

## 2015 WEST VIRGINIA LEGISLATION UPDATE: PART I

*The Honorable Joseph K. Reeder\**

*Matthew G. Chapman†*

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\* The Honorable Joseph K. Reeder is a Judge in the 29th Judicial Circuit, which covers all of Putnam County, West Virginia.

† Matthew G. Chapman, Esq., is an Associate in the Wheeling Office of Burns White, LLC, and is a proud graduate of West Virginia University College of Law. I wish to dedicate this article to my mentor and one of the greatest jurists in the West Virginia judiciary, the Honorable O.C. “Hobby” Spaulding—I miss you Judge, and I will always treasure the lessons you imparted upon me. I further wish to dedicate this article to my wonderful wife, J. Laura Wakim Chapman.

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I. INTRODUCTION

The West Virginia Legislature passed several laws during the 2015 Regular Legislative Session which may impact the legal community. This Article is the first in a two part series that discusses several of those laws—including election of judges, the West Virginia Consumer Credit and Protection Act, Premises Liability, and the Medical Professional Liability Act—and the possible effects. The second part of this Article will focus on the limitations on punitive damages, deliberate intent, choice of law in products liability suits, comparative fault, wrongful/retaliatory discharge, and the Wage Payment and Collection Act.

II. ELECTION OF JUDGES

Presented as an effort to reduce partisanship in the selection process, the West Virginia Legislature reformed judicial elections and fundamentally changed how the West Virginia Judiciary is elected.

In theory, this legislative change shortens the campaign season by holding the election of judges during the primary election, in lieu of both the Primary and General Elections.<sup>1</sup> “Supporters of [the changes] believe a shorter campaign season and one election instead of two will reduce the influence of money, as well as the amount of cash candidates have to raise. They also believe keeping the elections non-partisan will diminish some of the more strident party-based rhetoric.”<sup>2</sup>

The legislative changes are effective during the 2016 election cycle,<sup>3</sup> and it will be interesting to see if proponents of the changes are correct in their assumptions. The changes may actually increase the influence of party regulars; an unintended consequence that could result in the election of more ideological candidates.

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<sup>1</sup> Whitney Burdette, *House Approves Change to Judicial Election*, CHARLESTON GAZETTE-MAIL (Feb. 4, 2015), <http://www.wvgazette.com/article/20150204/DM0104/150209597/2006103025>.

<sup>2</sup> Hoppy Kercheval, *West Virginia Moving Toward Non-Partisan Judicial Elections*, METRONews (Feb. 19, 2015, 12:30 AM), <http://wvmetronews.com/2015/02/19/west-virginia-moving-toward-non-partisan-judicial-elections/>.

<sup>3</sup> S. 2010, 2015 Leg., Reg. Sess. (W. Va. 2015).

### A. Turn Out in Primary Election

It is axiomatic to say that turnout for primary elections is very low compared to general elections.

YEAR <sup>4</sup>	AVERAGE TURNOUT IN GENERAL ELECTION	AVERAGE TURNOUT IN PRIMARY ELECTION	YEAR	AVERAGE TURNOUT IN GENERAL ELECTION	AVERAGE TURNOUT IN PRIMARY ELECTION
2011 (special)	27%	16%	1980	72%	46%
2010	44%	24%	1978	49%	31%
2008	59%	43%	1976	69%	53%
2006	42%	26%	1974	41%	28%
2004	66%	39%	1972	73%	50%
2002	42%	32%	1970	48%	32%
2000	62%	41%	1968	76%	52%
1998	40%	32%	1966	48%	30%
1996	67%	47%	1964	75%	50%
1994	50%	39%	1962	58%	31%
1992	73%	54%	1960	77%	51%
1990	48%	41%	1958	60%	29%
1988	67%	50%	1956	75%	47%
1986	48%	26%	1954	51%	29%
1984	72%	50%	1952	75%	50%
1982	60%	32%	1950	61%	26%

Based upon information obtained from the West Virginia Secretary of State's website, voter turnout in primaries from 1950 to 2011, which was a special election, has averaged only 38%; general elections, however, have averaged 59% over the same time period.<sup>5</sup> With lower turnout, the importance of each individual vote is enhanced.

### B. Demographic of the Primary Voters in West Virginia

In West Virginia the average primary voter is considerably older<sup>6</sup> and, in many counties, more likely to be registered as a Democrat than a

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<sup>4</sup> Sec'y of State, *Voter Turnout Overview*, W. VA. SECRETARY OF ST., <http://www.sos.wv.gov/elections/history/voteturnout/Pages/TurnoutOverview.aspx>.

<sup>5</sup> *Id.*

<sup>6</sup> Sec'y of State, *Voter Turnout by Age*, W. VA. SECRETARY OF ST., <http://www.sos.wv.gov/elections/history/voteturnout/Pages/TurnoutAge.aspx> (last visited Sept. 21, 2015).

Republican.<sup>7</sup> While the data is incomplete, it appears that, by a slim margin, females<sup>8</sup> are also more likely to vote in a primary election.

