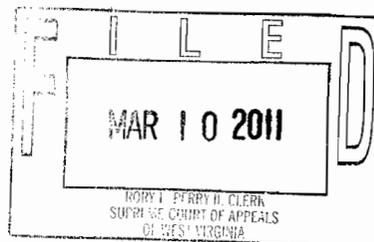


# ARGUMENT DOCKET

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**DANNY FISCHER and  
BRITTANEY FISCHER,**

**Appellants, Plaintiffs below,**



v.

**NO. 35677**

**SWVA, INC., in its capacity as Plan Administrator  
and Sponsor of the SWVA, Inc. Employee Health Care Plan,  
and SWVA, INC. EMPLOYEE HEALTH CARE PLAN,**

**Appellees, Defendants below.**

## **REPLY BRIEF OF APPELLANTS DANNY FISCHER AND BRITTANEY FISCHER**

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**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
TABLE OF AUTHORITIES .....	ii
DISCUSSION OF LAW .....	1
1. The Plan’s limitations period, with its requirement that third party liability be determined initially, foreclosed Fischer’s claim before the claim accrued.....	1
A. Fischer had to determine the amount of third party liability in order to satisfy the Plan’s requirements .....	2
B. Under West Virginia procedural law and the Fourth Circuit’s rationale in <i>White v. Sun Life Assurance Co. of Canada</i> , the trial court erred in granting summary judgment against Fischer .....	4
RELIEF PRAYED FOR .....	5

**TABLE OF AUTHORITIES**

**Cases:**

*Metropolitan Life Ins. Co. v. Glenn*,  
128 S.Ct. 2343, 171 L.Ed.2d 299 (2008) ..... 1

*White v. Sun Life Assurance Co. of Canada*,  
488 F.3d 240 (4<sup>th</sup> Cir. 2007) ..... 4,5

**Regulations:**

29 C.F.R. § 2560-503-1..... 4

## DISCUSSION OF LAW

1. **The Plan's limitation period, with its requirement that third party liability be determined initially, foreclosed Fischer's claim before the claim accrued.**

SWVA's brief neglects certain key points critical to a logical examination of the issue before the Court. As a matter of law, SWVA appears to agree that, though a plan may designate a short limitations period, that period must be reasonable and must not work to foreclose a claim before it accrues.

Following that concession, however, SWVA erroneously argues that the reasonableness of the Plan's ninety-day limitation period is not at issue. On the contrary, in view of the Plan's peculiar requirements for third party liability claims, the length of the limitations period is an important issue.

Of course, the trial court did not consider Fischer's arguments about the harsh effect of the unusual third party liability benefit requirements in the context of the short limitations period. Thus, SWVA's argument may be seen for what it really is – an attempt to supply a rationale that the trial court never adopted.

Moreover, the trial court did not articulate a standard of review, nor give consideration to the Plan administrator's conflict of interest – as both funding and deciding benefit claims, the very situation that the Supreme Court held in *Metropolitan Life Ins. Co. v. Glenn*<sup>1</sup> supports discovery in a claim for benefits – as a factor at all. The trial court simply

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<sup>1</sup> 128 S.Ct. 2343, 171 L.Ed.2d 299 (2008).

adopted an order prepared by SWVA that summed up the case as a simple limitations period issue notwithstanding significant gaps in analysis.

SWVA's argument needlessly complicates a very simple issue. Taking its cue from the trial court's Order – which it prepared – SWVA argues the limitations period issue detached from the facts as a pristine question of calendaring. The facts here are more nuanced though the legal issue is no more complicated than that this: did the Plan's limitation period, as applied with its third party liability requirements on Fischer, operate to foreclose Brittany Fischer's claims before she could perfect her claim? The answer is that it did.

**A. Fischer had to determine the amount of third party liability in order to satisfy the Plan's requirements.**

Instead of the typical subrogation provisions, SWVA included a peculiar provision that excludes payments in cases such as this one, where Brittany Fischer is injured in an accident by a third party. The provision then permits payment, but in a measure determined by the third party recovery.<sup>2</sup>

(SWVA mischaracterizes this point in its response by arguing that "No 'investigation' was needed to determine whether a third party was liable for causing the accident."<sup>3</sup> But the purpose of the investigation was to determine, consistent with the Plan's

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<sup>2</sup> SWVA0068-0069.

<sup>3</sup> Brief for Appellees at 13, footnote 35.

requirement, whether assets existed in addition to the Ohio minimum limits of liability coverage, not to verify that a third party was liable for the accident.)

