

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Meral, Inc.,
A West Virginia Corporation.**

Plaintiff.

v.

**Civil Action No. 17-C-303
Judge Swope**

**Brewster, Morhous, Cameron, Caruth,
Moore, Kersey & Stafford, PLLC,
A West Virginia professional limited liability company;
Lawrence E. Morhous
And Jerry J. Cameron,**

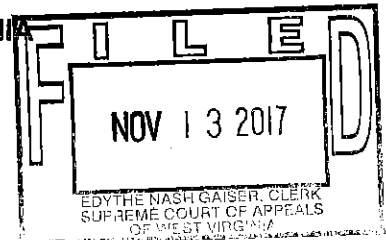
Defendants.

**DEFENDANT BREWSTER, MORHOUS, CAMERON, CARUTH,
MOORE, KERSEY & STAFFORD, LAWRENCE E. MORHOUS, AND JERRY J.
CAMERON'S REPLY IN OPPOSITION TO MERAL, INC.'S MOTION TO
REFER ACTION TO THE BUSINESS COURT DIVISION**

COME NOW Defendants Brewster, Morhous, Cameron, Caruth, Moore, Kersey & Stafford ("Brewster Morhous"), Lawrence E. Morhous ("Morhous"), and Jerry J. Cameron ("Cameron") (collectively "Defendants"), by counsel, Peter T. DeMasters, John T. McCartney, and the law firm of Flaherty Sensabaugh Bonasso, PLLC, and pursuant to Trial Court Rule 29.06(a)(1), submit their Reply in Opposition to Meral, Inc.'s Motion to Refer Action to the Business Court Division ("Reply"). Meral, Inc.'s ("Plaintiff") claims of attorney malpractice and breach of contract in the instant litigation do not involve complex business issues; to the contrary, the major inquiries in this case are rather simple and straight forward, requiring no intricate or expert knowledge of complex commercial issues. Thus, the present case does not warrant referral to the business court division and should remain in the Circuit Court of Mercer County. In support of this Reply, Defendants state the following:

FACTS AND ALLEGATIONS

Plaintiff, as lessee of certain real property mineral rights in Greenbrier County, West Virginia, entered an Asset Purchase Agreement ("APA") on January 31, 2011 with South Fork



Mining Company, LLC ("South Fork"). See *Complaint* at ¶14. Per the APA, Plaintiff was to be paid certain purchase price and royalty payments in exchange for South Fork's right to mine and sell coal. See *Id.* at ¶¶15-18. During the negotiations, preparation, and execution of the APA, Plaintiff was represented by Defendant Morhous. See *Id.* at ¶¶19-20. After timely payments by South Fork, Plaintiff and South Fork entered an amendment to the APA ("Amendment") on March 17, 2014, allowing the final purchase price payment to be made in several installments. See *Id.* at ¶¶24-26. It is alleged that Defendant Morhous also represented Plaintiff during its negotiations and preparation of the Amendment, a point which Defendants have since denied. See *Id.* at ¶27.

After entering the Amendment, South Fork filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the West District of Virginia. See *Id.* at ¶31. It is alleged that at the time of the bankruptcy proceeding, South Fork owed \$671,812.14 of the \$5.2 million purchase price and \$109,920.55 in overriding royalty payments. See *Id.* at ¶¶32-33. Subsequent to filing bankruptcy, South Fork failed to make payments per the APA and Amendment. Based upon its failure to pay, Plaintiff sought to eject South Fork from the subject property. See *Id.* at ¶¶36; 38. The bankruptcy court, affirmed by the United States District Court for the Western District of Virginia, held that the APA was an executory contract with Plaintiff having "no right to retake possession of the WPP leasehold and loadout facility under West Virginia law." See *Id.* at ¶40. It is alleged that while "South Fork continues to mine and sell coal," Plaintiff has "received no overriding royalty payments from South Fork on coal mined and sold[.]" See *Id.* at ¶¶45-46.

After erroneously filing an action against Defendants in Greenbrier County West Virginia, Plaintiff filed the present action on August 4, 2017 in Mercer County, West Virginia. In the Complaint, Plaintiff alleges that Defendants' conduct in their representation of Plaintiff, as outlined above, "fell below" the applicable standard of care. Plaintiff's Complaint provides three causes of action: Count I--Professional Liability; Count II--Breach of Contract; and Count III--Liability for Acts and Omissions of Members. All three counts are based upon Defendants'

alleged "fail[ure] to exercise ordinary professional skill and knowledge in their rendition of professional services to Plaintiff Meral in its dealings with South Fork[.]"