BY AGE:									
Election <sup>9</sup>	18-24	18-24%	25-40	25-40%	41-55	41-55%	56+	56+%	Total
2012 Primary	13,030	4%	40,719	12%	84,585	25%	195,962	59%	334,296
2010 Primary	10,652	4%	32,973	12%	72,828	27%	158,294	58%	274,747
2008 Primary	28,499	6%	78,089	16%	141,972	29%	236,706	49%	485,266
2008 General	54,643	8%	137,807	20%	200,876	29%	304,797	44%	698,123
2006 Primary	10,877	4%	35,514	13%	83,872	31%	139,586	52%	269,849
2006 General	17,390	4%	64,556	15%	136,616	31%	222,452	50%	441,014
2010 Primary	10,652	4%	32,973	12%	72,828	27%	158,294	58%	274,747

BY PARTY:							
Date <sup>10</sup>	Election	Dem	Rep	Mtn	NoP	Oth	Total
May 8, 2012	2012 Primary	198,546	104,332	130	25,188	6,717	334,913
Oct 4, 2011	2011 General(Special)	169,959	102,880	161	21,257	5,357	299,614
May 14, 2011	2011 Primary (Special)	118,954	57,387	23	10,355	3,140	189,859
Nov 2, 2010	2010 General	294,539	181,639	286	48,505	9,270	534,239
Aug 28, 2010	2010 Special	86,888	49,105	45	7,872	2,772	146,682
May 11, 2010	2010 Primary	174,892	87,934	91	17,330	5,050	285,297
Nov 4, 2008	2008 General	388,571	231,242	380	78,332	11,450	709,975
May 13, 2008	2008 Primary	330,545	121,674	184	37,755	7,044	497,202
Nov 7, 2006	2006 General	273,038	149,990	193	30,434	6,628	460,283
May 9, 2006	2006 Primary	184,240	82,814	65	11,517	3,696	282,332
Nov 2, 2004	2004 General	420,462	240,148	382	65,833	9,559	736,384
May 11, 2004	2004 Primary	263,400	115,245	81	16,231	4,599	399,556

<sup>7</sup> Sec'y of State, *Voter Turnout by Party*, W. VA. SECRETARY OF ST. [hereinafter *Voter Turnout by Party*], <http://www.sos.wv.gov/elections/history/voterturnout/Pages/TurnoutParty.aspx> (last visited Sept. 21, 2015).

<sup>8</sup> Sec'y of State, *Voter Turnout by Gender*, W. VA. SECRETARY OF ST. [hereinafter *Voter Turnout by Gender*], <http://www.sos.wv.gov/elections/history/voterturnout/Pages/TurnoutGender.aspx> (last visited Sept. 21, 2015).

<sup>9</sup> Sec'y of State, *Voter Turnout by Age*, W. VA. SECRETARY OF ST., <http://www.sos.wv.gov/elections/history/voterturnout/Pages/TurnoutAge.aspx> (last visited Sept. 21, 2015).

<sup>10</sup> *Voter Turnout by Party*, *supra* note 7.

BY GENDER:								
Date <sup>11</sup>	Election	Female	F%	Male	M%	Not Specified	N%	Total
May 13, 2008	2008 Primary	233,886	47%	192,518	39%	71,480	14%	497,884
Nov 4, 2008	2008 General	335,960	47%	286,739	40%	87,874	12%	710,573
May 11, 2010	2010 Primary	123,897	43%	116,987	41%	44,490	16%	285,374
Aug 28, 2010	2010 Special	64,270	44%	59,084	40%	23,110	16%	146,464
Nov 2, 2010	2010 General	240,579	45%	219,726	41%	72,993	14%	533,298
May 13, 2011	2011 Primary (Special)	81,024	43%	76,828	41%	31,268	17%	189,120
Oct 4, 2011	2011 General (Special)	131,692	44%	126,983	42%	43,046	14%	301,721
May 8, 2012	2012 Primary	149,708	45%	139,200	42%	46,005	14%	334,913

*C. General Overview of Primary Election Voters—From Party Based Polarization to Issue Based Polarization?*

One of the primary justifications for changing the election of the judiciary was to remove party based polarization of judges.<sup>12</sup> By changing to nonpartisan elections, however, the yolk of the party based election may be replaced with the yolk of the issue or ideological based election.

It has been observed that primary voters are more polarized and, therefore, force candidates to be more ideological in the primary:

Scholars and practitioners of politics have long argued that primary elections are a major contributing factor to polarization. The argument goes as follows: because primary elections are (mostly) restricted to voters from one party and (usually) garner low turnout, ideologues in both parties can easily dominate those elections. Thus candidates, incumbents and non-incumbents alike, move away from the center and are driven to support more extreme policy and political positions.<sup>13</sup>

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<sup>11</sup> *Voter Turnout by Gender*, *supra* note 8.

<sup>12</sup> Kercheval, *supra* note 2 (stating that supporters of the Bill “believe keeping the elections non-partisan will diminish some of the more strident party-based rhetoric.”).

<sup>13</sup> Elaine C. Kamarck, *Increasing Turnout in Congressional Primaries*, BROOKINGS (July 2014), <http://www.brookings.edu/~media/research/files/papers/2014/07/increasing-turnout-congress-primaries/kamarckincreasing-turnout-in-congressional-primaries72614.pdf>. In a footnote following this quote, the author goes on to state:

For instance, David Brady, Hahrie Han and J.C. Pope looked at congressional primaries from 1956 to 1998 and concluded that “. . . candidates who do not appeal to an ideological base of organized voters are more likely to lose in the primaries.” Gary Jacobson argues that primary electorates are “. . . much more partisan and prone to ideological extremity and the need to please them is one force behind party polarization in Congress.”

Given that only the most partisan voters tend to vote during the primary, it is quite likely that it will not diminish more strident party-based rhetoric. Instead, it may shift to the underlying issues that currently define the parties.

Prior to the new legislation, judges used party identification as a tool to educate voters as to their overall philosophy.<sup>14</sup> Without being able to rely on party identification, judges may now be forced to run more issue-based campaigns in order to distinguish themselves from the crowd.

