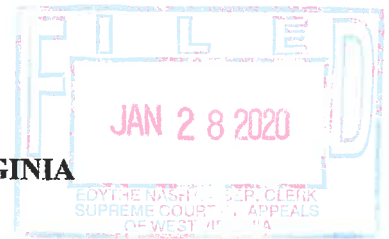


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
(BUSINESS COURT DIVISION)**



**HOWARD LISTON,**

**Plaintiff,**

**v.**

**MONONGALIA COUNTY CIRCUIT COURT**

**Civil Action No. 16-C-279**

**The Honorable Susan Tucker**

**FRONTIER WEST VIRGINIA INC.,  
a West Virginia corporation, and  
T.A. Chapman, Inc., a West Virginia Corporation,**

**Defendants.**

**TO: THE HONORABLE CHIEF JUSTICE**

**DEFENDANTS' JOINT MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, Defendant, Frontier West Virginia, Inc., by and through counsel, Charles C. Wise III of Bowles Rice LLP, and Defendant T.A. Chapman, by and through counsel, J. Victor Flanagan and Jonathan J. Jacks of Pullin, Fowler, Flanagan, Brown & Poe, PLLC and Heather M. Noel and Sara E. Brown of MacCorkle Lavender PLLC, respectfully request the above-styled case be referred to the Business Court Division.

In regard to additional related actions:

- ☒ There are no known related actions.
- ☐ The following related actions could be the subject of consolidation, and are
- ☐ now pending
- or
- ☐ may be filed in the future. (Please list case style, number, and Court if any)
- 
- 

This action involves: (Please check all that apply)

- |  |  |
|--|--|
| <input checked="" type="checkbox"/> Breach of Contract;              | <input type="checkbox"/> Sale or Purchase of Commercial Products Covered by the Uniform Commercial Code; |
| <input type="checkbox"/> Sale or Purchase of Commercial Entity;      | <input type="checkbox"/> Terms of a Commercial Lease;  |
| <input type="checkbox"/> Sale or Purchase of Commercial Real Estate; | <input type="checkbox"/> Commercial Non-consumer debts;  |
|  | <input type="checkbox"/> Internal Affairs of a Commercial Entity;  |

- ☐ Trade Secrets and Trademark Infringement;
  - ☐ Non-compete Agreements;
  - ☐ Intellectual Property, Securities, Technology Disputes;
  - ☒ Commercial Torts;
  - ☐ Insurance Coverage Disputes in Commercial Insurance Policies;
  - ☐ Professional Liability Claims in Connection with the Rendering of Professional Services to a Commercial Entity;
  - ☐ Anti-trust Actions between Commercial Entities;
  - ☐ Injunctive and Declaratory Relief Between Commercial Entities;
  - ☐ Liability of Shareholders, Directors, Officers, Partners, etc.;
  - ☐ Mergers, Consolidations, Sale of Asscts, Issuance of Debt, Equity and Like Interest;
  - ☐ Shareholders Derivative Claims;
  - ☐ Commercial Bank Transactions;
  - ☐ Franchisees/Franchisors;
  - ☐ Internet, Electronic Commerce and Biotechnology
  - ☒ Disputes involving Commercial Entities; or
  - ☐ Other (Describe) \_\_\_\_\_
-

In support of this Motion, the movants note this matter contains issues significant to the businesses and presents novel and/or complex commercial issues for which specialized treatment will be helpful. Furthermore, this case would potentially benefit from the assistance of the specialized alternative dispute resolution offered through Judicial Mediation. The moving parties assert these positions as more fully described herein:

The parties to this civil action are a commercial property owner and commercial entities and the nature of this matter satisfies the definitional requirements set forth for Business Litigation in Rule 29.06 of the West Virginia Trial Court Rules. Additionally, this matter involves complex issues related to improvements to real property. The claims herein concern matters of significance to the transactions, operations and the governance of the relationship between the multiple parties. Matters at issue in this action require a need for specialized business knowledge required for a fair and accurate determination of the allegations of the Plaintiff and Defendants. As such, the business court would be the most appropriate venue to address these issues because they are solely business issues and will likely involve complex discovery and resolution strategy.

The Second Amended Complaint in this matter may be short in length, however, the issues behind the Complaint are indeed complex. Plaintiff contends his commercial rental property was damaged as the result of the replacement and removal of a utility pole adjacent to his property sometime in or around calendar years 1990 – 1993. Plaintiff's cause of action was only recently filed. While general matters of liability are disputed, the crux of the inability to resolve the dispute relates, in great part, to the application of the statute of limitations, and more importantly, the statute of repose. The statute of repose governs improvements to real property and is intrinsically tied into the business of construction. These matters have led to impasses during multiple attempts at mediation, as will be discussed more fully below.

In addition to the dispute between Plaintiff and the Defendants as to the viability of the claims, significant disputes exist between the Defendants and the Defendants' respective insurance carriers. The case was originally filed against Defendant Frontier, however, Plaintiff was granted leave to add Defendant T.A. Chapman to this matter. Defendant T.A. Chapman is no longer in business, however, was in business until approximately 2008. Given the fact this matter is based upon construction actions allegedly occurring in or around 1990 – 1993 has created unusual and complex business issues. The Parties are forced to attempt to litigate business related disputes without the benefit of the typical documents that would be available, and without the ability to interview or depose individuals who actually performed the alleged construction or entered into any related agreements or contracts related to the alleged acts.

If this were not enough, the Defendants also face significant disputes regarding claims for contractual indemnity and breach of contract based upon contracts entered into approximately three decades ago. Adding complexity to the issues, based upon the vague nature of the allegations, there are disputes ongoing related to any potential coverage by the Defendants' insurance carriers. In particular, with Defendant T.A. Chapman, three different insurers provided General Commercial Liability policies that require interpretation and application to this matter. These issues have led to disputes that hinder any attempt at resolution of the matter at issue based upon disagreements between the carriers as to each's potential duty to defend and indemnify.

The prior attempts at resolution demonstrate why this matter is suited for, and would benefit from, Business Court. Prior to Defendant T.A. Chapman's addition to the case, Frontier and Plaintiff attempted mediation twice, with two separate mediators. Both attempts did not come close to resolution. The first was stalled almost entirely by disputes as to the application of the

statute of limitations and statute of repose. The second attempt was again not productive however, the parties believed the addition of T.A. Chapman and the involvement of its additional insurance carriers, would benefit the chances of success.

After T.A. Chapman was added, a third mediation was attempted, with a new mediator, in hopes of finding someone particularly suited to deal with the complex and unusual issues. However, at the conclusion of mediation, the Parties remained even further apart than at the prior two mediations. The same disputes and issues continued to arise, namely, how does the statute of repose apply to Frontier and T.A. Chapman, in regards to work completed regarding a utility pole; and, if liability exists, how do the contracts and insurance policies apply as to each Defendant and their insurance carriers.

