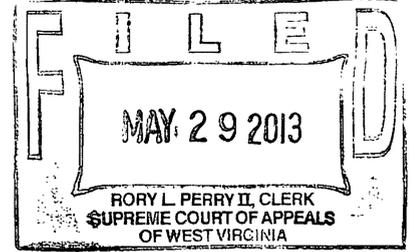


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 13-0562



STATE OF WEST VIRGINIA ex rel.
SKYLINE CORPORATION and
AAA MOBILE HOMES, INC.
OF NEW MARTINSVILLE,

Petitioners and
Defendants Below,

v.

(Civil Action No. 12-C-28)
Pleasants County Circuit Court

THE HONORABLE TIM SWEENEY,
Judge of the Circuit Court of Pleasants County,
West Virginia; and THOMAS R. LIKENS and
LORI LIKENS,

Respondents and
Plaintiffs Below.

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

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I. QUESTIONS PRESENTED

1. Does West Virginia Code § 21-9-11a, as amended, require a Plaintiff to file an administrative complaint with the West Virginia Manufactured Housing Construction and Safety Standards Board as a condition precedent to filing a civil action in Circuit Court when the Plaintiffs do not allege an imminent threat of property or personal injury?

2. Does a Complaint devoid of any meaningful allegations of fact satisfy the pleading requirements of the West Virginia Rules of Civil Procedure?

II. STATEMENT OF THE CASE

On September 4, 2012, Plaintiffs filed Civil Action 12-C-28 in the Circuit Court of Pleasants County, West Virginia. The case was assigned to the Honorable Timothy Sweeney. Appendix (“App.”) at pages 4-11.

The Complaint alleges negligent design, construction and installation of the plaintiffs manufactured home which was constructed by Skyline Corporation (“Skyline”) and purchased by them from AAA Homes, Inc. of New Martinsville (“AAA Homes”) on April 28, 2010. See Complaint generally and at paragraph 4. App. at page 7. Plaintiffs also alleged breach of contract, breach of express and implied warranties, destruction of property, unjust enrichment and “Additional Matters.”¹ Plaintiffs do not allege that they filed an administrative complaint with the West Virginia Manufactured Housing Construction and Safety Standards Board.

On October 8, 2012, Skyline and AAA Homes, by their counsel, moved to dismiss all claims asserted by the plaintiffs against them in Civil Action No. 12-C-28 pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and West Virginia Code § 21-9-11a. App. At 12-19. The Plaintiffs did not file any response to the motion to dismiss.

¹ Count Seven alleging “additional matters” merely reserves the right to raise additional claims in the future.

The Court heard oral argument on the motion on December 19, 2012. A transcript of the proceedings is found at App. 20-31. Plaintiffs appeared by M. Paul Marteney, their counsel. Skyline Corporation appeared by its Counsel, John R. Teare, Jr. and Spilman Thomas & Battle, PLLC. AAA Homes appeared by Jonathan J. Jacks and Pullin, Fowler, Flanagan, Brown and Poe, PLLC, its counsel.²

Plaintiffs' counsel admitted in open Court that the plaintiffs had not filed an administrative complaint before filing their civil action. App. at p. 27. Skyline informed the Court that it had confirmed with the West Virginia Division of Labor that the plaintiffs did not file an administrative complaint. App. at p. 28.

At the conclusion of the hearing, the Court reserved ruling and advised counsel for the plaintiffs that he could file a response to the motion to dismiss within thirty days and further ruled that defendants could file a reply if deemed necessary. App. at p. 29.

Plaintiffs did not file any response to the motion to dismiss within thirty days of oral argument and did not seek an extension of time to file a response. On February 5, 2013, more than three weeks after the time for Plaintiffs to file a response had expired, Skyline Corporation informed the Court that no response had been filed and that the motion was ripe for ruling. On March 19, 2013, AAA Homes also sent notice to the Court that the motion was ripe for ruling.