SWVA chose to include this language in the Plan and it presumably saves the fund expenditures in accident cases. In this case, SWVA refused to pay Brittaney Fischer's medical expenses, citing the third party exclusion. SWVA required information from her attorneys to determine compliance with the third party provision.<sup>4</sup>

SWVA's counsel made clear the Plan's intention on enforcing the third party exclusion by requiring information on the third party's assets even if suit were required.<sup>5</sup> As her medical bills mounted and collection activity ensued, Fischer's attorneys attempted to comply with the plan's requirements.

Since the accident occurred in Ohio, Fischer had to retain local counsel in that jurisdiction. The defendant's insurance coverage in the third party action had to be determined. The insurance carrier for the defendant retained counsel for their insured. To satisfy SWVA's requirements, the Fischers had to file suit in Ohio.<sup>6</sup>

The dilemma imposed in view of Brittaney Fischer's accident and the third party liability exclusion became apparent to her counsel. On August 29, 2007, her counsel explained that the third party action was not progressing quickly enough in view of the

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<sup>4</sup> SWVA0204.

<sup>5</sup> SWVA0227-0230.

<sup>6</sup> *Fischer v. Vanperson*, 08-CI-000100, Court of Common Pleas of Ross County, Ohio.

Plan's 90-day limitation following appeals.<sup>7</sup> Significantly, SWVA's counsel evidently agreed since SWVA extended the deadline, but only until May 28, 2008.

To file suit, Fischer was required under the Plan provisions to determine the viability of claims and recovery against the third party. In good faith, Fischer filed suit and undertook to investigate assets and the potential for recovery. The Plan administrator arbitrarily imposed a deadline in contravention of the Plan's third party liability requirements. Fischer filed her claim for benefits as soon as practicable given the Plan's requirements – which it repeatedly asserted – and even extended the limitations period once in recognition of the very problem Fischer complains of.

Whether considered under state or federal principles of benefit accrual, SWVA's conduct is both arbitrary and violates its own procedures. Furthermore, the application of the rules in this manner violates the applicable notice and reasonableness requirements.<sup>8</sup> Finally, in view of the trial court's failure to consider the pertinent issue, including the standard of review and conflict of interest as a factor, the decision is procedurally defective.

**B. Under West Virginia procedural law and the Fourth Circuit's rationale in *White v. Sun Life Assurance Co. of Canada*, the trial court erred in granting summary judgment against Fischer.**

Fischer has previously explained that because the federal court remanded this action to the Circuit Court of Cabell County, state-law procedural rules govern its adjudication.

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<sup>7</sup> SWVA0447-0448.

<sup>8</sup> 29 C.F.R. § 2560.503-1

Thus, West Virginia law governs whether summary judgment in SWVA's favor was appropriate.

The circuit court erred in granting SWVA's motion for summary judgment because Fischer did not have an adequate opportunity to conduct discovery and the existence of genuine issues of material fact precluded SWVA's right to judgment as a matter of law.

Whether under West Virginia procedural law or the Fourth Circuit's rationale in *White v. Sun Life Assurance Co. of Canada*,<sup>9</sup> which found that a plan cannot "start the clock on a claimant's cause of action" before the claim is able to file suit[,] "<sup>10</sup> this Court should reverse the circuit court's ruling.

Finally, Fischer has exhausted the remedies imposed by the Plan's third party liability requirements, and there is nothing left for the Plan administrator to do. In view of the futility of remanding this case in recognition of that fact, Fischer asks that this Court reverse the trial court's decision with instructions to enter judgment in favor of Fischer.

#### **RELIEF PRAYED FOR**

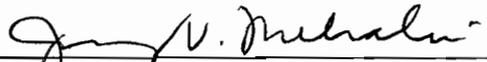
Appellants Danny Fischer and Brittany Fischer pray that this Honorable Court reverse the January 6, 2010 Order of the Circuit Court of Cabell County, West Virginia, and remand this action to the Circuit Court of Cabell County with instructions to enter judgment in their favor.

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<sup>9</sup> 488 F.3d 240 (4th Cir. 2007).

<sup>10</sup> *Id.* at 242.

**DANNY FISCHER and  
BRITTANEY FISCHER**  
By Counsel



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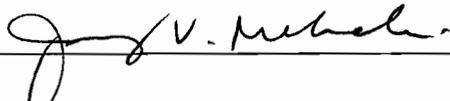
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CERTIFICATE OF SERVICE

I, Jeffrey V. Mehalic, hereby certify that on this 10th day of March, 2011, I served the foregoing **REPLY BRIEF OF APPELLANTS DANNY FISCHER AND BRITTANEY FISCHER** upon the following counsel of record by depositing true copies thereof in the United States mail, postage prepaid, addressed to them at their last known office addresses as listed below:

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