In summary, the moving parties believe the matter is suited for the Business Court in order to help resolve the application of statutes intrinsically involved with business, such as the statute of repose, to resolve issues related to alleged breaches of contract, and to navigate questions of loss shifting in the form of contractual indemnification. Furthermore, as discussed above, the Judicial Mediation is desired as the Parties have unsuccessfully mediated with three different mediators, and in addition to the facts and application of law, mediation will include complex discussion and disagreement regarding the application of General Commercial Liability Insurance Policies.

In further support of this Motion, please find attached hereto an accurate copy of the operative complaint, operative amended complaint(s), Defendants' answers and counterclaims, and the docket sheet.

In regard to expedited review, the Movants:

- ☒ DOES NOT request an expedited review under W.Va. Trial Court Rule 29.06(a)(4), and gives notice that all affected parties may file a memorandum stating their position, in accordance with W.Va. Trial Court Rule 29.
- ☐ hereby REQUESTS that the Chief Justice grant this Motion to Refer without responses, pursuant to W.Va. Trial Court Rule 29.06(a)(4), and contends that the following constitutes good cause to do so: \_\_\_\_\_

WHEREFORE, the undersigned hereby MOVES, pursuant to W.Va. Trial Court Rule 29, the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

Respectfully submitted, this 28<sup>th</sup> day of January, 2020,

FRONTIER WEST VIRGINIA, INC., and  
T.A. CHAPMAN, INC.,  
By Counsel,



Charles C. Wise III (WV State Bar #46764)  
Bowles Rice LLP  
125 Granville Square, Suite 400  
Morgantown, WV 26501  
*Counsel for Frontier West Virginia Inc.*



J. Victor Flanagan (WV State Bar #5254)  
Jonathan J. Jacks (WV State Bar #11731)  
Pullin, Fowler, Flanagan,  
Brown & Poe, PLLC  
2414 Cranberry Square  
Morgantown, WV 26508  
*Counsel for T.A. Chapman, Inc*

and

A handwritten signature in dark ink, appearing to read "Heather M. Noel". The signature is fluid and cursive, with the first name "Heather" and last name "Noel" being clearly legible.

Heather M. Noel (WV State Bar #7814)

Sara E. Brown (WV State Bar # 11999)

MacCorkle Lavender PLLC

2004 White Willow Way

Morgantown, WV 26505

(304) 344-5600 telephone

(304) 344-8141 facsimile

*Counsel for T.A. Chapman, Inc.*

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

HOWARD LISTON,

Plaintiff,

v.

Civil Action No. 16-C-279  
(Judge Susan B. Tucker)

FRONTIER WEST VIRGINIA INC.,  
a West Virginia corporation, and  
T.A. CHAPMAN, INC., a West  
Virginia Corporation,

Defendants.


**CERTIFICATE OF SERVICE**

I, Heather M. Noel, counsel for Defendant, T.A. Chapman, Inc., do hereby certify that on January 28, 2020, I served a true and correct copy of the foregoing "***Defendants' Joint Motion to Refer Case to the Business Court Division***," with attachments, upon all counsel/parties of record, by either hand-delivery or depositing the same in the regular United States mail, postage prepaid, sealed in an envelope, and addressed as follows:

Kevin T. Tipton, Esq.  
Tipton Law Offices  
316 Merchant Street, Suite 100  
Fairmont, WV 26554  
*Counsel for Plaintiff*

Charles C. Wise III, Esq.  
Bowles Rice LLP  
125 Granville Square, Suite 400  
Morgantown, WV 26501  
*Counsel for Frontier West Virginia, Inc.*

Victor Flanigan Esq.  
Jonathan J. Jacks, Esq.  
Pullin, Fowler, Flanagan,  
Brown & Poe, PLLC  
2414 Cranberry Square  
Morgantown, WV 26508  
*Counsel for T.A. Chapman, Inc*

  
Heather M. Noel (WV State Bar #7814)  
Sara E. Brown (WV State Bar # 11999)  
MacCorkle Lavender PLLC  
2004 White Willow Way  
Morgantown, WV 26505  
(304) 344-5600 telephone  
(304) 344-8141 facsimile  
*Counsel for T.A. Chapman, Inc.*



CASE#: **16-C-279**

Sub Code:

Date Opened: 05/09/2016

JUDGE: SUSAN B. TUCKER

Date Printed: 01/27/2020

Plaintiff: **HOWARD LISTON**  
vs  
Defendant: **FRONTIER WEST VIRGINIA INC**

Pro Attorney: KEVIN TIPTON  
Def Attorney: CHARLES C. WISE III

<u>Page</u>	<u>Date</u>	<u>Memorandum</u>	<u>Account#</u>	<u>Earned</u>	<u>Collected</u>	<u>Balance</u>
1	05/09/2016	Complaint Filed				
2	05/09/2016	Process issued to Sec/State				
3	08/02/2016	Amended Complaint filed				
4	08/02/2016	Process issued to Sec/State				
5	08/15/2016	S/S accepted service on behalf of Citizens Telecommunications				
6	08/15/2016	Company of WV on 8/5/16				
7	09/06/2016	Def. Frontiere WV, Inc's Answer to Pl's Amended Complaint (Wise)				
8	09/26/2016	c/s Frontier West Virginia Inc's First Set of Combined Discovery				
9	09/26/2016	Requets to Pl.				
10	09/26/2016	AGREED ORDER SUBSTITUTING FRONTIER WEST VIRGINIA INC., AS DEFENDANT:				
11	09/26/2016	style be modified to reflect Frontier West Virginia, Inc. as				
12	09/26/2016	def & to remove Citizens Communications Company of West				
13	09/26/2016	Virginia, dba Frontier Communications of West Virginia				
14	01/09/2017	c/s Pl's Responses to Frontier WV Inc's First Set of Combined				
15	01/09/2017	Discovery Requests to Pl				
16	02/15/2017	Court's Notice of Pre-Trial/Scheduling Conference (10:30 am 3/28/17)				
17	02/22/2017	c/s Pl's First Set of Interr., Req. for Prod. & Req. for Adm. to				
18	02/22/2017	Def. Frontier Communications				
19	03/17/2017	c/s Pl's First Supplemental Response to Frontiere WV, Inc's First				
20	03/17/2017	Set of Combined Discovery Requests to Pl				
21	03/27/2017	c/s Objections, Answers & Responses of Frontier WV, Inc. to Pl's				
22	03/27/2017	First Set of Interr. & Req. For Prod.				
23	03/28/2017	*Pretrial/Scheduling Conference Memorandum of Def.				
24	03/28/2017	*Pl's Pretrial Memorandum				

STATE OF WEST VIRGINIA, SS:

I, Jean Friend, Clerk of the Circuit/Family Court of Monongalia County State aforesaid do hereby certify the attached ORDER is a true copy of the original Order made and entered by said Court.