ARGUMENT

I. The Instant Action is Not a Proper Case for Referral to Business Court.

Pursuant to West Virginia Trial Court Rule 29.06(a)(1), "[a]ny party or judge may seek a referral of Business Litigation to the Division by filing a Motion to Refer to the Business Court Division with the Clerk of the Supreme Court of Appeals of West Virginia." Under Trial Court 29.04(a), "Business Litigation" is defined as one or more pending actions in circuit in which:

- (1) the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and
- (2) the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; and
- (3) the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

Accordingly, in order for a case to be transferred to the Business Court under Trial Court rule 29.04, the pending action must meet the requirements set forth in subsections one and two, and not involve a claim under subsection three. Based upon the principal claims and allegations in the Complaint, the present matter fails to satisfy subsections one and two.

- a. Plaintiff's Claims Do Not Involve Matters of Significance to the Transactions, Operations, or Governance Between Business Entities.

Without explanation or further clarification, Plaintiff argues that T.C.R. 29.04(a)(1) is

satisfied by describing this action as one which "involves matters of significance to transactions between business entities as required by Trial Court Rule 29.04(a)(1)." This is a gross mischaracterization of the present action. The present matter is between Meral, Inc., a West Virginia corporation, two individual defendants, attorneys Lawrence E. Morhous and Jerry J. Cameron, and the law firm of Brewster Morhous. Notably, the main issue in this litigation is whether Defendants Morhous and Cameron met the applicable standard of care in their capacity as attorneys providing services to Plaintiff. As noted above, the substantive allegations in the Complaint are based upon Morhous and Cameron's alleged "fail[ure] to exercise ordinary professional skill and knowledge in their rendition of professional services to Plaintiff Meral in its dealings with South Fork[.]" While aspects of contractual negotiations and drafting are involved in the substantive work performed by Morhous and Cameron, this is a malpractice action at its core. Whether the counts in the Complaint are couched as professional negligence claims or breach of contract, the critical issue in this matter continues to revolve around standard of care for attorneys Morhous and Cameron. Because this is a malpractice action between a business and its individual attorneys, as opposed to a claim based upon "transactions, operations, or governance between business entities," this case is more appropriately suited for its current venue and Plaintiff's Motion should be denied.

- b. Plaintiff's Claims Do Not Present Commercial and/or Technology Issues In Which Specialized Treatment is Likely to Improve the Expectation of a Fair Resolution Because of the Need for Specialized Knowledge or Expertise.

In an effort to argue that T.C.R. 29.04(a)(2) is satisfied, Plaintiff provides a general statement mirroring the language of trial court rule 29.04(a)(2) that "the dispute concerns commercial issues for which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the dispute because the need for specialized knowledge and expertise in the subject matter or familiarity of some specific law or legal principal that may be applicable." Again, this characterization of the case is false. The issues presented in this case

do not require "specialized treatment" or "specialized knowledge and expertise" as described by Plaintiff. Discovery will focus on conversations between Defendants Morhous, Cameron, and Plaintiffs, and the circumstances surrounding the APA and Amendment. Testimony will be provided regarding work performed by Defendants, Plaintiff, and South Fork in negotiating and entering the APA and Amendment. A determination of whether Defendants breached the requisite standard of care will be based upon the aforementioned written documents and testimony provided. While some of the issues may have nuances which require some explanation and clarification, these issues are not complex and require no specialized business knowledge to handle any potential disputes between the parties.

In sum, a referral of this case to business court would be contrary to the business court's stated purpose and intent. It would further be a waste of time, as the case is properly in Mercer County Circuit Court before the honorable Derek C. Swope, and there should be no issues moving this case through discovery and to trial.

CONCLUSION

For all the foregoing reasons, the Defendants respectfully requests that this Court deny Plaintiff's Motion to Refer Action to Business Court Division and allow this case to properly remain in Mercer County Circuit Court.

**BREWSTER, MORHOUS, CAMERON,
CARUTH, MOORE, KERSEY & STAFFORD,
PLLC, LAWRENCE E. MORHOUS, and JERRY J.
CAMERON**

By Counsel

John T. McCartney (by Kaitlyn N. PyHak (13034) with permission)

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Defendants.

CERTIFICATE OF SERVICE

I, John T. McCartney, do hereby certify that I have served the foregoing "BREWSTER MORHOUS, CAMERON, CARUTH, MOORE, KERSEY & STAFFORD, LAWRENCE E. MORHOUS, AND JERRY J. CAMERON'S REPLY I IN OPPOSITION TO MERAL, INC.'S MOTION TO REFER ACTION TO THE BUSINESS COURT DIVISION" upon the following individuals on this 13th day of November 2017, by U.S. Mail:

William J. Leon, Esquire
William J. Leon, LC
1200 Dorsey Avenue, Suite III
Morgantown, WV 26501
Counsel for Plaintiff

Honorable Derek C. Swope, Judge
Circuit Court of Mercer County
Mercer County Courthouse
1501 Main Street, Suite 200
Princeton, WV 24740

Julie Ball, Clerk of the Circuit Court
Circuit Court of Mercer County
Mercer County Courthouse
1501 Main Street, Suite 200
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