

AGENDA

May 25, 2021

West Virginia Bar Government Lawyers Committee
Meeting and Free 2 hour CLE Program

Code Updates from the 2021 West Virginia Legislative Session
and Discussion of SB277 Granting Ex Post Facto Limitation of Liability for Covid-19
Actions

12:00pm Government Lawyers Committee Meeting

12:15pm CLE Program introduction of first speaker Christopher C. Ross, Esq.
Puller, Fowler, Flannigan, Brown & Poe, PLLC

Provisions of SB277

Discussion of Ex Post Facto analysis likely to be applied by West
Virginia Supreme Court under prior caselaw followed by questions and
answers

12:45 CLE Program introduction of second speaker Doren Burrell, Esq. Staff
Attorney Legislative Services Division

Code Updates from the 2021 Legislative Session

an explanation of key legislation and significant changes in the West
Virginia Code for Practicing attorneys

followes by questions and answers

2:00 Conclusion of CLE

Instructional time 1 hour 45 minutes

CHRISTOPHER C. ROSS is a Member of Pullin, Fowler, Flanagan, Brown & Poe, PLLC's Charleston office practices insurance defense litigation in areas of state and municipal government, employment, civil rights, products liability, toxic torts, construction & property damage, workers compensation, collections & bankruptcy, landlord-tenant, and he continues to stay current on issues of how traditional law intersects with the issues of our digital age. Before joining the firm, Mr. Ross was an Assistant Public Defender in Kanawha County, West Virginia and an Assistant Prosecuting Attorney in Akron, Ohio. He is member of Defense Trial Counsel of West Virginia, Leadership West Virginia, and he is licensed to practice in West Virginia, Ohio, Kentucky, and the District of Columbia. Mr. Ross earned his B.A. in Psychology at West Virginia University and his J.D. at the University of Akron School of Law where he focused on labor & employment and computer & cyberspace law. He was a member of the American Bar Association Negotiation Competition advocacy team and participated in the national Saul Lefkowitz Intellectual Property Moot Court competition. A native West Virginian, he lives in Charleston, WV with his wife and boy/girl twin toddlers.

West Virginia's COVID-19 Jobs Protection Act (SB-277)

Is it constitutional as intended?



Prepared by:
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May 25, 2021

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The Rush to Pass COVID Legislation

- As 2021 began, 30 states had already passed legislation to shield certain entities from some or all liabilities related to COVID-19
- More than 20 states have now passed legislation providing blanket immunity from civil litigation to employers and/or to persons and entities conducting business during the pandemic.
- At least 8 states have now passed legislation that is, in whole or in part, retroactive.

SB 277: COVID-19 Jobs Protection Act

- SB 277 passed both chambers with little debate and was signed into law by the Governor to be retroactively effective on 1/1/20 to all suits pending or otherwise.
- SB 277 promulgated W.Va. Code §55-19-1 *et seq.* which establishes new law and legislative findings related to COVID-19 and its impact on business and litigation.
- The COVID-19 Jobs Protection Act bars causes of action against any person, essential business, business, entity, health care facility, health care provider, first responder, or volunteer for loss, damage, physical injury or death arising from COVID-19.

SB 277 (continued)

- The Act also extinguishes liability for death or personal injury related to the design, manufacture, or labeling of supplies or personal protective equipment either sold or donated.
- The only exception for the manufacturing provision is for a person having actual knowledge of a product defect and acting with reckless and outrageous indifference or with actual malice.
- Workers Compensation claims will be the sole and exclusive remedy for work-related injury, disease, or death arising from COVID-19 unless intentional conduct or malice is demonstrated.

SB 277 (continued)

- No new cause of action is created, nor defense limited by this new Act.
- This Act does not affect duties or rights arising from contract as that could be construed as an intrusion in violation of the West Virginia Constitution.
- The Act is retroactively effective back to January 1, 2020.
- Completed legislation: April 1, 2021
- Signed by the Governor: April 8, 2021.

Construction of retroactive laws in WV

- West Virginia Code 2-2-10(bb) states that a statute is presumed to be prospective unless expressly made retrospective.
- In general, retroactive application of statutes has not been favored where new legislation seeks to extinguish vested rights that were lawfully established prior to the enactment of the retrospective legislation.
- The Legislature clearly has the power to change laws prospectively (moving forward from enactment) so long as they are not unconstitutional.
- Scrutiny must be applied to legislation that is intended to apply retrospectively to ensure that it is constitutionally valid where substantive rights are impacted.

Retroactivity (continued)

- The WV Supreme Court in *Martinez v. Asplundh*, 803 S.E.2d 582 (W.V.a 2017) found that “statutory changes that are purely procedural in nature will be applied retroactively.”
- In so finding, the Court determined that the right to “front pay” and “back pay” did not vest at the time of discharge from employment, but rather vested only upon an entry of judgment in the plaintiff’s favor. Thus, this right is only procedural rather than substantive.
- Justices Davis and Workman dissented and opined that such a law is a substantive rather than remedial change as they seek to alter the consequences to events already accomplished in an *ex post facto* manner.

Retroactivity (continued)

- Two years later the Court in *Goldstein v. Peacemaker Props., LLC*, 828 S.E.2d 276 (W.Va. 2019) found that property owners alleging “notice pleading” in a demand for monetary property damages were a “vested property right” which cannot be retroactively extinguished without procedural due process.
- Justices Jenkins and Armstead dissented and opined that a “notice pleading” claim for property damages is not a vested property right because it represents only future, prospective relief. For this, and other reasons, the dissenting Justices believed that the damages claimed were “special damages” required to be pled with particularity under Rule 9.

Future Litigation

- The different opinions by the Court in *Martinez* and *Goldstein* appear to be at odds in what constitutes a substantive right.
- Both decisions were a 3-2 split with Justice Walker writing for the majority.
- In *Martinez* J. Walker was joined by J. Loughry and J. Ketchum (J. Davis and J. Workman dissenting).
- In *Goldstein* J. Walker was joined by J. Hutchinson and J. Workman (J. Jenkins and J. Armstead dissenting.)
- The current Supreme Court consists of J. Jenkins, J. Armstead, J. Walker, J. Hutchinson, and J. Wooton. Two of those have recently voted against retroactivity and two have recently voted to support it with J. Wooton to be determined. Further, J. Walker has voted on both sides of the issue.

Other Retroactive Issues

- It is unclear whether our current Court will view SB 277 as procedural or substantive, but the intent of the law is clear, to cut off a broad swath of potential litigation that may have already accrued and been completed.
- There are no exceptions to the general shield law.
- The only exceptions to the manufacturing and employment shields in this Act are intentional and malicious conduct, both of which are difficult burdens to demonstrate.
- There is no sunset provision to this Act, such as that exist in other states, as it seeks to prohibit almost all litigation stemming from workplace or manufacturing causation, indefinitely and forever.

Interpretation is Key

- Interpretation of the two most recent Supreme Court cases on these issues will be key to how the Court applies the issue of retroactive extinguishment of a whole class of litigation.
- If the Act is upheld, West Virginia's COVID-19 shield law will be among the strongest in the nation for the protections that it provides and its near total bar to COVID related litigation.

Employment Implications

- The issue of how COVID injuries will be covered by West Virginia Workers Compensation will also be a future issue to watch.
- Typically, workers compensation is unavailable for “ordinary diseases of life”.
- Thus, the Act’s requirement that all employment-related COVID claims be resolved through Workers Compensation may be a dead letter for employment claimants.

Disclaimer

These materials are presented with the understanding that the information provided is not legal advice. Due to the rapidly changing nature of the law, information contained in this presentation may become outdated. Anyone using information in this presentation should always research original sources of authority and update this information to ensure accuracy when dealing with a specific matter. No person should act or rely upon the information contained in this presentation without seeking the advice of an attorney.

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User Name: F89190M

Date and Time: Thursday, February 18, 2021 11:18:00 PM EST

Job Number: 136920115

Document (1)

1. [*Goldstein v. Peacemaker Props., LLC*, 241 W. Va. 720](#)

Client/Matter: dtc

Search Terms: retro! /s legis!

Search Type: Terms and Connectors

Narrowed by:

Content Type
Cases

Narrowed by
Court: State Courts > West Virginia



Goldstein v. Peacemaker Props., LLC

Supreme Court of Appeals of West Virginia

January 9, 2019, Submitted; March 15, 2019, Filed

No. 17-0796

Reporter

241 W. Va. 720 *; 828 S.E.2d 276 **; 2019 W. Va. LEXIS 102 ***

BEN AND DIANE GOLDSTEIN, husband and wife, Plaintiffs Below, Petitioners v. PEACEMAKER PROPERTIES, LLC, a West Virginia Limited Liability Company, PEACEMAKER NATIONAL TRAINING CENTER, LLC, a West Virginia Limited Liability Company, Defendants Below, Respondents

shooting range, noise, circuit court, ordinance, damages, nuisance, discovery, retroactively, injunctive relief, nuisance claim, compliance, substantial justification, misconduct, claim for money, additional sanctions, vested property right, monetary damages, circumstances, guidelines, request for production, motion to compel, attorney's fees, special damage, exempt, notice, ranges, nuisance action, measures, grant summary judgment, noise abatement

Subsequent History: Reported at [*Goldstein v. Peacemaker Props., LLC*, 825 S.E.2d 337, 2019 W. Va. LEXIS 386 \(W. Va., Mar. 15, 2019\)](#)

Case Summary

Prior History: Appeal from the Circuit Court of Berkeley County. The Honorable Christopher C. Wilkes [***1] . Case No. 15-C-520.

[*Liberty Corporate Capital Ltd. v. Peacemaker Nat'l Training Ctr., LLC*, 348 F. Supp. 3d 585, 2018 U.S. Dist. LEXIS 182409 \(N.D. W. Va., Oct. 24, 2018\)](#)

Disposition: Affirmed-in-part, reversed-in-part, and remanded with instructions.

Overview

HOLDINGS: [1]-Petitioners landowners' nuisance claim for an injunction against respondent shooting range failed under [W. V. Code § 61-6-23\(e\)\(1\) \(2018 Supp.\)](#) because the legislature barred such claims against shooting ranges observing a county noise ordinance, and the Berkeley County, W. Va., noise ordinance exempted shooting ranges; [2]-The statute did not retroactively bar the landowners' damages claim because it was sufficiently alternatively stated under [W. Va. R. Civ. P. 8](#), and it was a vested property right that could not be retroactively extinguished; [3]-The landowners were not entitled to discovery sanctions under [W. Va. R. Civ. P. 37\(a\)\(4\)\(A\)](#) or (C) because the shooting range's opposition to a motion to compel was substantially justified, prior orders merely allowing the landowners to file a fee petition were

Core Terms

not contradicted, and the court reviewed all a second time.
necessary materials.

Outcome

Judgment affirmed in part, reversed in part.

LexisNexis® Headnotes

Governments > **Legislation** > Effect &
Operation > **Retrospective** Operation

Real Property

Law > ... > Nuisance > Defenses > Statutory
Authorization

HNI [↓] **Effect & Operation, Retrospective Operation**

The West Virginia **Legislature** has amended [W. Va. Code § 61-6-23 \(2014\)](#) to bar nuisance claims against a shooting range if the shooting range is in compliance with local noise ordinances. The **legislature** has specified that that amendment applies **retroactively**.

Civil Procedure > Appeals > Standards of
Review > De Novo Review

Civil Procedure > Appeals > Summary
Judgment Review > Standards of Review

HN2 [↓] **Standards of Review, De Novo Review**

A trial court's entry of summary judgment is reviewed de novo, a term that means anew, afresh,

Governments > Local

Governments > Ordinances & Regulations

HN3 [↓] **Local Governments, Ordinances & Regulations**

The Berkeley County, W. Va., noise ordinance places time and decibel limitations upon noise in residential settings. The ordinance expressly states that those limitations do not apply to (1) lawful hunting or target shooting, trap, skeet or shooting ranges as defined in [W. Va. Code § 61-6-23 \(2018 Supp.\)](#).

Governments > Legislation > Interpretation

HN4 [↓] **Legislation, Interpretation**

The primary object in construing a statute is to ascertain and give effect to the intent of the legislature. Thus, if the legislative intent is clearly expressed in the statute, a court is not at liberty to construe the statutory provision. Rather, it applies a statute whose language is plain to the facts before it consistently with the expressed legislative intent. In other words, where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.

Real Property

Law > ... > Nuisance > Defenses > Statutory
Authorization

HN5 [↓] **Defenses, Statutory Authorization**

In [W. Va. Code § 61-6-23 \(2014\)](#), as amended, the legislature has made clear that a property owner's right to maintain a nuisance lawsuit against a nearby shooting range—even one that commenced operations after the person bought his or her property—must yield to the combined effect of a

municipal or county ordinance regulating noise and the new [W. Va. Code § 61-6-23\(e\) \(2018 Supp.\)](#).

Real Property

Law > ... > Nuisance > Defenses > Statutory Authorization

[HN6](#) **Defenses, Statutory Authorization**

Under [W. Va. Code § 61-6-23\(e\)\(1\) \(2018 Supp.\)](#), the operation or use of a shooting range may not be enjoined based on noise, nor may any person be subject to an action for nuisance or criminal prosecution in any matter relating to noise resulting from operation of a shooting range, if the shooting range is operating in compliance with all ordinances relating to noise in effect at the time the construction or operation of the shooting range began, whichever occurred earlier in time.

Governments > Courts > Common Law

Real Property

Law > ... > Nuisance > Defenses > Statutory Authorization

Governments > State & Territorial

Governments > Legislatures

Governments > Local

Governments > Ordinances & Regulations

[HN7](#) **Courts, Common Law**

By virtue of the authority of [W. Va. Const. art. VIII, § 13](#) and [W. Va. Code § 2-1-1 \(1931\)](#), it is within the province of the legislature to enact statutes which abrogate the common law. In [W. Va. Code § 61-6-23\(e\)\(1\) \(2018 Supp.\)](#), the legislature has exercised that authority to abrogate the common law to create a zone of protection from noise-based nuisance suits for shooting ranges that do not violate local noise ordinances in effect at the earlier of the range's construction or commencement of operations. Because Berkeley County, W. Va., has

chosen not to impose noise limits on shooting ranges, shooting ranges cannot be out of compliance with the County's noise ordinance. A shooting range does not fall outside the zone of protection created by the legislature in [W. Va. Code § 61-6-23\(e\)\(1\) \(2018 Supp.\)](#) because it is exempt from the County's ordinance. To do so would render meaningless the protection created by the legislature and leveraged by the express exemption in the County's ordinance.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Governments > **Legislation** > Effect & Operation > Retrospective Operation

[HN8](#) **Procedural Due Process, Scope of Protection**

Foundationally, an accrued legal claim is a vested property right. While a **legislature's** unmatched powers allow it to sweep away settled expectations suddenly, it may not **retroactively** change statutes so as to sweep away vested property rights without implicating both procedural due process under the West Virginia and federal constitutions and the certain remedy provision of [W. Va. Const. art. III, § 17](#). Thus, if a verified complaint contains a claim for legal relief, rather than future injunctive relief, only, then it is error to apply a statutory amendment to dismiss that claim, regardless of a **legislature's** direction that the amendment should apply **retroactively**.

Civil

Procedure > ... > Pleadings > Complaints > Requirements for Complaint

[HN9](#) **Complaints, Requirements for Complaint**

West Virginia remains a notice-pleading state. The

West Virginia Supreme Court of Appeals has not adopted the more stringent pleading requirements as has been the case in federal court, and all that is required by a plaintiff is "fair notice." Under [W. Va. R. Civ. P. 8](#), a complaint must be intelligibly sufficient for a trial court or an opposing party to understand whether a valid claim is alleged and, if so, what it is. Although entitlement to relief must be shown, a plaintiff is not required to set out facts upon which the claim is based. This contrasts to pleading under the federal rules, which require a plaintiff to plead facts to show that the plaintiff has stated a claim entitling him or her to relief.

Civil Procedure > Remedies > Damages

Civil

Procedure > ... > Pleadings > Complaints > Requirements for Complaint

[HN10](#) [📄] Remedies, Damages

A plea for money damages does not disappear because it is pled in the alternative. [W. Va. R. Civ. P. 8](#) expressly contemplates that relief in the alternative may be demanded.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule

Civil Procedure > ... > Discovery > Misconduct During Discovery > Motions to Compel

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

[HN11](#) [📄] Basis of Recovery, American Rule

As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement. [W. Va. R. Civ. P. 37](#) is one of those rules. It is designed to provide sanctions in order to ensure that those persons who are subject to

discovery requests promptly and adequately respond. Under [W. Va. R. Civ. P. 37\(a\)\(4\)\(A\)](#), when a trial court grants a party's motion to compel discovery, the court shall, after affording an opportunity to be heard, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's answer, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust. But, if a trial court grants, in part, and denies, in part, a motion to compel, W. Va. R. Civ. P. 37(a)(4)(C) applies.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

Civil Procedure > ... > Discovery > Misconduct During Discovery > Motions to Compel

[HN12](#) [📄] Basis of Recovery, Bad Faith Awards

Under [W. Va. R. Civ. P. 37](#), a derelict party can avoid the sanctions of paying expenses, including attorney's fees, by showing that his or her conduct was substantially justified or that such an award would be unjust. The derelict party has the burden of proving that his or her failure to supply requested discovery was substantially justified or that other circumstances would make an award of expenses unjust, and a trial court's action in setting an award is subject to review for an abuse of discretion.

Civil Procedure > ... > Attorney Fees &

Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

[*Point 2, Crockett v. Andrews, 153 W. Va. 714, 172 S.E.2d 384 \(1970\).*](#)

4. "'By virtue of the authority of [*Article 8, Section \[13\]*](#) of the Constitution of West Virginia and of [*Code, 1931, 2-1-1*](#) it is within the province of the legislature to enact statutes which abrogate the common law.' [*Syllabus, Perry v. Twentieth St. Bank, 157 W.Va. 963, 206 S.E.2d 421 \(1974\).*](#)" [*Syllabus Point 4, Verba v. Ghaphery, 210 W. Va. 30, 552 S.E.2d 406 \(2001\).*](#)

[HN13](#) [📌] Basis of Recovery, Bad Faith Awards

When considering whether an opposition to discovery was "substantially justified," federal courts hold that a motion, or opposing a motion, is "substantially justified" if the motion raised an issue about which reasonable people could genuinely differ on whether a party was bound to comply with a discovery rule, that is, if there is a genuine dispute as to proper resolution. Accordingly, a motion under [*W. Va. R. Civ. P. 37*](#), or opposition to a [*Rule 37*](#) motion, is substantially justified if the motion or opposition raises an issue about which reasonable people could differ as to the appropriateness of the contested action.

5. "As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." [*Syllabus Point 2, Sally-Mike Properties v. Yokum, 179 W. Va. 48, 365 S.E. 2d 246 \(1986\).*](#)

6. A motion under Rule 37 of the West Virginia Rules of Civil Procedure, or opposition to a Rule 37 motion, is substantially justified if the motion or opposition raises an issue about which reasonable people could differ as to the appropriateness of the contested action.

Counsel: For Petitioners: Joseph L. Caltrider, Esq., Bowles Rice LLP, Martinsburg, West Virginia.

Syllabus

[*721] BY THE COURT

1. "A circuit court's entry of summary judgment is reviewed *de novo*." [*Syllabus Point 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 \(1994\).*](#)

2. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." [*Syllabus Point 1, Smith v. State Workmen's Comp. Comm'r, 159 W. Va. 108, 219 S.E.2d 361 \(1975\).*](#)

3. "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." [*Syllabus*](#)

For National Rifle Association of America, [***2]
Amicus Curiae: Kevin B. Burgess, Esq., Hamilton, Burgess, Young & Pollard, PLLC, Fayetteville, West Virginia.

For Respondents: Christopher P. Stroeck, Esq., Gregory A. Bailey, Esq., Arnold & Bailey, PLLC, Charles Town, West Virginia.

For West Virginia Citizens Defense League,
Amicus Curiae: Ian T. Masters, Esq., Manypenny Raines Law Office, PLLC, Chester, West Virginia.

Judges: CHIEF JUSTICE WALKER delivered the

Opinion of the Court. JUSTICE ARMSTEAD and JUSTICE JENKINS concur, in part, and dissent, in part, and reserve the right to file separate opinions.

Opinion by: WALKER

Opinion

[**278] [*722] WALKER, Chief Justice:

Petitioners Ben and Diane Goldstein sued Respondents Peacemaker National Training Center, LLC, and its related entity, Peacemaker Properties, LLC, for nuisance in 2015. The Petitioners own land in Frederick County, Virginia, and they claim that noise from Respondents' nearby shooting ranges substantially and unreasonably interferes with their use and enjoyment of their rural property.

In 2017, [HNI](#)^[↑] the West Virginia Legislature amended [West Virginia Code § 61-6-23](#) (2014) to bar nuisance claims against a shooting range if the shooting range is in compliance with local noise ordinances. The Legislature specified that that amendment applied *retroactively*. [***3] Based upon that statutory amendment and Berkeley County's noise ordinance, the circuit court concluded that Petitioners' nuisance claim was retroactively barred, granted Respondents summary judgment, and dismissed Petitioners' suit. Petitioners now appeal that order, along with the circuit court's order denying their petition for attorneys' fees and costs under [West Virginia Rule of Civil Procedure 37](#) and motion for additional sanctions due to Respondents' alleged discovery misconduct.

We find that the circuit court correctly applied the 2017 amendment to [West Virginia Code § 61-6-23](#) to dismiss, retroactively, Petitioners' nuisance claim seeking injunctive relief because Berkeley County's

noise ordinance specifically exempts shooting ranges, such as Respondents', from complying with its limitations. But, because Petitioners' plea for money damages accrued prior to the 2017 amendment of [§ 61-6-23](#), Petitioners' right to pursue those damages was vested and the Legislature could not *retroactively* bar Petitioners from pursuing their nuisance claim for money damages. So, we reverse that part of the circuit court's order granting summary judgment to Respondents on Petitioners' nuisance claim for money damages and we remand the matter back to the circuit court for further [***4] proceedings. Finally, we find that the circuit court did not abuse its discretion by denying Petitioners' petition for attorneys' fees and costs and motion for additional sanctions for litigation misconduct, and we affirm the circuit court's order denying that petition and motion.¹

I. FACTS AND PROCEDURAL HISTORY

We present the facts and procedural history of this case in two parts. First, we address the allegations giving rise to Petitioners' nuisance complaint, Respondents' motion for summary judgment, and the circuit court's order granting that motion. Second, we address the parties' lengthy discovery dispute leading to the circuit court's denial of Petitioners' petition for attorneys' fees and costs (fee petition) and motion for additional sanctions for litigation misconduct.

A. Respondents' motion for summary judgment.

Petitioners bought property in rural Frederick County, Virginia, in 1976. They designed and built a home on the land, and from 1983 until 2010, Mr. Goldstein commuted from the property to Washington, D.C., for work. Respondent Peacemaker Properties, LLC (Peacemaker

¹ We acknowledge the amicus curiae briefs filed on behalf of the National Rifle Association of America and the West Virginia Citizens Defense League. We value their participation in this case.

Properties) owns a 501-acre parcel of land near Petitioners' property, straddling the Berkley County, West [***5] Virginia, and Frederick County, Virginia, line. In 2011, Peacemaker National Training Center (the Training Center), a large complex of shooting ranges, commenced operations on Peacemaker Properties' land.² Peacemaker National Training [**279] [*723] Center, LLC (Training Center LLC) operates the Training Center.

Petitioners filed a verified, nuisance complaint against Peacemaker Properties and the Training Center (collectively, Respondents) in the Circuit Court of Berkeley County in September 2015. Petitioners alleged that before operations at the Training Center commenced, Respondents' manager, Cole McCulloch (McCulloch) made representations regarding its hours of operation and the noise that activities at Respondents' range would generate. Petitioners further alleged that, after commencing operations, shooting at the Training Center frequently occurred outside of its set hours of operation and in excess of the noise levels promised by McCulloch. These conditions, Petitioners alleged, substantially and unreasonably interfered with their use and enjoyment of their nearby property.

For relief, Petitioners sought a temporary and permanent injunction from the circuit court to impose specific hours of operation [***6] and maximum noise levels upon Respondents. Should Respondents deviate from those prescriptions, Petitioners further asked that the circuit court require them (1) to implement noise abatement measures on Peacemaker Properties' land, or (2) in the event those abatement measures were unsuccessful, to compensate Petitioners for the cost of noise abatement measures on their own property

"and any other damages permitted by West Virginia law and supported by the evidence." Petitioners also prayed for "such other legal and equitable relief as the [circuit court] shall deem just and proper under the circumstances."