Circuit Clerk

CASE#: 16-C-279

Sub Code:

Date Opened: 05/09/2016

JUDGE: SUSAN B. TUCKER

Date Printed: 01/27/2020

Plaintiff: HOWARD LISTON

vs

Defendant: FRONTIER WEST VIRGINIA INC

Pro Attorney: KEVIN TIPTON

Def Attorney: CHARLES C. WISE III

<u>Page</u>	<u>Date</u>	<u>Memorandum</u>	<u>Account#</u>	<u>Earned</u>	<u>Collected</u>	<u>Balance</u>
25	04/03/2017	c/s Pl's Second Suppl. Responses to Frontier WV, Inc's First Set of				
26	04/03/2017	Combined Discovery Requests to Pl.				
27	04/05/2017	SCHEDULING ORDER: trial-2/21/18 at 9 am & scheduled for 4 d;				
28	04/05/2017	deposit-\$1500 each; final pretrial hrg-11 am 2/12/17; dates &				
29	04/05/2017	specifics for pretrial activities				
30	05/01/2017	Preliminary Fact Witness Disclosure of Frontier WV, Inc.				
31	05/03/2017	Pl's Preliminary Fact Witness Disclosures				
32	08/31/2017	*Pl's Notice of Deposition of Matthew Cook				
33	08/31/2017	*Notice of Deposition of Timothy Spencer				
34	09/01/2017	*Pl's Notice of Deposition of Timothy Spencer				
35	09/01/2017	*Pl's Notice of Deposition of Matthew Cook				
36	09/06/2017	c/s Notice of Deposition for Howard Liston				
37	10/27/2017	c/s Amended Notice of Deposition for Howard Liston				
38	11/06/2017	Pl's Amended Notice of Deposition of Timothy Spencer				
39	11/06/2017	Pl's Amended Notice of Deposition of Matthew Cook				
40	01/05/2018	c/s Def's Disclosure of Expert Witness				
41	01/16/2018	c/s Pl's Suppl. Rspnss to Frontiere WV's 1st Set of Combined				
42	01/16/2018	Discovery Requests to Pl.				
43	01/23/2018	Def. Frontier West Virginia, Inc's Motion for Summary Judgment				
44	01/23/2018	Def. Frontier WV, Inc's Memo of Law in Support of Its Motion for				
45	01/23/2018	Summary Judgment				
46	01/29/2018	Joint Motion to Continue The February 21, 2018 Trial Date and Amend				
47	01/29/2018	The April 5, 2017 Scheduling Order				
48	02/13/2018	AMENDED SCHEDULING ORDER: trial-7/31/18 for 4 d; trial				

CASE#: **16-C-279**

Sub Code:

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JUDGE: SUSAN B. TUCKER

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Plaintiff: **HOWARD LISTON**  
vs  
Defendant: **FRONTIER WEST VIRGINIA INC**

Pro Attorney: KEVIN TIPTON  
Def Attorney: CHARLES C. WISE III

<u>Page</u>	<u>Date</u>	<u>Memorandum</u>	<u>Account#</u>	<u>Earned</u>	<u>Collected</u>	<u>Balance</u>
49	02/13/2018	deposit-\$1500; pretrial hrg-2 pm 7/16/18; dates & specifics for				
50	02/13/2018	pretrial activities established				
51	03/19/2018	*Pl's Expert Witness Disclosure				
52	04/24/2018	Def 's Supplemental Disclosure of Expert Witnesses				
53	05/23/2018	*Pl's Amended Notice of Deposition of Timothy Spencer				
54	05/23/2018	*Pl's Amended Notice of Deposition of Amanda West				
55	05/23/2018	*Pl's Notice of Deposition of David B. Sharpe PE				
56	06/04/2018	Supplemental Affidavit of Timothy R. Spencer in Further Support of				
57	06/04/2018	Def's Motion for Summary Judgment				
58	06/25/2018	Def's Notice of Mediation				
59	06/28/2018	Def's Notice of Hearing (2 pm 7/16/18 - motion for summary judgment)				
60	07/05/2018	Def's Final Fact Witness and Exhibit List				
61	07/05/2018	Def' Proposed Voir Dire				
62	07/05/2018	Def's Proposed Jury Instructions				
63	07/05/2018	Def's Proposed Verdict Form				
64	07/10/2018	Pl's Response to Motion for Summary Judgment				
65	07/12/2018	Def. Frontier WV, Inc's Reply Memo in Further Support of Its Motion				
66	07/12/2018	for Summary Judgment				
67	07/13/2018	*Pl's List of Witnesses and Exhibits				
68	07/13/2018	*Pl's Objections to Def's Proposed Jury Instructions and Verdict Form				
69	07/13/2018	*Pl's Proposed Verdict Form				
70	07/16/2018	Pl's Jury Deposit (\$1500) (returned 6/19)				
71	07/16/2018	Def's Jury Deposit (\$1500) Retnd to Atty 4/16/19				
72	09/10/2018	c/s Pl Third supplemental responses to Frontier West Virginia Inc.				

CASE#: 16-C-279

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JUDGE: SUSAN B. TUCKER

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Plaintiff: HOWARD LISTON  
vs  
Defendant: FRONTIER WEST VIRGINIA INC

Pro Attorney: KEVIN TIPTON  
Def Attorney: CHARLES C. WISE III

Page	Date	Memorandum	Account #	Earned	Collected	Balance
73	09/10/2018	First set of Combined Discovery Requests to PI Howard Liston				
74	09/24/2018	Notice of Change of Address (counsel for Frontier)				
75	09/24/2018	Notice of Appearance (Jeffrey Ray/C. Wise for Frontier)				
76	10/11/2018	*Pl's Response to Def's Motion to Compel and/or Motion to Continue				
77	10/15/2018	Def's Motion to Compel, Or In The Alternative, Motion for Continuance				
78	10/16/2018	Court's Notice of Scheduling Conference (11/1/18 at 9:30 am)				
79	11/26/2018	SCHEDULING ORDER: trial-4/23/19; deposit-\$1200; final pretrial				
80	11/26/2018	hrg.-10 am 4/16/18; dates & specifics for pretrial activities				
81	11/26/2018	established				
82	12/06/2018	Notice of Appearance and Substitution of Additional Counsel (Charles				
83	12/06/2018	Wise for Def.)				
84	01/07/2019	c/s Notice of Deposition of Raymond C. Rase				
85	01/28/2019	c/s First Supplemental Responses of Frontiere WV, Inc to Pl's First				
86	01/28/2019	Set of Req. for Prod.				
87	02/25/2019	c/s Pl's 4th Suppl. Responses to Frontier WV, Inc's First et of				
88	02/25/2019	Combined Discvoery Requests to Pl.				
89	03/26/2019	Def's Motion in Limine to Exclude Photographs Unrelated to Pl's				
90	03/26/2019	Property				
91	03/26/2019	Def's Motion in Limine Concerning The Proper Calculation of Damages				
92	04/08/2019	Def. Frontier West Virginia, Inc's Second Supplemental Disclosure of				
93	04/08/2019	Expert Witnesses				
94	04/09/2019	Def's Motion for Jury View				
95	04/16/2019	Def's Final Fact Witness and Exhibit List				
96	04/16/2019	Def's Proposed Vior Dire				

