same policy. If the Court determines a policy is ambiguous, it can interpret the meaning of it. Here, the insurance policy clearly required the insured to report the accident within 24 hours in order to make an uninsured motorist claim, so the Dobbins family failed to satisfy this requirement.

How They Voted:

Judge Greear delivered the 3-0 opinion of the Intermediate Court of Appeals.

Impact on Business:

The ICA has made clear it will not find coverage when West Virginia law requires conditions precedent to coverage or when finding coverage would be contrary to the clear and unambiguous terms of the insurance policy.

James Atkinson v. NCI Nursing Corps. and Medtox Laboratories, Inc.
Case No. 22-ICA-233 (Nov. 15, 2023)

What the Court Was Asked to Decide:

The Intermediate Court of Appeals ("ICA") was asked to determine whether the Petitioner's claims against NCI Nursing Corp. and Medtox Laboratories, Inc. fell under the West Virginia Medical Professional Liability Act ("MPLA").

What the Court Decided:

In Atkinson, the ICA cautioned against a broad reading of the MPLA, as it is "designed to be in derogation of the common law" in narrowing the statutory rights of citizens to compensation for injury and death, and thus concluded that Petitioner was not a patient of the Respondents and therefore his claims were not subject to the MPLA.

Facts:

James Atkinson ("Petitioner") alleged that he was a patient of NCI Nursing Corps. ("Respondent" or "NCI"), a healthcare facility under the MPLA. Respondent alleged that Petitioner failed to comply with the pre-suit notice required by the MPLA, and the circuit court affirmed. On November 15, 2023, the ICA reversed the circuit court's order and remanded the case for further proceedings, and held that a urinalysis screen at an employee's workplace does not constitute an act of "healthcare," involve a "medical diagnosis," or involve "medical care," two terms that are *not defined* by the MPLA. Importantly, the ICA found this situation "analogous to a physician performing record reviews or independent medical evaluation of an individual."

Petitioner, a coal mine belt supervisor employed by Harrison Coal Company, was required to submit to a drug and alcohol screen administered by Respondent. Respondent sent Petitioner's sample to a laboratory, MedTox Laboratories, Inc. ("MedTox"), which showed the presence of marijuana. Petitioner's employer suspended him without pay and thereafter terminated his employment. However, Petitioner alleged that he never ingested any illegal drugs. He contested the test results and submitted to an additional drug test and a hair follicle test. The additional drug test was also positive for marijuana, but the hair follicle test was negative. Thereafter, Petitioner protested the West Virginia Office of Miners' Health, Safety and Training ("WVOMHST") suspension of his mining certifications. During that process, the NCI nurse who conducted the random drug screening testified that he did not conduct the drug screening in accordance with 49 C.F.R. § 40.33(a) and (e), which require that parties collecting urine samples from miners subscribe to a mandated list-serve and receive refresher training at least every five years. The nurse also testified that he did not have any documentation showing that he met the requirements set forth in 49 C.F.R. § 40.33(g), which is required in order for an individual to be permitted to act as a collector in the drug testing program. Petitioner alleged that this failure automatically rendered the drug screen results "null and void." However, NCI and MedTox did not void or otherwise disqualify the results of the urinalysis.

On July 18, 2022, Petitioner filed the underlying complaint asserting claims for "professional malpractice" (Count I), negligence (Count II), violation of statutes (Count III), and sought punitive and other damages. On August 29, 2022, NCI filed its *Motion to Dismiss* pursuant to Rules 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure. In its Motion, NCI alleged that Petitioner's claim "relate[d] to and stem[ming] from his [p]rofessional [m]alpractice claims asserted in Count 1" of his complaint was an MPLA claim and subject to the pre-suit notice requirements of West Virginia Code § 55-7B-6.

On October 31, 2022, the court entered an order granting NCI's Motion to Dismiss. Specifically, the court found that Petitioner failed to comply with the requirements of the MPLA deemed

applicable thereto given the determination that NCI was "a [health care] provider pursuant to the MPLA and their services rendered with respect to Plaintiff qualify as [health care]." Petitioner appealed and the ICA reviewed this case *de novo*.