In partisan systems, voters know a candidate's partisan affiliation, which they can presume will correlate at some level with a judge's philosophy and ideological leanings. Nonpartisan elections, by comparison, provide no such cue. As a consequence, in nonpartisan systems interest groups and others can more easily shape voters' perceptions of a judge by publicizing isolated rulings.<sup>15</sup>

Therefore, in this new era of nonpartisan election of judges, judicial campaigns may focus on polarizing issues as opposed to polarizing partisan affiliation.<sup>16</sup> This may be a distinction without a difference.<sup>17</sup>

#### *D. The Elimination of Party Politics?*

The new legislation is laudable in its attempt to remove party politics from judicial elections. The ultimate goal, however, appears limited given the current case law. For instance, a political party has a right to endorse a judicial

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*Id.* at 1–2, n.15 (internal citation omitted); *cf.* Alan Abramowitz, *Don't Blame Primary Voters for Polarization*, 5 FORUM, no. 4, 2008, <http://themonkeycage.org/Abramowitz.Primary.Voters.pdf> (finding that “[t]he evidence does not support the theory” that primary voters are “dominated by strong partisans whose views are more extreme than those of rank-and-file party supporters.”).

<sup>14</sup> See Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. 21, 24–25 (2009).

<sup>15</sup> *Id.* In that law review article, the authors note that “nonpartisan elections do not necessarily encourage greater judicial independence than partisan elections,” but “[i]nstead, nonpartisan elections create the incentive for judges to cater to public opinion, and this pressure is particularly strong for the types of issues that attract attention from interest groups, the media, and voters.” *Id.* at 21.

<sup>16</sup> It is uncontroverted that a state is prohibited from preventing a judicial candidate from discussing his opinions as to legal or political issues in dispute. *Republican Party of Minna v. White*, 536 U.S. 765, 788 (2002) (applying Minnesota law).

<sup>17</sup> It may also be that judicial candidates simply try to identify with political issues in an effort to connect themselves with the particular party that shares this viewpoint. But as discussed in Section D, judicial candidates can simply state which party they belong to and forego this roundabout process.

candidate.<sup>18</sup> Political parties, therefore, are not prevented from advertising that a particular candidate is a member of that party.

Beyond political parties' rights, a judicial candidate can turn a nonpartisan election into a partisan fight by announcing his political affiliation.<sup>19</sup> Judicial canons cannot seek to prevent a candidate from sending an advertisement that identifies that candidate's political affiliation and the political affiliation of his opponent.<sup>20</sup> Ultimately, while the ballot may not make reference to a party affiliation, nothing prevents either a political party or the judicial candidate from making party affiliation an issue.

#### *E. Removal of Money?*

The argument that nonpartisan election of judges in the primary will remove the influence of money and reduce the amount of cash candidates have to raise is also unpersuasive. From a practical standpoint, judicial candidates will now need to get out their message in a shorter amount of time to a fewer amount of people, i.e., the partisan primary voters. This would indicate that more money may be necessary in order to specifically target these voters in an effort to get the message out and convince them (1) to vote and (2) to vote for the candidate. Only time will tell whether nonpartisan election of judges during the primary election, will remove money from politics.

#### *F. Election by Plurality*

There may be a very serious unintended consequence with these changes. Previously, the partisan primary served to whittle the number of eligible candidates down to one Democrat and one Republican. With the new changes, the election occurs during the primary. So, for instance, in regards to election of supreme court judges<sup>21</sup> and circuit court judges,<sup>22</sup> pursuant to House Bill 2010, the candidate with the highest number of votes cast in the primary wins the seat regardless of the number of candidates that run. The authors can imagine a scenario in which several individuals are running for a particular judicial office and the winning candidate, who has a very strong base of support from a plurality of voters based upon one key issue or reaction to a judge's decision, wins with that plurality. On its face, it seems undemocratic to win an

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<sup>18</sup> Sanders Cty. Republican Cent. Comm. v. Bullock, 698 F.3d 741, 749 (9th Cir. 2012) (enjoining enforcement of a state statute that banned a political organization from endorsing a judicial candidate); Concerned Democrats of Fla. v. Reno, 458 F. Supp. 60, 65 (S.D. Fla. 1978) (holding that states cannot ban party endorsements).

<sup>19</sup> See Carey v. Wolnitzek, 614 F.3d 189 (6th Cir. 2010); Siefert v. Alexander, 608 F.3d 974, 978, 981 (7th Cir. 2010).

<sup>20</sup> See Winter v. Wolnitzek, 56 F. Supp. 3d 884 (E.D. Ky. 2014).

<sup>21</sup> H.D. 2010, 2015 Leg., Reg. Sess. (W. Va. 2015).

<sup>22</sup> *Id.*

important position by a simple plurality of votes. It may also lead to the election of a judge based upon one key issue in which a majority of the population does not agree with.

### G. Election by Divisions

In passing House Bill 2010, the Legislature changed the way in which the election of justices to the Supreme Court of Appeals and magistrates are conducted. Now, justices of the Supreme Court and magistrates will run in divisions.<sup>23</sup> So, for instance, a candidate will have to pick a division and the candidate with the most votes will win that individual seat. This brought election of justices and magistrates in line with that of circuit court judges.

## III. WEST VIRGINIA CONSUMER CREDIT & PROTECTION ACT

By enacting Senate Bill 542,<sup>24</sup> the West Virginia Legislature has made some interesting changes to the West Virginia Consumer Credit & Protection Act (the “WVCCPA”) as set forth in West Virginia Code § 46A-1-101 *et. seq.* This legislation changes how damages are calculated, the rules for contacting a represented debtor, and the definition of communication.

### A. Damages Calculation

In the prior version of the WVCCPA, violations were \$100 to \$1,000 per violation.<sup>25</sup> These figures could be adjusted for inflation from September 1, 1974.<sup>26</sup> Adjusting for inflation based upon the most recent numbers, the penalties were approximately \$475.14 to \$4,751.45.