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Def Attorney: CHARLES C. WISE III

<u>Page</u>	<u>Date</u>	<u>Memorandum</u>	<u>Account#</u>	<u>Earned</u>	<u>Collected</u>	<u>Balance</u>
97	04/16/2019	Def Proposed Jury Instructions and Verdict form				
98	05/07/2019	ORDER ALLOWING PLAINTIFF LEAVE TO AMEND COMPLAINT AND CONTINUE TRIAL				
99	05/07/2019	DATE: complaint be amended to add T. A. Chapman, Inc. as def.;				
100	05/07/2019	trial cont. until 6/26/19				
101	05/17/2019	Second Amended Complaint (adding T. A. Chapman, Inc.)				
102	05/17/2019	WVSP				
103	05/17/2019	Process issued on T. A. Chapman, Inc. only - S/S				
104	05/24/2019	Clerk fee				
105	06/05/2019	S/S accepted service on behalf of T.A. Chapman, Inc on 5/30/19				
106	06/07/2019	Pl Motion to Continue Trial				
107	06/17/2019	ORDER CONTINUING TRIAL DATE: 6/25/19 trial & 6/18/19 pretrial conf				
108	06/17/2019	continued; scheduling conf-9 am 7/26/19				
109	06/19/2019	Court's Amended Notice of Scheduling Conference (1 pm 7/25/19)				
110	07/03/2019	Def. Frontier WV, Inc's Answer to Pl's Second Amended Complaint				
111	07/03/2019	& Cross-Claim Against T. A. Chapman, Inc. (Wise)				
112	07/25/2019	Notice of Appearance (Victor Flanagan/Jonathan Jacks for T A Chapman				
113	07/25/2019	Def. T. A. Chapman, Inc's Motion to Dismiss The Pl's Second Amended				
114	07/25/2019	Complaint and Frontier West Virginia, Inc's Cross Claim				
115	07/25/2019	Def. T. A. Chapman, Inc's Memo in Support of Motion to Dismiss Pl's				
116	07/25/2019	Second Amended Complaint and Frontier WV, Inc's Cross Claim				
117	07/25/2019	SCHEDULING ORDER: trial-7/21/20 for 4 d; deposit-\$1300; final				
118	07/25/2019	pretrial conf-10:30 am on 7/14/19				
119	07/26/2019	Frontier WV, Inc's Amended Pretrial/Scheduling Conf. Memo				
120	07/29/2019	T A Chapman Inc's Pretrial/Scheduling Conference Memo				

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Pro Attorney: KEVIN TIPTON

Def Attorney: CHARLES C. WISE III

<u>Page</u>	<u>Date</u>	<u>Memorandum</u>	<u>Account#</u>	<u>Earned</u>	<u>Collected</u>	<u>Balance</u>
121	08/26/2019	Def. Frontier WV, Inc's Preliminary Fact Witness Disclosure				
122	08/26/2019	*Pl's Preliminary Fact Witness Disclosures				
123	08/29/2019	Def TA Chapman's Notice of Hearing (11 am 9/3/19-motion to dismiss)				
124	08/30/2019	Pl's Response to Def T. A. Chapman's Motion to Dismiss				
125	09/03/2019	Frontier WV, Inc's Response to TA Chapman Inc's Motion to Dismiss				
126	09/03/2019	the Pl's Second Amended Complaint & Frontier's Crossclaim				
127	09/16/2019	Def. TA Chapman's Amended Notice of Hearing (11 am 9/24/19)				
128	10/21/2019	Def. Frontier WV's Notice of Mediation (1 pm 11/15/19)				
129	10/28/2019	*Notice of Appearance (Heather Noel for T A Chapman, Inc)				
130	11/27/2019	Transcript of Motion to Dismiss Hearing on 9/24/19				
131	12/09/2019	Transcript of Proceedings held 4/16/19				
132	12/20/2019	Transcript of Hearing held 7/16/18 (final pretrial-motions)				
133	01/13/2020	ORDER DENYING DEFENDANT FRONTIER WEST VIRGINIA, INC'S MOTION FOR				
134	01/13/2020	SUMMARY JUDGMENT: motion denied & case continue to trial				
135	01/13/2020	ORDER DENYING DEFENDANT T. A. CHAPMAN'S MOTION TO DISMISS: motion				
136	01/13/2020	denied & case continue to trial; parties engage in mediation				
137	01/13/2020	before 11/15/19				
138	01/24/2020	T.A. Chapman, Inc's Answer To Frontier WV, Inc.'s Cross Claim				
139	01/24/2020	T.A. Chapman, Inc's Answer to Pl's Second Amended Complaint				
140	01/24/2020	c/s Def. T. A. Chapman, Inc's First Set of Interr. & Req. for Prod.				

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

HOWARD LISTON,  
Plaintiff,

v.  
FRONTIER COMMUNICATIONS  
CORPORATION,  
Defendant.

Case No. 16-C-279

COMPLAINT

NOW COMES the Plaintiff, **HOWARD LISTON**, by and through his attorney, **KEVIN T. TIPTON**, and for his Complaint against **FRONTIER COMMUNICATIONS CORPORATION**, hereby states as follows:

**PARTIES AND JURISDICTION**

1. The Plaintiff, **HOWARD LISTON**, is, and was at all relevant times hereto, a resident of Morgantown, Monongalia County, West Virginia.
2. The Defendant, **FRONTIER COMMUNICATIONS CORPORATION** (hereinafter referred to as "FRONTIER"), is, and was at all relevant times hereto, a Connecticut corporation doing business, for profit, in the State of West Virginia.
3. The incident complained of in this Complaint occurred in Morgantown, Monongalia County, West Virginia.