On June 24, 2017, Respondents filed a four-page motion for summary judgment with supporting memorandum of law, in which they argued that amendments to [West Virginia Code § 61-6-23](#) enacted in 2017 retroactively "prohibit[ed] nuisance actions against gun ranges." Specifically, Respondents argued that [subsections \(e\) and \(f\) of § 61-6-23](#), enacted in 2017, operated in combination with Berkeley County's noise ordinance to bar Petitioners' suit. The circuit court agreed, and, on August 11, 2017, entered an order granting summary judgment to Respondents and dismissing Petitioners' complaint with prejudice. Petitioners now appeal from that final [***7] order.

B. Petitioners' Fee Petition and Motion for Additional Sanctions for Litigation Misconduct.

Petitioners served discovery on Respondents on April 1, 2016, approximately six months after filing their verified complaint. Importantly, in that discovery, Petitioners requested that Respondents produce all documents in their possession or control identifying each person, organization, or entity that had used the ranges at the Training Center for approximately the previous ten years (requests for production 23 and 24). After receiving Respondents' responses³ and objections, and an unsuccessful "meet and confer," Petitioners filed their First Motion to Compel in July 2016, seeking from Respondents complete responses to numerous interrogatories and requests for production, including requests for production 23 and 24. The circuit court referred Petitioners' motion to compel to a discovery commissioner, who conducted a

² Petitioners assert that shooting activity began at the Training Center in September 2011. Respondents contend shooting activity began approximately five months earlier, in April 2011. This dispute is not germane to our decision on appeal because the parties do not dispute that shooting began at the Training Center after Berkeley County adopted its noise ordinance in 2007.

³ In response to Petitioners' requests for production 23 and 24, Respondents did not assert a specific objection and produced a list of approximately twenty-nine names and email addresses of individuals who participated in a 2011 training event.

lengthy hearing on September 2, 2016.

On September 30, 2016, the discovery commissioner issued a recommended order granting-in-part and denying-in-part Petitioners' motion to compel. As for requests for production 23 and 24, the recommended order directed Respondents to produce [***8] responsive information subject to a protective order. Also in the recommended order, the discovery commissioner concluded that Petitioners had "substantially prevailed" and gave Petitioners leave to petition for attorneys' fees and expenses pursuant to [West Virginia Rule of Civil Procedure 37\(a\)\(4\)](#) [*724] . [**280] Petitioners filed their first fee petition on December 12, 2016.

Respondents filed exceptions and objections to the discovery commissioner's recommended order on October 14, 2016, arguing that the identity of their patrons was not relevant to Petitioners' nuisance claim; that their customer list was proprietary and confidential information; and, that "some military groups that use [Respondents'] ranges forbid the disclosure of member information." In November 2016, the circuit court overruled Respondents' objections, adopted the discovery commissioner's recommended order, in full, and entered the discovery commissioner's recommended protective order.

Respondents then moved the circuit court to reconsider and stay its November 2016 order. With regard to requests for production 23 and 24, Respondents again argued that their client information was proprietary and beyond the scope of discovery. They also claimed that disclosure of this information [***9] could violate state and federal law pertaining to concealed carry permits and firearm sales and infringe upon those range users' right to freely associate and to keep and bear arms under the [First](#) and [Second Amendments to the United States Constitution](#), respectively. In January 2017, the circuit court denied Respondents' motion for reconsideration and ordered Respondents to produce the requested information under the

previously entered protective order. Respondents made their business records available to the Petitioners on March 22, 23, 29, 31, and April 7, 2017.

On March 15, 2017, the West Virginia Citizens Defense League (CDL), Dominic Applegate (Applegate), and Keith Morgan (Morgan) served a motion to intervene⁴ in this matter to "prevent the disclosure of information relating to [Respondents'] members and guests[.]" On March 17, 2017, Respondents posted a statement to their website regarding the circuit court's order granting Petitioners' motion to compel and identified the information that Respondents were obligated to produce to Petitioners under the court's November 2016 order. Supplemental motions to intervene from more of Respondents' clients followed on March 24 and 31, 2017, posing the same grounds for intervention as stated in [***10] CDL, Applegate, and Morgan's motion.

The circuit court held a *Pitrolo*⁵ hearing on Petitioners' fee petition on March 20, 2017, during which Respondents argued that a fee award was not mandatory under Rule 37(a)(4)(A). Then, on April 4, 2017, presiding Judge Gray Silver III recused himself from the case after receiving a voicemail and viewing an internet posting that he perceived as "part of an effort in support of the [Respondents] to intimidate [the circuit court] to rule for the [Respondents] on at least the pending motions, and to reconsider prior rulings in favor of the [Petitioners], and to threaten the Court to do so." Judge Silver transferred the case to Judge Christopher C. Wilkes, who presided over the remainder of the proceedings, below.

On May 19, 2017, Petitioners submitted a

⁴ Applegate, Morgan, and the CDL served their motion on Petitioners' and Respondents' counsel on March 15, 2017. According to the docket included in the appendix record, Applegate, Morgan, and the CDL filed the motion with the circuit court on March 17, 2017.

⁵ See [Aetna Cas. & Sur. Co. v. Pitrolo](#), 176 W. Va. 190, 342 S.E.2d 156 (1986).

supplemental brief in support of their fee petition and a new motion for additional sanctions for litigation misconduct, seeking entry of a default judgment in their favor. Petitioners alleged that Respondents' March 17 internet posting was designed to incite their clients and supporters to harass and threaten the court, Petitioners, and their counsel, and argued that the circuit court should impose harsh sanctions [***11] for such conduct. On August 9, 2017, Judge Wilkes denied Petitioners' pending fee petition and motion for additional sanctions for litigation misconduct by order, finding that Respondents had presented a "legitimate" discovery dispute that did not merit fee-shifting as a sanction pursuant to Rule 37(a)(4)(A).

II. ANALYSIS

As in the preceding section, we address Petitioners' arguments in two parts. First, [**281] [*725] we analyze their challenge to the circuit court's ruling at summary judgment. Second, we analyze their challenge to the circuit court's denial of their fee petition and motion for additional sanctions for litigation misconduct. Each challenge raises its own standard of review, which we discuss in the appropriate analysis section, below.

A. Respondents' motion for summary judgment.

We first consider the circuit court's August 11, 2017 order granting summary judgment to Respondents. [HN2](#)⁶ "A circuit court's entry of summary judgment is reviewed *de novo*[,]""⁶ a term that "means [a]new; afresh; a second time."⁷ Before addressing the parties' arguments, we first review the legislative background of [West Virginia Code § 61-6-23](#), Berkeley County's noise ordinance, and

the circuit court's order granting summary judgment to Respondents.

(1) Legislative [***12] background of [§ 61-6-23](#).

In 1998, the West Virginia Legislature enacted a new code section, [§ 61-6-23](#),⁸ limiting nuisance actions against shooting ranges in certain circumstances. Under [subsection \(b\) of § 61-6-23](#), as originally enacted, a landowner may not bring a nuisance claim against a nearby shooting range for noise *if* the range was established before the would-be nuisance plaintiff bought his property.⁹ But, the statute preserved a nearby landowner's nuisance claim for noise (1) if the shooting range was established after the landowner bought his property; or (2) if the landowner bought his property after the shooting range was established, but there was a substantial change in the use of the range or shooting activity ceased at the range for a period of two years, but then resumed.¹⁰

The Legislature amended [§ 61-6-23](#) in April 2017 (the 2017 Amendment).¹¹ Relevant to our discussion, the Legislature added two new subsections, [\(e\)\(1\)](#) and [\(f\)](#), which are reproduced, below:

(e)(1) No municipal or county ordinance regulating noise may subject a shooting range to noise control standards more stringent than those standards in effect at the time construction or operation of the shooting range began, whichever occurred earlier in time. The operation or [***13] use of a shooting range may not be enjoined based on noise, nor may

⁶ [Syl. Pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 \(1994\)](#).

⁷ [Gastar Expl. Inc. v. Rine, 239 W. Va. 792, 798, 806 S.E.2d 448, 454 \(2017\)](#) (internal quotation omitted).

⁸ 1998 W. Va. Acts 632-33 (codified at [W. Va. Code § 61-6-23](#) (2000)).

⁹ [W. Va. Code § 61-6-23\(b\)](#) (2014).

¹⁰ *Id.* at [§ 61-6-23\(b\)](#), [\(c\)](#), and [\(d\)](#).

¹¹ 2017 W. Va. Acts 22-24 (codified at [W. Va. Code § 61-6-23](#) (2018 supp.)).

any person be subject to an action for nuisance or criminal prosecution in any matter relating to noise resulting from the operation of a shooting range, if the shooting range is operating in compliance with all ordinances relating to noise in effect at the time the construction or operation of the shooting range began, whichever occurred earlier in time.

...

(f) It is the intent of the Legislature in enacting the amendments to this section during the 2017 regular session of the Legislature that the amendments be applied retroactively.

The Legislature also added in 2017 the following proviso to subsections (b) and (c) of § 61-6-23: "Provided, That if a municipal or county ordinance regulating noise exists, subsection (e) of this section controls."

(2) *Berkeley County's noise ordinance.*

Berkeley County, where Petitioners' nuisance claim was pending in 2017, is one of the few in West Virginia that has passed a county-wide noise ordinance.¹² First adopted in 2007, and then amended in 2009, HN3¹³ the ordinance places time and decibel limitations **[**282]** **[*726]** upon noise in residential settings.¹³ The ordinance expressly states that those limitations "do not apply to: (1) [l]awful hunting or **[***14]** target shooting, trap, skeet or shooting ranges as defined in § 61-6-23, Code of West Virginia, 1931, as amended[.]"¹⁴ Indisputably, the Berkeley County ordinance was in effect before Respondents commenced operations in 2011.

¹² "Nuisance: Excessive Noise in Residential and Similar Settings," Berkeley Cty Comm'n, adopted Sept. 13, 2007 and amended April 30, 2009, available at <http://www.berkeleycountycomm.org/docs/ordinances/enoise.pdf>.

¹³ *Id.*

¹⁴ *Id.*

(3) *The circuit court's order granting summary judgment to Respondents.*

The stage set, we now turn to the circuit court's August 11, 2017 order granting Respondents' motion for summary judgment. Broadly, the circuit court found that "the recent amendment of W. Va. Code §61-2-23 [sic]. . . retroactively prohibits nuisance actions against shooting ranges[.]" In support of this conclusion, the circuit court reasoned that,

[a]s confirmed by W.Va. Code § 8A-1-1, et seq., the WV State Legislature has provided general land use planning authority to governing bodies of counties and municipalities. The West Virginia Supreme Court has confirmed that local governing bodies have been given the express authority to govern land use planning and zoning matters . . . Pursuant to W.Va. Code § 8A-1-1, et seq., "governing body of municipality or county commission may create planning commission to develop comprehensive plan for zoning, building restrictions, and subdivision regulations. . ." McFillan v. Berkeley County Planning Com'n, 190 W. Va. 458, 438 S.E.2d 801 (1993).

Here, in drafting this Statute, the Legislature did not intend to preempt this **[***15]** local authority, and in fact, clearly designated the same. Berkeley County utilized its express land use planning authority to enact a local Noise Ordinance that specifically exempts, among nine various exemptions, shooting ranges. W.Va. Code § 61-2-23 [sic] authorizes each county to regulate shooting ranges as each deems appropriate. The instant applicable statute allows counties to impose whatever noise restrictions it desires, but protects gun ranges from nuisance actions if the gun ranges are operating in a manner consistent with the local noise ordinance imposed [sic].

....

In the instant case, the Plaintiffs seek injunctive relief from this Court. Unlike the cases cited herein, the Court is not required to amend or modify an injunction, but rather should apply the law as it stands today and find that the Plaintiffs are not entitled to the relief sought in the form of injunctive relief. . . . Even absent the Legislature's clear intent of retroactivity, it is abundantly clear that the Legislature intended to prevent any prospective relief against shooting ranges in the form of an injunction predicated upon noise. Indeed, the statute specifically instructs that a shooting range may not be enjoined based [***16] upon noise. W.Va. Code 61-6-23(e)(1) [sic] as amended.¹⁵

Based on this reasoning, the circuit court granted summary judgment to Respondents.

(4) Discussion.


Petitioners challenge both the circuit court's application of § 61-6-23(e)(1) and the retroactive application of the 2017 Amendment to dismiss their lawsuit. We address those arguments in turn.

(a) Application of § 61-6-23(e)(1).

Petitioners attempt to counter the circuit court's conclusion, that § 61-6-23(e)(1) bars Petitioners' nuisance action against Respondents, in several ways. First, they contend that the circuit court's conclusion—that the 2017 Amendment to § 61-6-23 applies retroactively to prohibit all nuisance actions against shooting ranges—is overbroad and not supported by the text of the amendment. Second, they question the circuit court's reasoning that the 2017 Amendment empowers localities to regulate shooting ranges as they see fit and protects those ranges in compliance with the local rules from nuisance claims. Third, they argue that the Legislature could not have intended the 2017

amendment to immunize irresponsible shooting [*727] [**283] range operators from common law nuisance claims if a local noise ordinance does not apply to the shooting range. This, they argue, would cause an imbalance between the rights [***17] of the range and those of neighboring property owners—an imbalance other courts have found persuasive when considering similar statutes in other states. Finally, Petitioners contend the question of whether Respondents are in compliance with Berkeley County's noise ordinance is a factual one and, thus, summary judgment is premature.

Respondents counter that Berkeley County expressly chose to exempt shooting ranges from the limitations imposed on other activities by its noise ordinance. The 2017 Amendment to § 61-6-23 underscores and elevates this choice, they argue, because the 2017 Amendment allows localities to impose whatever noise restrictions they desire, thereby protecting ranges that comport with those local choices from noise-based nuisance claims. Finally, Respondents cite decisions from other states' courts finding ranges to be in compliance with local ordinances for the purposes of similar statutes where the pertinent locality had not, in fact, enacted a local ordinance. This, they argue, is analogous to the situation presented in this case and weighs in favor of affirming the circuit court's order.

Petitioners' assignment of error is a question of statutory interpretation. HN4 "The primary [***18] object in construing a statute is to ascertain and give effect to the intent of the Legislature."¹⁶ "Thus, 'if the legislative intent is clearly expressed in the statute, this Court is not at liberty to construe the statutory provision[.]'"¹⁷

¹⁶ Syl. Pt. 1, Smith v. State Workmen's Comp. Comm'r, 159 W. Va. 108, 219 S.E.2d 361 (1975).

¹⁷ In re I.M.K., 240 W. Va. 679, 685, 815 S.E.2d 490, 496 (2018) (quoting Dan's Carworld, LLC v. Serian, 223 W. Va. 478, 484, 677 S.E.2d 914, 920 (2009)).

¹⁵ Internal notes omitted.

"Rather, we apply a statute whose language is plain to the facts before us consistently with the expressed legislative intent."¹⁸ In other words, "[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."¹⁹ After reviewing [§ 61-6-23\(e\)\(1\)](#), we find that the statutory language clearly expresses the intent of the Legislature and does not need to be construed.

Applying that statute to the facts of this case, we find that the circuit court correctly concluded that [§ 61-6-23](#), as amended in 2017, bars Petitioners' nuisance claim for injunctive relief against Respondents. First, it is undisputed that Petitioners purchased their property prior to the commencement of operations at Respondents' shooting range. Thus, [§ 61-6-23\(c\)](#) (2014 and 2018 supp.) may permit Petitioners' suit against Respondents because, under that section, "[a] person who owned property in the vicinity of a shooting range that was established after [***19] the person acquired the property may maintain a nuisance action for noise against that shooting range," subject to certain time limitations upon the action. [HN5](#)^[↑] In the 2017 Amendment, however, the Legislature made clear that a property owner's right to maintain a nuisance lawsuit against a nearby shooting range—even one that commenced operations after the person bought his property—must yield to the combined effect of a municipal or county ordinance regulating noise and the new [§ 61-6-23\(e\)](#).²⁰

Second, it is undisputed that Berkeley County has a noise ordinance and that that ordinance removes

this matter from the purview of [§ 61-6-23\(c\)](#) and places it in the realm of [§ 61-6-23\(e\)](#). [HN6](#)^[↑] Under [§ 61-6-23\(e\)\(1\)](#),

[t]he operation or use of a shooting range may not be enjoined based on noise, nor may any person be subject to an action for nuisance or criminal prosecution in any matter relating to noise resulting from operation of a shooting range, if the shooting range is operating in compliance with all [**284] [*728] ordinances relating to noise in effect at the time the construction or operation of the shooting range began, whichever occurred earlier in time.

The parties do not dispute that Berkeley County's noise ordinance pre-dated the construction and operation [***20] of Respondents' range. Thus, pursuant to the plain language of [§ 61-6-23\(e\)\(1\)](#), if Respondents' range operates in compliance with that ordinance, then Respondents are not susceptible to a claim for injunctive relief to remedy a noise nuisance.

Petitioners argue that Respondents' range cannot be "in compliance" with Berkeley County's noise ordinance because it is exempt from it, that is, there is nothing for the range to comply with. Citing dictionary definitions for the word "compliance," they contend that the word conveys action, and that because Berkeley County's noise ordinance requires no action from a shooting range, true compliance is impossible. Petitioners' argument presumes too much.

[HN7](#)^[↑] "By virtue of the authority of [Article 8, Section \[13\] of the Constitution of West Virginia](#) and of [Code, 1931, 2-1-1](#) it is within the province of the legislature to enact statutes which abrogate the common law."²¹ In [§ 61-6-23\(e\)\(1\)](#), the Legislature exercised that authority to abrogate the

¹⁸ *Id.* at 686, 815 S.E.2d at 497.

¹⁹ *Syl. Pt. 2, Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970).

²⁰ See *W. Va. Code § 61-6-23(c)* (2018 supp.) ("Provided, That if a municipal or county ordinance regulating noise exists, [subsection \(e\)](#) of this section controls"). This conclusion, however, is subject to our reasoning in the following section regarding the limits upon the *Legislature's* authority to amend statutes, *retroactively*.

²¹ *Syl. Pt. 4, Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001) (quoting *Syllabus, Perry v. Twentieth St. Bank*, 157 W. Va. 963, 206 S.E.2d 421 (1974)).

common law to create a zone of protection from noise-based nuisance suits for shooting ranges that do not violate local noise ordinances in effect at the earlier of the range's construction or commencement of operations. As Respondents argue, because Berkeley County chose not to impose noise limits on them, their range [***21] cannot be out of compliance with the ordinance. We simply cannot conclude that Respondents' shooting range falls outside the zone of protection created by the Legislature in [§ 61-6-23\(e\)\(1\)](#) because it is exempt from Berkeley County's ordinance. To do so would render meaningless the protection created by the Legislature and leveraged by the express exemption in Berkeley County's ordinance.

At least two other courts have reached a similar conclusion in the context of their own states' comparable statutes. In 2001, the Supreme Court of Georgia examined [§ 41-1-9\(c\)](#) of the Code of Georgia²² and explained:

Ascribing ordinary signification to the words of this statute, as we are bound to do, [OCGA § 1-3-1](#), we think its plain, commonsense meaning is as defendants suggest: A sporting clay course cannot be deemed a sound generating nuisance if it does not run afoul of local noise control ordinances (or ordinances aimed at the regulation of a sport shooting range). . . .

Jenkins County has not enacted an ordinance pertaining to noise control in general, or sport

shooting ranges in particular. Thus, it cannot be said that defendants' sporting clay course failed to comply with noise control ordinances on the date on which it commenced [***22] operation. It follows that defendants' course could not be enjoined as a noise generating nuisance, and that the trial court erred in ruling otherwise.²³

In 2018, the Supreme Court of Arkansas relied upon the Georgia court's analysis to find that its state's statute granted immunity to a shooting range from a noise-based nuisance [*729] [**285] claim, even though the shooting range operated in a locality that did not have a noise ordinance.²⁴ As in the Georgia case, the Arkansas court reasoned that under its state's statute²⁵ the shooting range at issue

²³ [Jenkins v. Clayton](#), 273 Ga. 439, 542 S.E.2d 503, 503 (Ga. 2001). But see [Yates v. Kemp](#), 979 N.E.2d 678, 681-82 (Ind. Ct. App. 2012) (holding that Indiana's similar statute did not provide immunity to range where there were no applicable noise ordinances or laws with which range could comply); [Gray v. Barnhart](#), 144 Pa. Commw. 474, 601 A.2d 924, 926-27 (Pa. Commw. Ct. 1992) (holding that nuisance immunity offered by Pennsylvania's similar statute did not apply where township had no noise control ordinance in effect when range was constructed).

²⁴ [3 Rivers Logistics, Inc. v. Brown-Wright Post No. 158 of Am. Legion, Dep't of Ark., Inc.](#), 548 S.W.3d 137, 2018 Ark. 91 (Ark. 2018).

²⁵ [Arkansas Code § 16-105-502\(a\)](#) and [\(b\)](#) state:

(a) Notwithstanding any other provision of law to the contrary, a person who operates or uses a sport shooting range in this state shall not be subject to civil liability or criminal prosecution for noise or noise pollution resulting from the operation or use of the sport shooting range if the sport shooting range is in compliance with noise control ordinances of local units of government that applied to the sport shooting range and its operation at the time the sport shooting range was constructed and began operation.

(b) A person who operates or uses a sport shooting range is not subject to an action for nuisance, and no court of the state may enjoin the use or operation of a sport shooting range on the basis of noise or noise pollution, if the sport shooting range is in compliance with noise control ordinances of units of local government that applied to the sport shooting range and its operation at the time the sport shooting range [***24] was constructed and began operation.

²² [Section 41-1-9\(c\)](#) of the Code of Georgia states:

No sport shooting range or unit of government or person owning, operating, or using a sport shooting range for the sport shooting of firearms shall be subject to any action for civil or criminal liability, damages, abatement, or injunctive relief resulting from or relating to noise generated by the operation of the range if the range remains in compliance with noise control or nuisance abatement rules, regulations, statutes, or ordinances applicable to the range on the date on which it commenced operation.

[Ga. Code Ann. § 41-1-9\(c\)](#) (2014).

was

entitled to immunity as long as the shooting range did not violate any local noise ordinances existing at the time it was constructed and began [***23] operation. Because no local noise control ordinances existed at the time the shooting range in this case began operation, the [shooting range] was in compliance with local noise control ordinances[.]²⁶

Respondents' situation under [§ 61-6-23\(e\)\(1\)](#) is similar. Because Berkeley County chose not to impose noise limitations upon shooting ranges like Respondents', as a matter of law Respondents cannot have violated those same local noise ordinances. Consequently, the circuit court did not err by finding that [§ 61-6-23\(e\)\(1\)](#) applied to bar Plaintiff's claim for injunctive relief.²⁷

(b) Retroactive application of the 2017 Amendment.

Petitioners also challenge the circuit court's retroactive application of the 2017 Amendment to dismiss their entire nuisance claim against Respondents. Petitioners acknowledge that the Legislature specifically directed that the 2017 Amendment apply retroactively,²⁸ and that the Legislature may do so as to claims for injunctive relief.²⁹ Nevertheless, they argue that their verified

complaint against Respondents included a claim for money damages, which is a vested property right that the Legislature may not eliminate by retroactive legislation. Respondents answer that Petitioners' verified complaint did not include a claim for money damages, and that the circuit court properly applied the 2017 Amendment retroactively to dismiss Petitioners' entire nuisance claim. [***25]

HN8[↑] Foundationally, an accrued legal claim is a vested property right.³⁰ While "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly," it may not "retroactively change statutes [**286] [*730] so as to sweep away vested property rights[]"³¹ without implicating both procedural due process under the West Virginia and federal constitutions³² and the certain remedy provision of [Article III, Section 17 of the West Virginia Constitution](#).³³ Thus, as Petitioners argue, if their 2015 verified complaint contained a claim for legal relief, rather than future injunctive relief, only, then the circuit court erred by applying the 2017 Amendment to dismiss that claim, regardless of the Legislature's direction that the 2017 Amendment should apply retroactively.³⁴

court's order) (citing [American Steel Foundries v. Tri-City Central Trades Council](#), 257 U.S. 184, 201, 42 S. Ct. 72, 66 L. Ed. 189 (1921)).

³⁰ See [Gibson v. W. Va. Dep't of Highways](#), 185 W. Va. 214, 225, 406 S.E.2d 440, 451 (1991), holding modified by [Neal v. Marion](#), 222 W. Va. 380, 664 S.E.2d 721 (2008); see also [Plaut v. Spendthrift Farm, Inc.](#), 1 F.3d 1487, 1495 (6th Cir. 1993) ("Since injunctive relief necessarily depends on a continuing affront to one's legal rights, while legal relief depends only on a judicial determination that one's legal rights have been violated with resulting cognizable damage to the claimant, Congress could permissibly change the law so as to deprive a party of its right to injunctive relief.") *aff'd*, 514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995).

³¹ [Gribben v. Kirk](#), 197 W. Va. 20, 26, 475 S.E.2d 20, 26 (1996) (cleaned up).