On March 28, 2013, more than seven weeks after Skyline informed the Court that the matter was ripe for decision and without further direction by the Court; the Plaintiffs filed and served proposed findings of fact and conclusions of law. Counsel for Skyline contacted the Court's staff to determine whether the Court wanted Skyline to file a proposed Order. Counsel

² Pullin, Fowler, Flanagan, Brown and Poe, PLLC entered its appearance for AAA Homes of New Martinsville after the filing of the motion to dismiss.

for Skyline was informed that he could file a proposed Order. Defendants filed and served a joint proposed Order with Findings of Fact and Conclusions of Law on April 18, 2013.

On April 25, 2013 the Circuit Court entered an Order denying defendants' motion to dismiss. App. at 1-2. In relevant part, the Circuit Court held that the administrative remedies "are merely optional at the election of the manufactured housing owner and are not mandatory." App. at p. 1. The Circuit Court also held that the Complaint was sufficient on its face to survive Rule 12(b)(6) scrutiny. App. at p. 2.

On April 30, 2013, Skyline filed its motion for stay to pursue this extraordinary writ. On May 3, 2013, AAA Homes filed a response in support of the motion for stay. All counsel entered into a stipulation of stay on May 8, 2013 which was filed with the Circuit Court.

III. SUMMARY OF ARGUMENT

1. The Circuit Court committed plain error and exceeded its lawful jurisdiction by ruling that the provisions of West Virginia Code § 21-9-11a were merely optional and not mandatory. West Virginia Code §21-9-11a was amended in 2011 to make clear that the Legislature intended to make the filing of an administrative complaint with the West Virginia Manufactured Housing Construction and Safety Standards Board a condition precedent to filing a civil action in Circuit Court.

2. Plaintiffs' Complaint which is devoid of any meaningful allegations of fact and generally does no more than recited causes of action does not satisfy the pleading requirements of the West Virginia Rules of Civil Procedure. Essential material facts must appear on the face of the complaint. *Fass v. Newsco Well Service, Ltd.*, 177 W. Va. 50, 52, 350 S.E.2d 562, 563 (per curiam)(1986), citing *Greschler v. Greschler*, 71 A.D.2d 322, 325, 422 N.Y.S.2d 718, 720 (1979). "The complaint must set forth enough information to outline the elements of a claim or

permit inferences to be drawn that these elements exist” and “more detail is required than the bald statement that the plaintiff has a valid claim of some type against the defendant.” The West Virginia Rules of Civil Procedure clearly contemplate some factual statement in support of the claim. *Fass* at 52-53, 350 S.E.2d at 563-634 (internal citations omitted). Accord, *Sticklen v. Kittle*, 168 W. Va. 147, 164, 287 S.E.2d 148, 157-58 (1981). The Plaintiffs’ Complaint does not contain even the most basic of factual allegations to put the Defendants or the Court on notice of the nature of the Plaintiffs’ claims.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

While Skyline and AAA Homes believe that the controlling statute, and the legislative intent of the statute, are clear and therefore oral argument should be unnecessary. However, the interpretation of this particular statute, as amended, presents a matter of first impression for the Court. Accordingly, argument pursuant to Rule 20 might be appropriate. Skyline and AAA Homes neither request nor object to oral argument.

V. ARGUMENT

- 1. West Virginia Code § 21-9-11a was amended in 2011 to make clear that the Legislature intended to make the filing of an administrative complaint with the West Virginia Manufactured Housing Construction and Safety Standards Board a condition precedent to filing a civil action in Circuit Court.**

West Virginia Code § 21-9-11a was amended by Senate Bill No. 439 on March 12, 2011 and was to be effective from passage. App. at pp. 32-38. The Governor signed S.B. No. 439 on March 31, 2011. *Id.* The legislation amended West Virginia Code §21-9-11a to provide, in relevant part:

No purchaser or owner of a manufactured home may file a civil action seeking monetary recovery or damages for claims related to or arising out of the manufacture, acquisition, sale or installation of the manufactured home until the expiration of ninety days after the consumer or owner has filed a written complaint with the board. The board has a period of ninety days, commencing

with the date of filing of the complaint, to investigate and take administrative action to order the correction of defects in the manufacture or installation of a manufactured home. This period of exclusive administrative authority may not prohibit the purchaser or owner of the manufactured home from seeking equitable relief in a court of competent jurisdiction to prevent or address an immediate risk of personal injury or property damage. The filing of a complaint under this article shall toll any applicable statutes of limitation during the ninety-day period but only if the applicable limitation period has not expired prior to the filing of the complaint.

