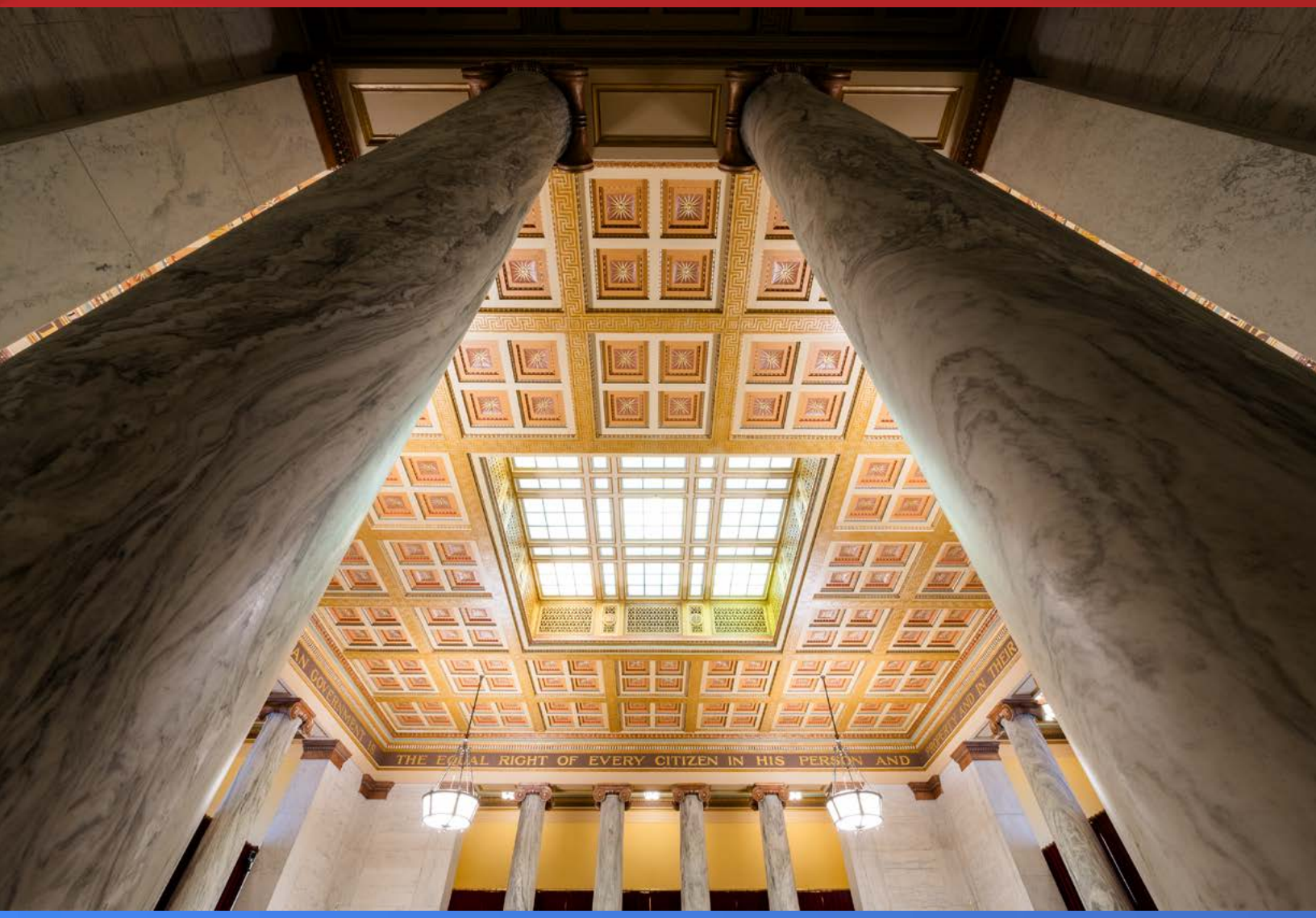
CourtWatch



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

2025

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 2024 and Spring 2025 Terms of Court and present this report on the impact of those Court decisions on our state's economy to Chamber members.

The West Virginia Chamber of Commerce
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Romeo v. Antero Resources Corporation
Case No. 23-589 (June 11, 2025)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to answer two certified questions from the United States District Court for the Northern District of West Virginia, concerning issues relating to royalty calculations in gas leases. The first question asked whether the requirements of *Wellman v. Energy Resources, Inc.,* 210 W. Va. 200, 557 S.E.2d 254 (2001), and *Estate of Tawney v. Columbia Natural Resources, L.L.C.,* 219 W. Va. 266, 633 S.E.2d 22 (2006), extend only to the "first available market" as opposed to the "point of sale" when the duty to market is implicated. The second question asked whether the first marketable product rule extends beyond gas to require a lessee to pay royalties on natural gas liquids ("NGLs"), and if it does, whether the lessors share in the postproduction costs for the NGLs.

What the Court Decided:

The Court answered the first question in the negative, deciding that the requirements of *Wellman* and *Estate of Tawney* extend to the point of sale, not just to the point of marketability or to the first available market.

The Court answered the first prong of the second question in the affirmative, deciding that *Wellman*'s marketable product rule extends beyond wet and residue gas to require a lessee to pay royalties on NGLs. The Court answered the second prong of the second question in the negative, deciding that the lessors do not share in the postproduction costs of NGLs.

Facts:

The Plaintiffs in the underlying case, Jacklin Romeo, Susan S. Rine, and Debra Snyder Miller, brought a breach of contract action against Antero Resources Corporation ("Antero"), alleging ownership of oil and gas interests in Harrison County, West Virginia. Their interests are subject to existing leases in which the original lessee assigned his or their interests to Antero.

Relevant to the parties' legal arguments, the wells subject to the Plaintiffs' royalty interests produce wet gas. Wet gas can be sold as is or can be sent to a processing plant where the residue gas is separated from heavier liquid hydrocarbon byproducts, referred to as the "Y-grade mixture." The Y-grade mixture can then be sent for processing, where it is fractionated into NGLs.

Plaintiff Romeo is the assignee of a portion of the lessors' interest under a 1984 lease agreement ("the Mutschelknaus lease"). Plaintiffs Rine and Miller are the assignees of portions of the lessors' interest under a 1979 lease agreement ("the Matthey lease"). Both leases provided for one-eighth royalties.

Plaintiffs alleged that Antero breached the terms of the royalty provisions in both leases. Specifically, Plaintiffs argued that Antero was not permitted to deduct postproduction costs from the gross sale proceeds in calculating the royalties due to Plaintiffs.

Holding:

First, the Court reaffirmed *Wellman* and *Estate of Tawney* and upheld the "point of sale" rule, maintaining that the lessee is responsible for all postproduction costs related to getting the product to the ultimate point of sale. The Court disagreed with Antero's position that the lessee bears postproduction costs only until the product is "first rendered marketable." The Court stated that the "duty to market embraces the responsibility to get the oil or gas in marketable condition

and actually transport it to market," not simply until the lessee makes the gas marketable in the first place. Thus, the Court held that, except as may be specifically provided by the parties' agreement, where an oil and gas lease contains an express or implied duty to market, the requirements of *Wellman* and *Estate of Tawney* extend to the point of sale, not just to the point of marketability or to the first available market.

Second, the Court held that the marketable product rule extends beyond wet and residue gas to require a lessee to pay royalties on the sale of any byproducts of the wet gas, including NGLs. Further, the Court held that the deduction of postproduction costs on the sale of NGLs is not permissible, absent express language in an oil and gas lease. The Court reasoned that, once gas is produced from lessors' wells, the producer/lessee makes all of the critical decisions about marketing, processing, transporting, and selling the gas. Thus, the Court stated that "fundamental fairness requires that the lessors be on notice that their royalties will vary depending on when, where, and how the producers get the gas to market." As such, the Court ultimately held that, without express language, lessees are not permitted to deduct postproduction costs from a lessor's royalties on the sale of wet gas byproducts.