³² See *id.*

³³ See [Syl. Pt. 6, in part, Gibson](#), 185 W. Va. at 214, 406 S.E.2d at 440.

³⁴ Cf. [Martinez v. Asplundh Tree Expert Co.](#), 239 W. Va. 612, 618,

[Ark. Code Ann. § 16-105-502\(a\)](#) and [\(b\)](#) (2016).

²⁶ [3 Rivers Logistics, Inc.](#), 548 S.W.3d at 142.

²⁷ Because our application of the plain language of [§ 61-6-23\(e\)\(1\)](#) is dispositive, we do not address Petitioners' remaining arguments regarding its construction. Furthermore, [§ 61-6-23\(e\)\(1\)](#) bars Petitioners' nuisance claim for injunctive relief as a matter of law, obviating Petitioners' argument that their claim for injunctive relief must be remanded for additional factual development.

²⁸ See [W. Va. Code § 61-6-23\(f\)](#).

²⁹ See [Landgraf v. USI Film Products](#), 511 U.S. 244, 273, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (observing that relief by injunction operates in the future, so plaintiff had no vested right in the trial

Upon review of Petitioners' verified complaint, we find that it contains a claim for money damages, a vested property right that the Legislature may not extinguish by retroactive legislation. [HN9](#)^[↑] West Virginia remains a notice-pleading state. As we explained in *Roth v. DeFelice Care, Inc.*, "this Court has not adopted the more stringent pleading requirements as has been the case in federal court and all that is required by a plaintiff is [***26] 'fair notice.'"³⁵ As Justice Cleckley explained,

[u]nder Rule 8, a complaint must be intelligibly sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, what it is. Although entitlement to relief must be shown, **a plaintiff is not required to set out facts upon which the claim is based.**³⁶

This contrasts to pleading under the federal rules, which require a plaintiff "to plead facts to show that the plaintiff has stated a claim entitling him to relief."³⁷

In their verified complaint, Petitioners demand "monetary damages for the cost of implementing reasonable and necessary noise abatement measures on their own property to comply with these guidelines and any other damages permitted by West Virginia law and supported by the evidence." They also ask for "any other damages permitted by West Virginia law and supported by the evidence"

[803 S.E.2d 582, 588 \(2017\)](#) (holding that statute limiting types of damages available for employment-related claims is remedial statute that may be applied retroactively because Legislature specified that statute is to apply retroactively and statute does not impact vested right).

³⁵ *Roth v. DeFeliceCare, Inc.*, 226 W. Va. 214, 220 n.4, 700 S.E.2d 183, 190 n.4 (2010) (quoting *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995)).

³⁶ *Id.* at 220, 700 S.E.2d at 189 (emphasis in original) (quoting *Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. at 776, 461 S.E.2d at 522).

³⁷ *Id.* at 220, n.4, 700 S.E.2d at 189, n.4 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

and "such other *legal* and equitable relief as the [circuit court] shall deem just and proper under the circumstances."³⁸ These demands evidently notified Respondents that Petitioners seek money damages as relief for the alleged nuisance conditions on Respondents' property because the demands prompted Respondents to act. [***27] During discovery, Respondents asked Petitioners to specifically identify all monetary damages they claimed in the lawsuit. Respondents also sought to trigger insurance coverage for Petitioners' claim expressly due to Petitioners' plea for money damages. Finally, [HN10](#)^[↑] Petitioners' plea for money damages does not disappear because it is pleaded in the alternative. Rule 8 of the West Virginia Rules of Civil Procedure expressly contemplates that "[r]elief in the alternative . . . may be demanded." For those reasons, we find that the circuit court erred by applying the 2017 Amendment to [§ 61-6-23](#) retroactively to dismiss Petitioners' accrued nuisance claim for money damages.

B. Petitioners' fee petition and motion for additional sanctions for litigation misconduct

Petitioners also appeal the circuit court's denial of their fee petition and motion for [***287] [*731] additional sanctions for litigation misconduct. Petitioners argue that the circuit court applied the wrong subpart of Rule 37—Rule 37(a)(4)(C), not Rule 37(a)(4)(A)—rendering an otherwise mandatory fee award discretionary. They also contend that the circuit court's order rests on erroneous findings and overlooks Respondents' "obvious" discovery abuses, that is, that the circuit court erroneously focused only on the parties' dispute over the discovery [***28] of Respondents' customer lists and ignored other indicators of discovery misconduct. Finally, they argue that by denying their fee petition, the circuit court reversed its prior order inviting them to submit the petition. Respondents counter that Rule 37(a)(4)(C) applies

³⁸ Emphasis added.

to the fee petition and that, even if Rule 37(a)(4)(A) applies, the circuit court's finding that the parties were engaged in a legitimate discovery dispute satisfies the "substantially justified" exception to that rule's otherwise mandatory fee award.

We begin with *Syllabus Point 2 of Sally-Mike Properties v. Yokum*: [HN11](#)^[↑] "As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement."³⁹ Rule 37 is one of those rules. It is "designed to provide sanctions in order to ensure that those persons who are subject to discovery requests promptly and adequately respond."⁴⁰ Under Rule 37(a)(4)(A), when a circuit court grants a party's motion to compel discovery,

the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including **[***29]** attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's answer, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

But, if a circuit court grants, in part, and denies, in part, the motion to compel, Rule 37(a)(4)(C) applies. That rule states:

If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to

the motion among the parties and persons in a just manner.

[HN12](#)^[↑] Under Rule 37, "the derelict party can avoid the sanctions of paying expenses, including attorney's fees, by showing that his conduct was 'substantially justified' or that such an award would be 'unjust.'"⁴¹ The derelict party "has the burden of proving that his failure to supply the requested discovery was substantially justified or that other circumstances would make an award of expenses unjust[,] and . . . a trial court's action in setting an award is subject to review for an abuse of discretion." **[***30]**⁴²

The parties contest whether Rule 37(a)(4)(A) or Rule 37(a)(4)(C) applies in this case. We find this argument to be of no moment because the circuit court considered both and concluded that Respondents had presented a "legitimate dispute," a conclusion that aligns with the "substantial justification" exception found in Rule 37(a)(4)(A). So, we are left with the question of whether the circuit court erred by refusing to grant Petitioners their reasonable fees and costs because Respondents' opposition to Petitioners' discovery requests was "substantially justified,"⁴³ with particular emphasis on those requests aimed at discovering the identities of the users of Respondents' ranges.

We have not defined the phrase "substantially justified," although numerous **[**288]** **[*732]** federal courts have.⁴⁴ As summarized by a leading treatise, the [HN13](#)^[↑] federal courts hold that "a motion, or opposing a motion, is 'substantially justified' if the motion raised an issue about which reasonable people could genuinely differ on

⁴¹ *Id.*

⁴² *Id.* at [Syl. Pt. 3](#), in part.

⁴³ [W. Va. R. Civ. P. 37\(a\)\(4\)\(A\)](#).

⁴⁴ See 8B Wright, Miller & Marcus, *Federal Practice and Procedure* § 2288 n.31 (3d ed. 2010) (collecting cases).

³⁹ [Syl. Pt. 2, Sally-Mike Prop. v. Yokum](#), 179 W.Va. 48, 365 S.E.2d 246 (1986).

⁴⁰ [Shreve v. Warren Assocs.](#), 177 W. Va. 600, 604, 355 S.E.2d 389, 393 (1987).

whether a party was bound to comply with a discovery rule,"⁴⁵ that is, if "there is a 'genuine dispute' as to proper resolution[.]"⁴⁶ Accordingly, we now hold that a motion under Rule 37 of the West Virginia Rules of Civil Procedure, or opposition to a Rule 37 motion, is substantially justified if the motion or [***31] opposition raises an issue about which reasonable people could differ as to the appropriateness of the contested action.

Applying that standard, we find that the circuit court did not abuse its discretion by concluding that, in this particular case, Respondents' opposition to Petitioners' motion to compel presented a legitimate or genuine dispute, and thus did not merit sanctions under either Rule 37(a)(4)(A) or (C). While Petitioner views the circuit court's order granting, in part, and denying, in part, their motion to compel as an absolute win, that alone does not invalidate the circuit court's conclusion that Respondents' opposition to Petitioners' motion to compel was "substantially justified."

A review of the transcript of the hearing before the discovery commissioner shows that Respondents offered arguments in support of their objections based in either law or fact, and that, in several instances, the discovery commissioner questioned the breadth of Petitioners' discovery requests. For example, during argument regarding Petitioners' request for production 11,⁴⁷ the discovery

commissioner asked, "What do receipts have to do with a nuisance case? [***32] That's what I'm struggling with." He also stated that he had "some concern about why it's any of the Goldstein's [sic] or the Discovery Commissioner's business, or the public's business, in particular, about [Respondents'] monetary receipts." The discovery commissioner ultimately recommended that Respondents produce documents responsive to request for production 11 subject to a protective order, and the circuit court adopted that recommendation. Nevertheless, that Petitioners ultimately prevailed on their motion to compel regarding request for production 11 and the vast majority of issues raised in that motion, does not necessarily render the circuit court's conclusion—that Respondents' opposition was legitimate, i.e. substantially justified—an abuse of the court's discretion.

With particular regard to requests for production 23 and 24, we agree with the circuit court that Respondents' position regarding the discoverability of their [***33] clients' information, while ultimately overruled, raised issues about which reasonable people could differ. At various times, Respondents argued that their customers' information was not discoverable because it was proprietary and confidential and that it was protected by the federal Constitution and various state and federal laws. While the circuit court ultimately dismissed those arguments and ordered [**289] [*733] Respondents to respond, that, however, does not mean that a reasonable person would not have raised a similar objection to the discovery requests given the seriousness of the issue.

⁴⁵ *Id.*; see, e.g., *Doe v. Lexington-Fayette Urban Cty. Gov't*, 407 F.3d 755, 765 (6th Cir. 2005) ("A motion is 'substantially justified' if it raises an issue about which 'there is a genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action.'") (quoting *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) (citations and quotation marks omitted)); *Maddow v. Procter & Gamble Co.*, 107 F.3d 846, 853 (11th Cir. 1997) ("Substantially justified means that reasonable people could differ as to the appropriateness of the contested action.") (citing *Pierce*, 487 U.S. at 565).

⁴⁶ *Decision Insights, Inc. v. Sentia Grp., Inc.*, 311 F. App'x 586, 599 (4th Cir. 2009) (quoting *Pierce*, 487 U.S. at 565-66, n.2).

⁴⁷ Petitioners' request for production 11 states:

Please produce a true and accurate copy of all documents in your possession or control which reflect receipts from

customers at any shooting range operated by either Defendant in Berkeley County, West Virginia, on each day from January 1, 2006 to the present.

Respondents objected to this request based on confidentiality and privilege. They also objected that it was not reasonably calculated to lead to admissible evidence. Petitioners' request for production 12 is identical to 11, except that 12 seeks the same materials from any of Respondents' shooting ranges located in Frederick County, Virginia.

Petitioners also argue that the circuit court's order denying its fee petition contradicted its prior orders. This is not an accurate reading of the circuit court's November 2016 order, which stated that "[Petitioners] may file an application for attorney fees and expenses in accordance with Rule 37(a)(4) [sic] within 30 days of this order."⁴⁸ As discussed above, Rule 37 enables the party subject to a motion to compel to avoid the sanctions of paying expenses by showing that his conduct was substantially justified or that the award would be unjust. Although the circuit court invited Petitioners to submit a fee petition, the possibility [***34] always remained that Respondents would demonstrate either substantial justification for their actions, or that an award of fees would be otherwise unjust.

Finally, Petitioners argue that even if the circuit court correctly found the dispute over Respondents' customer information was legitimate, the circuit court ignored other examples of litigation misconduct by Respondents that merit sanction. This, they argue, demonstrates that the circuit court's order rests on a clearly erroneous understanding of the facts of the case. We do not agree. In its order, the circuit court affirmatively stated that it had reviewed the transcript of the discovery commissioner's September 2016 hearing. It also stated that it had received copies of all pleadings, transcripts, and other filings related to Petitioners' fee petition and motion for additional sanctions for litigation misconduct. Thus, the circuit court had before it, and reviewed, the materials necessary to determine whether Respondents' actions were substantially justified and whether further litigation sanctions—that is, default judgment—were warranted. Following our review of the appendix record, we cannot say that the circuit court's denial [***35] of Petitioners' fee petition and motion for additional sanctions for

litigation misconduct was an abuse of its discretion.

III. CONCLUSION

For the reasons previously stated, we affirm the circuit's order denying Petitioners' fee petition and motion for additional sanctions for litigation misconduct. We affirm, in part, and reverse, in part, the circuit court's order granting summary judgment to Respondents, and remand this matter to the circuit court to resume proceedings in the Petitioners' nuisance claim for monetary damages.

Affirmed in part, reversed in part, and remanded.

Dissent by: Jenkins (IN PART); Armstead

Dissent

Jenkins, Justice, concurring, in part, and dissenting, in part, joined by Justice Armstead:

The majority's opinion in this case correctly finds that the legislative [*734] amendments to W. Va. Code § 61-6-23 apply retroactively to deprive Mr. and Mrs. Goldstein of a claim for injunctive relief against Peacemaker's shooting range operations. Additionally, the opinion also properly determines that the Goldsteins are not entitled to an award of costs and/or attorney's fees under Rule 37 of the West Virginia Rules of Civil Procedure because Peacemaker provided "substantial justification" for its refusal to answer the Goldsteins' discovery requests and/or its provision of [***36] limited information in response thereto.

However, this is the extent of my agreement with the majority in this case. I do not agree with the majority's assessment that the Goldsteins' complaint sets forth a claim for money damages sufficient to place Peacemaker on notice and preserve the Goldsteins' nuisance claim because the *only* relief the Goldsteins seek in their complaint is injunctive

⁴⁸The circuit court's order also stated that Petitioners had "substantially prevailed" against Respondents in the discovery dispute. However, that is the wrong standard to determine whether a party is entitled to reasonable expenses and fees under Rule 37.

relief, which, by virtue of the legislative **[**290]** amendments to [W. Va. Code § 61-6-23](#), is no longer an available remedy against a shooting range under the facts and circumstances of this case. For this reason, I respectfully dissent.

Complaint Requests Only Injunctive Relief

Based upon the plain language of the Goldsteins' complaint, I disagree with the opinion's resolution of the notice pleading issue. The majority's opinion concludes that the Goldsteins' complaint included a claim for money damages such that their nuisance claim was a vested property right that the Legislature could not usurp by making its amendments to [W. Va. Code § 61-6-23](#) **retroactive**. While I agree that West Virginia is a notice pleading jurisdiction, I do not agree that the Goldsteins' complaint adequately asserted a claim for money damages insofar as their claim for relief **[***37]** requested injunctive relief, or, in the alternative, other types of injunctive relief.

This case involves the application of [W. Va. Code § 61-6-23](#). The operative statutory language provides: Berkeley County had adopted a noise ordinance, but its provisions specifically exempted shooting ranges from its operation. The parties disagree as to whether Peacemaker was "operating in compliance with all ordinances relating to noise" in effect at the relevant times given that it is exempt therefrom, but the majority astutely recognizes that Peacemaker, who was not found to have violated the pertinent noise ordinance, was in compliance therewith.

No municipal or county ordinance regulating noise may subject a shooting range to noise control standards more stringent than those standards in effect at the time construction or operation of the shooting range began, whichever occurred earlier in time. The operation or use of a shooting range may not be enjoined based on noise, nor may any person be subject to an action for nuisance or criminal prosecution in any matter relating to noise

resulting from the operation of a shooting range, if the shooting range is operating in compliance with all ordinances relating to noise **[***38]** in effect at the time the construction or operation of the shooting range began, whichever occurred earlier in time.

[W. Va. Code § 61-6-23\(e\)\(1\)](#). The Legislature further expressly made this provision **retroactive**. See [W. Va. Code § 61-6-23\(f\)](#) ("It is the intent of the Legislature in enacting the amendments to this section during the 2017 regular session of the Legislature that the amendments be applied **retroactively**."). At the relevant times referenced in the statute,

Further, as the majority rightly observed, it is clear from the statutory language that the Goldsteins' claim for injunctive relief is prohibited by [W. Va. Code § 61-6-23\(e\)\(1\)](#): injunctive relief is not a vested property right because it is future or prospective relief, and, once an injunction is granted, it can be altered or withdrawn if the law that previously authorized the injunctive relief later is changed to foreclose such remedy. See generally [Landgraf v. USI Film Products](#), 511 U.S. 244, 274, 114 S. Ct. 1483, 1501, 128 L. Ed. 2d 229 (1997) (recognizing that "relief by injunction operates *in futuro*," and, thus, party had no "vested right" in injunctive relief it had been awarded (internal quotations and citations omitted)).

Thus, as the majority also correctly noted, the only relief that is potentially available to the Goldsteins, then, is their claim for nuisance if such claim is a vested **[***39]** property right insofar as the Legislature cannot **retroactively** apply a statute to deprive an individual of a vested property right. See, e.g., [Gribben v. Kirk](#), 197 W. Va. 20, 26, 475 S.E.2d 20, 26 (1996) (noting that Legislature cannot "**retroactively** change statutes so as to sweep away vested property rights" (citations omitted)). To be a vested property right, then, the pivotal question is whether the Goldsteins' complaint adequately pled a cause of action for nuisance and requested monetary damages therefor. It is at this

juncture, though, that I must depart from my brethren. My reading of the complaint suggests that the Goldsteins requested only injunctive relief therein, which, as noted previously, is not available to them under the current language of [W. Va. Code § 61-6-23](#).

Under the notice pleading standard of this State, a claim for money damages must be apparent from the pleading, which, here, is **[**291]** **[*735]** *the complaint*. See [W. Va. R. Civ. P. 8\(a\)](#) ("A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) *a demand for judgment for the relief the pleader seeks*." (emphasis added)).

Indeed, Rule 8 of the Rules of Civil Procedure requires clarity . **[***40]** . . . The primary purpose of these provisions is rooted in fair notice. Under Rule 8, a complaint must be intelligibly sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, what it is.

[State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 776, 461 S.E.2d 516, 522 \(1995\)](#). See also [In re Estate of Olson, 2008 S.D. 97, ¶ 20, 757 N.W.2d 219, 225 \(2008\)](#) (stating that "damages [must] be pled with reasonable certainty" (internal quotations and citations omitted)). As such, a defendant should not be expected to have to read an *appellate brief* to ascertain the precise nature of damages sought in a *complaint*. Rather, the complaint, itself, should be sufficient to place the defendant on notice of the damages a plaintiff seeks and is required to contain a clear statement of the relief requested. See generally Rule 8. The Goldsteins' complaint does just that, but the relief sought in the complaint is injunctive, not monetary.

Although the complaint sets forth the law governing nuisance and vaguely references that Peacemaker, as a result of the operation of its shooting range, "has substantially and unreasonably

interfered with Mr. and Mrs. Goldstein's private use and enjoyment of their home property," Compl. at 9, the complaint stops short of explaining exactly how the Goldsteins have been injured by Peacemaker's **[***41]** actions such that their claim for the aforementioned monetary damages could reasonably be anticipated. Rather, the injuries they claim to have suffered all speak in terms of injunctive relief by averring that,

[i]n particular, the Peacemaker National Training Center has substantially and unreasonably interfered with Mr. and Mrs. Goldstein's private use and enjoyment of their home property, as well [as] all of its neighboring property owners, by: 1) frequently exceeding the published hours of operation which it previously acknowledged as reasonable in consideration of its neighbors' concerns; and 2) frequently exceeding the noise levels which it previously identified as reasonable in consideration of its neighbors' concerns.

Compl. at 10. These averments are followed by the Goldsteins' prayer for relief:

RELIEF

WHEREFORE the Plaintiffs, BEN GOLDSTEIN and DIANE GOLDSTEIN, respectfully request this Honorable Court to grant them *temporary and permanent injunctive relief* against the Defendants, PEACEMAKER PROPERTIES, LLC, and PEACEMAKER NATIONAL TRAINING CENTER, LLC, by imposing specifically enforceable guidelines for: 1) hours of operation for the shooting range which may not be enlarged under **[***42]** any circumstances (i.e. no shooting before or after those hours originally published at any time); and 2) maximum noise levels from the shooting range which may not be exceeded under any circumstances. Should the Defendants fail to meet these specific guidelines, the Plaintiffs respectfully request this Honorable Court to

grant them *temporary and permanent injunctive relief* against the Defendants by requiring the Defendants to implement reasonable and economically feasible noise abatement measures on their own property with the objective of meeting these guidelines. Should the Defendants still fail to meet these specific guidelines, the Plaintiffs respectfully request this Honorable Court to award monetary damages for the cost of implementing reasonable and necessary noise abatement measures on their own property to comply with these guidelines and any other damages permitted by West Virginia law and supported by the evidence. Finally, the Plaintiffs respectfully request this Honorable Court to grant then [sic] such other legal and equitable relief as the Court shall deem just and proper under the circumstances.

Compl. at 10-11 (italicized emphasis added).

Therefore, the relief requested [***43] by the Goldsteins in their complaint specifically requests [*736] [**292] "temporary and permanent injunctive relief" and the imposition of guidelines regarding the operating hours of the shooting range and the maximum noise levels of the shooting range. Compl. at 10. Alternatively, if Peacemaker fails to comply with such guidelines, the Goldsteins request Peacemaker to implement noise abatement measures on its property, and, only if Peacemaker fails to meet those guidelines, the Goldsteins then request the "award [of] monetary damages for the cost of implementing reasonable and necessary noise abatement measures on their property to comply with these guidelines." Compl. at 10. Although the Goldsteins further request "other damages" permitted by law and "other legal and equitable relief" deemed just by the court, neither of these provisions put the defendants on notice as to a claim for monetary damages for nuisance given that the injuries claimed and damages requested in the complaint refer to injunctive relief.

In their appellate brief to this Court, the Goldsteins

finally state that they also are asserting a claim for "monetary damages (i.e. diminution in value and annoyance and inconvenience) [***44] caused by Peacemaker's nuisance." Pet. Br. at 42. Not only is this revelation in the wrong pleading, the pleading in which it should have been stated, *i.e.*, the complaint, does not set forth grounds to support this alleged request for money damages with sufficient specificity to preserve the Goldsteins' claim for money damages in their nuisance action against Peacemaker.

Insufficiently Pled Claim for Money Damages

Assuming arguendo that the Goldsteins' complaint asserted a claim for money damages as determined by the majority, the Goldsteins still are not entitled to pursue their nuisance claim because they did not sufficiently plead their claim for monetary relief.

In this regard, the Goldsteins argue that their general request for "such other legal and equitable relief as the Court shall deem just and proper under the circumstances" suffices as a claim for money damages insofar as legal relief signifies monetary relief. Compl. at 11. Be that as it may, such a general request is not sufficient to constitute a claim for money damages. See [*Grode v. Mut. Fire, Marine, & Inland Ins. Co.*, 154 Pa. Cmwlt. 366, 374, 623 A.2d 933, 937 \(1993\)](#) (concluding that request for "'additional damages'" did "not sufficiently set forth the type of damages [sought] and the legal basis for those damages"). [***45]

Furthermore, even if the Goldsteins' complaint could be construed as requesting the monetary damages that they reference in their brief to this Court, *i.e.*, diminution in value, annoyance, and inconvenience, these damages also have not been properly pled in the complaint to afford the Goldsteins a claim for relief in nuisance. In this regard, a claim for diminution of value requires a loss in value that the plaintiff's property has sustained as a result of the defendant's allegedly wrongful conduct. See [*Allgood Rd. United Methodist Church, Inc. v. Smith*, 173 Ga. App. 28,](#)

[29, 325 S.E.2d 392, 394 \(1984\)](#) ("The general rule for the measure of damages involving real property is the diminution of the fair market value of the property and/or the cost of repair or restoration."). See also [LaSalle Nat'l Bank v. Willis, 378 Ill. App. 3d 307, 330, 880 N.E.2d 1075, 1093, 317 Ill. Dec. 83 \(2007\)](#) ("[W]hen a landowner has shown that he suffered a compensable injury, it is necessary to examine the exact interest harmed." (citation omitted)). Here, the Goldsteins do not set forth any such allegations as to the reduction in their property's value that they attribute to Peacemaker's lawful operation of its shooting range, alleging only that Peacemaker's actions have "substantially and unreasonably interfered with Mr. and Mrs. Goldstein's private use and enjoyment of their home property." Compl. at 9, [***46] 10.