Holding:

The ICA held that the actions of NCI did not constitute "health care" under West Virginia Code § 55-7B-2(e)(1). The Court "easily dismiss[ed]" the consideration that conducting a uranalysis drug screen test was an act, service or treatment provided in furtherance of either a physician or health care facility's "plan of care." First, no physician or health care facility took part in the collection of Petitioner's urine, which took place *at Petitioner's workplace*. Second, there was no "plan of care" for Petitioner or treatment provided to or planned for Petitioner by NCI – just simply the collection of urine for a routine drug and alcohol screening. Thus, the Court was left to determine if collecting a urine sample and completing a uranalysis is an act, service, or treatment provided under, pursuant to, or in furtherance of a "medical diagnosis," which, importantly, is a term *that is not defined by the MPLA*. Thus, the Court relied upon persuasive guidance to hold that "medical diagnosis" is a term of art that has a specific and particular meaning, "relating to the identification and alleviation of a physical or mental illness, disease, or defect." While the uranalysis was designed to identify the presence of various substances in Petitioner's urine, the ICA held that "the test itself did not identify any physical or mental illness, disease, or condition." Thus, the urinalysis did not constitute "a medical diagnosis."

The ICA also considered whether the services provided to Petitioner fell under the definition of "healthcare" pursuant to the MPLA. This required the Court to analyze another undefined term incorporated into the MPLA: "medical care." The ICA relied upon Merriam-Webster's dictionary definition, which defines "medical" as "of, relating to, or concerned with physicians or the practice of medicine," Medical, Merriam-Webster Collegiate Dictionary (11th ed. 2003), and "care" as "serious attention." Care, Black's Law Dictionary (11th ed. 2019). Thus, the ICA found that the plain and commonly accepted meaning of medical care relates to or concerns serious attention by a physician or the practice of medicine. Because no physician gave Petitioner serious attention, i.e., care, no "medical care was provided to [Petitioner] by anyone at NCI. NCI simply acted as an agent assisting in the collection of the urine sample, preservation of the sample, and transport of that sample to the appropriate laboratory for testing." *Atkinson v. NCI Nursing Corps*., 249 W. Va. 443, 895 S.E.2d 846, 853 (Ct. App. 2023). Accordingly, the ICA concluded that NCI did not provide medical care to Petitioner under West Virginia Code § 55-7B-2(e)(2).

How They Voted:

Chief Judge Greear delivered the unanimous opinion of the Intermediate Court of Appeals.

Impact on Business:

In summary, the ICA concluded that "under the limited facts and circumstances of this case, in submitting to a urinalysis, not ordered by any physician for diagnosis and/or treatment, and not performed at a health care facility, Petitioner did not receive "health care" from NCI under West Virginia § 55-7B-2, (e)(1) or (e)(2),6 and the application of the MPLA is not triggered." Importantly, the ICA found this situation "analogous to a physician performing record reviews or independent medical evaluation of an individual." In that situation, the Supreme Court has reasoned that a "physician who undertakes to evaluate prospective employee's medical records for the employer lacks sufficient professional relationship with employee to support malpractice action." Syl. Pt., *Rand v. Miller,* 185 W. Va. 705, 408 S.E.2d 655 (1991); *See also Kirk v. Anderson,* 496 P.3d 66 (Utah 2021) (holding that there is not physician-patient relationship between IME examiner and claimant); *See also Smith v. Radecki*, 238 P.3d 111 (Alaska 2010) (physicians conducting IMEs at the behest of third parties assume a fundamentally different role from a diagnosing or treating physician).

Cummings v. Paine
Case No. 22-ICA-220 (Mar. 14, 2024)

What the Court was Asked to Decide:

The Intermediate Court of Appeals ("ICA") was asked to review an order of the Circuit Court of Monongalia County which denied a motion to preclude defendants from receiving a pro tanto verdict reduction in the amount of plaintiff's settlement with one of three named defendants. Specifically, the Court was asked whether the circuit court erred by concluding that the Medical Professional Liability Act ("MPLA") is ambiguous.

What the Court Decided:

The ICA held that MPLA required the circuit court to reduce the jury verdict by the amount of the pre-verdict settlement. Further, to the extent the MPLA's fault assessment rules conflict with the West Virginia Code's general liability statute's fault assessment rules, the MPLA controls in medical malpractice actions.

Facts:

Thomas Cummings ("Mr. Cummings") is the executor of his deceased spouse's ("Ms. Cummings") estate. In March 2019, Cindy Cummings underwent a total hip replacement surgery at Ruby Memorial Hospital and was later discharged for rehabilitation at a nursing home facility. On December 31, 2019, Ms. Cummings died after developing a post-surgical infection. Following Ms. Cummings' death, Mr. Cummings filed a medical malpractice action against Dr. Ward J. Paine, Benjamin Klennert (a Physician's Assistant ("P.A.")), and the nursing home. Prior to trial, Mr. Cummings settled with the nursing home.