**FACTS**

4. Plaintiff incorporates each and every allegation contained in Paragraphs 1 through 3 as if fully restated verbatim herein.
5. At a time unknown to the Plaintiff, **FRONTIER** removed a utility pole adjacent to his rental property located on Hite Street in Morgantown, Monongalia County, West Virginia.
6. At the time **FRONTIER** removed said utility pole, **FRONTIER**, by and through its employees, cut the pole at or near the level of the sidewalk which runs immediately adjacent

**FILED**  
MAY 19 2016  
JEAN FRIEND, CLERK

to the Plaintiff's rental property.

7. Rather than remove the pole completely and repair the hole, FRONTIER negligently left the bottom portion of the pole in the ground, open to the elements.
8. Over time, water has infiltrated the area where the bottom portion of the utility pole was left, washing away the sediment and soil underneath the sidewalk that runs adjacent to the Plaintiff's rental property.
9. As a direct and proximate result, water has infiltrated the Plaintiff's rental property causing severe structural damage and mold. The infiltration and resulting damage continues at this time.
10. As a direct and proximate result of the structural damage and mold, the Plaintiff's property has been condemned and deemed uninhabitable.
11. FRONTIER's failure to properly and completely remove the utility pole at issue in this litigation was negligent.
12. As a further direct and proximate cause of the aforesaid negligence of FRONTIER, the Plaintiff has suffered and sustained damages and injuries, including, but not limited in any manner to the following: aggravation, annoyance, and inconvenience; substantial property damages, lost income; substantial foreseeable consequential damages; and substantial incidental damages.

**WHEREFORE**, the Plaintiff, **HOWARD LISTON**, demands judgment against the Defendant **FRONTIER COMMUNICATIONS CORPORATION** in this matter for all damages sustained as set forth herein, together with pre-judgment and post-judgment interest thereon; punitive damages; for all costs and attorney fees incurred in pursuit of this action to which he is entitled by law; and for such other relief as this Court deems proper.

Plaintiff hereby demands a **TRIAL BY JURY** in this matter.



HOWARD LISTON  
Plaintiff, By Counsel



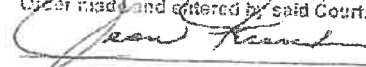
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KEVIN T. TIPTON  
West Virginia State Bar #8610

TIPTON LAW OFFICES  
316 Merchant Street, Suite 100  
Fairmont, WV 26554  
(304) 366-9900  
(304) 366-9902 (fax)

STATE OF WEST VIRGINIA, SS:

I, Jean Friend, Clerk of the Circuit/Family Court of  
Monongalia County State aforesaid do hereby certify  
the attached ORDER is a true copy of the original  
Order made and entered by said Court.



Circuit Clerk

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

HOWARD LISTON,  
Plaintiff,

v.  
CITIZENS TELECOMMUNICATIONS COMPANY  
OF WEST VIRGINIA d/b/a FRONTIER  
COMMUNICATIONS OF WEST VIRGINIA,  
a Connecticut corporation,  
Defendant.

Case No. 16-C-279

AMENDED COMPLAINT

NOW COMES the Plaintiff, HOWARD LISTON, by and through his attorney, KEVIN T. TIPTON, and for his Amended Complaint against CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA D/B/A FRONTIER COMMUNICATIONS OF WEST VIRGINIA, a Connecticut corporation, hereby states as follows:

**PARTIES AND JURISDICTION**

1. The Plaintiff, HOWARD LISTON, is, and was at all relevant times hereto, a resident of Morgantown, Monongalia County, West Virginia.
2. The Defendant, CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA D/B/A FRONTIER COMMUNICATIONS OF WEST VIRGINIA (hereinafter referred to as "FRONTIER"), is, and was at all relevant times hereto, a Connecticut corporation doing business, for profit, in the State of West Virginia.
3. The incident complained of in this Complaint occurred in Morgantown, Monongalia County, West Virginia.

**FACTS**

4. Plaintiff incorporates each and every allegation contained in Paragraphs 1 through 3 as if fully restated verbatim herein.
5. At a time unknown to the Plaintiff, FRONTIER removed a utility pole adjacent to his rental

**FILED**

AUG 02 2016

JEAN FRIEND, CLERK

property located on Hite Street in Morgantown, Monongalia County, West Virginia.

6. At the time FRONTIER removed said utility pole, FRONTIER, by and through its employees, cut the pole at or near the level of the sidewalk which runs immediately adjacent to the Plaintiff's rental property.
7. Rather than remove the pole completely and repair the hole, FRONTIER negligently left the bottom portion of the pole in the ground, open to the elements.
8. Over time, water has infiltrated the area where the bottom portion of the utility pole was left, washing away the sediment and soil underneath the sidewalk that runs adjacent to the Plaintiff's rental property.
9. As a direct and proximate result, water has infiltrated the Plaintiff's rental property causing severe structural damage and mold. The infiltration and resulting damage continues at this time.
10. As a direct and proximate result of the structural damage and mold, the Plaintiff's property has been condemned and deemed uninhabitable.
11. FRONTIER's failure to properly and completely remove the utility pole at issue in this litigation was negligent.
12. As a further direct and proximate cause of the aforesaid negligence of FRONTIER, the Plaintiff has suffered and sustained damages and injuries, including, but not limited in any manner to the following: aggravation, annoyance, and inconvenience; substantial property damages, lost income; substantial foreseeable consequential damages; and substantial incidental damages.

**WHEREFORE**, the Plaintiff, **HOWARD LISTON**, demands judgment against the Defendant **CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA D/B/A FRONTIER COMMUNICATIONS OF WEST VIRGINIA**, a Connecticut

corporation in this matter for all damages sustained as set forth herein, together with pre-judgment and post-judgment interest thereon; punitive damages; for all costs and attorney fees incurred in pursuit of this action to which he is entitled by law; and for such other relief as this Court deems proper.

Plaintiff hereby demands a **TRIAL BY JURY** in this matter.

**HOWARD LISTON**  
Plaintiff, By Counsel

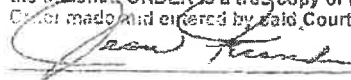


**KEVIN T. TIPTON**  
West Virginia State Bar #8610

**TIPTON LAW OFFICES**  
316 Merchant Street, Suite 100  
Fairmont, WV 26554  
(304) 366-9900  
(304) 366-9902 (fax)

**STATE OF WEST VIRGINIA, SS:**

I, Joan Friend, Clerk of the Circuit/Family Court of Monongalia County State aforesaid do hereby certify the attached ORDER is a true copy of the original Order made and entered by said Court.



Circuit Clerk

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

**(Amended) CIVIL CASE INFORMATION STATEMENT**  
(Civil Cases Other than Domestic Relations)

**I. CASE STYLE:**

Case No. 16-C-279

**Plaintiff(s)**

HOWARD LISTON

c/o Tipton Law Offices

316 Merchant St, Fairmont, WV 26554

vs.