Additionally, in the context of nuisance, damages other than those for diminution of value, such as annoyance and inconvenience as claimed herein, have been determined to be special damages, which must be specially pled pursuant to Rule 9 of the West Virginia Rules of Civil Procedure. "[T]he general measure of damages for a temporary nuisance [is]: the diminution in the rental value of the property caused by the nuisance, plus any special damages. *Special damages include the personal inconvenience, annoyance* [*737] , [*293] and discomfort caused by the existence of a nuisance." [Miller v. Rohling, 720 N.W.2d 562, 569 \(Iowa 2006\)](#) (emphasis added; internal quotations and citations omitted). Accord [Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 185 \(Iowa 2004\)](#) (concluding that if the subject facility "will be operated indefinitely as a nuisance, the court should award special damages supported by the evidence, past and future, as well as any decreased value of the plaintiffs' property proved by them" and that "[s]hould the evidence show the defendant will abate the nuisance, the plaintiffs' recovery would be limited to their special damages up to the time of abatement and any diminution in the rental value of their property while the nuisance exists"); [Pettengill v. Turo, 159 Me. 350, 357, 193 A.2d 367, 372 \(1963\)](#) ("The measure of damages to be applied

in cases of temporary nuisance injury to real estate, supported by reason [***47] and authority, is that the injured land-owner is entitled to be compensated for the depreciation in the rental or useable value of the property caused by the nuisance . . . during the continuance of the injury, together with such special damage (including permanent injury to land) as may be proved." (citations omitted)). See also [W. Va. R. Civ. P. 9\(g\)](#) ("When items of special damage are claimed, they shall be specifically stated." (emphasis added)); [Pleasant Valley Promenade v. Lechmere, Inc., 120 N.C. App. 650, 672-73, 464 S.E.2d 47, 63 \(1995\)](#) (observing that "special damages must be pleaded, and the facts giving rise to the special damages must be alleged so as to fairly inform the defendant of the scope of plaintiff's demand" (internal quotations and citations omitted)). Again, however, the Goldsteins' complaint falls short because it fails to set forth such claims at all, much less with specificity.

Contrary to the conclusion reached by the majority, the complaint at issue herein simply does not provide sufficient notice of a claim for monetary relief to alert the defendants as to the nature of damages requested, particularly when the specific damages requested therein are couched in terms of injunctive relief. Accordingly, I would affirm Judge Wilkes' decision in this regard because the Goldsteins [***48] have not pled a claim for money damages for nuisance and thus do not have a vested property right that survives the legislative amendments to [W. Va. Code § 61-6-23](#). For these reasons, I respectfully concur, in part, and dissent, in part. I am authorized to state that Justice Armstead joins in this separate opinion.

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1. [*Martinez v. Asplundh Tree Expert Co., 239 W. Va. 612*](#)

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Martinez v. Asplundh Tree Expert Co.

Supreme Court of Appeals of West Virginia

May 16, 2017, Submitted; June 16, 2017, Filed

No. 17-0039

Reporter

239 W. Va. 612 *; 803 S.E.2d 582 **; 2017 W. Va. LEXIS 510 ***

HELIO MARTINEZ, Petitioner v. ASPLUNDH
TREE EXPERT CO., Respondent

Prior History: [***1] Certified Questions from the United States District Court for the Northern District of West Virginia.

Martinez v. Asplundh Tree Expert Co., 2017 U.S. Dist. LEXIS 47447 (N.D. W. Va., Jan. 12, 2017)

Disposition: CERTIFIED
ANSWERED.

QUESTIONS

Core Terms

damages, retroactive, punitive damages, front pay, cause of action, vested right, backpay, rights, cap, substantial rights, retroactive application, certified question, district court, effective date, questions, effective date of the statute, award of punitive damages, retrospectively, remedies, unmitigated, wrongful discharge, amount of damages, remedial statute, alterations, accrued, courts, vested, crew, reasonable diligence, duty to mitigate

Case Summary

Overview

HOLDINGS: [1]-*W. Va. Code § 55-7E-3 (2016)*, requiring a plaintiff in an employment case to mitigate damages, applied retroactively to an employee's discrimination claims based on facts arising before the statute's enactment, occurring before trial of the claims, because it was a remedial statute addressing the procedure for addressing front pay and back pay awards that did not impact a vested right, since the employee had no vested right to damages; [2]-*W. Va. Code § 55-7-29 (2016)*, limiting punitive damages, applied retroactively to the employee's discrimination claims because it was a remedial statute that did not impact a vested or substantive right, since the employee had no such right to punitive damages.

Outcome

Certified questions answered.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate
Jurisdiction > Certified Questions

Civil Procedure > Appeals > Standards of
Review > De Novo Review

Civil Procedure > Appeals > Standards of
Review > Questions of Fact & Law

[HN1](#) **Appellate Jurisdiction, Certified Questions**

A de novo standard is applied by the West Virginia Supreme Court of Appeals in addressing the legal issues presented by a certified question from a federal district or appellate court.

Governments > Legislation > Effect &
Operation > Retrospective Operation

[HN2](#) **Effect & Operation, Retrospective Operation**

The West Virginia Supreme Court of Appeals has held that a statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute unless the statute provides explicitly for retroactive application. New legislation should not generally be construed to interfere with existing contracts, rights of actions, suits, or vested property rights.

Governments > Legislation > Effect &
Operation > Retrospective Operation

[HN3](#) **Effect & Operation, Retrospective Operation**

It has been held that a law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its

passage can it be considered to be retroactive in application.

Labor & Employment

Law > ... > Remedies > Damages > Backpay

Labor & Employment

Law > ... > Remedies > Damages > Frontpay

[HN4](#) **Damages, Backpay**

[W. Va. Code § 55-7E-3 \(2016\)](#) addresses the recovery of front pay and back pay in employment cases.

Labor & Employment

Law > ... > Remedies > Damages > Backpay

[HN5](#) **Damages, Backpay**

"Back pay" is defined as the wages that an employee would have earned, had the employee not suffered from an adverse employment action, from the time of the adverse employment action through the time of trial. [W. Va. Code § 55-7E-1\(a\) \(2016\)](#).

Labor & Employment

Law > ... > Remedies > Damages > Frontpay

[HN6](#) **Damages, Frontpay**

"Front pay" is defined as the wages that an employee would have earned, had the employee not suffered from an adverse employment action, from the time of trial through a future date. [W. Va. Code § 55-7E-1\(b\) \(2016\)](#).

Labor & Employment Law > Wrongful
Termination > Remedies > Damages

[HN7](#) **Remedies, Damages**

W. Va. Code ch. 55, art. 7E includes articulated

findings and a declaration of purpose. According to [W. Va. Code § 55-7E-2\(a\)\(3\) \(2016\)](#), the goal of compensation remedies in employment law cases is to make the victim of unlawful workplace actions whole. Moreover, in West Virginia, the amount of damages recently awarded in statutory and common law employment cases has been inconsistent with established federal law and the law of surrounding states. This lack of uniformity in the law puts West Virginia and its businesses at a competitive disadvantage. [W. Va. Code § 55-7E-2\(a\)\(4\) \(2016\)](#). Finally, the purpose of W. Va. Code ch. 55, art. 7E is to provide a framework for adequate and reasonable compensation to those persons who have been subjected to an unlawful employment action, but to ensure that compensation does not far exceed the goal of making a wronged employee whole. [W. Va. Code § 55-7E-2\(b\) \(2016\)](#).

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > Retrospective Operation

[HN8](#) **Effect & Operation, Prospective Operation**

A statute is presumed to be prospective in its operation unless expressly made retrospective. [W. Va. Code § 2-2-10\(bb\) \(2013\)](#). The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the legislature intended to give the statute retroactive force and effect.

Governments > Legislation > Effect & Operation > Amendments

Governments > Legislation > Effect & Operation > Retrospective Operation

Governments > Legislation > Types of Statutes

[HN9](#) **Effect & Operation, Amendments**

How statutory amendments apply may be determined by the subject matter of the statute. For example, statutory changes that are purely procedural in nature will be applied retroactively. On the other hand, it has been held that a statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute provides explicitly for retroactive application. A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application.

Labor & Employment

Law > ... > Remedies > Damages > Backpay

Labor & Employment

Law > ... > Remedies > Damages > Frontpay

[HN10](#) **Damages, Backpay**

[W. Va. Code § 55-7E-3 \(2016\)](#) abrogates prior case law, providing that in any employment law cause of action, unmitigated or flat back pay and front pay awards are not an available remedy. Any amount of back pay or front pay awarded by a commission, court or jury shall be reduced by the amount of interim earning or the amount earnable with reasonable diligence by a plaintiff. [W. Va. Code § 55-7E-3\(a\), \(b\) \(2016\)](#). Moreover, the statute provides that the amount of front pay, if any, to be awarded shall be an issue for a trial judge to decide. [W. Va. Code § 55-7E-3\(b\) \(2016\)](#).

Governments > Legislation > Effect &

Operation > **Retrospective** Operation

Governments > Legislation > Types of Statutes

[HN11](#) [↓] Effect & Operation, Retrospective Operation

Statutes which do not create new rights or take away vested ones are deemed to be **remedial** and are not within the strict application of the rule of presumption against **retroactivity**. Generally, a **remedial** statute has been defined as a statute that relates to practice, procedure, remedies and does not affect substantive or vested rights.

Governments > Legislation > Effect & Operation > Retrospective Operation

Labor & Employment

Law > ... > Remedies > Damages > Backpay

Governments > Legislation > Types of Statutes

Labor & Employment

Law > ... > Remedies > Damages > Frontpay

[HN12](#) [↓] Effect & Operation, Retrospective Operation

A remedial statute improves or facilitates remedies already existing for the enforcement or rights of redress of wrongs, as opposed to an enactment extinguishing a cause of action or barring a party from prosecuting a cause of action that affects substantive rights and, therefore, is not remedial. [W. Va. Code § 55-7E-1 \(2016\)](#) addresses the procedure by which an award of back pay or front pay is considered at trial by eliminating a former "malice exception" to a plaintiff's duty to mitigate wage damages. A plaintiff has no vested right in a particular measure of damages.

Governments > Legislation > Effect & Operation > **Retrospective** Operation

Labor & Employment Law > Wrongful Termination > Remedies > Damages

Governments > Legislation > Types of Statutes

[HN13](#) [↓] Effect & Operation, Retrospective Operation

[W. Va. Code § 55-7E-3 \(2016\)](#) is a **remedial** statute that does not impact a vested right. Because it neither diminishes substantive rights nor augments substantive liabilities, it is not subject to a **retroactivity** analysis. **Retroactivity** ought to be judged with regard to the act or event that the statute is meant to regulate. [W. Va. Code § 55-7E-3 \(2016\)](#) clearly regulates the award of back pay and front pay at trial in an employment case. Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When an intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not **retroactive**. In general, statutes dealing with a remedy apply to actions tried after their passage even though the right or cause of action arose prior thereto. Therefore, [W. Va. Code § 55-7E-3 \(2016\)](#), abrogating Syllabus Point 2 of *Mason County Board of Education v. State Superintendent of Sch. and its progeny* is a **remedial** statute that does not impact a vested or substantive right.

Governments > Legislation > Effect & Operation > Retrospective Operation

Labor & Employment Law > Wrongful Termination > Remedies > Damages

[HN14](#) [↓] Effect & Operation, Retrospective Operation

The provisions of [W. Va. Code § 55-7E-3 \(2016\)](#) are applicable irrespective of when a cause of action accrued or when the claim or suit is filed, thereby imposing an affirmative duty on the part of

a plaintiff to mitigate any claim for past and/or future wages and requiring an award, if any, of back pay and front pay to be reduced by the amount of interim earnings or the amount that may be earned with reasonable diligence by the plaintiff.

Civil

Procedure > Remedies > Damages > Punitive Damages

[HN15](#) [📄] **Damages, Punitive Damages**

[W. Va. Code § 55-7-29 \(2016\)](#) pertains to punitive damages.

Civil

Procedure > Remedies > Damages > Punitive Damages

Labor & Employment Law > Wrongful Termination > Remedies > Damages

Governments > Legislation > Effect & Operation > Retrospective Operation

Governments > Legislation > Types of Statutes

[HN16](#) [📄] **Damages, Punitive Damages**

[W. Va. Code § 55-7-29 \(2016\)](#), placing limits on punitive damages awards, is similar to [W. Va. Code § 55-7E-3 \(2016\)](#), requiring plaintiffs to mitigate damages in employment cases, in that both address the process for consideration of damages at trial. The latter statute articulates the evidentiary standard and procedure for an award of punitive damages at trial and imposes a cap on such awards. Statutes which do not create new rights or take away vested ones are deemed to be **remedial** and are not within the strict application of the rule of presumption against **retroactivity**.

Civil

Procedure > Remedies > Damages > Punitive Damages

Governments > Legislation > Effect & Operation > **Retrospective** Operation

Governments > Legislation > Types of Statutes

[HN17](#) [📄] **Damages, Punitive Damages**

[W. Va. Code § 55-7-9 \(2016\)](#), limiting punitive damages, is a **remedial** statute that does not impact a vested or substantive right. Accordingly, its provisions are applicable irrespective of when the cause of action accrued or when the claim or suit is filed. As such, [W. Va. Code § 55-7-29 \(2016\)](#) is not subject to a **retroactivity** analysis. Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive. A plaintiff has no right, much less a vested right, to an award of punitive damages prior to trial.

Syllabus

[*613] [583] BY THE COURT**

1. "A de novo standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court." Syllabus Point 1, [Light v. Allstate Ins. Co., 203 W.Va. 27, 506 SE.2d 64 \(1998\)](#).
2. "The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect. Syl. pt. 4, [Taylor v. State Comp. Comm'r, 140 W.Va. 572, 86 S.E.2d 114 \(1955\)](#)."

Syllabus Point 2, *In re Petition for Attorney Fees and Costs: Cassella v. Mylan Pharm., Inc.*, 234 W.Va. 485, 766 S.E.2d 432 (2014).

3. "Statutory changes that are purely procedural in nature will be applied retroactively." Syllabus Point 4, *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2002).

4. "A statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute provides explicitly for retroactive application." Syllabus Point 2, *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996). ii

5. "A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only [***2] when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application. Syl. pt. 3, *Sizemore v. State Workmen's Comp. Comm'r*, 159 W.Va. 100, 219 S.E.2d 912 (1975)." Syllabus Point 3, *In re Petition for Attorney Fees and Costs: Cassella v. Mylan Pharm., Inc.*, 234 W.Va. 485, 766 S.E.2d 432 (2014).

6. *West Virginia Code § 55-7E-3*, abrogating Syllabus Point 2 of *Mason County Board of Education v. State Superintendent of Schools*, 170 W.Va. 632, 295 S.E.2d 719 (1982) and its progeny, is a remedial statute that does not impact a vested or substantive right. Accordingly, its provisions are applicable irrespective of when the cause of action accrued or when the claim or suit is filed, thereby imposing an affirmative duty on the part of the plaintiff to mitigate any claim for past and/or future wages and requiring an award, if any, of back pay and front pay to be [**584] [*614] reduced by the amount of interim earnings or the amount that may be earned with reasonable diligence by the

plaintiff.

7. *West Virginia Code § 55-7-9* is a remedial statute that does not impact a vested or substantive right. Accordingly, its provisions are applicable irrespective of when the cause of action accrued or when the claim or suit is filed.

Counsel: For Petitioner: Allan N. Karlin, Esq., Jane E. Peak, Esq., Benjamin J. Hogan, Esq., Allan N. Karlin & Associates, Morgantown, West Virginia.

For Respondent: Joseph U. Leonoro, Esq., Steptoe & [***3] Johnson PLLC, Charleston, West Virginia; Michael J. Moore, Esq., Steptoe & Johnson PLLC, Bridgeport, West Virginia.

Judges: JUSTICE WALKER delivered the Opinion of the Court. CHIEF JUSTICE LOUGHRY concurs and reserves the right to file a concurring opinion. JUSTICE KETCHUM concurs and reserves the right to file a concurring opinion. JUSTICE DAVIS dissents and reserves the right to file a dissenting opinion. JUSTICE WORKMAN dissents and reserves the right to file a dissenting opinion. LOUGHRY, C. J., concurring, joined by KETCHUM, J. Davis, Justice, dissenting, joined by Justice Workman.

Opinion by: WALKER

Opinion

WALKER, Justice:

This case is before us on two certified questions from the United States District Court for the Northern District of West Virginia. We consider whether two recently enacted statutes relating to

damages — [West Virginia Code §§ 55-7-29](#) and [55-7E-3](#) — apply in a trial conducted after the effective date of the statutes when the underlying facts in the case occurred prior to that effective date. Finding the two statutes at issue to be remedial, we answer the certified questions in the affirmative.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Helio Martinez was employed by Respondent Asplundh Tree Expert Co. ("Asplundh") to perform [***4] tree cutting services from 2011 until he was discharged on September 13, 2013. Mr. Martinez is an American citizen originally from Puerto Rico. He worked on a four-person work crew first assigned to work in Pennsylvania but then transferred to work in West Virginia by Asplundh. Mr. Martinez's work crew was comprised entirely of Hispanic individuals and, according to Mr. Martinez, they were treated less favorably than other work crews as they were provided inferior equipment. Moreover, he alleges that at least one member of Asplundh management referred to them as the "Mexican crew" even though none of the crew members were of Mexican descent.

On September 13, 2013, Asplundh summarily terminated Mr. Martinez's employment on the grounds of theft. Although Mr. Martinez denied any wrongdoing, he was not provided any opportunity to respond to the accusation of wrongdoing. The separation notice documenting the termination was prepared by Mr. Martinez's direct supervisor, Terry McFarlan, and states: "Took our truck to shop, was caught stealing from a Jaflo truck on camera." Mr. Martinez's entire work crew was terminated as a result of the alleged theft of a cell phone charger from the truck [***5] of a competitor (Jaflo) parked at a truck repair facility (United Auto).

Mr. McFarlan and his supervisor, Tim Blankenship, admitted in their depositions that the video

surveillance upon which the decision to fire Mr. Martinez was based did not show him stealing the cell phone charger. Rather, Asplundh now claims that the video surveillance revealed Mr. Martinez was in a position to observe two other crew members steal the cell phone charger. Although counsel for Mr. Martinez requested a copy of the video surveillance within days of the discharge, it disappeared without explanation. Mr. McFarlan suggested in his deposition that the video "erased itself."

Following his discharge, Mr. Martinez filed a complaint against Asplundh with the West Virginia Human Rights Commission ("Commission"). The Commission subsequently issued a Notice of Right to Sue on December 30, 2014. On January 25, 2015, Mr. Martinez filed a civil action against Asplundh in the Circuit Court of Harrison County alleging that he was wrongfully discharged from employment in violation of the West Virginia Human Rights Act, [§§ 5-11-1 through -20](#) (2013) (the "Human Rights Act"). Mr. Martinez claims that he was unlawfully discriminated [***6] against on the basis of race, national origin and/or ancestry.

[**585] [*615] On February 25, 2015, Asplundh removed the case to the United States District Court for the Northern District of West Virginia on the basis of diversity pursuant to [28 U.S.C. § 1332 \(2012\)](#). Prior to trial, the parties jointly moved the district court to stay the case and certify the questions we now consider.

By order entered on January 1, 2017, the district court certified the following questions to this Court:

1. Does [W.Va. Code § 55-7E-3](#), which abrogates [Mason County Bd. of Educ. v. State Superintendent of Sch., 170 W. Va. 632, 295 S.E.2d719 \(1982\)](#), apply to a wrongful discharge case under the West Virginia Human Rights Act, [W.Va. Code § 5-11-9\(1\)](#), where the plaintiff employee was discharged on September 3, 2013, the effective date of the

statute is June 8, 2015, and this case is set for trial after June 8, 2015?

2. Does [W.Va. Code § 55-7-29](#), which limits punitive damage awards, apply to a wrongful discharge case under the West Virginia Human Rights Act, [W.Va. Code § 5-11-9\(1\)](#), where the plaintiff employee was discharged on September 3, 2013, the effective date of the statute is June 8, 2015, and this case is set for trial after June 8, 2015?

We proceed to consider the issues raised by the certified questions.

II. STANDARD OF REVIEW

As we have established, [HNI](#)^[↑] "[a] de novo standard is applied by this Court in addressing [***7] the legal issues presented by a certified question from a federal district or appellate court." Syl. pt. 1, [Light v. Allstate Ins. Co.](#), 203 W.Va. 27, 506 S.E.2d 64 (1998). We consider the certified questions presented by the district court according to this standard.

III. DISCUSSION

To begin, we summarize the arguments advanced by the parties, which are virtually the same for both certified questions. Petitioner argues that responding to the certified questions in the affirmative would impose an impermissible retroactive application of [West Virginia Code §§ 55-7-29](#) and [55-7E-3](#). Asserting that the law of damages is substantive, Petitioner contends that application of the statutes at issue would impair substantive rights contrary to [HN2](#)^[↑] this Court's prior holding that "[a] statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute . . . unless the statute provides explicitly for retroactive application." Syl. Pt. 2, [Public Citizen, Inc. v. First Nat. Bank in Fairmont](#), 198 W.Va. 329,

[480 S.E.2d 538 \(1996\)](#). To hold otherwise, Petitioner states, would be contrary to our observation that "[i]t has been stated repeatedly that new legislation should not generally be construed to interfere with existing contracts, rights of actions, suits, or vested property rights." [Mildred L.M. v. John O.F.](#), 192 W.Va. 345, 351 n.10, 452 S.E.2d 436, 442 n.10 (1994) [***8] (citing [Landgraf v. USI Film Prods.](#), 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)). Petitioner further argues that the statutes at issue are neither procedural nor remedial, and absent contrary language in the legislation, may not be applied retroactively to a case based on a discharge from employment that preceded the statute's effective date of June 8, 2015.

Conversely, Respondent asserts that a plaintiff does not have a right to damages until they are proven at trial and thus Mr. Martinez had no vested right to unmitigated front pay or punitive damages prior to trial. Respondent relies upon the language of each statute referring to an "award" for its argument that applicability is not triggered until damages are awarded. Consequently, Respondent posits that it is not seeking to apply the subject statutes retroactively. Respondent urges this Court to rely upon our prior holding that [HN3](#)^[↑] "[a] law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application." Syl. Pt. 3, [Sizemore v. State Workmen's Compensation Comm'r.](#), 159 W.Va. 100, 219 S.E.2d 912 (1975). Respondent requests [***9] that "the law in effect on the date of trial be applied in this case" and [***586] [*616] urges this Court to disregard what it characterizes as a "cloud of confusion" created by Petitioner's retroactivity argument.

We now address each certified question in turn.

A. [West Virginia Code § 55-7E-3](#)

The first certified question is based upon [HN4](#)¹ [West Virginia Code § 55-7E-3](#), which addresses the recovery of front pay¹ and back pay² in employment cases and states:

(a) In any employment law cause of action against a current or former employer, regardless of whether the cause of action arises from a statutory right created by the Legislature or a cause of action arising under the common law of West Virginia, the plaintiff has an affirmative duty to mitigate past and future lost wages, regardless of whether the plaintiff can prove the defendant employer acted with malice or malicious intent, or in willful disregard of the plaintiff's rights. The malice exception to the duty to mitigate damages is abolished. Unmitigated or flat back pay and front pay awards are not an available remedy. Any award of back pay or front pay by a commission, court or jury shall be reduced by the amount of interim earnings or the amount earnable with reasonable diligence by the plaintiff. It is **[***10]** the defendant's burden to prove the lack of reasonable diligence.

(b) In any employment law claim or cause of action, the trial court shall make a preliminary ruling on the appropriateness of the remedy of reinstatement versus front pay if such remedies are sought by the plaintiff. If front pay is determined to be the appropriate remedy, the amount of front pay, if any, to be awarded shall be an issue for the trial judge to decide.

[W. Va. Code § 55-7E-3](#) (2016). The effective date

¹ [HN5](#)¹ "Back pay" is defined as "the wages that an employee would have earned, had the employee not suffered from an adverse employment action, from the time of the adverse employment action through the time of trial." [W.Va. Code § 55-7E-1\(a\)](#).

² [HN6](#)² "Front pay" is defined as "the wages that an employee would have earned, had the employee not suffered from an adverse employment action, from the time of trial through a future date." [W.Va. Code § 55-7E-1\(b\)](#).

of this statute was June 8, 2015.³

[HN7](#)³ This new article of Chapter 55 also includes articulated findings and a declaration of purpose. According to [West Virginia Code § 55-7E-2\(a\)\(3\)](#), "the goal of compensation remedies in employment law cases is to make the victim of unlawful workplace actions whole" [W.Va. Code § 55-7E-2\(a\)\(3\)](#). Moreover, "[i]n West Virginia, the amount of damages recently awarded in statutory and common law employment cases have been inconsistent with established federal law and the law of surrounding states. This lack of uniformity in the law puts our state and its businesses at a competitive disadvantage." [W.Va. Code § 55-7E-2\(a\)\(4\)](#). Finally, "[t]he purpose of this article is to provide a framework for adequate and reasonable compensation to those persons who have been subjected to an unlawful employment **[***11]** action, but to ensure that compensation does not far exceed the goal of making a wronged employee whole." [W.Va. Code § 55-7E-2\(b\)](#).