Justice Walker and Justice Bunn filed dissents. Justice Walker stated that *Tawney* and *Wellman* were wrongly decided and made West Virginia an outlier in its jurisprudence on this issue. Justice Bunn would have narrowed the majority opinion by modifying *Tawney* and *Wellman* to extend only until a product is marketable, not until it is sold.

How They Voted:

Chief Justice Wooton delivered the 3-2 opinion of the Court. Justice Walker and Justice Bunn dissented and submitted separate opinions. Justice Armstead voluntarily recused himself from consideration of this appeal. Chief Justice Wooton appointed Judge Hardy of Kanawha County to sit by designation. Judge Hardy joined Chief Justice Wooton and Justice Trump in the majority. This was the second of two cases decided by a 3-2 vote concerning the legal implications of gas lease royalty calculations. In both cases, the deciding vote was cast by a judge sitting by designation.

Impact on Business:

This case reaffirms the questionable holdings of *Wellman* and *Tawney*. It reinforces the application of the marketable product and point of sale rules in West Virginia. As the Court noted, it likely means that producers will have less of an incentive to transport gas to more lucrative markets because doing so will increase costs and their royalty obligations. Further, producers/lessees concerned about the economic impacts of this case may attempt to negotiate lease modifications to include express language permitting postproduction deductions. As noted by the dissents, West Virginia is the only state to interpret gas leases in this way.

Camden-Clark Mem'l Hosp. Corp. v. Marietta Area Healthcare, Inc.
Case No. 23-569 (May 14, 2025)

What the Court was Asked to Decide:

This case came to the West Virginia Supreme Court from the United States District Court for the Northern District of West Virginia seeking to resolve three questions:

1) Is a claim for negligent supervision against an employer viable under West Virginia common law;

2) If yes, what are the elements of a negligent supervision claim; and

3) Can intentional or reckless torts committed by an employee form the basis for a negligent supervision claim against the employer?

What the Court Decided:

The Court issued two new syllabus points collectively answering the certified questions as follows:

1) Yes, a claim for negligent supervision does exist under West Virginia common law.

2) A claim for negligent supervision in West Virginia requires proof of the traditional elements of negligence – duty, breach, causation, and damages – supplemented by the additional necessity of demonstrating a tortious act or omission by the employee whose conduct forms the basis of the claim.

3) Yes, an intentional or reckless tort can form the basis for a claim for negligent supervision against the employer.

Facts:

The certified questions arose from three civil actions. The second and third actions were brought because of the first civil action, a *qui tam* action (an action brought by a private citizen on behalf of the government to recover funds lost due to fraud against the government). The *qui tam* action was brought by Michael King, Dr. Michael Roberts, and Todd Kruger allegedly with the approval of Camden-Clark Memorial Hospital Corporation, Camden-Clark Health Services, Inc., West Virginia University Hospitals, Inc., and West Virginia United Health System, Inc. (collectively "Camden-Clark") against Marietta Area Healthcare, Inc., Marietta Memorial Hospital, and Marietta Healthcare Physicians, Inc. (collectively "Marietta"). The *qui tam* action alleged that Marietta had 1) violated the Federal Claims Act by seeking reimbursements from federal healthcare programs while violating federal healthcare fraud prevention laws and 2) paid physicians in excess of their fair market value to induce referrals. The Department of Justice investigated and found the *qui tam* action unsubstantiated. On March 20, 2020, Kruger, Roberts, and King requested the District Court dismiss the *qui tam* action, and the District Court dismissed it on March 23, 2020.

After the District Court dismissed the *qui tam* action, Marietta filed two actions. The first, *Marietta I*, was filed against King, Roberts, and Kruger. *Marietta I* was based partly on malicious prosecution and fraudulent legal process claims for bringing the *qui tam* actions. Due to a jury deadlock at the conclusion of the trial, the case was ruled a mistrial.

Marietta filed the second action, *Marietta II*, against Camden-Clark while *Marietta I* was ongoing. *Marietta II* alleged in part that Camden-Clark negligently supervised King, Roberts, and Kruger, causing them to pursue a spurious *qui tam* action against Marietta. During *Marietta II*, the District Court felt it could not rely on earlier West Virginia Supreme Court decisions to determine whether a claim for negligent supervision existed under West Virginia common law for intentional or reckless torts. Thus, the District Court certified the three questions to the West Virginia Supreme Court before proceeding with *Marietta II*.

Holding:

First, the Court confirmed that a third-party claim against an employer for negligent supervision of its employees exists under West Virginia common law, pointing to a "long recognized" line of cases where the Court had previously implied it but had not so explicitly held.

Second, the Court established that the elements for a negligent supervision claim are the traditional negligence elements — duty, breach, causation, and damages — with the additional element of an underlying tortious act or omission by an employee. Whether the duty to supervise exists, and that duty's scope, are "fact dependent" taking into consideration factors such as the work performed, the employees performing it, the size of the business, the type of work, and the employer's clientele, among others. However, for the duty to supervise to exist, the harm caused by the employee must be foreseeable.

Third, the Court held that even negligent, reckless, or intentional acts by the employee can form the basis of a negligent supervision claim against the employer. The Court looked at laws both outside the state and within and found no jurisdiction which limited negligent supervision claims only to instances where the employee's base conduct was negligent and held their decision was not a departure from West Virginia's established negligence laws.

How They Voted:

Justice Trump delivered the opinion of the Court. Justice Bunn concurred in part and dissented in part. Justices Walker and Armstead deemed themselves disqualified and did not participate in the decision of the case. Circuit Judges Jennifer Bailey and Sean Hammers sat by temporary assignment.

Impact on Business:

This case provides a powerful reminder that employers can be held liable for their employees' actions in various ways beyond traditional *respondeat superior*. With the cause of action now firmly cemented and defined, employers should prepare for increased litigation of third-party claims for negligent supervision based on employees' negligent, reckless, or intentional conduct outside the scope of employment.

Cunningham v. Cornell University
U.S. Supreme Court Case No. 23-1007 (April 17, 2025)

What the Court was Asked to Decide:

The United States Supreme Court was asked to decide the following query: When participants bring an ERISA "prohibited transaction" claim under ERISA § 406/29 U.S.C. § 1106(a)(1)(C), must they also plead—in their complaint—that no statutory exemptions under ERISA § 408/29 U.S.C. § 1108 apply, or are those exemptions affirmative defenses that the defendant must raise and prove? Put another way, is disproving § 1108 exemptions part of the plaintiff's initial pleading burden, or is the defendant's burden as an affirmative defense?

What the Court Decided:

The Supreme Court decided that a plaintiff may bring a "prohibited transaction" claim without referencing the exemptions to that statute's prohibitions in ERISA § 408/29 U.S.C. § 1108 because the exemptions are affirmative defenses that defendants bear the burden of pleading and proving.

Facts:

Cornell University sponsored two large retirement plans for employees governed by the Employee Retirement Income Security Act of 1974, also known as ERISA. These plans were administered with the help of outside service providers, including TIAA and Fidelity. Under ERISA § 406/ 29 U.S.C. § 1106(a)(1)(C) [prohibited transactions under ERISA are codified in § 1106 of the United States Code], it is generally a prohibited transaction for a plan fiduciary to cause the plan to furnish services to a "party in interest" (which includes these service providers) unless an exemption applies.

In 2017, current and former participants in Cornell's retirement plans sued the University and other plan fiduciaries in the United States District Court for the Southern District of New York. In their complaint, they alleged that Cornell caused the plans to pay excessive recordkeeping and administrative fees to the service providers. They claimed that the payments were made pursuant to arrangements that unreasonably benefited the providers and that this amounted to prohibited transactions. Importantly, Plaintiffs did not plead that no § 1108 exemptions applied; rather, they simply alleged the core prohibited transaction. Cornell and the other defendants filed a motion to dismiss the ERISA § 406/ 29 U.S.C. § 1106(a)(1)(C) claim.