The new legislation amended §§ 46A-5-101 and 106. In § 46A-5-101, the new legislation provides for the recovery of actual damages, and “a right in an action to recover from the person violating this chapter a penalty of \$1,000 per violation: *Provided*, That the aggregate amount of the penalty awarded shall not exceed the greater of \$175,000 or the total alleged outstanding indebtedness . . . .”<sup>27</sup> In § 46A-5-106, the legislature changed the start date from which inflation shall be calculated; it was adjusted to be from September 1, 2015, as opposed to 1974.<sup>28</sup> The practical impact of these changes is to substantially reduce the amount of damages a debtor can obtain from a creditor for any alleged violation of the WVCCPA.

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<sup>23</sup> *Id.*

<sup>24</sup> S. 542, 2015 Leg., Reg. Sess. (W. Va. 2015).

<sup>25</sup> W. VA. CODE § 46A-5-101(1) (1996).

<sup>26</sup> W. VA. CODE § 46A-5-106 (1994).

<sup>27</sup> S. 542, 2015 Leg., Reg. Sess. (W. Va. 2015).

<sup>28</sup> *Id.*



*B. Contacting a Represented Debtor—Written Notice Required*

Former West Virginia Code § 46A-2-128 prohibited debt collectors from using “unfair or unconscionable means to collect or attempt to collect any claim.”<sup>29</sup> Included in the definition of “unfair or unconscionable means” was the following:

Any communication with a consumer whenever it appears that the consumer is represented by an attorney and the attorney’s name and address are known, or could be easily ascertained, unless the attorney fails to answer correspondence, return phone calls or discuss the obligation in question or unless the attorney consents to direct communication.<sup>30</sup>

Inherently, this created issues because it only had to “appear” that a debtor was represented and that “the attorney’s name and address are known or *easily ascertained*.”<sup>31</sup> Essentially, all that was required of the debtor was to simply state during one of the debt collection calls that he or she was represented by an attorney. If it was demonstrated that the debtor verbally advised the collector of representation, then all direct contact was prohibited.

The West Virginia Legislature, through Senate Bill 542 amended this code section to require the debtor to send written notice to the creditor.<sup>32</sup> Further, Senate Bill 542 requires that:

[N]otice must clearly state the attorney’s name, address and telephone number and be sent to the debt collector’s registered agent, identified by the debt collector at the office of the West Virginia Secretary of State or, if not registered with the West Virginia Secretary of State, then to the debt collector’s principal place of business.<sup>33</sup>

Whereas in the old statute, the debtor only had to state that he was represented by an attorney, the new statute definitively requires that written notice, which includes the attorney’s name address and telephone number, be sent to the collector.

*C. Regular Account Statements/Notice Required by Law*

West Virginia Code § 46A-2-128(e) was very broad in scope as “any communication” with a debtor who was represented by counsel was considered

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<sup>29</sup> W. VA. CODE § 46A-2-128 (1991).

<sup>30</sup> *Id.* § 46A-2-128(e).

<sup>31</sup> *Id.* (emphasis added).

<sup>32</sup> S. 542, 2015 Leg., Reg. Sess. (W. Va. 2015).

<sup>33</sup> *Id.*

an “unfair or unconscionable means to collect or attempt to collect” a debt.<sup>34</sup> In an effort to limit the scope, the West Virginia Legislature further amended § 46A-2-128(e) to exclude “[r]egular account statements provided to the consumer and notices required to be provided to the consumer pursuant to applicable law” as prohibited communications.<sup>35</sup>

Both of these changes make practical sense as neither constituted “unfair or unconscionable means to collect or attempt to collect” a debt. It strains credulity to suggest a regular account balance is either unfair or unconscionable in any way. Account balances are items that a company should provide and something that all consumers understand will be provided by a company when you engage their services. Further, if the “applicable law” required a company to send a communication, then some regulatory or governmental body has deemed that communication to be important. How could something that is important be unfair or unconscionable? Obviously, a creditor should not be put into a catch-22 situation whereby it has to choose between being in violation of some other “applicable law” or being in violation of the WVCCPA.

#### IV. PREMISES LIABILITY & THE “OPEN AND OBVIOUS” DOCTRINE

In this Legislative Session, the Legislature sought to change certain particular points of law set forth by the West Virginia Supreme Court of Appeals. This included the Supreme Court’s decision in *Hersh v. E-T Enterprises, Ltd. P’ship*.<sup>36</sup>

##### A. “Open and Obvious” Doctrine Generally

It is axiomatic to say that a business owner has a duty to protect invitees from any hazardous conditions on the business’s property by either fixing the condition or warning invitees that the condition exists. The “duty to warn” is premised on the idea that property owners generally know what is wrong with their property and should warn invitees about any condition on the property that might injure them.

The “open and obvious” doctrine provides an exception to the general rule. It states that if a condition was open and obvious to a reasonable person, and that person is injured by said condition, a defendant is not liable for either failing to fix the condition or failing to warn the injured person of said condition.<sup>37</sup> The reasoning is that a person could have discovered and avoided

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<sup>34</sup> W. VA. CODE § 46A-2-128(e) (1991).

<sup>35</sup> S. 542, 2015 Leg., Reg. Sess. (W. Va. 2015).

<sup>36</sup> *Hersh v. E-T Enters., Ltd. P’ship*, 752 S.E.2d 336 (W. Va. 2013), *superseded by statute*, W. Va. Code § 5-7-28 (2015).