To answer the certified question presented by the district court, we first examine our precedent relating to the applicability of statutory enactments. We begin with the statutory proposition that [HN8](#)⁴ "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." [W.Va. Code § 2-2-10\(bb\)](#) (2013). "The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect. Syl. pt. 4, [Taylor v. State Compensation Comm'r, 140 W.Va. 572, 86 S.E.2d 114 \(1955\)](#)." Syl. Pt. 2, [In re Petition for Attorney Fees and Costs: Cassella v. Mylan Pharm., Inc., 234 W.Va. 485, 766 S.E.2d 432 \(2014\)](#).

[HN9](#)⁵ How statutory amendments apply may be determined by the subject matter of the statute. For

³ 2015 W.Va. Act ch. 5.

example, "[s]tatutory changes that are purely procedural in nature [**587] [*617] will be applied retroactively." Syl. Pt. 4, [Miller v. Smith](#), 229 W. Va. 478, 729 S.E.2d 800 (2002). On the other hand, we have held that "[a] statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute [***12] provides explicitly for retroactive application." [Public Citizen at Syl. Pt. 2](#).

Addressing whether a statute applies retrospectively, we have held, "[t]he law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application. Syl. pt. 3, [Sizemore v. State Workmen's Comp. Comm'r](#), 159 W.Va. 100, 219 S.E.2d 912 (1975)." [Cassella at Syl. Pt. 3](#).

Turning to the first certified question, we note that the Legislature's findings and declaration of purpose set forth explicitly in [West Virginia Code § 55-7E-2](#) state that "the amount of damages recently awarded in statutory and common law employment cases have been inconsistent with established federal law and the law of surrounding states." *Id.* This inconsistency originated with this Court's holding more than 30 years ago regarding an employee's duty to mitigate damages:

Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, [***13] and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue

of mitigation is on the employer.

Syl. Pt. 2, [Mason County Board of Educ. v. State Superintendent of Sch.](#), 170 W.Va. 632, 295 S.E.2d 719 (1982). Eventually, this Court extended this so-called "malice exception" beyond a plaintiff's duty to mitigate back pay damages and applied the exception to front pay damages. See [Burke-Parsons-Bowlby Corp. v. Rice](#), 230 W.Va. 105, 115 736 S.E.2d 338, 348 (2012); [Peters v. Rivers Edge Mining, Inc.](#), 224 W.Va. 160, 184, 680 S.E.2d 791, 815 (2009); [West Virginia Am. Water Co. v. Nagy](#), No. 10-1229, 2011 W. Va. LEXIS 183, 2011 WL 8583425 at *3 (W.Va. June 15, 2011) (memorandum decision). As a result, this State adopted a concept of unmitigated front and back pay unrecognized by any other state.⁴

[HN10](#)[↑] [West Virginia Code § 55-7E-3](#) abrogates [Mason County](#) and its progeny, providing that "in any employment law cause of action," "[u]nmitigated or flat back pay and front pay awards are not an available remedy. Any amount of back pay or front pay by a commission, court or jury shall be reduced by the amount of interim earning or the amount earnable with reasonable diligence by the plaintiff." [W.Va. Code § 55-7E-3\(a\)-\(b\)](#). Moreover, the statute provides that "[t]he amount of front pay, if any, to be awarded shall be an issue for the trial judge to decide." [W.Va. Code § 55-7E-3\(b\)](#).

We now consider whether this statute applies to an employment case that is based [***14] upon a claim for unlawful discriminatory discharge that occurred prior to June 8, 2015, and is set for trial after the effective date of [West Virginia Code § 55-7E-3](#). As we have stated, [HN11](#)[↑] "[s]tatutes which do not create new rights or take away vested ones are deemed to be **remedial** and are not within the strict application of the rule of presumption against **retroactivity**." [Mildred L.M.](#), 192 W.Va. at

⁴ Amber Marie Moore, Student Work, *Can Damages Be Too Damaging? Examining Mason County and its Progeny*, 115 W. Va. L. Rev. 807, 837 (2012).

[351 n.10](#), [452 S.E.2d 445 n.10](#) (citing [Joy v. Chessie Emp. Fed. Credit Union](#), [186 W.Va. 118](#), [411 S.E.2d 261 \(1991\)](#)). Generally, a **remedial** statute has been defined as "a statute that relates to practice, procedure, remedies and does not affect substantive or vested rights." 73 Am. Jur. 2d *Statutes* § 7 (2017). Accordingly, we consider whether the statute at issue is remedial.

[*618] [**588] [HN12](#)^[↑] A remedial statute improves or facilitates remedies already existing for the enforcement or rights of redress of wrongs, as opposed to an enactment extinguishing a cause of action or barring a party from prosecuting a cause of action that affects substantive rights and, therefore, is not remedial. [73 Am. Jur. 2d Statutes § 7](#); see also [Langston v. Riffe](#), [359 Md. 396](#), [754 A.2d 389](#), [395-96 \(Md. 2000\)](#). [West Virginia Code § 55-7E-1](#) addresses the procedure by which an award of back pay or front pay is considered at trial by eliminating the former "malice exception" to a plaintiff's duty to mitigate wage damages. As the Iowa Supreme Court observed, "[i]t has been held that a plaintiff has no vested right in a particular measure of damages." [***15] [Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc.](#), [473 N.W.2d 612](#), [619 \(Iowa 1990\)](#) (citations omitted). Several other courts have agreed with this approach. [Jasperson v. Purolator Courier Corp.](#), [765 F.2d 736 \(8th Cir. 1985\)](#) (applying statute removing punitive damages as remedy to case filed prior to statute's enactment); [Dardeen v. Heartland Manor, Inc.](#), [186 Ill. 2d 291](#), [710 N.E.2d 827](#), [831-32](#), [238 Ill. Dec. 30 \(Ill. 1999\)](#) ("Because no vested right is affected, the application of the [amended statute abolishing treble damages] to plaintiff's pending suit is proper, irrespective of when the cause of action accrued or the complaint was filed."); [Meech v. Hillhaven West, Inc.](#), [238 Mont. 21](#), [776 P.2d 488](#), [504 \(Mont. 1989\)](#) ("There is no vested right to exemplary damages and the legislature may, at its will, restrict or deny the allowance of such damages") (citation omitted); [Vaughan v. Taft Broadcasting Co.](#), [708 S.W.2d 656](#), [660 \(Mo. 1986\)](#) ("[U]nder Missouri law, punitive damages are remedial and a plaintiff has no vested

right to such damages prior to the entry of judgment."). Although these cases specifically address punitive damages, which is the subject of the second certified question, we find this analysis equally applicable to front and back pay damages.

We find that [HN13](#)^[↑] [West Virginia Code § 55-7E-3](#) is a **remedial** statute that does not impact a vested right. Because it neither diminishes substantive rights nor augments substantive liabilities, it is not subject to a **retroactivity** analysis under [syllabus point 2 of Public Citizen](#). We note that **retroactivity** ought to be judged with regard to the act or event [***16] that the statute is meant to regulate.⁵ On that point, [West Virginia Code § 55-7E-3](#) clearly regulates the award of back pay and front pay at trial in an employment case. As we have stated, "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive" [State ex rel. Ocwen Loan Servicing, LLC v. Webster](#), [232 W. Va. 341](#), [351](#), [752 S.E.2d 372](#), [382 \(2013\)](#) (quoting [Landgraf](#), [511 U.S. at 273-74](#)). It is recognized that "[i]n general, statutes dealing with a remedy apply to actions tried after their passage even though the right or cause of action arose prior thereto." 3 Sutherland Statutory Construction § 60:1 (7th ed. 2016). We therefore hold that [West Virginia Code § 55-7E-3](#), abrogating [Syllabus Point 2 of Mason County Board of Education v. State Superintendent of Sch.](#), [170 W.Va. 632](#), [295 S.E.2d 719 \(1982\)](#) and its progeny is a remedial statute that does not impact a vested or substantive right. Accordingly, [HN14](#)^[↑] its provisions are applicable irrespective of when the cause of action accrued or when the claim or suit is filed, thereby imposing an affirmative duty on the part of the plaintiff to mitigate any claim for past and/or future wages and requiring an award, if any,

⁵ A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* § 41, p. 263 (2012).

of back pay and front pay to be reduced by the amount of interim earnings or the [***17] amount that may be earned with reasonable diligence by the plaintiff. Thus, we answer the first certified question in the affirmative.

B. West Virginia Code § 55-7-29

We now turn to the second certified question, which is whether [West Virginia Code § 55-7-29](#) applies to a case that is based upon a claim for unlawful discriminatory discharge that occurred prior to June 8, 2015, and is set for trial after that effective date of [West Virginia Code § 55-7E-3](#). [HN15](#)[↑] [West Virginia Code § 55-7-29](#) [**589] [*619] pertains to punitive damages and states in relevant part as follows:

(a) An award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.

(b) Any civil action tried before a jury involving punitive damages may, upon request of any defendant, be conducted in a bifurcated trial in accordance with the following guidelines:

(1) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory damages, if any. [***18]

(2) If the jury finds during the first stage of a bifurcated trial that a defendant is liable for compensatory damages, then the court shall determine whether sufficient evidence exists to proceed with a consideration of punitive damages.

(3) If the court finds that sufficient evidence exists to proceed with a consideration of punitive damages, the same jury shall

determine if a defendant is liable for punitive damages in the second stage of a bifurcated trial and may award such damages.

(4) If the jury returns an award for punitive damages that exceeds the amounts allowed under [subsection \(c\)](#) of this section, the court shall reduce any such award to comply with the limitations set forth therein.

(c) The amount of punitive damages that may be awarded in a civil action may not exceed the greater of four times the amount of compensatory damages or \$500,000, whichever is greater.

[W.Va. Code § 55-7-29](#) (2016). The effective date of this statute was also June 8, 2015.⁶

[HN16](#)[↑] [West Virginia Code § 55-7-29](#) is similar to [West Virginia Code § 55-7E-3](#) in that both address the process for consideration of damages at trial. The latter statute articulates the evidentiary standard and procedure for an award of punitive damages at trial and imposes a cap on such awards. As explained above, "[s]tatutes which do [***19] not create new rights or take away vested ones are deemed to be **remedial** and are not within the strict application of the rule of presumption against **retroactivity**." [Mildred L.M., 192 W.Va. at 351 n.10, 452 S.E.2d 445 n.10](#) (citation omitted).

In reliance on the same authorities cited in our discussion of the first certified question, we hold that [HN17](#)[↑] [West Virginia Code § 55-7-9](#) is a **remedial** statute that does not impact a vested or substantive right. Accordingly, its provisions are applicable irrespective of when the cause of action accrued or when the claim or suit is filed. As such, [West Virginia Code § 55-7-29](#) is not subject to a **retroactivity** analysis under [syllabus point 2 of Public Citizen](#). As the Supreme Court of the United States explained in *Landgraf*:

Even absent specific legislative authorization, application of new statutes passed after the

⁶2015 W.Va. Acts ch. 6.

events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.

Landgraf, 511 U.S. at 273. A plaintiff has no right, much less a vested right, to an award of punitive damages prior to trial. Thus, we answer the second certified question in the affirmative.

IV. CONCLUSION

Having answered each of the two certified questions in the affirmative, [***20] this matter is dismissed from the docket of this Court.

Certified questions answered.

Concur by: LOUGHRY

Concur

[*620] [**590] LOUGHRY, C. J., concurring, joined by KETCHUM, J.:

The Legislature, in enacting West Virginia Code § 55-7E-3, commendably sought to eradicate West Virginia's outlier status regarding unmitigated back and front pay in employment claims and thereby eliminate an unjustifiable windfall to plaintiffs. The duty of an injured plaintiff to mitigate damages is a long-standing and universally recognized principle that Mason County Board of Education v. State Superintendent of Schools, 170 W.Va. 632, 295 S.E.2d 719 (1982), obliterated, thereby creating a blight on our state's wrongful discharge law. West Virginia Code § 55-7E-3 further recognizes the surreptitious manner in which *Mason County* was extended to allow not only unmitigated back pay, but front pay as well. See Peters v. Rivers Edge Mining, Inc., 224 W.Va. 160, 184, 680 S.E.2d 791 (2009) (applying *Mason County* to front pay award

in absence of new syllabus point). This statute laudably imposes a legislative check on the Court's prior attempts at "judicial legislation." Properly venerating the clarity of the statute and its intended reach, the majority succinctly concludes that damages are not vested rights and that the Legislature clearly intended the statute to affect every award of damages from the effective date of the statute. Therefore, I concur with the majority's conclusion [***21] that West Virginia Code § 55-7E-3 and West Virginia Code § 55-7-29, which limits punitive damages, are remedial statutes applicable to causes of action that accrued and/or were filed prior to the statute's effective date.

The Legislature left little doubt of its intentions in enacting West Virginia Code § 55-7E-3. In its declaration of purpose, the Legislature stated:

The citizens and employers of this state are entitled to a legal system that provides adequate and reasonable compensation to those persons who have been subjected to unlawful employment actions, a legal system that is fair, predictable in its outcomes, and a legal system that functions within the mainstream of American jurisprudence. . . . The goal of compensation remedies in employment law cases is to make the victim of unlawful workplace actions whole, including back pay; reinstatement or some amount of front pay in lieu of reinstatement; and under certain statutes, attorney's fees for the successful plaintiff.

W.Va. Code § 55-7E-2(a)(2) and (3). However, the Legislature noted that "[i]n West Virginia, the amount of damages recently awarded in statutory and common law employment cases have been inconsistent with established federal law and the law of surrounding states. This lack of uniformity in the law puts our state and its businesses [***22] at a competitive disadvantage." *Id.* at § 55-7E-2(a)(4). Accordingly, it enacted this statute with the precise objective to eliminate unmitigated front and back pay, and expressly indicated by the absence of any provision to the contrary, that this injustice

would be abolished concurrent with the effective date of the statute.

Front pay has been aptly described as requiring "a sensitivity to the competing interests of the employee, on the one hand, in being made whole and the employer, on the other hand, in being spared the duty to subsidize a prospective windfall." Quinlan v. Curtiss-Wright Corp., 425 N.J. Super. 335, 41 A.3d 739, 749 (N.J. App. Div. 2012). Observing that the duty to mitigate damages in wrongful discharge cases is "rooted in an ancient principle of law," the United States Supreme Court has held that federally-based employment claims "require[] the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied." Ford Motor Co. v. E. E. O. C., 458 U.S. 219, 231-32, 102 S. Ct. 3057, 73 L. Ed. 2d 721 (1982). The rationale underlying the duty to mitigate is obvious: "Since only actual losses should be made good, it seems [***23] fair that deductions [**591] [*621] should be made not only for actual earnings by the worker but also for losses which he willfully incurred." Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 198, 61 S. Ct. 845, 85 L. Ed. 1271 (1941). Accordingly, the legislative foreclosure of unmitigated front and back pay returns West Virginia to the mainstream of jurisprudence on such awards and equitably prohibits employer subsidy of "prospective windfall[s]." Quinlan, 41 A.3d at 749.

The equity of West Virginia Code § 55-7E-3 notwithstanding, it is clear that the majority's conclusion that the statute applies to damages awards rendered for actions accruing and/or filed before the statute's enactment is likewise sound. "[P]rocedural and remedial laws generally do not affect vested rights, which are property rights that the Constitution protects like any other property. Such procedural and remedial laws that do not affect vested rights should be enforced as they exist

at the time judgment is rendered." City of Austin v. Whittington, 384 S.W.3d 766, 790 (Tex. 2012) (citations omitted); see also 16A C.J.S. Constitutional Law § 498 ("Unless the remedy is one that is expressly protected by a constitutional provision, there is no vested right to a particular remedy, and existing remedies may be changed or abolished provided a substantial remedy remains.").

With respect specifically to statutes affecting remedies that are enacted while matters [***24] are pending, "[i]t is well established that a plaintiff has no vested property right in a particular measure of damages, and that the Legislature possesses broad authority to modify the scope and nature of such damages." Am. Bank & Trust Co. v. Cmty. Hosp., 36 Cal. 3d 359, 204 Cal. Rptr. 671, 683 P.2d 670, 676 (Cal. 1984); see also 16A C.J.S. Constitutional Law § 499 ("A statute which relates merely to matters of remedy may be made applicable to pending proceedings at any time before the final judgment of the court becomes effective."). Indeed, the Fourth Circuit has observed, "[p]rocedural statutes that affect remedies are generally applicable to cases pending at the time of enactment." Koger v. Ball, 497 F.2d 702, 706 (4th Cir. 1974). As the United States Supreme Court long-ago explained,

[c]onsidering the Act . . . as providing a remedy only, it is entirely unexceptionable. It has been repeatedly decided in this court that the retrospective operation of such a law forms no objection to it. Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed.

Sampeyreac v. United States, 32 U.S. (7 Peters) 222, 239, 8 L.Ed. 665 (1833).

Furthermore, the notion that particular categories of damages are not "vested rights" is well-recognized. The defining characteristics of a "vested right" has been explained as follows: "[A] right has not vested until it is so perfected, complete, and [***25] unconditional that it may be equated with a

property interest." White v. Sunrise Healthcare Corp., 295 Ill. App. 3d 296, 692 N.E.2d 1363, 1366, 230 Ill. Dec. 197 (Ill. App. Ct. 1998). As the *White* court further explained:

Because not all expectations are vested rights, a new law is not retroactive "just because it relates to antecedent events, or because it draws upon antecedent facts for its operation." United States Steel Credit Union v. Knight, 32 Ill.2d 138, 142, 204 N.E.2d 4 (1965). . . . [T]his is especially true of statutes that leave substantive rights in place and change only the procedures and remedies used to enforce those rights. Most directly pertinent here, the case law leaves no doubt that, prior to judgment, a plaintiff has no vested right to a statutory penalty such as [] punitive damages[.]

692 N.E.2d at 1366; see Weingrad v. Miles, 29 So. 3d 406, 416 (Fla. Dist. Ct. App. 2010) (finding plaintiff "had no vested right to a particular damage award").

The foregoing technical analysis notwithstanding, a plain reading of the statutes at issue demonstrates their applicability and operation. The applicability of the statutes was made clear in the Legislature's precise use of the term "award": "Any *award* of back pay or front pay by a commission, court or jury shall be reduced by the amount of interim earnings or the amount earnable with reasonable diligence by the plaintiff." W.Va. Code § 55-7E-3(a) [****592**] [***622**] (emphasis added); "An *award* of punitive damages may only occur . . . " W.Va. Code 55-7-29(a) (emphasis [*****26**] added); "The amount of punitive damages that may be *awarded* in a civil action . . . " W.Va. Code 55-7-29(c) (emphasis added). Clearly, the Legislature contemplated application of the statutes to any "award" of such damages, a defined event that occurs only at trial. Even without the necessity of the "vested right" analysis, the statutes' plain language demonstrates that, as of its effective date, any *award* of back pay or front pay must be reduced in accordance therewith and punitive

damages may only be awarded in compliance with West Virginia Code § 55-7-29. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, State v. Epperly, 135 W.Va. 877, 65 S.E.2d 488 (1951). That is to say, "[w]here the language of a statutory provision is plain, its terms should be applied as written and not construed." DeVane v. Kennedy, 205 W.Va. 519, 529, 519 S.E.2d 622, 632 (1999).

The Legislature's message is clear: unmitigated front pay and back pay are no longer permitted in West Virginia as of the effective date of the statute. Likewise, limitless punitive damages are no longer available. The Legislature could use no plainer language to convey to the public, litigants, and the courts that West Virginia's outlier status with regard to unrestrained [*****27**] damages awards is not only inequitable and legally imprudent, but harmful to the state and, therefore, its citizens; and that it intends to foreclose such awards immediately. Accordingly, I respectfully concur.

Dissent by: Davis

Dissent

Davis, Justice, dissenting, joined by Justice Workman:

I respectfully dissent to the majority opinion in this case because it is shamefully inconsistent with the established precedent of this State. In order to reach a very result-oriented decision, the majority distorts the paradigm of analysis engaged in by this Court for decades regarding the retroactivity of statutes.

The approach to be utilized in determinations of retroactive or prospective statutory application is very clear. The analysis begins with the presumption that a statute operates only

prospectively unless the legislative intent for **retroactive** application is clearly stated. Syl. pt. 3, *Shanholtz v. Monongahela Power Co.*, 165 W. Va. 305, 270 S.E.2d 178 (1980). Exceptions exist where the matters addressed are procedural or **remedial**; even those exceptions, however, do not apply where the alterations attach a new legal consequence to a completed event. See *Public Citizen, Inc. v. First Nat'l Bank in Fairmont*, 198 W. Va. 329, 335, 480 S.E.2d 538, 544 (1996) (emphasis added). The majority's opinion is a classic example of the exception swallowing the rule.

As this Court explained in [***28] *Public Citizen*, the pertinent inquiry is whether the statutory alteration "diminishes substantive rights or augments substantive liabilities" *Id. at 331, 480 S.E.2d at 540*. If it does, it is substantive and not **retroactive**. Even if it is considered procedural or **remedial**, as the majority believes the two alterations in this case are, *the alteration still is not retroactive* in all instances.¹ This Court previously has warned that "even here the procedural/substantive distinction is not talismanic." *Id. at 335, 480 S.E.2d at 544*.

The test of the interpretive principle laid down by the United States Supreme Court in *Landgraf* is unitary. It is whether the [sic] "the new provision attaches *new legal consequences to events completed before its enactment*." If a new procedural or **remedial** provision would, if applied in a pending case, attach a new legal consequence to [**593] [*623] a completed event, then it will not be applied in that case

unless the Legislature has made clear its intention that it shall apply.

Id. (emphasis added) (citing *Landgraf v. USI Film Productions*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)).

In *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S. Ct. 2422, 165 L. Ed. 2d 323 (2006), the United States Supreme Court enunciated the "sequence of analysis" in determining retroactivity, as follows:

[W]e ask whether applying the statute to the person objecting would have a retroactive consequence [***29] in the disfavored sense of "affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment," *Landgraf, supra, at 278, 114 S. Ct. 1483* If the answer is yes, we then apply the presumption against retroactivity by construing the statute as inapplicable to the event or act in question owing to the "absen[ce of] a clear indication from Congress that it intended such a result."

548 U.S. at 37, 126 S. Ct. at 2428, 165 L. Ed. 2d 323 (emphasis added and citations omitted).²

The statutory alterations at issue in the present case undeniably attach new legal consequences to events already accomplished. Specifically, the United States District Court for the Northern District of West Virginia asks this Court to determine whether two recently enacted statutes, which limited the

¹ Interestingly, a procedural or **remedial** statute is often found to be **retroactive** because it relates to certain issues. For instance, the United States Supreme Court in *Landgraf v. USI Film Productions*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), explained that "[r]etroactive legislative provisions may serve legitimate purposes, such as responding to emergencies, correcting mistakes, preventing against the circumvention of a new statute during the time after it is proposed but before it is enacted, and serving to advance health, welfare, or safety." *Id. at 267-68, 114 S. Ct. at 1498, 128 L. Ed. 2d 229*. These types of considerations are quite obviously not present in the case *sub judice*.

² See *Landgraf*, 511 U.S. at 283, 114 S. Ct. at 1507, 128 L. Ed. 2d 229 (holding that Civil Rights Act of 1991 could not be retroactively applied because its punitive damages provision established new right to monetary relief). See also *U.S. Fid. & Guar. Co. v. United States*, 209 U.S. 306, 314, 28 S. Ct. 537, 539, 52 L. Ed. 804 (1908) ("There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.").

amount of damages the plaintiff would be entitled to receive, can be applied retroactively. The facts show that the plaintiff's cause of action for wrongful termination accrued on September 13, 2013, the date of his discharge. In 2015, the West Virginia Legislature enacted two statutes that limited damages in civil litigation. The first statute, [W. Va. Code § 55-7E-3](#), reduced the amount of front-pay and back-pay a fired employee could receive for failure to mitigate damages, [***30] even if he or she proved the employer had acted with malice. The second statute, [W. Va. Code § 55-7-29](#), placed a cap on the amount of punitive damages a plaintiff may receive. Because both statutes were enacted *after* the plaintiff's cause of action accrued, the District Court asked this Court to decide whether the statutes could be applied to the plaintiff. I strongly disagree with the majority's opinion that the statutes are procedural and ***remedial*** and can be applied ***retroactively***.³

Over one hundred years ago, this Court held the following in Syllabus point 3 of [Rogers v. Lynch](#), [44 W. Va. 94, 29 S.E. 507 \(1897\)](#):

No statute, however positive, is to be construed as designed to interfere with existing contracts, rights of action, or suits, and especially vested rights, unless the intention that it shall so operate is expressly declared; and the courts will apply new statutes only to future cases unless there is something in the very nature of the case or in the language of the new revision

which shows that they were intended to have a retroactive operation.