At trial, a jury returned a verdict in favor of Mr. Cummings and found that Dr. Paine and P.A. Klennert were each 45% at fault, and Mr. Cummings was 10% at fault. Furthermore, the jury awarded $225,000 in damages to Mr. Cummings.

Following the verdict, each party submitted proposed judgement orders: Dr. Paine and P.A. Klennert asked the court to reduce the verdict for the 10% fault of Mr. Cummings and applied the pro tanto adjustment of the verdict which would reduce the amount by subtracting the amount that was settled between Mr. Cummings and the nursing home. However, Mr. Cummings' proposal reduced the verdict only for his 10% and disregarded the pro tanto adjustment. Later, Mr. Cummings filed a *Motion to Preclude Defendants from Receiving a Pro Tanto Verdict Reduction in Amount of Plaintiff's Settlement* with the nursing home.

The circuit court denied Mr. Cummings' motion and found that the MPLA (specifically, West Virginia Code § 55-7B-9) was "clear and unambiguous." The circuit court read the statute to include a pro tanto reduction of the jury's verdict. Additionally, the circuit court entered a post-trial judgment in favor of Mr. Cummings in the adjusted amount of $11,250 and also reduced the amount by the "pre-verdict settlement" with the nursing home. Mr. Cummings appealed.

Holding:

The ICA affirmed the circuit court's order. First, the court concurred with the circuit court's conclusion that West Virginia Code § 55-7B-9 requires the trier of fact "to consider the fault of all alleged parties, *including the fault of anyone who has settled a claim with the plaintiff arising out*

of the same medical injury (emphasis added)." In doing so, the ICA stated that in West Virginia Code § 55-7B-9(d), the "[l]egislature expressly dictates that the court shall reduce the adjusted verdict . . . by the amount of any pre-verdict settlement arising out of the same injury.

In Mr. Cummings' second assessment of error, the ICA concurred with the circuit court's decision that West Virginia Code § 55-7B-9 of the MPLA is not inconsistent with the provisions of West Virginia Code § 55-7-13d, West Virginia's general liability statute. The ICA cited to the changes in the State's general liability statute, which provide in part: "where a plaintiff has settled with a party or nonparty before verdict, that plaintiff's recovery will be reduced in proportion to the percentage of fault assigned to the settling party or nonparty, rather than by the amount of the nonparty's or party's settlement." Moreover, the court stated that section 55-7B-9 was amended to:

> include language that parties who settled a claim with the plaintiff arising out of the same medical injury shall be considered in assigning fault (subsection b) and that any verdict awarded to plaintiff should be reduced by the amount of any pre-verdict settlements arising out of the same medical injury (subsection d)—irrespective of whether or not the trier of fact assigned fault to the settling defendants.

In Mr. Cummings' third assignment of error, he argued that the circuit court's reading of the MPLA creates an "absurd and unjust result in a double reduction" of his award. The ICA did not agree and stated that such an argument is a hypothetical concern because the jury did not find any fault on the part of the nursing home—who Mr. Cummings settled with prior to trial.

How They Voted:

Chief Judge Greear authored the unanimous majority opinion.

Impact on Business:

This case establishes that the MPLA, specifically section 55-7B-9, is clear and unambiguous. A reading of the statute requires the trier of fact to reduce an adjusted verdict by the amount of any pre-verdict settlement arising out of the same injury. This case limits the amount a plaintiff may be able to recover in a medical malpractice claim when the plaintiff settles with one of the parties or nonparties prior to a verdict.

W. Va. Dep't of Health & Hum. Res. Off. of Health Facility Licensure & Certification v. Heart 2 Heart Volunteers, Inc.,
Case No. 22-ICA-277 (Nov. 13, 2023)

What the Court was Asked to Decide:

The Intermediate Court of Appeals ("ICA") was asked to decide whether the West Virginia Department of Health and Human Resources Board of Review ("Board") erred by (1) reversing the Office of Health Facility Licensure and Certification's ("OHFLAC") denial of Serenity Hills Life Center's ("SHLC") licensure renewal, and (2) vacating civil monetary penalty levied against SHLC.