The stated legislative purpose of the Bill was “clarifying that the filing of a complaint with the state regulatory board is a prerequisite for the filing of a lawsuit.”

Defendants suggest that the language of the statute is clear: “No purchaser or owner of a manufactured home may file a civil action seeking monetary recovery or damages for claims related to or arising out of the manufacture, acquisition, sale or installation of the manufactured home until the expiration of ninety days after the consumer or owner has filed a written complaint with the board.” It is not necessary for the Circuit Court to interpret that statutory language, simply apply it. “Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” Syllabus point 2, *Griffith v. Frontier West Virginia, Inc.*, 228 W. Va. 277, 719 S.E.2d 747 (2011) Syllabus point 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). A straightforward reading of the statutory language, when applied to the undisputed facts of this case, requires that the plaintiff’s civil action be dismissed. The plaintiffs did not satisfy a clear statutory condition precedent to the filing of their civil action. The Circuit Court acted beyond its lawful authority when it permitted the plaintiffs to pursue their cause of action when they had not complied with the statutory condition precedent of filing an administrative complaint with the West Virginia Manufactured Housing Construction and Safety Standards Board.

If Skyline and AAA Homes are incorrect in their reading of the statutory provision, the Legislature was abundantly clear in its expression of the reason it amended West Virginia Code § 21-9-11a; it sought to make clear “that the filing of an administrative complaint with the state regulatory board is a prerequisite for the filing of a lawsuit.” App. at p. 32. “The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syllabus point 4, *Mace v. Mylan Pharmaceuticals Inc.*, 227 W. Va. 666, 714 S.E.2d 223 (2011); Syllabus point 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975).” The legislative intent is clear from the express statutory language: “No purchaser or owner of a manufactured home may file a civil action seeking monetary recovery or damages for claims related to or arising out of the manufacture, acquisition, sale or installation of the manufactured home until the expiration of ninety days after the consumer or owner has filed a written complaint with the board.” The Preamble to SB 439 reinforces that clarity by stating that the amendment was “to clarify[y] that the filing of a complaint with the state regulatory board is a prerequisite for the filing of a lawsuit.” App. at p. 33.

The Circuit Court of Pleasants County failed to give effect to the clear language of the statute and the legislative intent when it ruled that the filing of an administrative complaint under the statute was “merely optional at the election of the manufactured home owner.” App. at p. 1.

Senate Bill 439 does not present a new concept in jurisprudence. It has long been the general rule that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the Courts will act. Syllabus point 1, *Cowie v. Roberts*, 173 W.Va. 64, 312 S.E.2d 35 (1984); Syllabus point 1, *Daurette v. Traders Federal Sav. & Loan Ass'n.*, 143 W. Va. 674, 104 S.E.2d 320 (1958).

Plaintiffs may argue to this Court that they seek certain relief which is beyond the authority of the administrative agency to grant. Skyline does not dispute this issue; however this does not alter the legal principle involved. West Virginia Code §21-9-11a recognizes that there are circumstances where resort to the administrative remedy is not exclusive. For instance, the Code provides that the period of exclusive administrative remedy may not prohibit the purchaser or owner of the manufactured home from seeking equitable relief in a court of competent jurisdiction to prevent or address an immediate risk of personal injury or property damage. In further recognition that there may be claims related to or arising out of the manufacture, acquisition, sale or installation of the manufactured home for which the administrative agency does not have jurisdiction, such as the damage of shrubbery during installation and attorney's fees, the Legislature provided for the tolling of the statute of limitations to preserve any claims for which the statute of limitations had not already expired³ when the administrative complaint is filed.

The Plaintiffs did not comply with a mandatory condition precedent prior to the filing of their civil action. The statutory requirement and administrative remedy provides the Plaintiffs with an expedited procedure to compel compliance with the West Virginia Manufactured Housing Construction and Safety Standards Act, including an unbiased inspection, repair and re-inspection process backed by the power of the administrative agency to issue fines, revoke licenses and hire licensed contractors to be paid out of the consumer recovery fund established by the Division of Labor. *See, Conseco Finance Servicing Corp. v. Myers*, 211 W. Va. 631, 567 S.E.2d 641 (2002). Of course, this administrative process does not prevent the Plaintiffs and the Defendants from resolving any remaining disputes without filing suit.