[*624] [**594] See Syl. pt. 3, [Shanholtz](#), [165 W.Va. at 179, 270 S.E.2d at 306](#) ("A statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or is necessarily [***31] implied from the language of the statute."). See also Syl. pt. 5, [Arnold v. Turek](#), [185 W. Va. 400, 407 S.E.2d 706 \(1991\)](#) ("Statutory changes in the manner and method of distributing the proceeds of a judgment or settlement for wrongful death will not be given retroactive effect, and the statute in effect on the date of the decedent's death will control").⁴ Until the majority's opinion in this case, our law has been crystal clear that a statute operates prospectively absent a clear legislative intent to the contrary. There is absolutely no language in either [W. Va. Code § 55-7E-3](#) or [W. Va. Code § 55-7-29](#) that evidences a legislative intent that either statute should apply retroactively. The majority's opinion has tortured time-honored legal principles in order to reach a result that, as I will show, the overwhelming majority of the courts in the country have resolutely rejected.

It has been recognized that "most courts that have considered the issue disallowed retroactive application of a statutory damages cap." [Prince George's Cty. v. Longtin](#), [419 Md. 450, 487, 19 A.3d 859, 881 \(2011\)](#).⁵ See [Miles v. Weingrad](#), [164](#)

³ Because both statutes limit damages, I will not make a distinction between them in this discussion. However, it is obvious that the new statute regarding mitigation of damages creates and imposes upon the plaintiff a distinctly different duty than that which existed at the time of his termination, thus altering the legal consequence of the his actions immediately following his termination. Likewise, the placement of a new cap on punitive damages alters the rights the plaintiff had as of the time of the alleged wrongful act. See, e.g., [Heffelfinger v. Connolly](#), No. 3:06-CV-2823, 2009 U.S. Dist. LEXIS 6441, 2009 WL 112792, at *3 (N.D. Ohio Jan. 15, 2009) ("Ohio courts construing earlier damage cap statutes have similarly concluded that the date plaintiff's cause of action accrued . . . is the relevant date for determining whether a new damages regime applies.").

⁴ This Court has applied these principles in a variety of contexts. In [Beard v. Lim](#), [185 W.Va. 749, 408 S.E.2d 772 \(1991\)](#), for instance, this Court addressed the issue of alterations to a statute regarding prejudgment interest as applied to special damages and observed that changes in the statutory scheme could not be retroactively applied. [Id. at 753 n.7, 408 S.E.2d at 776 n.7](#).

⁵ The court in *Prince George's County* also noted:

It is patent that the enormous loss to . . . [the plaintiff] from application of the statutory cap would 'impair' his cause of action. Accordingly, we agree with the Court of Special Appeals that . . . [the plaintiff] had a vested right in bringing his cause of action—with no statutory cap on damages—prior to the enactment of the . . . [Local Government Tort Claims Act]

[So. 3d 1208, 1213 \(Fla. 2015\)](#) (determining that statutory cap on damages could not be applied retroactively as "precedent from this Court 'has refused to apply the statute retroactively if it impairs vested rights, creates new obligations or imposes new penalties.'" (citation omitted)); *Socorro v. New Orleans*, 579 So. 2d 931 (La. 1991) (same); [***32] [United States v. Searle](#), 322 Md. 1, 6, 584 A.2d 1263, 1265 (1991) (same); [Klotz v. St. Anthony's Med. Ctr.](#), 311 S.W.3d 752, 760 (Mo. 2010) (same); *Estate of Bell v. Shelby Cty. Health Care Corp.*, 318 S.W.3d 823, 833 (Tenn. 2010) (same); [Neiman v. Am. Nat'l Prop. & Cas. Co.](#), 2000 WI 83, 236 Wis. 2d 411, 422, 428, 613 N.W.2d 160, 164-65, 167 (2000) ("Strong common-law tradition defines the legislature's primary function as declaring law to regulate future behavior. Thus, as a matter of justice, no law should be enforced before people can learn of its existence and conduct themselves accordingly. In short, retroactivity disturbs the stability of past transactions." (citations omitted)); [Martin by Sceptur v. Richards](#), 192 Wis. 2d 156, 212, 531 N.W.2d 70, 93 (1995) (same); *Berghauer ex rel. Estate of Berghauer v. Heyl*, 2002 WI App 1, 249 Wis. 2d 488, 639 N.W.2d 223 (Wis. Ct. App. 2002) (same); [Bramble v. Virgin Island Port Auth., No. ST-06-CV-678](#), 2015 V.I. LEXIS 37, 2015 WL 1744241, at *6 (V.I. Super. Apr. 10, 2015) (same). See also [Alamo Rent-A-Car v. Mancusi](#), 632 So. 2d 1352, 1358 (Fla. 1994) (same); [Exec. Builders, Inc. v. Trisler](#), 741 N.E.2d 351, 361 (Ind. Ct. App. 2000) (same); [Murphy Homes, Inc. v. Muller](#), 2007 MT 140, 337 Mont. 411, 429, 162 P.3d 106, 120 (2007) (same); [Seltzer v. Morton](#), 2007 MT 62, 336 Mont. 225, 270, 154 P.3d 561, 595 (2007) (same); [Blair v. McDonagh](#), 177 Ohio App. 3d 262, 282, 2008 Ohio 3698, 894 N.E.2d 377, 391 (2008) (same).⁶ The

revisions. Although the legislature may, in its wisdom, limit tort damages prospectively, see, e.g., [Murphy v. Edmonds](#) [,] 325 Md. 342, 601 A.2d 102 (1992) (upholding statutory cap on noneconomic tort damages which applied [***33] prospectively), the constitution protects against retroactive application of these limitations.

[419 Md. at 489-90, 19 A.3d at 883.](#)

[**595] [*625] reason for this is that "[a]pplication of a damages cap deprives a person of compensation, just as abrogating a cause of action does." [Prince George's Cty.](#), 419 Md. at 487, 19 A.3d at 881.

Although the majority's opinion, at its best, crudely tries to argue that a law limiting damages is procedural and remedial, this argument is hollow and woefully unconvincing. It was observed in *Estate of Bell* that "for more than three decades Tennessee's appellate courts have consistently ruled that a change to the law that alters the amount of damages constitutes a substantive, as opposed to a procedural or **remedial**, change." 318 S.W.3d at 829-30. A statute altering the amount of damages "is clearly substantive as opposed to merely procedural because it has the effect of changing the law regarding the amount of damages recoverable in personal injury lawsuits. The very substance of the claim for damages, the amount thereof, is affected by the legislation." *Socorro*, 579 So.2d at 944. In *Klotz*, the court articulated an "underlying repugnance" to a **retroactive** application of laws and held that a court "cannot change the substantive law for a category of damages after a cause of action has accrued[.]" [Klotz](#), 311 S.W.3d at 760.

To be clear, "[u]nder the great weight of authority, the measure and elements [***34] of damages are matters pertaining to the substance of the right and not to the remedy." [Thomas v. Cumberland Operating Co.](#), 1977 OK 164, 569 P.2d 974, 977 (Okla. 1977). Thus, "[s]tatutes and amendments imposing, removing or changing a monetary

⁶ Compare [Carswell v. Oklahoma State Univ.](#), 2003 OK CIV APP 3, 62 P.3d 786, 789 (Okla. Civ. App. 2003) (holding statute that increased the amount of recovery effected a substantive change in the law and operates prospectively); [Greenvall v. Maine Mut. Fire Ins. Co.](#), 2001 ME 180, 788 A.2d 165, 167 (Me. 2001) (same); [Schultz v. Natwick](#), 2001 WI App 281, 249 Wis. 2d 317, 328, 638 N.W.2d 319, 325 (Wis. Ct. App. 2001) (same); and [Greenwald v. Sugarloaf Residential Prop. Owners Ass'n, Inc., No. A17A0420](#), 341 Ga. App. 451, 800 S.E.2d 621, 2017 Ga. App. LEXIS 220, 2017 WL 2243130, at *3 (Ga. Ct. App. May 23, 2017) (statute permitting award of attorney's fees and expenses could not be applied to case filed before effective date of statute).

limitation on recovery for personal injuries or death are generally held to be prospective only." [*Thomas*, 569 P.2d at 976](#). For example, in *Seltzer*, the plaintiff brought an action against the defendants for malicious prosecution and abuse of process. [*336 Mont. at 228, 154 P.3d at 569-70*](#). A jury returned a verdict in favor of the plaintiff that included punitive damages. [*Id. at 267, 154 P.3d at 593*](#). On appeal, the defendants argued that the punitive damages should have been reduced based upon a recently enacted cap on such damages. The appellate court disagreed, ruling as follows:

In [*Dvorak v. Huntley Project Irrigation District*, 196 Mont. 167, 639 P.2d 62, \(1981\)](#), . . . the jury returned a verdict for plaintiffs in the amount of \$5,000 compensatory damages and \$40,000 punitive damages against each of the three defendants. On appeal, this Court considered whether a statute prohibiting punitive damages awards against government entities was applicable to a cause of action that arose before the statute was enacted. . . . In resolving the appeal, this Court observed that the plaintiffs' cause of action arose in 1974, while [*§ 2-9-105, MCA*](#), was not enacted until 1977. Even though [*§ 2-9-105, MCA*](#), was in effect when the jury rendered [***35] its verdict in 1980, this Court held that the statute was not applicable to the case because it was enacted after the plaintiffs' cause of action arose.

....

Here, in its post-verdict order reviewing the punitive damages awards, the District Court relied on *Dvorak* in concluding that except as otherwise expressly provided by the Legislature, a new law limiting recovery of punitive damages does not apply to punitive damages awarded on a claim that accrued prior to the effective date of the statute. Thus, observing that *Seltzer's* tort claims accrued prior to the effective date of [the statute], the District Court determined that the statutory cap does not require a reduction of the jury's

punitive damages awards against the Defendants. We agree.

[*Seltzer*, 336 Mont. at 268-70, 154 P.3d at 594-95](#) (internal quotations omitted).

Additionally, in *Alamo Rent-A-Car*, the plaintiff filed an action for malicious prosecution against the defendant. [*632 So.2d at 1354*](#). A jury returned a verdict for the plaintiff. One of the issues raised on appeal was whether a statutory amendment that capped punitive damages applied retroactively to the plaintiff's cause of action. The Florida Supreme Court held that it did not for the following reasons:

The amendment became effective [***36] October 1, 1987. The instant cause of action arose during September 1986, which was . . . before the effective date of the amendment. This action was filed on October 2, 1987, one day after the effective date of the [**596] [*626] amendment. To determine whether the amendment applies to the instant cause of action, we must examine whether the amendment is one of substantive or procedural law.

A substantive statute is presumed to operate prospectively rather than *retrospectively* unless the Legislature clearly expresses its intent that the statute is to operate *retrospectively*. This is especially true when *retrospective* operation of a law would impair or destroy existing rights. Procedural or *remedial* statutes, on the other hand, are to be applied *retrospectively* and are to be applied to pending cases.

. . . [S]ubstantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights. Following this rationale, we find [*section 768.73\(1\)\(a\)*](#) to be a substantive rather than procedural statute. Punitive damages are assessed not as compensation to an injured party but as punishment against the wrongdoer. Consequently, a plaintiff's right to a claim for punitive damages is subject [***37] to the

plenary authority of the legislature. The establishment or elimination of such a claim is clearly a substantive, rather than procedural, decision of the legislature because such a decision does, in fact, grant or eliminate a right or entitlement. Because we find that [section 768.73\(1\)\(a\)](#) is substantive rather than procedural, we find that the amendment to [section 768.73\(1\)\(a\)](#) does not apply to the instant cause of action. This is true even though Mancusi's cause of action was filed after the effective date of the amendment.

[Alamo, 632 So. 2d at 1358](#) (internal citations omitted).

Finally, in *Martin by Scoptur*, a child and her parents brought a medical malpractice claim for treatment the child received after she suffered injuries from riding her bicycle into the back of a truck. [192 Wis. 2d at 162-63, 531 N.W.2d at 73](#). At the time of the injury, there was no limit on the amount of noneconomic damages a plaintiff could recover in a medical malpractice action. Almost a year after the malpractice occurred, the legislature enacted a cap on such damages of \$1,000,000. The plaintiffs subsequently filed a medical malpractice action, and a jury awarded the plaintiffs \$2,150,000 in noneconomic damages. On appeal, the Wisconsin Supreme Court held that applying the cap to the plaintiffs' verdict [***38] would have changed what they would have recovered under the law that existed at the time of the accident. In finding the cap could not apply retroactively, the Supreme Court reasoned as follows:

Since the cause of action accrued at a time when no cap existed on the amount of noneconomic damages recoverable, application of the cap to the Martins' cause of action constitutes a retroactive application. If we allowed the cap, it would act here to limit the recovery of a cause of action which, when it accrued, was unlimited.

....

To deprive the Martins and litigants like them

of their recovery in the ephemeral hope that this retroactive application will further the few purposes cited for the retroactive application of the cap, violates the most fundamental notions of fairness and strikes at the heart of due process.

Accordingly, we hold that retroactive application of the cap on noneconomic damages . . . would be unconstitutional under the [Due Process Clause of the United States](#) and [Wisconsin Constitutions](#).

[Id. at 199](#) & [212, 531 N.W.2d at 88 & 93](#).

In the final analysis, "legislation which involves mere procedural or evidentiary changes may operate retrospectively; however, legislation which affects substantive rights may only operate prospectively." [***39] [Fowler Props., Inc. v. Dowland, 282 Ga. 76, 78, 646 S.E.2d 197, 200 \(2007\)](#). This basic principle of fairness has been unjustifiably gutted by the majority's unbalanced, severely skewed, and result-driven scales of justice.

In view of the foregoing, I dissent. I am authorized to state that Justice Workman joins me in this dissenting opinion.

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WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 277

BY SENATORS BLAIR (MR. PRESIDENT) AND BALDWIN

(BY REQUEST OF THE EXECUTIVE)

[Passed March 11, 2021; in effect from passage]

1 AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §55-19-1, §55-19-2, §55-19-3, §55-19-4, §55-19-5, §55-19-6, §55-19-7, §55-
3 19-8, and §55-19-9, all relating generally to creating the COVID-19 Jobs Protection Act;
4 designating a short title; making legislative findings; setting forth legislative purposes;
5 defining terms; prohibiting certain claims against persons or entities arising from COVID-
6 19, COVID-19 care, or impacted care; extinguishing liability for death or personal injury
7 related to the design, manufacture, or labeling of supplies or personal protective
8 equipment either sold or donated; creating an exception to the extinguishment of claims
9 for persons having actual knowledge of a product defect acting with conscious, reckless,
10 and outrageous indifference to a substantial and unnecessary risk or with actual malice;
11 providing that, when a claim for workers' compensation benefits is awarded to an
12 employee pursuant to §23-1-1 *et seq.* of this code for a work-related injury, disease, or
13 death caused by or arising from COVID-19 in the course of and resulting from covered
14 employment, such claim for workers' compensation benefits shall be the sole and
15 exclusive remedy for such injury, disease, or death; providing that, except for §55-19-5
16 and §55-19-6 of this code, limitations on liability shall not apply to any person, employee,
17 or agent who engaged in intentional conduct with actual malice; providing for severability
18 of provisions; adding retro-activity of act to January 1, 2020; clarifying that no new cause
19 of action is created nor defense limited by the act; and clarifying that the article does not
20 affect duties or rights arising from contract.

Be it enacted by the Legislature of West Virginia:

ARTICLE 19. COVID-19 JOBS PROTECTION ACT.

§55-19-1. Short title.

1 This article shall be known and may be cited as the COVID-19 Jobs Protection Act.

§55-19-2. Findings and purpose.

1 (a) The West Virginia Legislature finds that:

2 (1) The novel coronavirus, also known as COVID-19, has been deemed a pandemic and
3 the President of the United States has declared a national emergency.

4 (2) The Governor issued a State of Preparedness on March 4, 2020, to allow agencies to
5 coordinate and create necessary measures to prepare for COVID-19.

6 (3) The Governor proclaimed a State of Emergency on March 16, 2020, finding that the
7 COVID-19 pandemic constitutes a disaster under §15-5-2 of this code.

8 (4) To protect public health, safety, and welfare, all nonessential businesses were directed
9 to cease all activities except for minimum basic operations in the state.

10 (5) To protect public health, safety, and welfare, and to ensure the health care system is
11 capable of serving all citizens in need, especially those at high risk and vulnerable to COVID-19,
12 all West Virginia residents were directed to stay at home unless performing an essential activity.

13 (6) Health care providers have operated with shortages of medical personnel, equipment,
14 and supplies while responding to COVID-19 and were prohibited by Executive Order No. 16-20
15 from engaging in elective medical procedures.

16 (7) There is a critical need for personal protective equipment, such as masks, respirators,
17 ventilators, and other medical equipment and products designed to guard against or treat COVID-
18 19.

19 (8) Manufacturers have substantially increased production of essential products and have
20 made products outside their ordinary course of business to aid in response to COVID-19.

21 (9) West Virginia is reopening its businesses, including restaurants, retail stores, office
22 buildings, fitness centers, hotels, hair and nail salons, and barber shops, as well as religious
23 institutions.

24 (10) Lawsuits are being filed across the country against health care providers and health
25 care facilities associated with care provided during the COVID-19 pandemic and illness of health
26 care workers due to exposure to COVID-19 while providing essential medical care, and against
27 businesses seeking damages associated with a person's exposure to COVID-19.

(11) The threat of liability poses an obstacle to efforts to reopen and rebuild the West Virginia economy and to continue to provide medical care to impacted West Virginians.

(12) The diagnosis and treatment of COVID-19 has rapidly evolved from largely uncharted, experimental, and anecdotal observations and interventions, without the opportunity for the medical community to develop definitive evidence-based medical guidelines, making it difficult, if not impossible, to identify and establish applicable standards of care by which the acts or omissions of health care providers can fairly and objectively be measured.

(b) It is the purpose of this article to:

(1) Eliminate the liability of the citizens of West Virginia and all persons including individuals, health care providers, health care facilities, institutions of higher education, businesses, manufacturers, and all persons whomsoever, and to preclude all suits and claims against any persons for loss, damages, personal injuries, or death arising from COVID-19.

(2) Provide assurances to businesses that reopening will not expose them to liability for a person's exposure to COVID-19.

§55-19-3. Definitions.

For the purposes of this article:

(1) "Arising from COVID-19" means any act from which loss, damage, physical injury, or death is caused by a natural, direct, and uninterrupted consequence of the actual, alleged, or possible exposure to, or contraction of, COVID-19, including services, treatment, or other actions in response to COVID-19, and without which such loss, damage, physical injury, or death would not have occurred, including, but not limited to:

(A) Implementing policies and procedures designed to prevent or minimize the spread of COVID-19;

(B) Testing;

(C) Monitoring, collecting, reporting, tracking, tracing, disclosing, or investigating COVID-19 exposure or other COVID-19-related information;

(D) Using, designing, manufacturing, providing, donating, or servicing precautionary, diagnostic, collection, or other health equipment or supplies, such as personal protective equipment;

(E) Closing or partially closing to prevent or minimize the spread of COVID-19;

(F) Delaying or modifying the schedule or performance of any medical procedure;

(G) Providing services or products in response to government appeal or repurposing operations to address an urgent need for personal protective equipment, sanitation products, or other products necessary to protect the public;

(H) Providing services or products as an essential business, health care facility, health care provider, first responder, or institution of higher education; or

(I) Actions taken in response to federal, state, or local orders, recommendations, or guidelines lawfully set forth in response to COVID-19.

(2) "COVID-19" and "coronavirus" means the novel coronavirus identified as SARS-CoV-2, the disease caused by the novel coronavirus SARS-CoV-2 or a virus mutating therefrom, and conditions associated with the disease.

(3) "COVID-19 Care" means services provided by a health care facility or health care provider, regardless of location and whether or not those services were provided in-person or through telehealth or telemedicine, that relate to the testing for, diagnosis, prevention, or treatment of COVID-19, or the assessment, treatment, or care of an individual with a confirmed or suspected case of COVID-19.

(4) "COVID-19 emergency" means the State of Emergency declared by the Governor of the State of West Virginia by proclamation on March 16, 2020, and any subsequent orders or amendments thereto.

(5) "Essential business" means a person or entity that is:

(A) An essential business or operation as specified by Executive Order No. 9-20 on March 23, 2020, and any subsequent orders or amendments thereto; or

(B) Within an essential critical infrastructure sector as defined by the United States Department of Homeland Security.

(6) "First responder" means a person who performs one or more "emergency services" as that term is defined in §15-5-2 of this code. "First responder" also includes any other person authorized by executive order who will be deployed in response to the COVID-19 pandemic.

(7) "Health care" means any act, service, or treatment as defined by §55-7B-2 of this code.

(8) "Health care facility" means a facility as defined by §55-7B-2 of this code and any other facility authorized to provide health care or vaccinations in response to the COVID-19 emergency, including, but not limited to, a personal attendant agency.

(9) "Health care provider" means a person, partnership, corporation, professional limited liability company, health care facility, entity, or institution as defined by §55-7B-2 of this code, whether paid or unpaid, including persons engaged in telemedicine or telehealth; and any person authorized to provide health care in response to the COVID-19 emergency, including, but not limited to personal attendants and the employer, employees or agents of a health care provider who provide, arrange for, and assist with the delivery of health care, including those whose licensing requirements were modified through executive order.

(10) "Impacted care" means care offered, delayed, postponed, or otherwise adversely affected at a health care facility or from a health care provider that impacted the health care facility or health care provider's response to, or as a result of, COVID-19 or the COVID-19 emergency: *Provided*, That this provision does not prohibit claims that may otherwise be brought pursuant to §55-7B-1 *et seq.* of this code so long as such claims for loss, damage, physical injury, or death are unrelated to COVID-19 or the COVID-19 emergency and the care provided. If the issue of impacted care is raised by a defendant under §55-19-4 of this code, the circuit court shall, upon motion by the defendant, stay the proceedings, including any discovery proceedings, and, as soon as practicable, hold a hearing to determine whether the care offered, delayed, postponed, or otherwise adversely affected at a health care facility or from a health care provider was related

to COVID-19 or the COVID-19 emergency. If the circuit court determines that the care offered, delayed, postponed, or otherwise adversely affected at a health care facility or from a health care provider was related to COVID-19 or the COVID-19 emergency and the care provided, then the cause of action shall be dismissed under §55-19-4 of this code.

(11) "Person" means an individual, partnership, corporation, association, state, county, or local governmental entity, or other entity, including, but not limited to, a school, a college or university, an institution of higher education, religious organization, or nonprofit charitable organization. "Person" includes an employee, agent, or independent contractor of the person, regardless of whether the individual is a paid or an unpaid volunteer.

(12) "Personal protective equipment" means coveralls, face shields, gloves, gowns, masks, respirators, or other equipment designed to protect the wearer or other persons from the spread of infection or illness.

(13) "Physical injury" means actual bodily harm, sickness, or disease.

(14) "Public health guidance" means written guidance related to COVID-19 issued by the Centers for Disease Control and Prevention, Occupational Safety & Health Administration of the United States Department of Labor, Office of the Governor, West Virginia Department of Health and Human Resources, or any other state, federal, county, or local government agency.

(15) "Qualified product" means personal protective equipment used to protect the wearer from COVID-19 or prevent the spread of COVID-19; medical devices, equipment, and supplies used to treat COVID-19 including products that are used or modified for an unapproved use to treat COVID-19 or prevent the spread of COVID-19; medical devices, equipment, or supplies utilized outside of the product's normal use to treat COVID-19 or to prevent the spread of COVID-19; medications used to treat COVID-19 including medications prescribed or dispensed for off-label use to attempt to combat COVID-19; tests to diagnose or determine immunity to COVID-19; and components of qualified products.

(16) "Volunteer" means any person or entity that makes a facility, product, or service available to support a state, county, or local response to COVID-19.

§55-19-4. Claims arising from the COVID-19 pandemic.

Notwithstanding any law to the contrary, except as provided by this article, there is no claim against any person, essential business, business, entity, health care facility, health care provider, first responder, or volunteer for loss, damage, physical injury, or death arising from COVID-19, from COVID-19 care, or from impacted care.

§55-19-5. Products made, sold, and donated in response to COVID-19.

(a) Any person that designs, manufactures, labels, sells, distributes, or donates a qualified product in response to COVID-19 that is utilized by any person, essential business, government entity, business entity, health care facility, health care provider, first responder, or volunteer shall not be liable in a civil action alleging personal injury, death, or property damage caused by or resulting from the product's manufacturing or design, or a failure to provide proper instructions or sufficient warnings.