What the Court Decided:

The ICA held that OHFLAC had standing to seek judicial review, and that the Board did not err in determining that the most serious deficiencies in OHFLAC's licensure statement of deficiencies were not supported by preponderance of evidence.

Facts:

Respondent, SHLC, a behavioral health center in Wheeling, West Virginia, was denied a renewal licensure application following a licensure statement of deficiencies from OHFLAC. OHFLAC's denial was based upon its investigation of a physical abuse complaint in which it was alleged that SHLC's President of its Board of Directors and CEO "forcibly" grabbed a resident by the arm and led her away from other residents after witnessing the resident remove her mask, in violation of SHLC's COVID-19 protocol. Additionally, SHLC was fined $10,000 based upon OHFLAC's statement of deficiencies.

SHLC appealed the denial and fine to the Board. After an administrative hearing, the Board reversed OHFLAC's denial and the $10,000 fine. The Board reasoned that OHFLAC's determinations were "not accurately determined." Although the Board concluded that several of SHLC's violations were supported by a preponderance of the evidence, they did not support a finding that SHLC's residents were significantly jeopardized—which was indicated within OHFLAC's statement of deficiencies.

Holding:

After a lengthy discussion on standing (it was determined that SHLC possessed standing), the ICA affirmed both the Board's decision to reverse OHFLAC's denial and its decision to vacate the $10,000 fine. The ICA relied on prior precedent that "a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge." The ICA went on to reason that because the Board oversaw a lengthy hearing with "multiple days of testimony and made detailed findings of facts and conclusions of law," it found that the Board was not clearly wrong in its decision.

How They Voted:

Judge Greear authored the unanimous majority opinion for the Intermediate Court of Appeals.

Impact on Business:

This case further illustrates that appellate courts will not re-weigh evidence regarding factual findings by an administrative law judge. This decision is positive for regulated businesses who have favorable administrative court decisions appealed to the Intermediate Court of Appeals.

Logan Gen. Hosp. LLC v. Boone Mem'l Hosp. Inc.
Case No. 23-ICA-134 (Nov. 13, 2023)

What the Court was Asked to Decide:

Whether the West Virginia Health Care Authority ("Authority") had sufficient findings of fact and conclusions of law to grant Boone Memorial Hospital's ("Boone Memorial") Certificate of Need ("CON") application that allowed for the development of an ambulatory care center in Chapmanville, West Virginia.

What the Court Decided:

No, there was insufficient support outlined in the decision that set forth the bases for the approval of the CON. The Authority's decision only included conclusory statements; no analysis was included despite the Authority conducting a hearing that included the admission of exhibits and witness testimony. Because there was no support for its decision, the ICA vacated the decision to grant the CON.

Facts:

Boone Memorial submitted its CON application to the Authority on June 13, 2022. In its application, Boone Memorial stated its objective was "to develop an ambulatory care center staffed by an employed, mid-level provider to provide primary care services to residents from Boone County, Lincoln County, and Logan County."

Logan General Hospital, LLC, d/b/a Logan Regional Medical Center ("Logan Medical") and Rural Health Access Corporation d/b/a Coalfield Health Center ("Coalfield") requested affected party status and a public hearing with the Authority.

The Authority conducted the public hearing on October 20, 2022. The Authority approved Boone Memorial's CON Application on March 20, 2023. Logan Medical and Coalfield appealed and argued the Authority provided no facts or law to support the approval of Boone Memorial's CON.

Holding:

West Virginia law requires the Authority to provide sufficient findings of fact and conclusions of law to support its decision. Additionally, West Virginia law requires that the decision its basis be sent to the parties asking for the hearing and attorneys of record. If a decision does not set forth sufficient findings of fact and conclusions of law, the court is unable to properly review it. Without a sufficient basis, the court would be speculating as to why the Authority reached its decision, which the court cannot do.

Here, the Authority's decision only contained "several single sentences and conclusory statements." The decision contained nothing from the administrative hearing even though several witnesses testified and exhibits were admitted during the hearing. Overall, "[t]he decision offer[ed] no analysis or rationale by the Authority to support its findings that" Boone Memorial's CON satisfied the required factors for a CON. Therefore, the ICA vacated the decision and remanded it back so that the Authority could provide sufficient findings of fact and conclusions of law.

How They Voted:

This memorandum decision was concurred in by all three judges.