<sup>37</sup> *Id.* at 353 (Loughry, J., dissenting) (quoting *O’Sullivan v. Shaw*, 726 N.E.2d 951, 954–55 (Mass. 2000)).

the condition just as easily as the defendant landowner could have warned the plaintiff.<sup>38</sup>

*B. The Hersh Decision*

In *Hersh*, the Plaintiff was walking down a set of stairs that had no handrails.<sup>39</sup> “[I]t was undisputed that the missing handrails were an ‘open and obvious’ condition, and undisputed that [Plaintiff] knew there were no handrails on the stairs before he fell.”<sup>40</sup> The Plaintiff fell down the stairs and suffered a head injury.<sup>41</sup> The circuit court granted summary judgment to all defendants because “the missing handrail was a condition that ‘was open, obvious, reasonably apparent, and as well known to [Plaintiff] as it was to the Defendants.’”<sup>42</sup>

The Plaintiff appealed, asking the court to abolish the “open and obvious” doctrine and urged the “[c]ourt to adopt Section 343A of the *Restatement (Second) of Torts* (1965).”<sup>43</sup> As cited by the court, this section states as follows:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.<sup>44</sup>

The court found that generally, the “open and obvious” rule is a harsh rule that many jurisdictions have abolished.<sup>45</sup> The court declined to adopt Section 343A *in toto*, but instead used the rule and the accompanying notes and comments to fashion a new rule.<sup>46</sup>

The *Hersh* decision overturned over 100 years of West Virginia precedent by holding that the “open and obvious doctrine in premises liability negligence actions is abolished.”<sup>47</sup> The Court replaced the doctrine with the following syllabus point:

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 340.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 345.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 345–46 (footnotes omitted).

<sup>46</sup> *Id.* at 347.

<sup>47</sup> *Id.* at syl. pt. 6.

In the ordinary premises liability case against the owner or possessor of the premises, if it is foreseeable that an open and obvious hazard may cause harm to others despite the fact it is open and obvious, then there is a duty of care upon the owner or possessor to remedy the risk posed by the hazard. Whether the actions employed by the owner or possessor to remedy the hazard were reasonable is a question for the jury.<sup>48</sup>

C. *The Dissents in Hersh*

In dissent, Justice Allen H. Loughry II found that the decision placed an “impossible burden” on property owners of making their premises “injury proof.”<sup>49</sup> Justice Loughry went on to state:

The facts of this case illustrate why such a rule is simply untenable. Here, [Defendant] temporarily removed the handrails on the steps because they were in disrepair and he was concerned that teenagers who were using the handrails as ramps while skateboarding were going to be injured. He contracted to have the handrails reinstalled two weeks before the petitioner’s fall. Given these circumstances, [Defendant’s] actions were clearly reasonable. In fact, the City of Martinsburg building code, of which the majority summarily concludes he was in violation, even allows for removal of the handrails for purposes of repair. Nonetheless, according to the majority, [Defendant] should have foreseen that someone with balance and mobility issues, that could not walk without the aid of a cane and who was falling on a daily basis would choose to traverse the steps, despite the obvious lack of a handrail. Without question, [Plaintiff] suffered an unfortunate injury. However, we should not overturn years of precedent merely to indulge our natural sympathy for someone who was hurt because he chose to run the risk of walking down the steps when he knew that there was no handrail and that he was not capable of proceeding safely.<sup>50</sup>

Justice Loughry further provided that: “[b]y abolishing the open and obvious doctrine, the majority has created a subjective legal duty which is

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<sup>48</sup> *Id.* at syl. pt. 5.

<sup>49</sup> *Id.* at 350 (Loughry, J., dissenting).

<sup>50</sup> *Id.* (Loughry, J., dissenting).

contingent, uncertain, and impractical for West Virginia property owners who wish to comply with the law.”<sup>51</sup>

In a separate dissent, Chief Justice Brent Benjamin argued that new rule conflated the duty element with the causation element:

Syllabus point 5 of the Majority opinion nullifies the duty element by making its existence dependent on causation. Where the existence of a duty was previously a question of law, it is now dependent on findings of fact regarding foreseeability. Although duty and causation were previously separate elements, now, any foreseeable injury will result in a finding that the property owner owed a duty to an invitee onto that property.<sup>52</sup>

*D. Senate Bill 13 and the Reassertion of the “Open and Obvious” Doctrine*

In reaction to this decision, the West Virginia Legislature passed Senate Bill 13.<sup>53</sup> This Bill adds a new code section, West Virginia Code § 55-7-28, which states as follows:

A possessor of real property, including an owner, lessee or other lawful occupant, owes no duty of care to protect others against dangers that are open, obvious, reasonably apparent or as well known to the person injured as they are to the owner or occupant, and shall not be held liable for civil damages for any injuries sustained as a result of such dangers.<sup>54</sup>

In fact, the Bill goes on to directly rebuke the *Hersh* decision:

It is the intent and policy of the Legislature that this section reinstates and codifies the open and obvious hazard doctrine in actions seeking to assert liability against an owner, lessee or other lawful occupant of real property to its status prior to the decision of the West Virginia Supreme Court of Appeals in the matter of *Hersh v. E-T Enterprises, Limited Partnership*, 232 W. Va. 305 (2013). In its application of the doctrine, the court as a matter of law shall appropriately apply the doctrine considering the nature and severity, or lack thereof, of violations of any statute relating to a cause of action.<sup>55</sup>

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<sup>51</sup> *Id.* at 354 (Loughry, J., dissenting).

<sup>52</sup> *Id.* at 355 (Benjamin, C.J., dissenting).

<sup>53</sup> S. 13, 2015 Leg., Reg. Sess. (W. Va. 2015).

<sup>54</sup> W. VA. CODE § 55-7-28(a) (2015).

<sup>55</sup> W. VA. CODE § 55-7-28(c) (2015).

It is clear that based upon this additional language contained within the Bill, that the Legislature definitively sought to reaffirm and restore the “open and obvious” doctrine.