(b) Any person that designs, manufactures, labels, sells, distributes, or donates household disinfecting or cleaning supplies or personal protective equipment in response to COVID-19 that does not make such products in the ordinary course of the person's business shall not be liable in a civil action alleging personal injury, death, or property damage caused by or resulting from the product's manufacturing or design, or a failure to provide proper instructions or sufficient warnings.

(c) The limitations on liability provided in this section shall not apply to any person, or any employee or agent thereof, that:

(1) Had actual knowledge of a defect in the product when put to the use for which the product was manufactured, sold, distributed, or donated; and acted with conscious, reckless, and outrageous indifference to a substantial and unnecessary risk that the product would cause serious injury to others; or

19 (2) Acted with actual malice.

20 (d) Any action under subsection (c) of this section must be brought not later than one year
21 after the date of personal injury, death, or property damage.

§55-19-6. Workers' compensation.

1 Notwithstanding the provisions of this article and the further provisions of §23-4-2 of this
2 code which permits the filing of a civil cause of action against an employer for damages in excess
3 of benefits received or receivable in a workers' compensation claim, if it is determined that the
4 employer acted with deliberate intention, when a claim for workers' compensation benefits is
5 awarded to an employee pursuant to §23-1-1 *et seq.* of this code for a work-related injury, disease,
6 or death caused by or arising from COVID-19 in the course of and resulting from covered
7 employment, such claim for workers' compensation benefits shall be the sole and exclusive
8 remedy for such injury, disease, or death and the immunity from suit provided under §23-2-6 and
9 §23-2-6a of this code shall be and remain in full force and effect.

§55-19-7. Exception.

1 Excluding the provisions of §55-19-5 and §55-19-6 of this code, the limitations on liability
2 provided in this article shall not apply to any person, or employee or agent thereof, who engaged
3 in intentional conduct with actual malice.

§55-19-8. Severability.

1 If any provision of this act or the application thereof to any person or circumstance is held
2 invalid, the invalidity shall not affect other provisions or applications of this act, and to this end the
3 provisions of this act are declared to be severable.

§55-19-9. Application.

1 (a) This article shall be effective retroactively from January 1, 2020, and applies to any
2 cause of action accruing on or after that date.

3 (b) Nothing in this article shall be construed to create a new cause of action or expand any
4 liability otherwise imposed, limit any defense, or affect the applicability of any law that affords
5 greater protections to defendants that are provided in this article.

6 (c) Nothing in this article shall be construed to affect any duties, rights, benefits, or any
7 other term or condition arising from a contractual relationship.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

.....
Chairman, Senate Committee

.....
Chairman, House Committee

Originated in the Senate.

In effect from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

The within this the.....
Day of, 2021.

.....
Governor

Biography for Doren Burrell

Doren Burrell (WVSB #555) is a 1985 graduate of the WVU College of Law and has been a member of the WV Bar for 35 years. For the past five years, he has served with the Division of Legislative Services conducting legal research and drafting bills for the West Virginia Legislature. Prior to this, he worked as a committee attorney for the WV Senate for three sessions. In addition to these legal jobs, he also worked for the West Virginia Attorney General, the Kanawha County Prosecuting Attorney, and the Kanawha County Assessor. He has been a lecturer at legal education programs for WVU-CLE, the West Virginia Legislature, the Charleston Police Academy, the West Virginia Auditor's Office, and the WV Commission on Drunk Driving Prevention.

Code Updates from the 2021 Legislative Session

OVERALL NUMBERS FROM THE SESSION

2039 Bills introduced: 722 in the Senate, 1317 in the House of Delegates.

Not all legislative acts amend the West Virginia Code: This year we had 313 resolutions, 198 bills authorizing rules, > 52 appropriations bills.

282 Bills completed legislation – 280 have been signed by the Governor, 1 vetoed (but amended and repassed), and 2 became law without the Governor's signature.

SECTION CONFLICTS IN COMPLETED ACTS

Nine code sections have been amended by multiple bills:

§11-21-9, §12-6C-11, §18-8-1a, §18A-3-2a, §21-5-1, §24-2-1, §24A-2-2b, §30-29-1, §46A-8-101

From WILEY V. TOPPINGS, 210 W. Va. 173, 556 S.E.2d 818, 2001 W. Va. LEXIS 133:

When faced with two conflicting enactments, this Court and courts generally follow the black-letter principle that "effect should always be given to the latest . . . expression of the legislative will" Joseph Speidel Grocery Co. v. Warder, 56 W.Va. 602, 608, 49 S.E. 534, 536 (1904). "The statute which is the more recent . . . prevails. . . . This rule applies even where the two statutes were enacted to be effective on the same date." Doe v. Attorney General, 425 Mass. 210, 216-217, 680 N.E.2d 92, 96 (1998)

See also Letter to Austin Caperton, Cabinet Secretary, Opinion of the Attorney General, November 1, 2017.

Six new sections were created with the same section numbers in more than one bill. (See attached list of Corrected Article and Section Citations.)

TIME OF EFFECT – "EFFECTIVE DATE"

W. Va. Constitution, Article VI, Section 30, sets the default time period.

*"And no act of the Legislature, * * * shall take effect until the expiration of ninety days after its passage, unless the Legislature shall by a vote of two thirds of the members elected to each house, * * * otherwise direct."*

Date of "passage"

"Held, that the word 'passage' in this section relates to the date of the passage of the act by the two houses, and not to the date of its approval by the governor," STATE V. MOUNTS, Syl. pt. 3, 36 W. Va. 179, 14 S.E. 407, 1892 W. Va. LEXIS 62.

Internal Effective dates.

“When a statute does not become operative immediately upon its enactment, but the time of its going into effect is postponed until a later date, either by virtue of its own terms or a general constitutional provision, it ordinarily does not have any effect until the stated period has expired.” Syl pt. 1, STATE EX REL. BD. OF EDUC. V. MELTON, 157 W. Va. 154, 159, 198 S.E.2d 130, 133, 1973 W. Va. LEXIS 200, “a statute speaks as of the time when it takes effect and not of the time it was passed.”

Two bills do not take effect until 2022

HB 2720	Creating a Merit-Based Personnel System within DOT, takes effect January 1, 2022.
HB 2933	Anti-Discrimination Against Israel Act, takes effect July 1, 2022

The Legislative Services Division now endeavors to have all W. Va. Code sections updated on its website within a prompt period of the effective date of the respective Act of the Legislature. **If you find any error or omissions**, please do not hesitate to notify our web team at webmaster@wvlegislature.gov or notify me directly at doren.burrell@wvlegislature.gov or 304-347-4809.

Selected Resolutions and Bills of Interest

HERE ARE SEVERAL NOTABLE RESOLUTIONS AND BILLS THAT HAVE COMPLETED THE LEGISLATIVE PROCESS IN THE 2021 REGULAR SESSION. THESE ARE ORGANIZED BY SUBJECT AND THE EFFECTIVE DATE OF EACH ACT IS INDICATED IN PARENTHESES. NOTE THAT THIS IS NOT A COMPLETE LIST OF ALL BILLS AND RESOLUTIONS PASSED OR ADOPTED.

JOINT RESOLUTIONS – proposed amendments to the state Constitution

HJR 2 Providing that courts have no authority or jurisdiction to intercede or intervene in, or interfere with, any impeachment proceedings of the House of Delegates or the Senate

HJR 3 Property Tax Modernization Amendment

SJR 4 Incorporation of Churches or Religious Denominations Amendment

ALCOHOL, BEER, WINE, LIQUOR

HB 2025 Provide liquor, wine, and beer licensees with some new concepts developed during the State of Emergency utilizing new technology to provide greater freedom to operate in a safe and responsible manner. (May 10)

CRIMINAL LAW

SB 392 Creating penalty for impersonating law-enforcement officer or official. (July 7)

SB 496 Relating to punishment for second or third degree felony. (July 6)

SB 626 Updating regulation for purchase of automobile catalytic converters. (July 7)

SB 713 Relating generally to inmate good time. (April 30)

HB 2253 Relating to forgery and other crimes concerning lottery tickets. (July 4)

HB 2262 Relating to the controlled substance monitoring database. (May 31)

HB 2888 Relating to when contentions can be revived based on forensic scientific evidence that was not available at time of conviction (July 1)

COURTS

SB 275 Relating generally to WV Appellate Reorganization Act of 2021. (June 30)

SB 674 Clarifying that unpaid restitution does not preclude person from obtaining driver's license (July 8)

DOMESTIC RELATIONS

SB 78 Relating to rehabilitative spousal support. (July 4)

EDUCATION

SB 14 Providing for additional options for alternative certification for teachers. (May 27)

SB 294 Relating generally to savings and investment programs offered by state. (April 7)

SB 657 Relating to free expression on state institution of higher education campuses. (July 8)

HB 2001 Relating generally to creating the West Virginia Jumpstart Savings Program. (June 9)

HB 2012 Relating to public charter schools. (June 1)

HB 2013 Relating to the Hope Scholarship Program. (June 15)

HB 2529 Prohibiting West Virginia institutions of higher education from discriminating against graduates of private, nonpublic or home schools by requiring them to submit to alternative testing. (July 6)

HB 3293 Relating to single-sex participation in interscholastic athletic events. (July 8)

ENERGY AND ENVIRONMENT

SB 368 Authorizing DEP to develop Reclamation of Abandoned and Dilapidated Properties Program. (July 9)

SB 404 Modifying well work permits issued by DEP Office of Oil and Gas. (June 16)

SB 464 Requiring composting of organic materials and commercial composting products comply with WV Fertilizer Law. (July 9)

SB 492 Establishing program for bonding to reclaim abandoned wind and solar generation facilities. (July 9)

SB 542 Relating generally to public electric utilities and facilities fuel supply for existing coal-fired plants. (July 9)

SB 2667 To create a cost saving program for state buildings regarding energy efficiency. (July 9)

FIREARMS

SB 458 Relating to possession of firearms by individuals during state of emergency. (July 8)

HB 2499 Tax reduction for arms and ammo manufacturing. (June 30)

FOIA

HB 2884 To make changes to the FOIA law to protect public utility customer databases from disclosure, with exceptions. (July 8)

HEALTH

SB 12 Relating to local health department accountability. (June 2)

SB 67 Relating to authority of Emergency Medical Services Advisory Council. (March 26)

SB 334 Establishing license application process for needle exchange programs. (July 9)

SB 714 Relating to physician assistant practice act. (July 8)

HB 2005 Relating to health care costs. (July 7)

HB 2024 Expand use of telemedicine to all medical personnel. (March 30)

HB 2616 Amend the reporting to the Governor and the Legislature to have information continuously available on the Office of Health Facility Licensure and Certification's website. (June 17)

HB 2877 Expand direct health care agreements beyond primary care to include more medical care services. (July 4)

HB 2982 Relating to the Second Chances at Life Act of 2021. (July 9)

HUMAN SERVICES

HB 2290 Initiating a State Employment First Policy to facilitate integrated employment of disabled persons. (June 28)

HB 2260 Relating to procurement of child placing services. (March 31)

INSURANCE

SB 398 Limiting eligibility of certain employers to participate in PEIA plans. (April 10)

SB 494 Authorizing transfer of moneys from Insurance Commission Fund to Workers' Compensation Old Fund. (July 5)

HB 2221 Relating to the establishment of an insurance innovation process. (July 9)

HB 2263 Update the regulation of pharmacy benefit managers. (June 28)

HB 2266 Relating to expanding certain insurance coverages for pregnant women. (April 10)

HB 2682 Relating to the issuance of license suspensions to insurance producers and insurance adjusters who have failed to meet continuing education requirements. (July 1)

HB 2776 Creating the Air Ambulance Patient Protection Act. (July 9)

JUVENILES

- SB 562 Relating to juvenile competency proceedings. (pending)
- HB 2094 Relating to the juvenile restorative justice programs. (June 30)
- HB 2260 Relating to procurement of child placing services. (March 31)
- HB 2363 Relating to “Best Interests of the Child Protection Act of 2021.” (July 10)

LABOR

- SB 11 Declaring work stoppage or strike by public employees to be unlawful. (June 2)
- SB 272 Relating to WV Employment Law Worker Classification Act. (June 9)
- SB 421 Authorizing Workforce West Virginia to hire at-will employees. (July 1)
- SB 435 Requiring county superintendents to authorize certain school principals or administrators at nonpublic schools to issue work permits for enrolled students. (June 24)
- HB 2009 Relating to limitations on the use of wages and agency shop fees by employers and labor organizations for political activities. (June 17)
- HB 2011 Eliminating any time requirements for part time personnel to work during a working year. (March 16)
- HB 2290 Initiating a State Employment First Policy to facilitate integrated employment of disabled persons. (June 28)
- HB 3191 Requiring employers to send certain notifications when retirants are hired as temporary, part-time employees. (July 6)

LOCAL GOVERNMENT

- SB 12 Relating to local health department accountability. (June 2)
- SB 334 Establishing license application process for needle exchange programs. (July 9)
- HB 2500 Create an act for Statewide Uniformity for Auxiliary Container Regulations. (April 10)
- HB 2842 Preventing cities from banning utility companies in city limits. (July 7)
- HB 2953 To clarify that counties can hire fire fighters as paid staff and to modify the existing procedures to include a procedure of public hearing to commission a vote. (July 9)

MOTOR VEHICLES

- SB 345 Expanding alcohol test and lock program to include offenders with drug-related offense. (June 3)

- SB 356 Allowing for written part of drivers' exam given in high school drivers' education course. (June 24)
- SB 431 Relating to school attendance notification requirements to DMV. (June 24)

PROFESSIONAL LICENSING

- SB 14 Providing for additional options for alternative certification for teachers. (May 27)
- SB 714 Relating to physician assistant practice act. (July 8)
- SB 372 Providing greater discretion to WV Board of Medicine to approve graduate clinical training (March 9)
- SB 472 Updating criteria for regulating certain occupations and professions. (July 4)
- SB 644 Exempting certain persons pursuing degree in speech pathology and audiology from license requirements. (July 5)
- SB 680 Allowing State Superintendent of Schools define classroom teachers certified in special education. (July 5)
- HB 2006 Relating to the West Virginia Contractor Licensing Act. (June 15)
- HB 2008 Amending requirements for licensure relating to elevator mechanics, crane operators, HVAC, electricians, and plumbers. (June 16)
- HB 2145 Relating to student aide class titles. (July 9)
- HB 2621 Mandating certification for certain members of fire departments, require certain types of training, allow specialized personnel who are not firefighters to be members of a department, and require the postings of fire department evaluations. (June 22)
- HB 2682 Relating to the issuance of license suspensions to insurance producers and insurance adjusters who have failed to meet continuing education requirements. (July 1)
- HB 2962 Relating generally to dental practice (July 9)

RULEMAKING

- SB 517 Relating to sunset provisions of legislative rules. (March 25)

STATE PURCHASING AND CONTRACTING

- SB 280 Relating to e-commerce modernization. (June 6)
- SB 587 Making contract consummation with state more efficient. (April 2)
- HB 2933 Anti-Discrimination Against Israel Act. (**July 1, 2022**)

LEGAL LIABILITY AND TORTS

- SB 5 Relating to claims arising out of WV Consumer Credit and Protection Act. (June 16)
- SB 439 Allowing use or nonuse of safety belt as admissible evidence in civil actions. (July 6)
- SB 673 Relating to venue for bringing civil action or arbitration proceedings under construction contracts. (July 1)
- SB 277 Creating COVID-19 Jobs Protection Act. (March 11)
- HB 2495 Relating to the filing of asbestos and silica claims. (June 29)

TAX

- SB 34 Creating exemption to state sales and use tax for rental and leasing of equipment. (July 1)
- SB 270 Providing for collection of tax by hotel marketplace facilitators. (June 7)
- SB 305 Providing exemption from consumers sales and service tax for certain aircraft maintenance. (June 21)
- SB 397 Relating to health care provider tax. (April 7)
- SB 437 Extending contingent increase of tax rate on certain eligible acute care hospitals. (April 5)
- SB 532 Limiting claims for state tax credits and rebates. (July 1)
- SB 693 Updating certain definitions and terms used in WV Personal Income Tax Act. (April 2)
- HB 2026 Relating to the modernization of the collection of income taxes by adopting uniform provisions relating to the mobile workforce. (June 28)
- HB 2358 Updating meaning of federal adjusted gross income and certain other terms used in West Virginia Personal Income Tax Act. (February 18)
- HB 2581 Providing for the valuation of natural resources property and an alternate method of appeal of proposed valuation of natural resources property. (April 10)
- HB 2808 Remove salt from list and definition of “mineral” for severance tax purposes. (June 29)

TECH, E-COMMERCE, AND MODERNIZATION

- SB 280 Relating to e-commerce modernization. (June 6)
- SB 318 Relating generally to public notice of unclaimed property held by State Treasurer. (July 9)
- SB 346 Authorizing DMV use electronic means when providing notice for licensees and vehicle owners. (July 1)

- SB 483 Allowing oaths be taken before any person authorized to administer oaths. (July 6)
- SB 651 Allowing county boards of education to publish financial statements on website. (July 6)
- HB 2024 Expand use of telemedicine to all medical personnel. (March 30)
- HB 2026 Relating to the modernization of the collection of income taxes by adopting uniform provisions relating to the mobile workforce. (June 28)
- HB 2763 Creating WV Cyber Incident Reporting. (July 5)

TRUSTS AND ESTATES

- SB 80 Allowing for administration of certain small estates by affidavit and without appointment of personal representative. (July 1)
- SB 81 Relating generally to WV Uniform Trust Code. (April 2)

QUESTIONS ?

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COMPREHENSIVE LIST OF BILLS AND JOINT RESOLUTIONS THAT HAVE PASSED BOTH HOUSES

House	Number	Title	Status	P Date
H	JR 2	Providing that courts have no authority or jurisdiction to intercede or intervene in, or interfere with, any impeachment proceedings of the House of Delegates or the Senate	ADPT	2021-04-09
H	JR 3	Property Tax Modernization Amendment	ADPT	2021-04-10
H	B 2001	Relating generally to creating the West Virginia Jumpstart Savings Program	SIGN	2021-03-19
H	B 2002	Relating to Broadband	PASS	2021-04-10
H	B 2005	Relating to health care costs	PASS	2021-04-08
H	B 2006	Relating to the West Virginia Contractor Licensing Act	SIGN	2021-03-27
H	B 2008	Amending requirements for licensure relating to elevator mechanics, crane operators, HVAC, electricians, and plumbers	SIGN	2021-03-27
H	B 2009	Relating to limitations on the use of wages and agency shop fees by employers and labor organizations for political activities	SIGN	2021-03-30
H	B 2011	Eliminating any time requirements for part time personnel to work during a working year	SIGN	2021-03-24
H	B 2012	Relating to public charter schools	SIGN	2021-03-11
H	B 2013	Relating to the Hope Scholarship Program	SIGN	2021-03-27
H	B 2014	Relating to role of the Legislature in appropriating federal funds	SIGN	2021-04-07
H	B 2019	Elevating Economic Development and Tourism Departments	SIGN	2021-03-08
H	B 2022	Budget Bill, making appropriations of public money out of the treasury in accordance with section fifty-one, article six of the Constitution	SIGN	2021-04-15

H	B	2024	Expand use of telemedicine to all medical personnel	SIGN	2021-04-09
H	B	2025	Provide liquor, wine, and beer licensees with some new concepts developed during the State of Emergency utilizing new technology to provide greater freedom to operate in a safe and responsible manner	PASS	2021-04-10
H	B	2026	Relating to the modernization of the collection of income taxes by adopting uniform provisions relating to the mobile workforce	SIGN	2021-04-09
H	B	2028	Exempting veterinarians from the requirements of controlled substance monitoring	SIGN	2021-04-19
H	B	2029	Relating to teacher preparation clinical experience programs	PEND	2021-04-16
H	B	2093	Relating to exemptions for the United States Department of Veterans Affairs Medical Foster Homes	SIGN	2021-04-19
H	B	2094	Relating to the juvenile restorative justice programs	SIGN	2021-04-09
H	B	2145	Relating to student aide class titles	PASS	2021-04-10
H	B	2195	Relating to motor vehicle crash reports	PASS	2021-04-10
H	B	2221	Relating to the establishment of an insurance innovation process	PASS	2021-04-10
H	B	2253	Relating to forgery and other crimes concerning lottery tickets	SIGN	2021-04-15
H	B	2260	Relating to procurement of child placing services	SIGN	2021-04-09
H	B	2262	Relating to the controlled substance monitoring database	SIGN	2021-03-10
H	B	2263	Update the regulation of pharmacy benefit managers	SIGN	2021-04-09
H	B	2266	Relating to expanding certain insurance coverages for pregnant women	PASS	2021-04-10
H	B	2267	Establishing an optional bus operator in residence program for school districts	PASS	2021-04-08

H	B	2290	Initiating a State Employment First Policy to facilitate integrated employment of disabled persons	SIGN	2021-04-07
H	B	2358	Updating meaning of federal adjusted gross income and certain other terms used in West Virginia Personal Income Tax Act	SIGN	2021-02-24
H	B	2359	Updating the meaning of federal taxable income and certain other terms used in the West Virginia Corporation Net Income Tax Act	SIGN	2021-02-24
H	B	2363	Relating to "Best Interests of the Child Protection Act of 2021"	PASS	2021-04-11
H	B	2366	Requiring agencies who have approved a proposed rule that affects fees or other special revenues to provide to the committee a fiscal note	SIGN	2021-04-19
H	B	2368	Myliissa Smith's Law, creating patient visitation privileges	PASS	2021-04-10
H	B	2370	Provide that Public Service Districts cannot charge sewer rates for filling a swimming pool	PASS	2021-04-10
H	B	2372	Allow pre-candidacy papers to be filed the day after the general election	SIGN	2021-03-30
H	B	2382	Authorizing the Department of Environmental Protection to promulgate a legislative rule relating to ambient air quality standards	SIGN	2021-04-07
H	B	2400	Authorizing the Department of Transportation to promulgate legislative rules	SIGN	2021-04-15
H	B	2427	Authorizing the Department of Health and Human Resources to promulgate legislative rules	PASS	2021-04-06
H	B	2495	Relating to the filing of asbestos and silica claims	SIGN	2021-04-15
H	B	2499	Tax reduction for arms and ammo manufacturing	SIGN	2021-04-08
H	B	2500	Create an act for Statewide Uniformity for Auxiliary Container Regulations	SIGN	2021-04-19
H	B	2507	Remove the limitations on advertising and promotional activities by limited video lottery retailers	PASS	2021-04-08
H	B	2529	Prohibiting West Virginia institutions of higher education from discriminating against graduates of private, nonpublic or home schools by requiring them to submit to alternative testing	PEND	2021-04-14

H	B	2573	Relating generally to the transparency and accountability of state grants to reduce waste, fraud, and abuse	PASS	2021-04-10
H	B	2581	Providing for the valuation of natural resources property and an alternate method of appeal of proposed valuation of natural resources property	PASS	2021-04-10
H	B	2616	Amend the reporting to the Governor and the Legislature to have information continuously available on the Office of Health Facility Licensure and Certification's website	SIGN	2021-03-30
H	B	2621	Mandating certification for certain members of fire departments, require certain types of training, allow specialized personnel who are not firefighters to be members of a department, and require the postings of fire department evaluations	SIGN	2021-04-05
H	B	2633	Creating the 2021 Farm Bill	PASS	2021-04-06
H	B	2667	To create a cost saving program for state buildings regarding energy efficiency	PASS	2021-04-10
H	B	2671	Relating to financial exploitation of elderly persons, protected persons or incapacitated adults	PASS	2021-04-10
H	B	2682	Relating to the issuance of license suspensions to insurance producers and insurance adjusters who have failed to meet continuing education requirements	SIGN	2021-03-30
H	B	2688	Allow county political parties to have building funds in a similar manner that state parties are allowed	PASS	2021-04-10
H	B	2694	Create the 2nd Amendment Preservation Act	PASS	2021-04-10
H	B	2701	Relating to authorizing the Division of Rehabilitation Services to approve acceptable training programs required for low vision individuals to obtain a Class G drivers license	SIGN	2021-04-01
H	B	2709	Providing that the aggregate liability of a surety on a consumer protection bond under the West Virginia Fintech Regulatory Sandbox Program does not exceed the principal sum of the bond	SIGN	2021-03-30
H	B	2720	Creating a Merit-Based Personnel System within DOT	PASS	2021-04-10
H	B	2722	Prohibiting the use of class B fire-fighting foam for testing purposes if the foam contains a certain class of fluorinated organic chemicals	PEND	2021-04-14