**Days to  
Answer**

**Type of Service**

**Defendant(s)**

Citizens Telecommunications Comp. d/b/a Frontier  
Name

30

WVSOS

c/o Corporate Service Company

Street Address

209 W. Washington St. Charleston WV 25302

City, State, Zip/Code

**II. TYPE OF CASE:**

- ☒ General Civil  
☐ Mass Litigation [As defined in T.C.R. 26.04(a)]  
    ☐ Asbestos  
    ☐ FELA Asbestos  
    ☐ Other: \_\_\_\_\_  
☐ Habeas Corpus/Other Extraordinary Writ  
☐ Other: \_\_\_\_\_

- ☐ Adoption  
☐ Administrative Agency Appeal  
☐ Civil Appeal from Magistrate Court  
☐ Miscellaneous Civil Petition  
☐ Mental Hygiene  
☐ Guardianship  
☐ Medical Malpractice

**III. JURY DEMAND:** ☒ Yes ☐ No CASE WILL BE READY FOR TRIAL BY (Month/Year): 08 /

**IV. DO YOU OR ANY  
OF YOUR CLIENTS  
OR WITNESSES  
IN THIS CASE  
REQUIRE SPECIAL  
ACCOMMODATIONS?**

☒ Yes ☐ No

**IF YES, PLEASE SPECIFY:**

- ☐ Wheelchair accessible hearing room and other facilities  
☐ Reader or other auxiliary aid for the visually impaired  
☒ Interpreter or other auxiliary aid for the deaf and hard of hearing  
☐ Spokesperson or other auxiliary aid for the speech impaired  
☐ Foreign language interpreter-specify language: \_\_\_\_\_  
☐ Other: \_\_\_\_\_

Attorney Name: Kevin T. Tipton

Firm: Tipton Law Offices

Address: 316 Merchant Street, Fairmont, WV 26554

Telephone: (304) 366-9900

Representing:

- ☒ Plaintiff ☐ Defendant  
☐ Cross-Defendant ☐ Cross-Complainant  
☐ 3rd-Party Plaintiff ☐ 3rd-Party Defendant

☐ Proceeding Without an Attorney

**FILED**

Original and 1 copies of complaint enclosed/attached.

Dated: 08 / 02 / 2016

Signature: 

AUG 02 2016

JEAN FRIEND, CLERK

SCA-C-100: Civil Case Information Statement (Other than Domestic Relations)

Revision Date: 12/2015

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

HOWARD LISTON,

Plaintiff,

v,

Case No. 16-C-279

CITIZENS COMMUNICATIONS COMPANY OF WEST VIRGINIA,  
d//b/a FRONTIER COMMUNICATIONS OF WEST VIRGINIA,  
a Connecticut corporation,

Defendant.

**DEFENDANT FRONTIER WEST VIRGINIA INC.'S  
ANSWER TO PLAINTIFF'S AMENDED COMPLAINT**

Defendant Frontier West Virginia Inc. ("Frontier")<sup>1</sup>, by counsel, Bowles Rice LLP, respectfully submits this Answer to Plaintiff's Amended Complaint.

**First Defense**

Plaintiff's Amended Complaint fails to state a claim against Frontier upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, because the pole in question was removed in 1990 and the claims are barred by the 10-year limitation in W.Va. Code § 55-2-6a.

**Second Defense**

Frontier asserts the affirmative defenses of assumption of risk, contributory negligence, estoppel, statute of limitations, statute of repose, laches and waiver.

**Third Defense**

In response to the specific allegations contained in the Amended Complaint, Frontier states as follows:

---

<sup>1</sup> Plaintiffs' listed incorrect Frontier entities as defendants in their Complaint. Frontier is answering on behalf of the correct entity, Frontier West Virginia Inc. Frontier will work with Plaintiff in substituting the correct party.

1. Frontier is without knowledge or information sufficient to admit or deny the allegations contained in paragraph 1 of the Amended Complaint.

2. Frontier admits Citizens Telecommunications Company d/b/a Frontier Communications of West Virginia is a Connecticut corporation. Frontier denies the remaining allegations contained in paragraph 2 of the Amended Complaint.

3. Frontier is without knowledge or information sufficient to admit or deny the allegations contained in paragraph 3 of the Amended Complaint.

4. Frontier incorporates by reference each of its responses to the allegations contained in paragraphs 1-3 of Plaintiff's Amended Complaint.

5. Frontier is without knowledge or information sufficient to admit or deny the allegations contained in paragraph 5 of the Amended Complaint, except it admits the utility pole was removed in 1990.

6. Frontier is without knowledge or information sufficient to admit or deny the allegations contained in paragraph 6 of the Amended Complaint.

7. The allegations contained in paragraph 7 of Plaintiff's Amended Complaint constitute a conclusion of law to which no response is required. To the extent a response is required, Frontier denies the allegations contained in paragraph 7.

8. Frontier is without knowledge or information sufficient to admit or deny the allegations contained in paragraph 8 of Plaintiff's Amended Complaint.

9. Frontier is without knowledge or information sufficient to admit or deny the allegations contained in paragraph 9 of Plaintiff's Amended Complaint.

10. Frontier is without knowledge or information sufficient to admit or deny the allegations contained in paragraph 10 of Plaintiff's Amended Complaint.

11. Frontier denies the allegations contained in paragraph 11 of Plaintiff's Amended Complaint.

12. Frontier denies the allegations contained in paragraph 12 of Plaintiff's Amended Complaint.

Frontier denies the allegations contained in the WHEREFORE clause of Plaintiff's Amended Complaint or that Plaintiff is entitled to any of the relief requested therein.

#### **Fourth Defense**

Frontier denies all allegations not specifically admitted herein.

#### **Fifth Defense**

Frontier breached no duty or obligation, if any, owed by it to Plaintiff. At all relevant times, Frontier acted reasonably and appropriately under the circumstances. Frontier denies that it is liable to Plaintiff in any amount, or that Plaintiff is otherwise entitled to a recovery against it.

#### **Sixth Defense**

Frontier affirmatively asserts that Plaintiff was guilty of comparative negligence which equaled or exceeded the negligence of all other tortfeasors. Therefore, Plaintiff's claims are barred by his own negligence.

#### **Seventh Defense**

Frontier affirmatively asserts that it did not act negligently, and did not commit any acts or omissions to the detriment of the Plaintiff which proximately caused injuries or damages as alleged in Plaintiff's Amended Complaint.



#### **Eighth Defense**

The injuries and damages of Plaintiff, if any, were caused by the intervening or superseding acts and/or omissions of persons or parties other than Frontier.