³ For instance, the filing of an administrative complaint would not toll the statute of limitations on Count Five of the Plaintiffs' Complaint because the damage was done, if at all, when the home was delivered and installed more than two years prior to the filing of their civil action.

The Legislature provided a limited period of exclusive remedy and an appropriate administrative remedy for consumers such as the Plaintiffs in this case. The Legislature also mandated that consumers must resort to the administrative remedy, unless an imminent danger exists, before resorting to civil litigation. The Circuit Court undermined the legislative purpose of West Virginia Code § 21-9-11a by holding that the mandatory statutory condition precedent of resort to the administrative remedy was “merely optional.”

2. Plaintiffs’ Complaint which is devoid of any meaningful allegations of fact, and generally does no more than recited causes of action, does not satisfy the pleading requirements of the West Virginia Rules of Civil Procedure.

This Court has held that essential material facts to support a civil action must appear on the face of the complaint. *Fass v. Nowasco Well Service, Ltd.*, 177 W. Va. 50, 52, 350 S.E.2d 562, 563 (*per curiam*)(1986), citing *Greschler v. Greschler*, 71 A.D.2d 322, 325, 422 N.Y.S.2d 718, 720 (1979). “The complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist” and “more detail is required than the bald statement that the plaintiff has a valid claim of some type against the defendant.” The West Virginia Rules of Civil Procedure and the precedent of this Court clearly contemplate some factual statement in support of the plaintiffs’ claims. *Fass* at 52-53, 350 S.E.2d at 563-634 (internal citations omitted). *Accord, Sticklen v. Kittle*, 168 W. Va. 147, 164, 287 S.E.2d 148, 157-58 (1981).

Skyline and AAA Homes understand that this issue may become moot if the Court grants their requested relief based upon the application of West Virginia Code § 21-9-11a. Defendants presents this issue to preserve all grounds that they used to seek dismissal in the Circuit Court and to present this issue and as an alternative basis for relief in the event that this Court holds

that the filing of an administrative complaint is not a condition precedent to the filing of a civil action.

A review of the plaintiff's complaint reveals precious few allegations of fact aside from allegations in support of venue:

- On April 28, 2010, plaintiffs purchased a home from AAA Homes of New Martinsville which was manufactured by Skyline. Complaint at paragraph 4, App. at p. 7.
- "Defendant AAA Homes contracted to provide site preparation work, including grading and foundation building, and during said work intentionally or negligently destroyed existing landscaping and heirloom plant belonging to Plaintiffs." Complaint at paragraph 23, App at p. 9.

The remainder of the Complaint is limited to legal conclusions such as:

- The home "was negligently designed and built by Skyline to the extent that it was not suitable for its intended purpose, and was defective when delivered." Complaint at paragraph 6, App. at p. 7.
- Skyline and AAA Homes issued an express warranty for the home, which they failed to honor." Complaint at paragraph 8, App. at p. 8.
- "Defendants were paid all sums due from Plaintiffs despite the defective product and services delivered, and were unjustly enriched thereby." Complaint at paragraph 25, App. at p. 9.

The allegations are so vague that the Circuit Court noted that the Complaint "may require clarification as to the specifics of plaintiff's claims, including dates of discovery for purposes of potential limitation of actions defenses" but concluded that such clarifications are the proper subject of a motion for more definite statement "for the purposes of addressing the defendants' reasonable concerns regarding these matters." App. at p. 2.

Skyline and AAA Homes respectfully suggest that a civil complaint that is so vague that a Court cannot tell if the action is time barred is so deficient that it should not be permitted to proceed. Permitting and condoning the filing of such thoroughly deficient Complaints, thereby compelling defendants to invest time, money and other resources to determine whether the lawsuit is timely filed, does not promote judicial economy and provides no incentive for counsel to draft appropriately detailed complaints. Defendants ask this Court to hold that a Complaint which does not put the defendants or the Court on reasonable notice of the basis for the civil action must be dismissed.