H	B	2730	Relating to persons filing federal bankruptcy petition to exempt certain property of the estate	PASS	2021-04-08
H	B	2747	Transferring the Parole Board to the Office of Administrative Hearings	PASS	2021-04-10
H	B	2758	Requiring the Insurance Commissioner to regulate professional bondsmen	PEND	2021-04-14
H	B	2760	Relating to economic development incentive tax credits	PASS	2021-04-10
H	B	2763	Creating WV Cyber Incident Reporting	PEND	2021-04-16
H	B	2764	Allow the Division of Financial Institutions to enter into reciprocity agreements with other jurisdictions that operate similar programs to the West Virginia Fintech Sandbox Program	SIGN	2021-03-30
H	B	2765	Relating to allowing emergency management and operations' vehicles operated by airports to use red flashing warning lights	PEND	2021-04-16
H	B	2768	Supplementing, amending and increasing an existing item of appropriation from the State Road Fund, to the Department of Transportation, Division of Highways	SIGN	2021-04-15
H	B	2769	Supplementing, amending and increasing items of existing appropriation from the State Road Fund to the Department of Transportation, Division of Motor Vehicles	SIGN	2021-04-15
H	B	2773	Permitting DNR to issue up to 100 permits for boats greater than 10 horsepower on Upper Mud River Lake	PASS	2021-04-08
H	B	2776	Creating the Air Ambulance Patient Protection Act	PASS	2021-04-10
H	B	2785	Relating to public school enrollment for students from out of state	PEND	2021-04-14
H	B	2788	Expiring funds to the unappropriated surplus balance from State Excess Lottery Revenue Fund	SIGN	2021-04-01
H	B	2789	Supplementing and amending the appropriations to Public Defender Services	SIGN	2021-04-01
H	B	2790	Supplementing, amending, decreasing, and increasing items of existing appropriation to Division of Highways	SIGN	2021-04-15
H	B	2791	Relating to enrollment and costs of homeschooled or private school students at vocational schools	SIGN	2021-04-15

H	B	2793	Permit out of state residents to obtain West Virginia concealed carry permits	SIGN	2021-04-09
H	B	2794	To extend the Neighborhood Investment Program Act to July 1, 2026	PASS	2021-04-09
H	B	2797	Declaring certain claims to be moral obligations of the State	SIGN	2021-04-05
H	B	2802	Supplementing and amending the appropriations of public moneys out of the Treasury from the balance of moneys remaining as an unappropriated surplus balance in the State Fund, General	SIGN	2021-04-01
H	B	2803	Supplementing and amending the appropriations of public moneys out of the Treasury from the balance of moneys remaining as an unappropriated surplus balance in the State Fund, General Revenue, to the Department of Commerce, Division of Forestry	SIGN	2021-04-01
H	B	2804	Expiring funds to the unappropriated surplus balance in the State Fund, General Revenue, for the fiscal year ending June 30, 2021	SIGN	2021-04-01
H	B	2808	Remove salt from list and definition of "mineral" for severance tax purposes	SIGN	2021-04-15
H	B	2823	Exempting buildings or structures utilized exclusively for agricultural purposes from the provisions of the State Building Code	PEND	2021-04-14
H	B	2829	Providing for the amortization of annual funding deficiencies for municipal police or firefighter pension and relief funds	PEND	2021-04-14
H	B	2830	Relating generally to sex trafficking	PEND	2021-04-14
H	B	2834	Adding the Curator of the West Virginia Division of Arts, Culture and History as an ex officio voting member of the commission	PASS	2021-04-07
H	B	2842	Preventing cities from banning utility companies in city limits	PASS	2021-04-08
H	B	2852	Relating to distribution of the allowance for increased enrollment	SIGN	2021-04-15
H	B	2854	Relating to the West Virginia Municipal Police Officers and Firefighters Retirement System	SIGN	2021-04-05
H	B	2855	Relating to the Natural Resources Police Officers Retirement System	SIGN	2021-04-05
H	B	2874	Extend the current veteran's business fee waivers to active duty military members and spouses	PASS	2021-04-07

H	B	2877	Expand direct health care agreements beyond primary care to include more medical care services	SIGN	2021-04-19
H	B	2884	To make changes to the FOIA law to protect public utility customer databases from disclosure, with exceptions	PASS	2021-04-09
H	B	2888	Relating to when contentions can be revived based on forensic scientific evidence that was not available at time of conviction	SIGN	2021-04-19
H	B	2890	To clarify the regulatory authority of the Public Service Commission of West Virginia over luxury limousine services	PASS	2021-04-07
H	B	2891	Creating minimum statutory standards for law-enforcement officers	PASS	2021-04-10
H	B	2895	Supplementing and amending the appropriations of public moneys to the Department of Veterans' Assistance	SIGN	2021-04-15
H	B	2896	Making a supplementary appropriation to the Department of Health and Human Resources, Division of Human Services	SIGN	2021-04-07
H	B	2897	Expiring funds to the balance of the Department of Commerce	SIGN	2021-04-07
H	B	2898	Making a supplementary appropriation to WorkForce West Virginia – Workforce Investment Act	SIGN	2021-04-15
H	B	2899	Making a supplementary appropriation to the Department of Commerce	SIGN	2021-04-07
H	B	2900	Expiring funds to the balance of the Department of Education – State Board of Education – School Building Authority – School Construction Fund	SIGN	2021-04-15
H	B	2901	Making a supplementary appropriation to the Department of Health and Human Resources, Division of Human Services	SIGN	2021-04-07
H	B	2903	Making a supplementary appropriation to the Department of Homeland Security, West Virginia State Police	SIGN	2021-04-07
H	B	2905	Relating to repealing the prohibition against the use of certain words	SIGN	2021-04-05
H	B	2906	Relating to the School Building Authority's allocation of money	PEND	2021-04-14
H	B	2914	To remove certain ex officio, voting members from the Archives and History Commission and update formatting	PASS	2021-04-07
H	B	2915	Relating to public records management and preservation	PASS	2021-04-10

H	B	2916	Creating the Semiquincentennial Commission for the celebration of the 250th anniversary of the founding of the United States of America	PASS	2021-04-07
H	B	2918	Relating to Family Drug Treatment Court	PEND	2021-04-14
H	B	2920	Making a supplementary appropriation to the Department of Health and Human Resources, Division of Health – Laboratory Services Fund	SIGN	2021-04-07
H	B	2927	Adding Caregiving expenses to campaign finance expense	PASS	2021-04-10
H	B	2933	Anti-Discrimination Against Israel Act	PASS	2021-04-10
H	B	2940	Making a supplementary appropriation to the Department of Education, State Board of Education – State Department of Education	SIGN	2021-04-07
H	B	2941	Supplementary appropriation decreasing an existing item and adding a new item of appropriation to the Department of Revenue, Insurance Commissioner	SIGN	2021-04-15
H	B	2953	To clarify that counties can hire fire fighters as paid staff and to modify the existing procedures to include a procedure of public hearing to commission a vote	PASS	2021-04-10
H	B	2957	Relating to the repeal of outdated code sections	PEND	2021-04-14
H	B	2958	Relating to repealing outdated sections of state code	PASS	2021-04-05
H	B	2962	Relating generally to dental practice	PASS	2021-04-10
H	B	2969	To clarify the procedures for the sale and operation of a municipally owned toll bridge by a private toll transportation facility	PEND	2021-04-14
H	B	2982	Relating to the Second Chances at Life Act of 2021	PASS	2021-04-10
H	B	2997	Adding a defense to the civil penalty imposed for a result of delivery of fuel to a state other than the destination state printed on the shipping document for fuel	PASS	2021-04-10
H	B	3002	Update road abandonment process	PASS	2021-04-10
H	B	3010	To extend the special valuation method for cellular towers to towers owned by persons not subject to regulation by the Board of Public Works	PEND	2021-04-07

H	B	3045	Relating to firefighter disability claims	PASS	2021-04-05
H	B	3078	Relating to powers and duties of the parole board	PASS	2021-04-10
H	B	3081	Updating the West Virginia Business Corporations Act	PASS	2021-04-02
H	B	3089	Make utility workers essential employees during a state of emergency	PASS	2021-04-10
H	B	3106	To change the hearing requirement for misdemeanors to 10 days	PASS	2021-04-10
H	B	3107	Declaring that Post Traumatic Stress Disorder diagnosed by a licensed psychiatrist is a compensable occupational disease for first responders	PASS	2021-04-10
H	B	3129	Relating to the Consumer Price Index rate increase	PEND	2021-04-16
H	B	3130	Relating to elimination of sunset provisions concerning towing rates	PEND	2021-04-16
H	B	3132	Relating to motor carrier inspectors	PASS	2021-04-09
H	B	3133	Relating to motor carrier rates	PASS	2021-04-10
H	B	3175	Relating to removing certain felonies than can prohibit vehicle salespersons from receiving a license	PEND	2021-04-14
H	B	3177	Removing expired, outdated, inoperative and antiquated provisions and report requirements in education	PASS	2021-04-10
H	B	3191	Requiring employers to send certain notifications when retirants are hired as temporary, part-time employees	PEND	2021-04-14
H	B	3215	Amending the requirements to become an elected prosecutor	PASS	2021-04-10
H	B	3254	Authorizing members of development authorities to accept federally authorized reimbursement for services which the members rendered on a voluntary basis	PEND	2021-04-14
H	B	3266	Providing for termination of extracurricular contact upon retirement	PASS	2021-04-09
H	B	3286	Making a supplementary appropriation to the Division of Human Services – Child Care and Development	SIGN	2021-04-15

H	B	3287	Making a supplementary appropriation to the Department of Homeland Security	SIGN	2021-04-15
H	B	3288	Supplementing and amending appropriations by decreasing and increasing existing items of appropriation in the DHHR	SIGN	2021-04-15
H	B	3289	Supplementary appropriation to the Department of Commerce, Geological and Economic Survey	SIGN	2021-04-15
H	B	3291	Making a supplementary appropriation to the Department of Homeland Security, Division of Administrative Services	SIGN	2021-04-15
H	B	3292	Making a supplementary appropriation to the Department of Health and Human Resources, Division of Health	SIGN	2021-04-09
H	B	3293	Relating to single-sex participation in interscholastic athletic events	PASS	2021-04-09
H	B	3294	Relating to unemployment insurance	PEND	2021-04-14
H	B	3295	Making a supplemental appropriation to Division of Human Services and Division of Health Central Office	SIGN	2021-04-15
H	B	3297	Making a supplemental appropriation to the Department of Veterans' Assistance - Veterans Home	SIGN	2021-04-15
H	B	3298	Making a supplemental appropriation to Dept. of Commerce, Dept. of Education, Senior Services and Civil Contingent Fund	SIGN	2021-04-15
H	B	3299	Authorizing Higher Education Rules	PASS	2021-04-10
H	B	3301	Relating generally to property tax increment financing districts	PASS	2021-04-10
H	B	3304	Authorizing the Division of Corrections and Rehabilitation to establish a Reentry and Transitional Housing Program	PASS	2021-04-10
H	B	3308	Relating to increasing number of limited video lottery terminals	PASS	2021-04-09
H	B	3310	Relating to the jurisdiction of the Public Service Commission	PASS	2021-04-09
H	B	3311	Relating to the cost of medical records	PASS	2021-04-09
H	B	3313	Making supplemental appropriation to the Division of Motor Vehicles	SIGN	2021-04-15

H	B	3314	Making supplemental appropriation to West Virginia State Police	SIGN	2021-04-15
H	B	3315	Making supplemental appropriation to Division of Environmental Protection - Oil and Gas Reclamation Fund	SIGN	2021-04-15
H	B	3316	Supplemental appropriation to the Department of Education, State Board of Education	SIGN	2021-04-15
S	JR	4	Incorporation of Churches or Religious Denominations Amendment	ADPT	2021-04-10
S	B	5	Relating to claims arising out of WV Consumer Credit and Protection Act	SIGN	2021-03-29
S	B	9	Continuing Licensed Racetrack Modernization Fund	SIGN	2021-04-02
S	B	10	Modifying racetrack licensing due date	SIGN	2021-04-02
S	B	11	Declaring work stoppage or strike by public employees to be unlawful	BL	2021-03-16
S	B	12	Relating to local health department accountability	SIGN	2021-03-16
S	B	14	Providing for additional options for alternative certification for teachers	SIGN	2021-03-10
S	B	34	Creating exemption to state sales and use tax for rental and leasing of equipment	PEND	2021-04-16
S	B	42	Creating Zombie Property Remediation Act of 2021	SIGN	2021-03-29
S	B	67	Relating to authority of Emergency Medical Services Advisory Council	SIGN	2021-04-07
S	B	78	Relating to rehabilitative spousal support	SIGN	2021-04-15
S	B	80	Allowing for administration of certain small estates by affidavit and without appointment of personal representative	SIGN	2021-04-15
S	B	81	Relating generally to WV Uniform Trust Code	SIGN	2021-04-15
S	B	89	Exempting certain kindergarten and preschool programs offered by private schools from registration requirements	SIGN	2021-04-15

S	B	126	Authorizing Department of Administration to promulgate legislative rules	SIGN	2021-03-19
S	B	156	Authorizing Department of Homeland Security to promulgate legislative rules	SIGN	2021-03-31
S	B	160	Authorizing Department of Revenue to promulgate legislative rules	SIGN	2021-03-31
S	B	182	Authorizing miscellaneous agencies and boards to promulgate legislative rules	SIGN	2021-03-31
S	B	216	Authorizing Department of Commerce to promulgate legislative rules	SIGN	2021-03-16
S	B	263	Permitting online raffles to benefit charitable and public service organizations	PEND	2021-04-16
S	B	270	Providing for collection of tax by hotel marketplace facilitators	SIGN	2021-03-18
S	B	272	Relating to WV Employment Law Worker Classification Act	SIGN	2021-03-19
S	B	275	Relating generally to WV Appellate Reorganization Act of 2021	SIGN	2021-04-08
S	B	277	Creating COVID-19 Jobs Protection Act	SIGN	2021-03-19
S	B	280	Relating to e-commerce modernization	SIGN	2021-03-18
S	B	294	Relating generally to savings and investment programs offered by state	PEND	2021-04-14
S	B	295	Relating generally to economic development loans and loan insurance issued by state	SIGN	2021-03-27
S	B	296	Relating generally to repealing certain rules	SIGN	2021-03-19
S	B	297	Relating generally to modernizing Board of Treasury Investments	PEND	2021-04-14
S	B	305	Providing exemption from consumers sales and service tax for certain aircraft maintenance	SIGN	2021-04-02
S	B	307	Relating generally to in-state tuition rates for certain persons	PEND	2021-04-14

S	B	318	Relating generally to public notice of unclaimed property held by State Treasurer	PEND	2021-04-16
S	B	334	Establishing license application process for needle exchange programs	SIGN	2021-04-15
S	B	335	Relating to WV Invests Grant Program for students at accredited community and technical college	SIGN	2021-04-10
S	B	338	Creating Fire Service Equipment and Training Fund	SIGN	2021-03-19
S	B	343	Authorizing DMV to process online driver's license or identification card change of address	PEND	2021-04-14
S	B	344	Relating to credit for qualified rehabilitated buildings investment	PEND	2021-04-16
S	B	345	Expanding alcohol test and lock program to include offenders with drug-related offense	SIGN	2021-03-16
S	B	346	Authorizing DMV use electronic means when providing notice for licensees and vehicle owners	SIGN	2021-04-15
S	B	356	Allowing for written part of drivers' exam given in high school drivers' education course	SIGN	2021-04-07
S	B	358	Removing prohibition on ATMs located in area where racetrack video lottery machines are located	SIGN	2021-03-16
S	B	359	Informing landowners when fencing that may contain livestock is damaged due to accident	PEND	2021-04-16
S	B	361	Extending supervision for conviction of soliciting minor and using obscene matter with intent to seduce minor	PEND	2021-04-14
S	B	368	Authorizing DEP to develop Reclamation of Abandoned and Dilapidated Properties Program	PEND	2021-04-16
S	B	372	Providing greater discretion to WV Board of Medicine to approve graduate clinical training	SIGN	2021-03-19
S	B	374	Increasing threshold for bid requirement to \$10,000 to be consistent with other state agencies	SIGN	2021-04-15
S	B	375	Relating to county boards of education policies for open enrollment	SIGN	2021-04-19
S	B	376	Removing obsolete provisions regarding DOH standards for studded tires and chains	PEND	2021-04-14

S	B	377	Relating to extension for boil water advisories by water utility or public service district	SIGN	2021-04-15
S	B	387	Relating to drug screening of applicants for cash assistance	PEND	2021-04-13
S	B	389	Relating to State Resiliency Office responsibility to plan for emergency and disaster response, recovery, and resiliency	SIGN	2021-04-15
S	B	390	Reorganizing Health Care Authority under DHHR and clarifying responsibilities for all-payer claims database	SIGN	2021-04-07
S	B	392	Creating penalty for impersonating law-enforcement officer or official	SIGN	2021-04-19
S	B	397	Relating to health care provider tax	PEND	2021-04-14
S	B	398	Limiting eligibility of certain employers to participate in PEIA plans	PEND	2021-04-16
S	B	401	Relating to WV Consumer Credit and Protection Act	PEND	2021-04-14
S	B	404	Modifying well work permits issued by DEP Office of Oil and Gas	SIGN	2021-03-27
S	B	419	Redefining "firearm" to match federal code	PEND	2021-04-16
S	B	421	Authorizing Workforce West Virginia to hire at-will employees	SIGN	2021-04-15
S	B	429	Exempting Division of Emergency Management from Purchasing Division requirements for certain contracts	SIGN	2021-04-15
S	B	431	Relating to school attendance notification requirements to DMV	SIGN	2021-04-07
S	B	434	Requiring training for law-enforcement officers responsible for investigating crimes of sexual assault	PEND	2021-04-14
S	B	435	Requiring county superintendents to authorize certain school principals or administrators at nonpublic schools to issue work permits for enrolled students	SIGN	2021-04-07
S	B	437	Extending contingent increase of tax rate on certain eligible acute care hospitals	SIGN	2021-04-15
S	B	439	Allowing use or nonuse of safety belt as admissible evidence in civil actions	SIGN	2021-04-19

S	B	458	Relating to possession of firearms by individuals during state of emergency	PEND	2021-04-16
S	B	459	Relating to return of member's paid contributions to heirs after member's death under certain circumstances	SIGN	2021-03-16
S	B	460	Relating to Deputy Sheriff Retirement System Act	PEND	2021-04-13
S	B	463	Consolidating position of Inspector General of former Workers' Compensation Fraud and Abuse Unit and position of Director of Insurance Fraud Unit	SIGN	2021-04-15
S	B	464	Requiring composting of organic materials and commercial composting products comply with WV Fertilizer Law	PEND	2021-04-16
S	B	466	Relating generally to appraisal management companies	PEND	2021-04-13
S	B	469	Permitting and establishing requirements for appearance by video for purpose of notarial acts	SIGN	2021-03-30
S	B	470	Limiting release of certain personal information maintained by state agencies	PEND	2021-04-16
S	B	472	Updating criteria for regulating certain occupations and professions	SIGN	2021-04-19
S	B	478	Permitting use of established federal marketplace programs to purchase supplies	PEND	2021-04-16
S	B	479	Relating to WV veterans service decoration and WV Service Cross	SIGN	2021-04-19
S	B	483	Allowing oaths be taken before any person authorized to administer oaths	SIGN	2021-04-19
S	B	486	Relating to powers and duties of Chief Technology Officer	SIGN	2021-04-15
S	B	488	Relating to distributing hotel occupancy tax to convention and visitor's bureaus	PEND	2021-04-13
S	B	492	Establishing program for bonding to reclaim abandoned wind and solar generation facilities	PEND	2021-04-16
S	B	494	Authorizing transfer of moneys from Insurance Commission Fund to Workers' Compensation Old Fund	PEND	2021-04-13
S	B	496	Relating to punishment for second or third degree felony	SIGN	2021-04-19

S	B	502	Providing lifetime hunting, fishing, and trapping license to residents, adopted, and foster children under 15	PEND	2021-04-16
S	B	514	Providing criteria for Natural Resource Commission appointment and compensation	SIGN	2021-04-15
S	B	517	Relating to sunset provisions of legislative rules	SIGN	2021-04-02
S	B	518	Relating to grounds for administrative dissolution of certain companies, corporations, and partnerships	SIGN	2021-04-15
S	B	521	Extending licensure renewal term of certain private investigators, security guards, and associated firms	SIGN	2021-04-15
S	B	523	Correcting improper code references	SIGN	2021-03-29
S	B	529	Correcting improper citation relating to DMV registration	SIGN	2021-04-15
S	B	532	Limiting claims for state tax credits and rebates	PEND	2021-04-16
S	B	534	Permitting Economic Development Authority to make working capital loans from revolving loan fund capitalized with federal grant funds	PEND	2021-04-16
S	B	537	Relating generally to kidnapping	PEND	2021-04-16
S	B	542	Relating generally to public electric utilities and facilities fuel supply for existing coal-fired plants	PEND	2021-04-16
S	B	562	Relating to juvenile competency proceedings	PASS	2021-04-10
S	B	577	Exempting certain fire departments from licensure requirements for providing rapid response services	SIGN	2021-04-19
S	B	587	Making contract consummation with state more efficient	SIGN	2021-04-15
S	B	613	Adding classification and base salaries of certain civilian employees of State Police Forensic Laboratory	PEND	2021-04-16
S	B	626	Updating regulation for purchase of automobile catalytic converters	SIGN	2021-04-19
S	B	634	Requiring training of certain officers for persons with autism spectrum disorder	SIGN	2021-04-19

S	B	636	Requiring certain history and civics courses be taught in schools	PEND	2021-04-16
S	B	641	Allowing counties to use severance tax proceeds for litter cleanup programs	PEND	2021-04-16
S	B	642	Requiring legal advertisements by State Auditor be posted to central website	PEND	2021-04-16
S	B	644	Exempting certain persons pursuing degree in speech pathology and audiology from license requirements	SIGN	2021-04-15
S	B	651	Allowing county boards of education to publish financial statements on website	SIGN	2021-04-19
S	B	655	Eliminating sunset and legislative audit provisions for certain PSC rules	PEND	2021-04-16
S	B	657	Relating to free expression on state institution of higher education campuses	PASS	2021-04-09
S	B	658	Requiring sheriff's departments to participate and utilize Handle With Care Program for trauma-inflicted children	PEND	2021-04-16
S	B	660	Providing for cooperation between law-enforcement agencies and military authorities	PEND	2021-04-16
S	B	661	Permitting retailers to assume sales or use tax assessed on tangible personal property	PEND	2021-04-16
S	B	668	Creating Psychology Interjurisdictional Compact	PEND	2021-04-13
S	B	671	Appointing Director of Office of Emergency Medical Services	PEND	2021-04-16
S	B	673	Relating to venue for bringing civil action or arbitration proceedings under construction contracts	PEND	2021-04-13
S	B	674	Clarifying that unpaid restitution does not preclude person from obtaining driver's license	PEND	2021-04-16
S	B	677	Relating generally to miners' safety, health, and training standards	PASS	2021-04-09
S	B	680	Allowing State Superintendent of Schools define classroom teachers certified in special education	SIGN	2021-04-19
S	B	684	Adding Curator of Division of Arts, Culture, and History as ex officio voting member to Library Commission	PEND	2021-04-16

S	B	693	Updating certain definitions and terms used in WV Personal Income Tax Act	SIGN	2021-04-13
S	B	695	Providing procedures for decreasing or increasing corporate limits by annexation	PEND	2021-04-16
S	B	702	Relating to involuntary hospitalization, competency, and criminal responsibility of persons charged or convicted of certain crimes	PASS	2021-04-10
S	B	713	Relating generally to inmate good time	SIGN	2021-04-19
S	B	714	Relating to physician assistant practice act	PEND	2021-04-16
S	B	717	Supplemental appropriation from General Revenue to WV Community and Technical College Education, Control Account	SIGN	2021-04-15
S	B	718	Relating generally to Coal Severance Tax Rebate	PEND	2021-04-16

Corrected Article and Section Citations

The following sections citations have been created as new sections in the West Virginia Code, but in each case, two different bills have designated the same new citation for different purposes. The Clerk of the House of Delegates has the authority to renumber sections when conflicts arise in this manner. The Clerk has made the changes shown for the following Acts.

§11 - 15 - 9 t*

S B 305 Providing exemption from consumers sales and service tax for certain aircraft maintenance.

Remains §11-15-9t*

H B 2499 Tax reduction for arms and ammo manufacturing.

Redesignated **§11-15-9u***

§16 – 63* - 1, §16 – 63* - 2, §16 – 63*- 3

H B 2500 Create an act for Statewide Uniformity for Auxiliary Container Regulations.

Remains §16-63*-1, §16-63*-2, §16-63*-3

S B 334 Establishing license application process for needle exchange programs.

Redesignated **§16-64*-1, §16-64*-2, §16-64*-3**

§24 - 1 - 1 c*

H B 3310 Relating to the jurisdiction of the Public Service Commission.

Remains §24-1-1c*

S B 542 Relating generally to public electric utilities and facilities fuel supply for existing coal-fired plants.

Redesignated **§24-1-1d***