The Southern District of New York granted Cornell's motion to dismiss finding that Plaintiffs failed to plead facts showing that that no statutory exemption applied. Put another way, the District Court found that Plaintiffs should have plead that no §1108 exemptions applied.

Plaintiffs appealed to the Second Circuit Court of Appeals where the District Court's decision was upheld. However, the Second Circuit affirmed the decision on different grounds. In affirming the decision, the Second Circuit held that plaintiffs must plead the inapplicability of § 1108(b)(2)(A), which exempts "reasonable arrangements" for "necessary services" at "reasonable compensation." The appellate court reasoned that the ERISA § 408/ 29 U.S.C. § 1108 exemption is incorporated into the § 406/§ 1106 prohibitions and, as a result, the Plaintiffs were required to plead that the plan fiduciaries' decision to retain outside service providers was "unnecessary or involved unreasonable compensation."

Because this decision conflicted with other federal appellate circuits, the Supreme Court was asked to decide whether a plaintiff could state an ERISA claim under § 406/§ 1106 without also pleading that the § 408/ § 1108 exemption does not apply.

Holding:

The Supreme Court held unanimously that a plaintiff *need not* plead or otherwise address the potentially applicable exemptions, which are akin to affirmative defenses. ERISA § 1106(a)(1)(C) contains three elements: It prohibits fiduciaries from (1) "caus[ing a] plan to engage in a transaction" (2) that the fiduciary "knows or should know . . . constitutes a direct or indirect . . . furnishing of goods, services, or facilities" (3) "between the plan and a party in interest." In an opinion by Justice Sotomayor, the court explained that the statutory bar is "categorical" and does not remove from its scope transactions that were "necessary or involved reasonable compensation." For its part, the exemptions in § 408/ § 1108 do not impose additional pleading requirements for § 1106(a)(1) claims. Relying on a prior decision, the court explained that "when a statute has exemptions laid out apart from the prohibitions, and the exemptions expressly refer to the prohibited conduct as such, the exemptions ordinarily constitute affirmative defenses that are entirely the responsibility of the party raising them." Accordingly, the Court concluded that a plaintiff need not plead these affirmative defenses. Rather, Plaintiffs need only plausibly allege the elements of a § 406/ § 1106(a)(1)(C) prohibited-transaction claim itself. Exemptions under § 408/ § 1108 are affirmative defenses that defendants bear the burden of pleading and proving.

How They Voted:

Justice Sotomayor authored the unanimous decision of the Court. Justice Alito, joined by Justices Thomas and Kavanaugh, wrote a concurring opinion cautioning that this lower pleading standard could lead to a surge of "meritless litigation." He encouraged robust use of procedural tools by district courts to manage such cases.

Impact on Business:

This case is significant in both a procedural aspect and for its impact on business. In terms of procedure, it creates a lower pleading bar for plaintiffs and it shifts the burden to defendants. For example, plan sponsors and fiduciaries must now affirmatively raise and prove exemptions, rather than relying on early dismissal for lack of plaintiff pleading. This signals a plaintiff-friendly trend. With regard to the decision's impact on business, it potentially creates an increase in litigation exposure and a heightened compliance pressure.

More ERISA "prohibited transaction" claims are likely to survive motions to dismiss, increasing defense costs and the likelihood of settlements. Fiduciaries may face broader discovery obligations earlier in a case and plan sponsors will need to document the reasonableness of service arrangements and fees more thoroughly from the outset, knowing they can't count on quick dismissal.

Ames v. Ohio Department of Youth Services
Case No. 23-1039 (June 5, 2025)

What the Court was Asked to Decide:

The Supreme Court of the United States was asked to resolve a circuit spilt as to whether members of a majority-group are required to satisfy a heightened evidentiary standard to prevail on a Title VII claim.

What the Court Decided:

The Court rejected the Sixth Circuit's "background circumstances" rule and decided that Title VII does not impose a heightened evidentiary standard on majority-group plaintiffs. The Court vacated the judgment below and remanded for application of the proper prima facie standard.

Facts:

In 2004, Marlean Ames, a heterosexual woman, began working with Ohio Department of Youth Services. In 2019, Ames applied for a newly created management position. Ames interviewed for the position; however, a different candidate was hired – a lesbian woman. Following her interview, the agency removed Ames from her role as a program administrator and replaced her with a gay man. The agency demoted Ames to the role she held when she first joined the agency, in which she suffered a significant pay cut.

Following these events, Ames filed suit against the agency pursuant to Title VII. She alleged that her denial from the newly created management position and subsequent demotion was due to her sexual orientation.

Holding:

The Court held that the Sixth Circuit's background circumstances rule, requiring plaintiffs to establish "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority," could not be squared with the text of Title VII or the Court's precedent.

The Court found that the text of Title VII's disparate-treatment provision draws no distinctions between majority-group plaintiffs and minority-group plaintiffs and that the relevant precedent "makes clear that the standard for proving disparate treatment under Title VII does not vary based on whether or not the plaintiff is a member of a majority group." The Court discussed the flexible application of the framework laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). With the first step of the framework requiring a prima facie showing that the defendant acted with discriminatory motive, the Court emphasized that the "precise requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic.'" Considering this required flexibility, the Court found that the background circumstances rule imposed too great of a burden.

The Court ultimately held that the Sixth Circuit's background circumstances rule was invalid and that Title VII does not impose such a heightened standard on majority-group plaintiffs.

How They Voted:

Justice Jackson delivered the unanimous opinion of the Court. Justice Thomas and Justice Gorsuch concurred and filed a joint opinion.

Impact on Business:

This case resolves the circuit spilt relating to the background circumstances rule that imposes a heightened standard on majority-group plaintiffs bringing a claim under Title VII. Courts can no longer require majority-group plaintiffs to provide additional evidence to establish a prima facie case of discrimination. This case helps ensure that Title VII has a uniform application across the country. While this decision could make discrimination claims by majority-group plaintiffs easier to prove, the unanimity of this decision indicates that the Court was troubled by a two-tier system for proof in discrimination cases.

Elaine Neidig v. Valley Health System
Case No. 24-27 (June 10, 2025)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to answer a reformulated certified question from the United States Court of Appeals for the Fourth Circuit. The certified question considered whether the Medical Professional Liability Act ("MPLA") applies to a suit against a health care provider or health care facility when the plaintiff claims only economic damages and disclaims all liability based on physical injury, emotional injury, or death.

What the Court Decided:

The Court determined that the MPLA does not apply to a suit against a health care provider or health care facility when the plaintiff claims only economic damages.

Facts:

Elaine Neidig had three mammograms at Valley Health System, which advertised the latest technology, its convenient location, and that it was an accredited mammography center under the Mammography Quality Standards Act ("MQSA"). In 2019, federal accreditation inspectors found that Valley Health was inaccurately positioning and compressing patients' breasts during mammograms. In response, Valley Health was required to notify its patients that it was likely that select mammograms have "serious image quality deficiencies," and that these deficiencies were a "serious risk to human health."

After receiving this notice, Neidig filed suit in state court and asserted consumer protection claims for unfair and deceptive acts under the West Virginia Consumer Credit Protection Act ("CCPA"), unjust enrichment, and breach of contract. She did not assert any claim seeking damages for physical injury, emotional injury, or death as a result of the care she received from Valley Health, but rather sought reimbursement for the cost of the mammogram.

Valley Health removed the case to federal court, which dismissed the complaint after finding that Neidig's claims were governed by the MPLA and were barred by its two-year statute of limitations. On appeal, the Fourth Circuit certified a question to the West Virginia Supreme Court regarding whether the MPLA applied to Neidig's case.

Holding:

The Court found that the MPLA does not apply to suits involving only economic damages. "The Medical Professional Liability Act does not apply to a suit against a health care provider or health care facility when the plaintiff claims only economic damages and disclaims all liability based on physical injury, emotional injury, or death." As a result, the claims are governed by the CCPA, which has a four-year statute of limitations.