VI. CONCLUSION

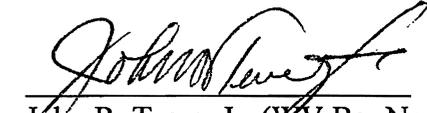
For the reasons discussed herein, Skyline Corporation and AAA Homes respectfully request that this Court issue a Rule to Show Cause why the Circuit Court should not give full effect to the legislative revision to West Virginia Code § 21-9-11a and, after full consideration of the issue Skyline and AAA Homes request that this Court grant a writ of mandamus directing the Circuit Court to dismiss Civil Action No. 12-C-28 pending in the Circuit Court of Pleasants County based upon plaintiffs' admitted failure to comply with the exclusive remedy provision which is a condition precedent to filing a civil action.

Skyline and AAA Homes, in the alternative, respectfully request that this Court issue a Rule to Show Cause directing the Circuit Court to show, if it can, how the Complaint in this civil action meets the minimum pleading requirements of the West Virginia Rules of Civil Procedure and, after full consideration, hold that the filing of a civil action without any meaningful allegations of fact to support any of the causes of action in the case below does not comply with the notice pleading requirements of the West Virginia Rules of Civil Procedure and prohibit the

enforcement of the Circuit Court's Order which denied defendants' motion to dismiss based upon the Plaintiffs' failure to satisfy minimum pleading requirements.

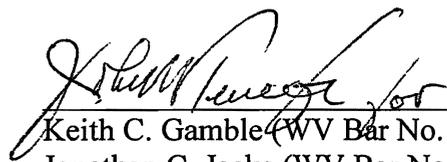
SKYLINE CORPORATION

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OF NEW MARTINSVILLE

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA ex rel.
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**(Civil Action No. 12-C-28)
Pleasants County Circuit Court**

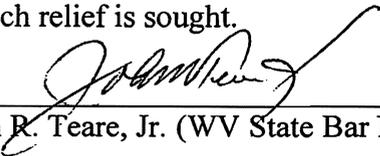
THE HONORABLE TIM SWEENEY,
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VERIFICATION

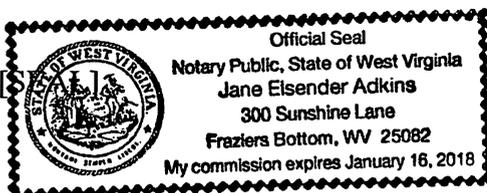
I, John R. Teare, Jr., verify that I am counsel for Skyline Corporation in this matter pending before the Circuit Court of Pleasants County, West Virginia, and styled Thomas R. Likens, and Lori Likens v. Skyline Corporation and AAA Mobile Homes, Inc. of New Martinsville, Civil Action No. 12-C-28.

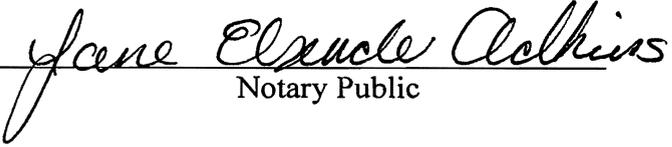
I further verify that the information contained in **Petition for Writ of Mandamus and/or Prohibition** and Appendix thereto filed herewith is true and that I am familiar with the proceedings leading to the order from which relief is sought.



John R. Teare, Jr. (WV State Bar No. 5547)

Subscribed and sworn before me this 30th day of May, 2013.





Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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**STATE OF WEST VIRGINIA ex rel.
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Plaintiffs Below.**

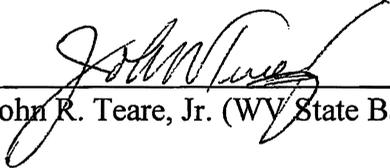
CERTIFICATE OF SERVICE

I, John R. Teare, Jr., counsel for Defendant Skyline Corporation, do hereby certify that a true and exact copy of the foregoing "Petition for Writ of Mandamus and/or Prohibition" has been served upon counsel of record via regular United States mail this 29th day of May, 2013, and addressed to the following:

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