#### V. PREMISES LIABILITY & DUTY OWED TO TRESPASSERS

In reaction to the *Hersh* decision, the West Virginia Legislature wanted to further protect property owners in regards to trespassers on land. In Senate Bill 3,<sup>56</sup> the West Virginia Legislature codified the common law rule that “[a] possessor of real property . . . owes no duty of care to a trespasser except in those circumstances where a common-law right-of-action existed as of the effective date of this section, including the duty to refrain from willfully or wantonly causing the trespasser injury.”<sup>57</sup> This Bill creates a new code section, specifically West Virginia Code § 55-7-27, that will become effective 90 days from the date of passage, which was January 29, 2015.<sup>58</sup>

#### VI. MEDICAL PROFESSIONAL LIABILITY ACT

There were several important changes made in this legislative session to the Medical Professional Liability Act (“MPLA”), as set forth in W. Va. Code § 55-7B-1, *et. seq.*

##### A. Collateral Source

In *Kenney v. Liston*,<sup>59</sup> the West Virginia Supreme Court of Appeals decided that jurors can only consider prices listed on medical bills when calculating awards for damages, regardless of how much those bills were discounted. Said another way, a plaintiff would be allowed to present to the jury the amount that was billed for his/her medical expenses, regardless of whether that was the ultimate amount paid.<sup>60</sup> Practically speaking, this enables a plaintiff to recover damages he did not actually incur.<sup>61</sup> The Court reasoned that the “collateral source rule” entitles a plaintiff to recover the billed rate for medical services because the discounted rate is a result of the insurance policy the plaintiff paid.<sup>62</sup>

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<sup>56</sup> S. 3, 2015 Leg., Reg. Sess. (W. Va. 2015).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Kenney v. Liston*, 760 S.E.2d 434 (W. Va. 2014).

<sup>60</sup> *See id.* at 449 (Loughry, J., dissenting).

<sup>61</sup> *See id.* at 449–50 (Loughry, J., dissenting).

<sup>62</sup> *Id.* at 441.

In a direct response to this opinion, the Legislature passed Senate Bill No. 6,<sup>63</sup> which changed the definition of collateral source set forth in West Virginia Code § 55-7B-2(b)(2) as follows:

(b) “Collateral source” means a source of benefits or advantages for economic loss that the claimant has received from:

...

(2) Any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental, nursing, rehabilitation, therapy or other health care services or provide similar benefits, *but excluding any amount that a group, organization, partnership, corporation or health care provider agrees to reduce, discount or write off of a medical bill[.]*<sup>64</sup>

The Bill went on to create a new section, W. Va. Code §55-7B-9d, which clearly defines what a verdict for past medical expenses may be:

A verdict for past medical expenses is limited to:

- (1) The total amount of past medical expenses paid by or on behalf of the plaintiff; and
- (2) The total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person on behalf of the plaintiff is obligated to pay.<sup>65</sup>

The question posed is certainly a tricky one; why should the plaintiff be precluded from obtaining the full amount billed for medical services? Stated another way, is the reasonable value of services rendered the amount actually billed? As the majority in *Kenney* point out, “a person who is negligent and injures another ‘owes to the latter full compensation for the injury inflicted[,] . . . and payment for such injury from a collateral source in no way relieves the wrongdoer of [the] obligation.’”<sup>66</sup> The majority in *Kenney* argued that the reasonable value was the amount actually billed.

Apparently the West Virginia Legislature decided the court’s use of such calculation belies the purpose of compensatory damages; i.e., to put the plaintiff in the same position he would have been had the injury not occurred. According to that position, the plaintiff is only responsible for the discounted medical bills negotiated by his insurance provider. What is reasonable, therefore, seems to be the amount negotiated by the insurance provider and the

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<sup>63</sup> S. 6, 2015 Leg., Reg. Sess. (W. Va. 2015).

<sup>64</sup> *Id.* (emphasis added).

<sup>65</sup> W. VA. CODE §55-7B-9d. (2015)

<sup>66</sup> *Kenney*, 760 S.E.2d at 440 (quoting *Walther v. Davis*, 111 S.E.2d 784, 788 (Va. 1960)).

person offering the medical services. As stated by Justice Loughry in his dissent:

What more probative evidence of the reasonable value of the services could there be than the negotiated and paid rate for the services? What more could a defendant offer to rebut the prima facie presumption established in West Virginia Code § 57-5-4j? Are we to blindly accept the fiction that hospitals and other medical providers routinely and as a matter of freely-negotiated contracts accept less than the reasonable value of their services?<sup>67</sup>

This is certainly a question that has vexed the legal community. The majority in *Kenney* would argue that a defendant “should not benefit from the expenditures made by the injured party or take advantage of contracts or other relations that may exist between the injured party and third persons.”<sup>68</sup> The dissent would argue that the purpose of the law is to make the plaintiff whole and including the billed rate, as opposed to the discount rate, does more than that.<sup>69</sup> Ultimately, the Legislature, by enacting Senate Bill No. 6, has determined that the appropriate rate is the discount rate.

#### B. *Contemporaneous/Related Causes of Action*

The situation frequently arises where a plaintiff will assert a cause of action under the MPLA as well as another cause of action for an alleged tort that occurred contemporaneously and/or is related to the medical negligence. This pleading strategy is a way to circumvent the caps on damages set forth in the MPLA.

So, for instance, a plaintiff may allege medical professional liability and also non-medical claims related to an asserted cover-up of medical negligence. This strategy was tested in *Boggs v. Camden-Clark Mem’l Hosp. Corp.*<sup>70</sup> In *Boggs*, the plaintiff decedent was admitted to Camden-Clark Memorial Hospital for surgery on her ankle.<sup>71</sup> During the administration of anesthetics, she went into cardiac arrest and died several days later.<sup>72</sup> A suit was brought against the anesthesiology group and hospital on theories of negligent hiring and retention and vicarious liability.<sup>73</sup>

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<sup>67</sup> *Id.* at 452.