How they Voted:

Chief Justice Wooton wrote the opinion for the majority. Justice Walker concurred, and Justice Armstead dissented. Justice Trump recused himself and was replaced by Circuit Judge Perri Jo DeChristopher sitting by temporary assignment.

Impact on Business:

Health care providers and health care facilities should be aware that plaintiffs can now bring claims as economic claims under the CCPA and potentially avoid the protections of the MPLA, including its pre-suit notice requirements and the two-year statute of limitations. Importantly, these "pure" economic claims will be subject to a four-year, and not two-year, statute of limitations.

Spyridoula L. Moschonas and Gerasimos Moschonas v. The Charles Town General Hospital d/b/a Jefferson Medical Center and Jason Giffi, D.O.
Case No. 24-ICA-79 (February 6, 2025)

What the Court was Asked to Decide:

The Intermediate Court of Appeals ("ICA") was asked to answer two questions:

1) Whether plaintiff's claims were timely in filing their complaint against the defendant health care providers pursuant to West Virginia Code § 55-7B-6(i)(1) (the "MPLA"); and

2) Whether the circuit court erred in assuming the statute of limitations period began on the first day of negligent care, rather than at the time when plaintiffs knew or should have known of their claim.

What the Court Decided:

The ICA affirmed the judgment of the circuit court, finding that the complaint was time barred pursuant to the two-year statute of limitations under the MPLA.

Facts:

On January 1–2, 2021, plaintiff Spyridoula L. Moschonas was treated at Jefferson Medical Center ("JMC") by Dr. Giffi. During her admission, she suffered a stroke and claimed the defendants JMC and Dr. Giffi failed to properly diagnose and treat her. She alleged permanent injury as a result.

On December 21, 2022, Moschonas mailed Notices of Claim and Screening Certificates of Merit to Dr. Giffi and JMC. Both Dr. Giffi and JMC received the Notices on January 3, 2023. JMC responded by e-mail on January 20, 2023, pointing out several deficiencies in the Certificate of Merit. JMC did not request pre-suit mediation.

On January 24, 2023, Dr. Giffi responded and also did not request pre-suit mediation, instead stating that no decision would be made regarding mediation until further information was provided. Although Moschonas provided additional information on February 9, 2023, Dr. Giffi never requested pre-suit mediation. Moschonas filed her complaint against JMC and Dr. Giffi on February 28, 2023.

Both defendants moved to dismiss the complaint as barred by the two-year statute of limitations in the MPLA. The circuit court granted the motions to dismiss, finding the MPLA applied, and the complaint was filed beyond the two-year statute of limitations. The court found that Moschonas' cause of action arose no later than January 2, 2021, meaning that the statute of limitations expired on January 2, 2023, and no exceptions to the statute of limitations applied.

Moschonas moved to alter or amend the circuit court's orders, claiming the discovery rule applied to excuse the late filing. The circuit court denied the motion on the grounds that Moschonas was rearguing points that the court had already rejected, and that their counsel's misunderstanding of the law was insufficient grounds for relief under Rule 60(b).

Moschonas appealed the circuit court's orders.

Holding:

The ICA found that W. Va. Code § 55-7B-6(i)(1) provides the following mutually exclusive situations for when the 30-day period for filing a complaint after serving the Notice of Claim and Certificate of Merit:

(1) receipt of a response from the health care provider;

(2) no response from the heath care provider after 30 days; and

(3) notification from a mediator that settlement was unsuccessful.

The ICA upheld the circuit court's decision that Moschonas was required to file the complaint within 30 days after receiving the responses to the Notices of Claim. Because Dr. Giffi and JMC responded to the Notice of Claim, the "triggering event" for the first situation applied, and therefore the complaint was not filed within 30 days. Because Dr. Giffi and JMC responded, neither the second nor third scenario applied.

The ICA found the "only reasonable interpretation" of the statutory language "'would be due' is the date a response is due if it has not already been served. Once a response is served, it is no longer due, and scenario two is moot. If the legislature had intended otherwise, it would have used language such as 'is due' rather than 'would be due.'"

The ICA also affirmed circuit court's ruling rejecting Moschonas' statutory tolling argument because she failed to argue that the discovery rule might have tolled the running of the statute of limitations in response to the motion to dismiss. Raising the argument on the later motion to alter or amend is not permitted because the Rules of Civil Procedure do not permit presenting new arguments or claims that could have previously been raised.

How They Voted:

Judge White delivered the opinion for the unanimous Court.

Impact on Business:

Once the "triggering event" occurs, *i.e.*, when the response from a health care provider is received, the 30-day period for filing a complaint begins to run from the date the response was received.

Heidi Price, Administratrix of the Estate of Ellis Wayne Price v. Raleigh General Hospital, LLC, and Philip Bailey
Case No. 24-ICA-68 (March 4, 2025)

What the Court was Asked to Decide:

The Intermediate Court of Appeals ("ICA") was asked to determine whether the COVID-19 Jobs Protection Act barred plaintiff's claims against the defendant health care providers.

What the Court Decided:

The ICA determined that plaintiff's failure to present opposing evidence to the health care providers' affidavits justified the dismissal of her medical malpractice claims under the COVID-19 Jobs Protection Act ("COVID-19 Act").

Facts:

On December 10, 2021, Ellis Wayne Price was admitted to Raleigh General Hospital ("RGH") with complaints of chest pain. Physician Assistant Philip Bailey determined Mr. Price was suffering from a heart attack. Several hours passed before Mr. Price received treatment for his diagnosis. Mr. Price later passed away from the heart attack.

Plaintiff Heidi Price, Administratrix of the Estate of Ellis Price, sued RGH and others, alleging they delayed the administration of medications to treat Mr. Price's heart attack, which ultimately led to his death. RGH moved to dismiss, arguing that the care Mr. Price received qualified as "impacted care" under the COVID-19 Act because at the time Mr. Price was being treated, RGH was experiencing a surge in COVID-19 patients. In addition to the motion to dismiss, RGH moved to stay the proceedings pending an evidentiary hearing to determine if Price's claims were barred by the COVID-19 Act.

At the hearing, RGH presented affidavits from its employees demonstrating that when Mr. Price was receiving treatment, RGH was experiencing a "surge" of COVID-19 patients, the ER waiting room was overcapacity, and RGH was understaffed. Price did not call any witnesses or introduce any evidence in opposition to the evidence offered by RGH. Instead, she argued that the "inability to conduct discovery" prohibited her from being able to adequately counter RGH's arguments. Following the hearing, the circuit court dismissed the complaint.

On appeal, Price argued that the circuit court erred in failing to allow limited discovery to determine if RGH's care of Mr. Price was impacted by COVID-19. She also argued that her due process rights were violated, and that the evidence presented by RGH was insufficient to meet its burden of establishing impacted care.

Holding:

The ICA found that the COVID-19 Act required an evidentiary hearing to determine whether Mr. Price's care was impacted by the COVID-19 emergency. The ICA denied Price's request for limited pre-hearing discovery based on the plain language of the statute. Further, the evidentiary hearing satisfied Price's due process rights. Finally, the ICA upheld the circuit court's decision to dismiss Price's complaint under the COVID-19 Act because Price offered no evidence to counter RGH's evidence.

How they Voted:

Judge Greear offered the opinion for the majority. Judge White concurred in part and dissented in part while reserving the right to file a separate opinion.

Impact on Business:

Health care providers should be aware of the broad statutory protected included in the COVID-19 Jobs Protection Act. If a plaintiff brings a claim in which the care received occurred during the COVID-19 emergency, health care providers may be entitled to statutory immunity.