Impact on Business:

Although the CON law has been substantially amended to limit the Authority's purview, its decisions nevertheless must contain sufficient findings of fact and conclusions of law to set forth the bases for them.

Rogers v. Orphanos
Case No. 23-ICA-58 (June 13, 2024)

What the Court was Asked to Decide:

The Intermediate Court of Appeals ("ICA") was asked to determine whether the circuit court erred in failing to apply the Trauma Cap in a Medical Professional Liability Act (MPLA) case when the defendant physician asserted that there was a lack of sufficient evidence in the record to allow the jury to make a finding of "recklessness." The Intermediate Court of Appeals was also asked to consider whether the circuit court abused its discretion on other evidentiary issues, thereby depriving the defendant of his right to an impartial and neutral trial.

What the Court Decided:

The ICA affirmed in part and revered in part the circuit court's decision, remanding the case for a new trial on damages. The ICA concluded that there was sufficient evidence to support a finding that the surgery at issue was not an "emergency surgery" under the MPLA and, therefore, the Trauma Cap did not apply. The ICA reversed and remanded on the issue of damages, finding that the circuit court abused its discretion is excluding the opinions of defendant's life expectancy expert.

Facts:

On June 4, 2017, Michael Rodgers was injured in a motorcycle crash and life-flighted to CAMC General, a Level 1 Trauma Center. Tests revealed that Rodgers had a T5 Chance frame in his spine. Dr. Orphanos, a neurosurgeon, was contacted for a neurosurgical consultation. On June 5, Dr. Orphanos examined Rodgers and recommended a spinal surgical procedure. On June 6, Dr Orphanos performed the surgery; however, after the surgery, Rodgers had no motor function in his legs. Dr. Orphanos returned Rodgers to surgery, but he could not find any evidence or compressions or other interference with the spinal cord to explain the paralysis.

Rodgers filed a complaint against Dr. Orphanos, alleging three breaches of the standard of care: (1) prior to the first surgery, Dr. Orphanos should have ordered a magnetic resonance imaging (MRI) of the thoracic spine instead of relying solely on the CT; (2) during the surgery, Dr. Orphanos should have used intraoperative neurophysiological monitoring (IONM) to monitor the spinal cord while placing the surgical screws; and (3) after learning about the paralysis after the first surgery, Dr. Orphanos should have ordered a CT myelogram to locate and repair the cord injury before it became irreversible. Rodgers further claimed that Dr. Orphanos' treatment amounted to gross negligence and recklessness.

In 2020, Rodgers suffered a stroke, but he did not amend his complaint to allege that Dr. Orphanos' 2017 care caused or contributed to the stroke. However, two months before trial, Rodgers served a second amended expert witness disclosure, which included new reports connecting the stroke to the 2017 care. Dr. Orphanos moved to exclude these reports, but the circuit court denied his motion. The week before trial, Dr. Orphanos served his second supplemental expert disclosures, which included rebuttal opinions to Rodgers' new expert opinions. Rodgers moved to strike Dr. Orphanos' new expert opinions. The circuit court granted the motion in part, precluding Dr. Orphanos from offering rebuttal expert testimony on Rodgers' life expectancy.

At trial, after the close of evidence, Dr. Orphanos moved for partial judgment as a matter of law under Rule 50(a) of the West Virginia Rules of Civil Procedure, arguing that the evidence was insufficient to allow the issue of recklessness to be presented to the jury, as there was no expert testimony of recklessness, and the evidence otherwise failed to establish recklessness. The circuit

court denied the motion. The jury returned a verdict for Rodgers, finding that the first surgery was not an "emergency surgery," and that Dr. Orphanos was "reckless" in his care and treatment.

Dr. Orphanos moved to reduce the jury's verdict under the MPLA's Trauma Cap. The circuit court heard arguments and issued an order that deferred ruling on the motion to reduce the entire verdict under the Trauma Cap, reduced noneconomic damages to $750,000 per West Virginia Code § 55-7B-8, and took under advisement the motion to reduce medical expenses. After the judgment order was entered, Dr. Orphanos filed a renewed motion for judgment as a matter of law on the issue of recklessness and a separate motion for a new trial. Rodgers also filed a motion to alter or amend the judgment. The circuit court denied these motions. On appeal, Dr. Orphanos argued that the MPLA requires expert testimony on the issue of recklessness, and the lower court erred in finding sufficient evidence for Rodgers' claim without such expert testimony.