<sup>68</sup> *Id.* at 441 (quoting *Wilson v. Hoffman Grp., Inc.*, 546 N.E.2d 524, 530 (Ill. 1989)).

<sup>69</sup> *Id.* at 449–50 (Loughry, J., dissenting).

<sup>70</sup> *Boggs v. Camden-Clark Mem’l Hosp. Corp.*, 609 S.E.2d 917, 920 (2004).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*



According to [Ms. Boggs' estate], following the death of Ms. Boggs, several parties engaged in a cover-up, which led Mr. Boggs to assert additional claims for fraud, the destruction of records, the tort of outrage, and the spoliation of evidence. Mr. Boggs maintains that these claims should be considered to be separate and distinct from his medical malpractice claims.<sup>74</sup>

The West Virginia Supreme Court of Appeals found that only the medical professional liability claims were subject to the MPLA; further the Court held that:

The West Virginia Medical Professional Liability Act, codified at W. Va. Code § 55-7B-1 *et seq.*, applies only to claims resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. *It does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability.*<sup>75</sup>

The West Virginia Legislature determined that this circumnavigation of the MPLA was inappropriate and, to respond to these types of cases, enacted Senate Bill 6.<sup>76</sup> This Bill changed the definition of “health care” as set forth in W. Va. Code § 55-7B-2(e) and the definition of “medical professional liability” as set forth in W. Va. Code § 55-7B-2(i).<sup>77</sup>

The initial definition of “health care” was limited to “any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient during the patient’s medical care, treatment or confinement.”<sup>78</sup> In changing the definition of “health care,” the Legislature added a new section and significantly supplemented the prior definition:

(e) “Health care” means:

(1) Any act, service or treatment provided under, pursuant to or in the furtherance of a physician’s plan of care, a health care facility’s plan of care, medical diagnosis or treatment;

(2) Any act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to or on behalf of a patient during the patient’s medical care,

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at syl. pt. 3 (emphasis added).

<sup>76</sup> S. 6, 2015 Leg., Reg. Sess. (W. Va. 2015).

<sup>77</sup> *Id.*

<sup>78</sup> W. VA. CODE § 55-7B-2(e) (2007) (amended 2015).

treatment or confinement, including, but not limited to, staffing, medical transport, custodial care or basic care, infection control, positioning, hydration, nutrition and similar patient services; and

(3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers.<sup>79</sup>

As stated above, the *Boggs* decision found that the MPLA “does not apply to other claims that may be *contemporaneous to or related to* the alleged act of medical professional liability.”<sup>80</sup> In a direct rebuke of this decision, the Legislature added language to W. Va. Code § 55-7B-2(i) that states that the definition of “medical professional liability” does apply to “other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services.”<sup>81</sup> This new legislation likely means that a plaintiff will have a more difficult time avoiding the MPLA and the caps on damages set forth therein.

### C. Who is Covered by the MPLA

The prior definitions of “health care facility,” as set forth in § 55-7B-2(f) and “health care provider” as set forth in § 55-7B-2(g), contained within the prior version of the MPLA were inadequate, and these inadequate definitions led to illogical results. For instance, the West Virginia Supreme Court of Appeals in *Phillips v. Larry’s Drive-In Pharmacy, Inc.*<sup>82</sup> found that a pharmacy is not considered a “health care facility” and/or a “health care provider.”<sup>83</sup>

In response, the Legislature amended and greatly expanded the definition of “health care facility” and “health care provider.”

(f) “Health care facility” means any clinic, hospital, pharmacy, nursing home, assisted living facility, residential care community, end-stage renal disease facility, home health agency, child welfare agency, group residential facility, behavioral health care facility or comprehensive community mental health center, intellectual/developmental disability center or program, or other ambulatory health care facility, in and licensed, regulated or certified by the state of West Virginia under state or federal law and any state-operated

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<sup>79</sup> W. Va. S. 6.

<sup>80</sup> *Boggs*, 609 S.E.2d at syl. pt. 3 (emphasis added).

<sup>81</sup> W. Va. S. 6.

<sup>82</sup> 647 S.E.2d 920 (W. Va. 2007).

<sup>83</sup> *Id.* at 929.

institution or clinic providing health care and any related entity<sup>84</sup>] to the health care facility.

(g) “Health care provider” means a person, partnership, corporation, professional limited liability company, health care facility, entity or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, physician assistant, advanced practice registered nurse, hospital, health care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, speech-language pathologist and audiologist, occupational therapist, psychologist, pharmacist, technician, certified nursing assistant, emergency medical service personnel, emergency medical services authority or agency, any person supervised by or acting under the direction of a licensed professional, any person taking actions or providing service or treatment pursuant to or in furtherance of a physician’s plan of care, a health care facility’s plan of care, medical diagnosis or treatment; or an officer, employee or agent of a health care provider acting in the course and scope of the officer’s, employee’s or agent’s employment.<sup>85</sup>

With these new definitions, it appears that the MPLA will be applied more broadly, which is welcome news to those entities and individuals that provide medical services but were not within the initial definitions.