Nationwide Insurance Company of America v. Brittney Duty and Gregory Duty, Individually and as Administrator of the Estate of Beverly Duty, and Lula Conley, Individually and as Administratrix of the Estate of Shelvy Conley, and Paul Conley
Case No. 23-ICA-491 (November 13, 2024)

What the Court Was Asked to Decide:

Whether the excluded driver restrictive endorsement, made part of a reinstated policy by Nationwide Insurance Company of America ("Nationwide"), was valid and sufficient to preclude coverage for the claims at issue.

What the Court Decided:

Yes, the excluded driver restrictive endorsement at issue was valid, precluding coverage. As such, the circuit court erred, and this matter was reversed and remanded.

Facts:

In Spring of 2016, Shelvy and Lula Conley ("the Conleys") were insured under an automobile insurance policy ("old policy"). At this time, the insured drivers included the Conleys as well as their son – Paul Conley ("Paul"). On April 18, 2016, Nationwide issued a written Notice of Cancellation to Shelvy Conley, stating that his old policy would be cancelled effective May 23, 2016, because Paul's driver's license was revoked, and Marie Conley's (Paul's wife) license was invalid. To avoid this cancellation, the Conleys, as well as Paul and Marie, all signed and dated forms titled "Authorization to Exclude a Driver (West Virginia)," to exclude both Paul and Marie. The old policy was still cancelled, so the Conleys applied to Nationwide for a new policy, expressly noting that Paul and Marie would be excluded drivers. A new policy was issued effective May 27, 2016, including a restrictive covenant (i.e., an excluded driver endorsement). Notably, the locations where one would enter the names of the excluded drivers were blank on this endorsement. However, the declarations page expressly listed both Paul and Marie as excluded drivers.

On July 5, 2016, Nationwide issued another Notice of Cancellation because they had not received valid driver exclusion authorization forms for Paul and Marie. Such forms were promptly provided and effective August 8, 2016, the new policy was reinstated. This reinstated new policy had the same policy number as the original new policy, had the same endorsements (including the excluded driver restrictive endorsement), and had an identical declarations page. The endorsement itself still did not "fill in the blanks" with the names of the excluded drivers (Paul and Marie), although again, they were indicated elsewhere in the policy. The endorsement, however, indicated that it applied "as stated in the policy declarations." This reinstated new policy was renewed and continued until September of 2019. Each renewal explicitly listed Paul and Marie as excluded drivers on the declarations page and noted the applicability of the restrictive endorsement.

In September of 2019, while operating a motor vehicle belonging to his parents, Paul crashed head-on into another vehicle causing injuries and death. Paul was at fault for this accident and was criminally charged. Those injured ("the Dutys") filed multiple claims with Nationwide which were denied as Paul was an excluded driver. The circuit court determined that the restrictive endorsement in the reinstated new policy was not properly executed, because, on its face, it did not specifically identify Paul as an excluded driver. Therefore, the circuit court determined that coverage existed for the Dutys' underlying claims and granted summary judgment on this point. Nationwide appealed.

Holding:

Pursuant to the intent of the legislature and as expressed in West Virginia Code § 33-6-31h, the unambiguous nature of the parties' contract, and case law regarding statutory and contract interpretation in West Virginia, the endorsement at issue was valid and precluded coverage.

The circuit court incorrectly determined that permitting Nationwide to attach a blank restrictive endorsement form and simply list excluded drivers on a declarations page would be in conflict with the omnibus provisions of West Virginia Code § 33-6-31(a). This statute provides, in relevant part:

> "[n]o policy or contract of bodily injury liability insurance, or of property damage, liability insurance, covering liability arising from ownership, maintenance[,] or use of any motor vehicle, may be issued or delivered in this state to the owner of such vehicle, or may be issued or delivered by any insurer licensed in this state upon any motor vehicle for which a certificate of title has been issued . . . unless it contains a provisions insuring the named insured and any other person except . . . **any persons specifically excluded by any restrictive endorsement attached to the policy** . . . against liability for death or bodily injury sustained or loss or damage occasioned within the coverage of the policy or contract as a result of negligence in the operation or use of such vehicle by the named insured or by such person."

In *Burr v. Nationwide Mut. Ins.*, the West Virginia Supreme Court acknowledged that the purpose of an omnibus clause in automobile liability insurance was generally to extend coverage, thereby affording such clauses liberal construction. However, such a clause does not operate in a vacuum, and there have been shifts since the decision in Burr. Specifically, West Virginia Code § 33-6-31h, now in effect, provides:

(a) "[f]or purposes of this section, the following definitions apply . . . (2) 'Excluded driver' means any driver specifically excluded from coverage under [West Virginia Code § 33-6-31].

(b) The Legislature finds that . . . (1) The explicit, plain language of a motor vehicle liabi ity policy between an insurer and its insured should control its effect[.]"

This statute, amongst revisions to West Virginia Code § 33-6-31(a) shows the Legislature's intent to honor agreements between insurers and insureds, even if the agreements limit coverage to injured parties. Requiring insurers to provide coverage for excluded drivers negatively impacts those not excluded by a restrictive endorsement.

Statutory provisions in West Virginia are interpreted by first identifying the legislative intent and second, by looking to the specific language. Clear and unambiguous expression of legislative intent is to be given full force and effect. West Virginia Code § 33-6-31h(b) explicitly indicates the plain language of a motor vehicle policy will control – this is clear and unambiguous. Further, in interpreting insurance policies, West Virginia Courts look to the plain and ordinary meaning of the language, as one would in the interpretation of any West Virginia contract and avoid creating ambiguities that do not exist.

In the policy and restrictive endorsement at issue, no ambiguity existed. While the restrictive endorsement did not specify a named person, it did explicitly provide that it "applie[d] as stated in the policy [d]eclarations." Said policy declarations then explicitly listed the excluded drivers. *Burr* does not require a different finding; the offending documents are distinguishable.

In *Burr***,** the offending document referenced a class of people, and nowhere was a specific person named, even in the declarations page. Here, Paul and Marie were explicitly named in the declarations page. Reading the policy and restrictive endorsement together, as required by West Virginia Code § 33-6-30, made this clear. While *Burr* requires exclusions to specifically designate those who are excluded, it does not provide that this must be done in a particular manner. As such, doing so on the declarations page when the endorsement specifically refers to such page, was sufficient. The endorsement at issue was valid, precluding coverage under the policy for the Dutys.

How They Voted:

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

Impact on Business:

This case clarifies that automobile insurance policies are read as a whole. While omnibus provisions related to such coverage typically are construed in favor of coverage, West Virginia has statutorily recognized the importance of the freedom to contract. As such, if an insurer wants to guarantee coverage is precluded, they must ensure this language of the policy and any endorsements are clear and unambiguous when read as a whole. Simply failing to include an excluded driver's name on an endorsement does not automatically force an insurer to provide coverage to an excluded driver.

Shaun and Jennifer Lopez, individually, and as Next Friends and Legal Guardians of S.L., G.L., and J.L., minors; and Keith and Melissa Chapman, individually, and as Next Friends and Legal Guardians of H.C., a minor v. Erie Insurance
Case No. 23-ICA-338 (Oct. 16, 2024)

What the Court was Asked to Decide:

Did the circuit court erred in applying contractual terms from an insurance policy's general definition section to an uninsured and underinsured motorists endorsement?

What the Court Decided:

No, the circuit court properly determined that the uninsured and underinsured motorists endorsement unambiguously referred to the general policy definition terms applied by the circuit court. Applying these definitions, the vehicle at issue did not meet the uninsured and underinsured motorists coverage requirements.

Facts:

Petitioners were parents of children injured in a motor vehicle crash during a Veterans Day parade on November 2, 2019. These children were on a parade float constructed on a trailer, which was being pulled behind a Ford F-150 insured under the Erie auto policy (the "Erie Policy") at issue in the case. The children were injured when a 2007 Yamaha Rhino utility-terrain vehicle ("UTV") unexpectedly accelerated and struck the ramp on the trailer, causing it to collapse. The police report showed the UTV was not registered through the West Virginia Division of Motor Vehicles ("DMV"). Rather, the Registration Status was "No Registration Required." After settling with the UTV driver, the compensation was insufficient to cover multiple injured parties, so the Petitioners made a claim for underinsured motorists benefits under the Erie Policy on October 22, 2020. On November 2, 2020, Erie denied coverage, finding that the UTV did not qualify as a "motor vehicle" under the Erie Policy.