#### **Ninth Defense**

Plaintiff has failed to mitigate any and all damages, the existence and extent of which Frontier expressly denies and demands strict proof thereof.

#### **Tenth Defense**

Plaintiff's damages, if any, were not proximately caused by the actions or inactions of Frontier, but were caused by the actions or inactions of other entities and individuals for whose actions Frontier has no control and bears no legal responsibility.

#### **Eleventh Defense**

Frontier asserts that the injuries, damages and conditions complained of by Plaintiff may be the result of some cause or condition other than the event described in the Amended Complaint and, accordingly, Frontier is not liable therefore.

#### **Twelfth Defense**

Exemplary or punitive damages violate Frontier's rights to procedural and substantive due process as provided by the Fifth and Fourteenth Amendments to the United States Constitution and Article III, Section 10, and all other applicable provisions, of the Constitution of the State of West Virginia.

#### **Thirteenth Defense**

Exemplary or punitive damages violate Frontier's rights to equal protection under the law and are otherwise unconstitutional under the Fourteenth Amendment to the United States Constitution and Article III, Section 1, and all other applicable provisions, of the Constitution of

the State of West Virginia, including, but not limited to, the protection from “excessive fines”, protection from cruel and unusual punishment, and to proportional penalties as provided in Article III, Section 5, of the Constitution of the State of West Virginia.

#### **Fourteenth Defense**

Plaintiffs must prove exemplary or punitive damages by clear and convincing evidence the necessary predicates or conditions in order to establish the threshold requirements for the recovery of punitive damages.

#### **Fifteenth Defense**

Exemplary or punitive damages claims should be bifurcated from the other claims alleged.

#### **Sixteenth Defense**

Frontier hereby gives notice that it intends to rely on other defenses, including, without limitation, those defenses available under Rules 8(c) and 12(b) of the West Virginia Rules of Civil Procedure, as may become available or apparent during the course of discovery, and reserves its right to amend this Answer to assert any such defense.

WHEREFORE, Defendant Frontier West Virginia Inc., having fully answered the Amended Complaint, requests that the Amended Complaint filed against it be dismissed, with prejudice, and that it be awarded its costs and expenses incurred in the defense of this suit, including reasonable attorneys’ fees; and for such other relief whether legal or equitable in character, that this Court deems just and appropriate.

**FRONTIER WEST VIRGINIA INC.**

By Counsel,



Charles C. Wise III (WVSB # 4616)

[cwise@bowlesrice.com](mailto:cwise@bowlesrice.com)

Robert J. Zak (WVSB # 11726)

[rzak@bowlesrice.com](mailto:rzak@bowlesrice.com)

Bowles Rice LLP

7000 Hampton Center

Morgantown, WV 26505

(304) 285-2500

(304) 285-2575 facsimile

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

HOWARD LISTON,

Plaintiff,

v.

Case No. 16-C-279

CITIZENS COMMUNICATIONS COMPANY OF WEST VIRGINIA,  
d/b/a FRONTIER COMMUNICATIONS OF WEST VIRGINIA,  
a Connecticut corporation,

Defendant.

CERTIFICATE OF SERVICE

I, Charles C. Wise III, counsel for Frontier West Virginia Inc., do hereby certify that I have served a true and correct copy of the foregoing Defendant Frontier West Virginia Inc.'s Answer to Plaintiff's Amended Complaint, this 1st day of September, 2016, upon counsel of record by placing a true copy of same in the United States mail, postage pre-paid and addressed as follows:

Kevin T. Tipton, Esquire  
Tipton Law Offices  
316 Merchant Street, Suite 100  
Fairmont, West Virginia 26554

  
Charles C. Wise III (WVSB # 4616)

## CIVIL CASE INFORMATION STATEMENT

### I. CASE STYLE:

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

HOWARD LISTON,

Plaintiff,

v.

Case No. 16-C-279

CITIZENS COMMUNICATIONS COMPANY OF WEST VIRGINIA,  
d/b/a FRONTIER COMMUNICATIONS OF WEST VIRGINIA,  
a Connecticut corporation,

Defendant.

### Filing Frontier West Virginia Inc.'s Answer to Plaintiff's Amended Complaint

Defendant: Frontier West Virginia Inc.		CASE NUMBER: 16-C-279
II: TYPE OF CASE:		
TORTS	OTHER	CIVIL
<input type="radio"/> ASBESTOS	<input type="radio"/> ADOPTION	<input type="radio"/> APPEAL FROM MAGISTRATE
<input type="radio"/> PROFESSIONAL MALPRACTICE	<input type="radio"/> CONTRACT	<input type="radio"/> PETITION FOR MODIFICATION OF MAGISTRATE SENTENCE
<input type="radio"/> PERSONAL INJURY	<input checked="" type="radio"/> REAL PROPERTY	<input checked="" type="radio"/> MISCELLANEOUS CIVIL
<input type="radio"/> PRODUCT LIABILITY	<input type="radio"/> MENTAL HEALTH	<input type="radio"/> OTHER
<input type="radio"/> OTHER TORT	<input type="radio"/> APPEAL OF ADMINISTRATIVE AGENCY	

III. JURY DEMAND: ☐ Yes ☐ No

CASE WILL BE READY FOR TRIAL BY (Month/Year):

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE? ☐ YES ☐ NO

**NONE KNOWN AT THIS TIME**

**IF YES, PLEASE SPECIFY:**

- ☐ **Wheelchair accessible hearing room and other facilities**
- ☐ **Interpreter or other auxiliary aid for the hearing impaired**
- ☐ **Reader or other auxiliary aid for the visually impaired**
- ☐ **Spokesperson or other auxiliary aid for the speech impaired**
- ☐ **Other: \_\_\_\_\_**

**Attorney Representing: Charles C. Wise III [WVSB # 4616]  
Robert J. Zak [WVSB # 11726]**

**Firm:** Bowles Rice LLP  
**Address:** 7000 Hampton Center  
Morgantown, West Virginia 26505  
**Telephone:** (304)285-2500  
**Facsimile:** (304)285-2575  
**cwise@bowlesrice.com**  
**rzak@bowlesrice.com**

**X Defendant**  
**Frontier West Virginia Inc.**

**Dated: September 1, 2016**

  
**Charles C. Wise III**

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

HOWARD LISTON,  
Plaintiff,

Case No. 16-C-279

v.  
FRONTIER WEST VIRGINIA, Inc.,  
a Connecticut corporation,  
and  
T.A. CHAPMAN, INC., a West Virginia  
Corporation,  
Defendants.