#### *D. Admissibility of Certain Types of Evidence under the MPLA*

Part of Senate Bill 6 was directly related to the type of evidence that could be used in medical negligence claims.<sup>86</sup> The Legislature sent a clear message that unrelated and outdated incidents of alleged misconduct should not necessarily be introduced at trial. To further this end, the Legislature enacted a new section, § 55-7B-7a:

(a) In an action brought, there is a rebuttable presumption that the following information may not be introduced unless it applies specifically to the injured person or it involves

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<sup>84</sup> The Legislature, by enacting new section § 55-7B-2(n), provided a very expansive definition of the term “related entity” as well. A related entity includes not only any “corporation, foundation,” etc., “under common control or ownership” but also includes those entities if they are owned or controlled “directly or indirectly, partially or completely, legally, beneficially or constructively[.]” W. Va. S. 6.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

substantially similar conduct that occurred within one year of the particular incident involved:

- (1) A state or federal survey, audit, review or other report of a health care provider or health care facility;
- (2) Disciplinary actions against a health care provider's license, registration or certification;
- (3) An accreditation report of a health care provider or health care facility; and
- (4) An assessment of a civil or criminal penalty.<sup>87</sup>

It is uncertain whether this statutory enactment will withstand judicial scrutiny as it may impede upon the West Virginia Rules of Evidence. "There should be no dispute concerning the Supreme Court's authority to create rules of evidence for civil and criminal trials."<sup>88</sup> This power is set forth in the Judicial Reorganization Amendment to the West Virginia Constitution: "[t]he court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the state relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law."<sup>89</sup> In *Teter v. Old Colony Co.*,<sup>90</sup> the West Virginia Supreme Court of Appeals found that a legislative enactment that is substantially contrary to the West Virginia Rules of Evidence is invalid.<sup>91</sup> Basically, the Legislature "lacks constitutional authority to codify rules inconsistent with existing rules already adopted by the court."<sup>92</sup>

Senate Bill 6 determines that unless certain exceptions apply, there is a rebuttable presumption that a governmental audit, disciplinary actions, accreditation reports, and assessments of civil or criminal penalties are not admissible evidence.<sup>93</sup> While it is unclear from the text of the Bill, the justification seems clear; the Legislature either determined that this type of evidence is not relevant and therefore not admissible or that this evidence, even if relevant, is so highly prejudicial, confusing, or a waste of time that it should

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<sup>87</sup> *Id.*

<sup>88</sup> LOUIS J. PALMER, JR., ET AL., HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS, § 101.03[2] (6th ed. 2015).

<sup>89</sup> W. VA. CONST. art. VIII, § 3.

<sup>90</sup> *Teter v. Old Colony Co.*, 441 S.E.2d 728 (W. Va. 1994).

<sup>91</sup> *Teter*, 441 S.E.2d at 743; *see also State v. Derr*, 451 S.E.2d 731, 743 (W. Va. 1994) (finding that "the West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence in circuit courts").

<sup>92</sup> PALMER, *supra* note 88, at § 101.3[2].

<sup>93</sup> S. 6, 2015 Leg., Reg. Sess. (W. Va. 2015).

be excluded. This analysis, however, is already covered by Rules 401,<sup>94</sup> 402,<sup>95</sup> and 403<sup>96</sup> of the West Virginia Rules of Evidence.

The ultimate question, however, is whether this legislative enactment is inconsistent with existing Rules 401, 402, and 403. An astute defense attorney may argue that the Legislature was simply trying to supplement the Rules of Evidence. An astute plaintiff attorney may retort with *State v. Derr*,<sup>97</sup> and point out that the “Rules of Evidence remain the paramount authority in determining the admissibility of evidence . . . .”<sup>98</sup> At this stage, however, it is uncertain as to whether § 55-7B-7a will survive judicial scrutiny.

#### *E. Minimum Staffing Requirements*

Also encompassed in § 55-7B-7a is a provision directly related to minimum staffing requirements: “[i]n any action brought, if the health care facility or health care provider demonstrates compliance with the minimum staffing requirements under state law, the health care facility or health care provider is entitled to a rebuttable presumption that appropriate staffing was provided.”<sup>99</sup>

#### *F. Expert Witness Testimony*

In order to establish that the applicable standard of medical care has not been met, the plaintiff’s expert is required to testify, and that expert must be competent to testify.<sup>100</sup> There are several factors set forth in the code that must be met in order to establish that an expert is “competent,” including the following:

- (1) The opinion is actually held by the expert witness;
- (2) the opinion can be testified to with reasonable medical probability;
- (3) the expert witness possesses professional knowledge and

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<sup>94</sup> Rule 401 of the West Virginia Rules of Evidence states: “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” PALMER, *supra* note 88, at § 401.01.

<sup>95</sup> Rule 402 of the West Virginia Rules of Evidence states: “Relevant evidence is admissible unless any of the following provides otherwise: (a) the United States Constitution; (b) the West Virginia Constitution; (c) these rules; or (d) other rules adopted by the Supreme Court of Appeals of West Virginia. Irrelevant evidence is not admissible.” *Id.* at § 402.01.

<sup>96</sup> Rule 403 of the West Virginia Rules of Evidence states: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” *Id.* at § 403.01.

<sup>97</sup> 451 S.E.2d 731 (W. Va. 1994).

<sup>98</sup> *Id.* at 743.

<sup>99</sup> W. Va. S. 6.

<sup>100</sup> W. VA. CODE §55-7B-7 (2007) (amended 2015).

expertise coupled with knowledge of the applicable standard of care to which his or her expert opinion testimony is addressed; (4) the expert witness maintains a current license to practice medicine with the appropriate licensing authority of any state of the United States . . . .<sup>101</sup>

The Legislature added one more requirement; specifically, that “the expert witness’s opinion is grounded on scientifically valid peer-reviewed studies if available . . . .”<sup>102</sup> Given the last clause in that sentence, “if available,” it is unclear as to how much of an effect this will have on a court’s ability to manage expert testimony based upon untested or unreliable science.

### *G. Effective Date*

The changes to the MPLA set forth in Senate Bill 6 will apply to all cases filed on or after July 1, 2015.<sup>103</sup>

## VII. CONCLUSION

As demonstrated above, this new legislation has some very significant changes that will be litigated in the coming years. Until such time as more guidance is given and/or new case law is announced, many in the legal community will be left with uncertainty.

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<sup>101</sup> *Id.*

<sup>102</sup> W. Va. S. 6. (emphasis added).

<sup>103</sup> *Id.*