Holding:

If a vehicle does not meet the definition of "motor vehicle" under the Erie Policy, then it cannot be an "underinsured motor vehicle" as defined by the Policy's UIM Endorsement.

The ICA first looked to the Erie Policy's language, specifically focusing on its plain and ordinary meaning. Contracts, including insurance policies, are read as a whole. The "Definitions" section of the UIM Endorsement explicitly stated that "[w]ords and phrases in bold type and quotations are used as defined in this endorsement. If a word or phrase in bold type and quotations is not defined in this endorsement, then the word or phrase is defined in the GENERAL POLICY DEFINITIONS section of this policy." Hence, any word or phrase in bold type and quotations has a specific contractual definition; "underinsured motor vehicle" is such a term within the UIM Endorsement. The contractual definition of "underinsured motor vehicle" started with the following language: "a **'motor vehicle'** for which…" The "underinsured motor vehicle" definition also included a list of exclusions, all starting with the phrase 'motor vehicle.' As such, the specific contractual definition of "motor vehicle" controlled, and with no definition in the UIM endorsement, the definitions section of the general policy controlled. The definition of "motor vehicle" was two-fold: the vehicle must be self-propelled **and** require registration under the law in the state of the insured. Both prongs must be met for a vehicle to qualify as a "motor vehicle" and it must be a "motor vehicle" to be a "underinsured motor vehicle." Here, because no registration was required for the UTV under West Virginia Code § 17A-3-2; the UTV did not qualify as a "motor vehicle" under the Erie Policy.

The ICA further determined that, while there are differences between general liability coverage and underinsured motorists coverage, the UIM Endorsement should not be read in isolation. While ambiguous policies are strictly construed against insurance companies, any ambiguity here was not relevant. While the ICA agreed that the "underinsured motor vehicle" definition was silent as to whether an off-roading "motor vehicle" being driven on a public road is included, perhaps making the "underinsured motor vehicle" definition ambiguous, this does not matter. Despite this theoretical ambiguity, it was clear and unambiguous that all "underinsured motor vehicles" must be "motor vehicles." It was effectively a condition precedent. If an insurance policy as a whole is unambiguous, ambiguity could not be created by taking things out of context.

Finally, the ICA addressed whether the Erie Policy's underinsured motorists coverage conflicted with the spirit and intent of the West Virginia uninsured and underinsured motorist statutes. The answer is no. Given the remedial nature of the uninsured motorist statute, it must be construed liberally, but there is a difference between uninsured motorists insurance and optional underinsured motorists insurance. Underinsured motorists coverage is construed less liberally. But in either case, insurance policies may lawfully exclude coverage from vehicles exempted from West Virginia Code § 17A-3-2's registration requirements.

How They Voted:

Chief Judge Thomas E. Scarr delivered the unanimous opinion of the Intermediate Court of Appeals.

Impact on Business:

While there are policy rationales backing statutes regarding uninsured and underinsured motorist coverage, so long as an insurance policy does not conflict with these statutes, insurance companies may refuse to provide coverage. The text of a policy governs and must be considered as a whole. When a policy, as a whole, is clear and unambiguous, its terms and any conditions precedent govern. This understanding provides security and predictability to insurers and policyholders.

Erie Insurance Property & Casualty Company v. James Skylar Cooper
Case No. 23-702 (April 29, 2025)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to answer a certified question from the United States Court of Appeals for the Fourth Circuit which asked whether West Virginia law requires an insurer to provide underinsured motorist coverage to a class of non-owned vehicles that have liability coverage under its insurance policy.

What the Court Decided:

Facts:

In August 2019, James Cooper was injured in a car accident while riding as a passenger on his way to a job site in a car owned and driven by Rick Huffman. The occupants' employer, Pison Management L.L.C. ("Pison"), held an insurance policy that provided $1,000,000 in liability coverage to two specific vehicles that Pison owned, as well as the vehicles driven by their employees that the company did not own (non-owned vehicles). Cooper sought uninsured motorist (UIM) coverage under Pison's insurance policy because Huffman was driving a covered, non-owned vehicle.

Erie denied UIM coverage to Cooper and filed suit in federal district court seeking a declaration that Pison's policy did not provide UIM coverage for Cooper. Cooper then filed a counterclaim and sought a declaration that Erie violated state law by not including UIM coverage for non-owned vehicles. He further argued that UIM coverage for non-owned vehicles existed as an operation of law. Both parties filed for summary judgment. The district court granted Cooper's motion and entered a declaratory judgment against Erie. When Erie appealed to the 4th Circuit, that court certified the question to the West Virginia Supreme Court of whether insurers needed to offer UIM coverage to non-owned vehicles that have liability coverage.

Holding:

The Court held that insurers do not have to extend their insurance policies and offer UIM coverage to a class of non-owned vehicles that receive liability protection.

The Court reasoned that under West Virginia law, there are two classes of insureds: Class I insureds include the named insured, their spouse and family, and Class II insureds defined as individuals who are operating under the consent of those covered under the policy. Cooper fell into the second category and would not enjoy as broad of coverage as someone in Class I.

The Court found that this case was legally and factually similar to a decision issued by the Virginia Supreme Court that held that UIM coverage did not necessarily extend to all non-owned vehicles and was limited to the vehicle that is named on the policy. That court further reasoned that UIM coverage is often first party coverage that follows the person listed on the policy rather than the vehicle. This is because Class II insureds only have coverage if they have the consent of the person listed on the policy. In this case, because Pison could not give consent to use a vehicle it did not own, the UIM coverage did not extend to Cooper. The Court also concluded that Cooper would have been considered a Class I insured under his family's policy and should have sought UIM coverage through that policy, not Pison's.

How They Voted:

Justice Trump delivered the majority opinion of the court. Chief Justice Wooton authored and filed a dissenting opinion.

Impact on Business:

This decision of the West Virginia Supreme Court could have a major impact on business, more specifically businesses that insure their employees' vehicles while they are performing work in their employment capacity. These businesses and their insurers are not obligated to offer or provide UIM coverage to vehicles that are not specifically listed on the business's insurance policy, even if they provide liability coverage to those vehicles.

Kaess v. BB Land, LLC
No. 23-522 (June 6, 2025)

What the Court was Asked to Decide:

The West Virginia Supreme Court was asked to answer two certified questions from the United States District Court for the Northern District of West Virginia. The first question asked whether there is an implied duty to market for oil and gas leases containing an in-kind royalty provision. The second question asked whether the requirements for postproduction expenses from *Wellman v. Energy Resources, Inc.*, 210 W. Va. 200, 557 S.E.2d 254 (2001), and *Estate of Tawney v. Columbia Natural Resources, L.L.C.*, 219 W. Va. 266, 633 S.E.2d 22 (2006), apply to leases containing an in-kind royalty provision.

What the Court Decided:

The Court answered both questions in the affirmative, deciding that both the implied duty to market and the requirements for postproduction costs found in *Wellman* and *Estate of Tawney* apply to leases containing royalty in-kind provisions.

Facts:

Petitioner Kaess owns certain mineral interests in approximately 103.5 acres of land in Pleasants County, West Virginia. His interests are subject to an oil and gas lease to which BB Land is the successor in interest. The lease contained an in-kind royalty provision, allowing Kaess to take his one-eighth share of production physically "in-kind."