Holding:

In affirming, in part, the circuit court's order, the Intermediate Court of Appeals avoided the issue of whether expert witness testimony is needed to support a finding that a doctor was reckless in their care and treatment. Instead, the ICA determined that another exception to the Trauma Cap applied: West Virginia Code § 55-7B-9c(e), which provides that the Trauma Cap does not apply "to any act or omission in rendering care or assistance which: (1) [o]ccurs after the patient's condition is stabilized and the patient is capable of receiving medical treatment as a nonemergency patient; or (2) is unrelated to the original emergency condition." The ICA concluded that there was sufficient evidence in the record for the jury to find that Rodgers' surgery was not an "emergency surgery" under the MPLA because "every physician who provided testimony on the issue concurred that the procedure was not deemed an emergency surgery."

After reaching this conclusion, the ICA addressed Dr. Orphanos' other assignments of error. However, the ICA found that the circuit court only abused its discretion by excluding Dr. Orphanos' life expectancy expert after permitting Rodgers' late disclosed experts. The exclusion resulted in the jury awarding the full value of Rodgers' new life care plan. Thus, the ICA remanded the case for a new trial on damages.

How They Voted:

Chief Judge Scarr authored the unanimous majority opinion.

Impact on Business:

This case could have significant impacts on the defense of health care providers in West Virginia. By pivoting on the issue of recklessness in the context of the Trauma Cap, the ICA left the door open on whether expert testimony is necessary to establish recklessness. This uncertainty could result in more plaintiffs asserting claims of recklessness against health care providers in order to avoid application of the Trauma Cap.

Ford Motor Co. v. Tyler
Case No. 22-ICA-208 (Dec. 8, 2023)

What the Court was Asked to Decide:

The Intermediate Court of Appeals ("ICA") was asked to decide whether, under West Virginia law, an alternative feasible design must be shown for both a negligent design claim and a strict liability claim under products liability.

What the Court Decided:

The ICA adopted the Restatement (Third) of Torts: Products Liability, which states that providing that an alternative feasible design is a prerequisite to any claim sounding in tort, including one based on strict liability or negligence.

Facts:

Petitioner Ford Motor Company ("Ford") appealed the circuit court's denial of its motion for judgment as a matter of law, or alternatively, for a new trial, after the jury found that Ford was negligent in designing its 2014 Ford Mustang. In 2016, Respondent's ("Ms. Tyler") daughter ("Ms. Bumgarner") was driving a 2014 Ford Mustang when she got in a car accident. The engine caught fire because of the wreck and moved to the occupant compartment. Ms. Bumgarner was unable to exit the vehicle and died in the fire. Both cars were exceeding 100 miles per hour at the time of the crash.

Ms. Tyler, as administratrix of her daughter's estate, filed suit, asserting strict liability and negligence claims for defective design against Ford and negligence and vicarious liability against the driver of the other vehicle involved in the crash. According to the Ms. Tyler's fire expert, the deformation in the front of the Mustang from the crash compromised the reservoir and the brake fluid leaked, vaporized, and ignited, resulting in the fire.

After the close of evidence, but before closing arguments, Ms. Tyler voluntarily dismissed her strict liability design defect claim and announced that she would only pursue a theory of negligent design. After the trial court returned a verdict for Ms. Tyler, Ford filed a post-trial motion for judgment as a matter of law or in the alternative for a new trial, which the circuit court denied. Ford appealed.

Holding:

The ICA found that the Restatement (Third)'s approach to design defect claims under strict liability and negligence were consistent with West Virginia law. Accordingly, the ICA concluded that under a negligent design defect claim, proof of an alternative feasible design is required. However, the ICA recognized that while this is general rule, there may be exceptions, including for a strict liability malfunction design claim, or a claim that a product is inherently unsafe and should not have been put on the market in the first place. After reaching this conclusion, the ICA reversed and remanded the circuit court's opinion.

How They Voted:

Judge Scarr offered the opinion for the majority.

Impact on Business:

This ruling could have had important implications regarding evaluating products liability cases under West Virginia law. However, notably, the West Virginia Supreme Court overruled this decision in *Shears v. Ethicon, Inc.,* 902 S.E.2d 775 (W. Va. 2024). This opinion is one of the first ICA decisions overturned by the Supreme Court and demonstrates that the Supreme Court will not always grant deference to the ICA.

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

wvchamber.com