In or around March 2018, BB started reporting production of oil and gas from 64.093 of Kaess' acres which had been "pool[ed] or combine[d] ... with other land, lease or leases in the immediate vicinity thereof." After production has started, Kaess did not take his share of the oil and gas in-kind. Instead, BB Land sold Kaess' share and paid him a royalty based on his percentage of acreage contributed to the pool, with certain postproduction costs deducted.

Kaess filed suit in district court, alleging payment misallocation, improper deductions, and excessive deductions. The Court noted that the only cause of action relevant to the certified questions is the claim for improper deductions.

Holding:

First, quoting *SWN Prod. Co., LLC v. Kellam*, 247 W. Va. 778, 875 S.E.2d 216 (2022), the Court held that every oil and gas lease carries an implied duty to extract the minerals and get them to market for sale. The Court found "no principled basis" to treat in-kind leases as different than royalty provisions and flat-rate royalty provisions, both of which have long been understood to include an implied covenant to market. Specifically, the Court compared in-kind leases and flat-rate royalty provisions, determining they are "materially alike in that neither ties royalties to sale proceeds."

Applying that principle, the Court laid out three options for the situation where a royalty owner/lessor does not or cannot take physical possession of his or her share of the production under an in-kind royalty provision. The Court stated that, except as may be provided by the agreement, the producer/lessee may comply with its royalty obligation by: (1) delivering the lessor's share to a nearby purchaser at no cost and ensuring payment is made directly to the lessor; (2) purchasing the lessor's share under mutually agreed terms; or (3) if the lessor does not take their share, marketing and selling the lessor's share of the production on the lessee's behalf, along with the lessee's share of the production.

Second, the Court held that, in the third scenario, when the producer/lessee markets and sells the lessor's share of the production on the lessor's behalf, the lessee is required to pay royalties without deducting postproduction costs.

In reaching that conclusion, the Court again compared flat-rate royalty provisions and in-kind provisions, noting that neither contemplated that the lessee would retain possession after production. The Court reasoned that this similarity was sufficient to decide that, like flat-rate provisions, in-kind leases do not permit postproduction deductions unless the lease expressly and unambiguously allowed them.

Justice Walker filed a dissent, which Justice Bunn joined. The dissent argued that the majority opinion rewrote the provisions of the lease to take money from the producers and give it to the royalty owners. This was the first of two cases decided by a 3-2 vote concerning the legal implications of gas lease royalty calculations. In both cases, the deciding vote was cast by a judge sitting by designation.

How They Voted:

Chief Justice Wooton delivered the 3-2 opinion of the Court. Justice Armstead recused from the decision, and Chief Justice Wooton appointed Judge Hardy of Kanawha County to sit by designation. Justice Walker and Justice Bunn dissented and filed a joint opinion. Justice Trump concurred and filed a separate opinion.

Impact on Business:

This case expands West Virginia oil and gas law by applying *Wellman* and *Tawney* to in-kind royalty leases. In doing so, it enlarges the application of these precedents beyond the scope of the initial decisions. It also establishes the lessee's obligation to market and sell the lessor's share when the lessor does not take delivery in-kind.

A.D.A., as next friend of L.R.A., a minor child under the age of 18 v. Johnson & Johnson, et al.; A.N.C., as next friend of J.J.S., a minor child under the age of 18 v. Johnson & Johnson, et al.; Travis B., next friend and guardian of minor child Z.D.B., et al. v. McKesson Corporation, et al.; and Trey Sparks v. Johnson & Johnson, Inc., et al.
Case Nos. 23-ICA-275, 23-ICA-276, 23-ICA-287, and 23-ICA-307 (December 27, 2024)

What the Court was Asked to Decide:

The Intermediate Court of Appeals ("ICA") was asked to review the Mass Litigation Panel's ("MLP") order dismissing the claims brought on behalf of children born with Neonatal Abstinence Syndrome ("NAS") allegedly caused by in utero exposure to opioids against various opioid manufacturers, distributors, pharmacies, and other entities for their alleged roles in the opioid epidemic.

What the Court Decided:

The ICA affirmed in part, reversed in part, vacated in part, and remanded the cases back to the MLP for further proceedings.

Facts:

Plaintiffs in this case are the parents or guardians of individual minors allegedly suffering from the effects of NAS caused by exposure to opioids during their birth mothers' pregnancies. Plaintiffs brought claims against multiple opioid manufacturers, pharmacies, and others. Plaintiffs' twenty-one separate cases were consolidated and transferred to the MLP, where Defendants filed motions to dismiss.

The MLP dismissed Plaintiffs' claims with prejudice for the following reasons: (1) Plaintiffs did not have standing to bring public nuisance claims; (2) certain Plaintiffs failed to satisfy pre-suit notice requirements under the Medical Professional Liability Act ("MPLA") with respect to their claims against the Pharmacy Defendants; (3) Plaintiffs could not establish that Defendants owed them a duty of care and could not establish that their alleged injuries were caused by Defendants' conduct; (4) there was an insufficient showing of proximate cause for Plaintiffs' fraud claims; and (5) Plaintiffs' claims for civil conspiracy, medical monitoring, and punitive damages were derivative of their other tort claims. The MLP also dismissed the Plaintiffs' claims against the West Virginia Board of Pharmacy, finding that those claims were barred by the public duty doctrine and by qualified immunity.

Following these orders dismissing Plaintiffs' underlying claims with prejudice, the Plaintiffs filed instant appeals to the ICA.

Holding:

Regarding the MLP's order, the ICA affirmed in part, reversed in part, vacated in part, and remanded for further proceedings consistent with its opinion. The ICA held the MLP erred in dismissing Plaintiffs' claims against the Pharmacy Defendants with prejudice. The ICA found the Pharmacy Defendants were both "health care providers" and "health care facilities" as defined in W. Va. Code §§ 55-7B-2(g) and -2(f), and were entitled to pre-suit notice. Because the Pharmacy Defendants never received pre-suit notice pursuant to W. Va. Code § 55-7B-6(b), the MLP correctly dismissed Plaintiffs' claims. However, the ICA held that the dismissal should have been without prejudice, as West Virginia case law is clear that dismissals without prejudice are favored in situations like this. The ICA also determined that the MLP erred in continuing to analyze Plaintiffs' claims after concluding that it lacked subject matter jurisdiction.

Addressing Plaintiffs' other assignments of error, the ICA affirmed dismissal of Plaintiffs' claims for public nuisance, negligence, fraud, and civil conspiracy. The ICA reversed the MLP's decision with respect to the products liability claims, finding that the orders "do not substantively address the products liability claims" brought by Plaintiffs. The ICA then vacated the MLP's decision with respect to the dismissal of Plaintiffs' claims for punitive damages and medical monitoring so as to be consistent with its decision to reverse the dismissal of Plaintiffs' products liability claims. The ICA remanded on the issue of whether Plaintiffs could establish that any Defendants' conduct was a proximate cause of their injuries, finding that the MLP erred in concluding that "the sole proximate cause of all [Plaintiffs'] alleged injuries was their birth mothers' ingestion of opioids." The ICA affirmed the MLP's dismissal of Plaintiffs' claims against the West Virginia Board of Pharmacy based on the public duty doctrine and qualified immunity.

How They Voted:

Chief Judge Scarr delivered the opinion for the Court in a 3-0 decision.

Impact on Business:

This case could have implications for the pharmaceutical industry, as the ICA left open the possibility of recovery in these types of cases under a theory of products liability. Notably, Plaintiffs have appealed the ICA's decision to the West Virginia Supreme Court.

City of Huntington and Cabell County Commission v. AmerisourceBergen Drug Corporation, et al.
Case No. 24-166 (May 12, 2025)

What the Court was Asked to Decide:

The West Virginia Supreme Court was presented with a certified question from the United States Court of Appeals for the Fourth Circuit, asking whether, under West Virginia common law, conditions caused by the distribution of a controlled substance – specifically prescription opioids – can constitute a public nuisance, and if so, what the elements of such a claim would be.

What the Court Decided:

The West Virginia Supreme Court declined to answer the certified question from the Fourth Circuit. The Court explained that it could not resolve the legal issue because the case involved numerous disputed factual findings from the federal district court, all of which are currently being challenged on appeal.

Facts:

In 2017, the City of Huntington and the Cabell County Commission filed lawsuits against three pharmaceutical wholesale distributors – AmerisourceBergen Drug Corporation, Cardinal Health, Inc., and McKesson Corporation – alleging that their distribution practices contributed to a public health crisis by oversupplying prescription opioids. The plaintiffs claimed the distributors shipped excessive volumes of opioids into local pharmacies without conducting adequate due diligence or reporting suspicious orders, as required by the Controlled Substances Act (CSA) and DEA regulations.

The lawsuits asserted a cause of action for public nuisance under West Virginia common law. The plaintiffs alleged the volume of shipments was unreasonable and that the resulting availability of opioids led to widespread addiction, overdoses, and strain on public resources. They sought equitable relief in the form of a 15-year, approximately $2.5 billion abatement plan to address the alleged ongoing harms.

The cases were consolidated in federal multidistrict litigation and selected as bellwether trials. After streamlining, the cases proceeded solely on a public nuisance theory and were remanded to the U.S. District Court for the Southern District of West Virginia. Following a ten-week bench trial, the district court entered judgment for the distributors, concluding they had substantially complied with their federal obligations and that plaintiffs failed to prove the distributors engaged in unreasonable conduct or proximately caused the alleged nuisance. The court also found that the plaintiffs had not shown an interference with a public right and that the proposed abatement plan did not qualify as a proper remedy under nuisance law.

The plaintiffs appealed to the Fourth Circuit, challenging the district court's interpretation of the CSA, its findings on reasonableness and causation, and its conclusion that abatement was unavailable. The Fourth Circuit certified a question to the West Virginia Supreme Court, asking whether a public nuisance claim may be based on conditions caused by the distribution of controlled substances under West Virginia law, and if so, what the elements of such a claim are. Although the Fourth Circuit acknowledged that the underlying factual findings were disputed on appeal, it sought guidance on whether the public nuisance theory was legally viable in this context.

Holding:

The Court declined to answer the certified question, holding that it could not address the issue in the absence of a sufficiently precise and undisputed factual record. The Court explained that under the Uniform Certification of Questions of Law Act, it may only answer questions of law, not mixed questions of law and fact or issues dependent on contested findings. Because the factual determinations made by the federal district court (particularly those concerning the reasonableness of the distributors' conduct, proximate cause, and compliance with the Controlled Substances Act) were actively disputed on appeal, the Court found that any response would constitute an impermissible advisory opinion. It emphasized that whether a nuisance exists is typically a question of fact, and it declined to opine on the viability of a public nuisance claim in the abstract without a settled factual foundation.

How They Voted:

Justice Bunn authored the majority opinion of the Court. Justices Armstead and Trump were disqualified and did not participate in the decision. Judges Dimlich and Salango sat by temporary assignment in their place. Justice Walker concurred and indicated that she may write separately. Chief Justice Wooton and Judge Salango dissented and also indicated that they may write separately.

Impact on Business:

Under the Court's decision, businesses, particularly in regulated industries, avoid an immediate expansion of public nuisance liability. However, the Court did not rule on the merits and left the door open for future nuisance claims based on distribution practices if supported by an undisputed factual record. The decision maintains the status quo but provides no long-term clarity for companies facing similar litigation.

Steak Escape of Kanawha City II, LLC d/b/a Steak Escape, and Josh Macleery v. Jason Hudson
Case No. 24-ICA-173 (March 20, 2025)

What the Court was Asked to Decide:

The West Virginia Intermediate Court of Appeals was asked to determine whether Steak Escape of Kanawha City II, L.L.C. d/b/a Steak Escape ("Steak Escape") was properly served with the original complaint and summons in this case, and whether the circuit court should have denied Defendant Josh Macleery's motion to set aside the default judgment. Further, the court was also asked to decide whether the award for punitive damages against Macleery was proper and if the circuit court abused its discretion by awarding the plaintiff his attorney's fees.

What the Court Decided:

Facts:

The underlying action in this case was filed on August 24, 2022, by Jason Hudson. His complaint alleged that he was wrongfully terminated from his position at Steak Escape and named Steak Escape, the general manager Josh Macleery, and the shift supervisor Michael Hill as defendants. He further alleged that he was terminated due to a disability and that he endured discrimination during his tenure at Steak Escape.

On September 8, 2022, a Kanawha County Deputy Sheriff attempted to serve the complaint to the defendants at Steak Escape's Kanawha City location. However, Macleery indicated to the Deputy that the proper address for Steak Escape was in Ohio. The Deputy gave Macleery his summons and the one meant for Hill, but did not leave the summons and complaint for Steak Escape.

The summons and complaint were also mailed to the West Virginia Secretary of State (the "WVSOS") and were received on September 12, 2022. The WVSOS attempted to send these documents to Steak Escape's registered agent and to the address listed on the WVSOS's records for service of process but was unsuccessful three times. The summons and complaint were eventually returned to the WVSOS as "undeliverable as addressed."

On September 26, 2022, Hudson's counsel received documents postmarked from Steak Escape's Columbus office containing a joint response to Hudson's interrogatories from Macleery and Hill. No answer or notice of appearance was ever filed on behalf of the defendants.

Hudson filed a motion for default judgment against Steak Escape and Macleery, which was granted by the circuit court. A few weeks later, in January, Hudson served a notice of hearing on damages to both Steak Escape's Charleston location and its Ohio corporate office.

The defendants filed an emergency motion to set aside the default judgment on March 1, 2023. While at the hearing for that motion on March 3, 2023, the court ordered Hudson's counsel to conduct limited depositions of Macleery and Hill. On June 23, 2023, the court held a hearing to address Hudson's award for damages and the defendants' motion to set aside the default judgment. At the hearing, the court ordered Steak and Escape to provide evidence regarding its ability to receive mail at the address listed with the WVSOS.

The court ultimately denied the motion to set aside the default judgment and granted Hudson compensatory damages, punitive damages, and attorney's fees. The defendants appealed this decision to the West Virginia Intermediate Court of Appeals.

Holding:

The ICA held that Steak Escape was not properly served because service of process was neither accepted nor refused by Steak Escape's registered agent. Under the statute that provides the procedures for serving process on domestic corporations, if service is neither accepted nor refused by the certified agents, then it is improper. Since the statute regarding service of LLCs contained the same language, the court found it appropriate to invoke this rule for both statutes.

Furthermore, the ICA concluded that circuit court did not err in denying the motion to set aside the default judgment due to Macleery's intransigence. Because Macleery did not file an answer and refused to obtain counsel until a default judgment was entered against him, the ICA found no error in the circuit court's decision to deny his motion to set aside the default judgment.

The ICA concluded that the circuit court's award of punitive damages was proper because Macleery never filed an answer and could not refute the complaint's allegations that his actions were willful and showed a clear intent to cause physical or emotional distress. Punitive damages are typically awarded when a defendant acts with actual malice or a complete indifference to the health, safety, and welfare of others. The court concluded that the award of punitive damages was proper based on Hudson's uncontested allegations.

Lastly, the ICA found that the circuit court did not abuse its discretion in awarding attorney's fees because the time and labor expended by plaintiff's counsel in conducting additional depositions, briefs, and hearings were all reasonable.

How They Voted:

Judge Greear authored the majority opinion for the court. Judge White concurred.

Impact on Business:

This decision by the ICA reemphasizes the importance of process and the procedures for effective service. Businesses should be mindful about making sure information regarding their ability to accept or refuse service of process is accurate and up to date, as there are no assurances that their interests will otherwise be protected. While the concurring opinion suggests that businesses may be able to strategically avoid pending litigation by simply not accepting or refusing service of process, such a tactic is dangerous and may place that business in legal peril.

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