SECOND AMENDED COMPLAINT

NOW COMES the Plaintiff, HOWARD LISTON, by and through his attorney, KEVIN T. TIPTON, and for his Second Amended Complaint against FRONTIER WEST VIRGINIA, INC., a Connecticut corporation, and T.A. CHAPMAN, INC., a West Virginia corporation, hereby states as follows:

**PARTIES AND JURISDICTION**

1. The Plaintiff, HOWARD LISTON, is, and was at all relevant times hereto, a resident of Morgantown, Monongalia County, West Virginia.
2. The Defendant, FRONTIER WEST VIRGINIA, INC. (hereinafter referred to as "FRONTIER"), is, and was at all relevant times hereto, a Connecticut corporation doing business, for profit, in the State of West Virginia.
3. Upon information and belief, Defendant T.A. CHAPMAN, INC. (hereinafter referred to as T.A. CHAPMAN) was at all relevant times hereto a West Virginia corporation doing business, for profit, in the State of West Virginia.
4. The incident complained of in this Complaint occurred in Morgantown, Monongalia County, West Virginia.

**FACTS**

5. Plaintiff incorporates each and every allegation contained in Paragraphs 1 through 4 as if fully

ORIGINAL DOCUMENT FILED  
WITH CIRCUIT CLERK  
May 17, 2017

restated verbatim herein.

6. At a time unknown to the Plaintiff, between 1990 and 1992, FRONTIER removed a utility pole adjacent to his rental property located on Hite Street in Morgantown, Monongalia County, West Virginia.
7. In the alternative, at an exact time unknown to the Plaintiff between 1990 and 1992, FRONTIER hired or otherwise contracted with T.A. CHAPMAN to remove said utility pole.
8. At the time FRONTIER and/or T.A. CHAPMAN removed said utility pole, FRONTIER and/or T.A. CHAPMAN, by and through its employees, cut the pole at or near the level of the sidewalk which runs immediately adjacent to the Plaintiff's rental property.
9. Rather than remove the pole completely and repair the hole, FRONTIER and/or T.A. CHAPMAN negligently left the bottom portion of the pole in the ground, open to the elements.
10. Over time, water has infiltrated the area where the bottom portion of the utility pole was left, washing away the sediment and soil underneath the sidewalk that runs adjacent to the Plaintiff's rental property.
11. As a direct and proximate result, water has infiltrated the Plaintiff's rental property causing severe structural damage and mold. The infiltration and resulting damage continues at this time.
12. As a direct and proximate result of the structural damage and mold, the Plaintiff's property has been condemned and deemed uninhabitable.
13. FRONTIER and/or T.A. CHAPMAN's failure to properly and completely remove the utility pole at issue in this litigation was negligent.
14. As a further direct and proximate cause of the aforesaid negligence of FRONTIER and/or T.A. CHAPMAN, the Plaintiff has suffered and sustained damages and injuries, including, but



not limited in any manner to the following: aggravation, annoyance, and inconvenience; substantial property damages, lost income; substantial foreseeable consequential damages; and substantial incidental damages.

**WHEREFORE**, the Plaintiff, **HOWARD LISTON**, demands judgment against the Defendants **FRONTIER WEST VIRGINIA, INC.**, a Connecticut corporation, and **T.A. CHAPMAN, INC.** a West Virginia corporation, jointly and severally, in this matter for all damages sustained as set forth herein, together with pre-judgment and post-judgment interest thereon; punitive damages; for all costs and attorney fees incurred in pursuit of this action to which he is entitled by law; and for such other relief as this Court deems proper.

Plaintiff hereby demands a **TRIAL BY JURY** in this matter.

**HOWARD LISTON**  
Plaintiff, By Counsel



---

**KEVIN T. TIPTON**  
West Virginia State Bar #8610

**TIPTON LAW OFFICES**  
316 Merchant Street, Suite 100  
Fairmont, WV 26554  
(304) 366-9900  
(304) 366-9902 (fax)

**IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA  
DIVISION NO. 1**

**HOWARD LISTON,**

**Plaintiff,**

**v.**

**Case No. 16-C-279  
Judge Susan B. Tucker**

**FRONTIER WEST VIRGINIA INC., and  
T.A. CHAPMAN, INC., as a West Virginia corporation,**

**Defendants.**

**DEFENDANT FRONTIER WEST VIRGINIA INC.'S ANSWER TO PLAINTIFF'S  
SECOND AMENDED COMPLAINT AND CROSS-CLAIM AGAINST  
T.A. CHAPMAN, INC.**

---

Defendant Frontier West Virginia Inc. ("Frontier"), by counsel, Bowles Rice LLP, respectfully submits this Answer to Plaintiff's Second Amended Complaint and Cross-Claim.

**First Defense**

Plaintiff's Second Amended Complaint fails to state a claim against Frontier upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, because the utility pole in question was replaced in or about 1990 and the claims are barred by the 10-year limitation in W.Va. Code § 55-2-6a.

**Second Defense**

Frontier asserts the affirmative defenses of assumption of risk, contributory negligence, estoppel, statute of limitations, statute of repose, laches and waiver.

**Third Defense**

In response to the specific allegations contained in the Second Amended Complaint, Frontier states as follows:

1. Frontier is without knowledge or information sufficient to admit or deny the allegations contained in paragraph 1 of the Second Amended Complaint.

2. Frontier admits that Frontier West Virginia Inc. is a West Virginia for-profit corporation. Frontier denies the remaining allegations contained in paragraph 2 of the Second Amended Complaint.

3. Frontier, upon information and belief, admits the allegations contained in paragraph 3 of the Second Amended Complaint.

4. Frontier, upon information and belief, admits the allegations contained in paragraph 4 of the Second Amended Complaint.

5. Frontier incorporates by reference each of its responses to the allegations contained in paragraphs 1-4 of Plaintiff's Second Amended Complaint as if fully set out herein.

6. Frontier is without knowledge or information sufficient to admit or deny the allegations contained in paragraph 6 of the Second Amended Complaint, except it admits the utility pole was replaced in or about 1990.

7. Frontier, upon information and belief, denies the allegations contained in paragraph 7 of the Second Amended Complaint, except it admits that its predecessor contracted with T. A. Chapman to, among other things, replace the utility pole in question as part of an improvement project in the Morgantown area.

8. Frontier, upon information and belief, admits generally the allegations contained in paragraph 8 of the Second Amended Complaint.

9. Frontier denies the allegations contained in paragraph 9 of Plaintiff's Second Amended Complaint, except it admits, upon information and belief, that T. A. Chapman replaced the utility pole in question and left the bottom portion of the old pole in place.

10. Frontier is without knowledge or information sufficient to admit or deny the allegations contained in paragraph 10 of Plaintiff's Second Amended Complaint.

11. Frontier is without knowledge or information sufficient to admit or deny the allegations contained in paragraph 11 of Plaintiff's Second Amended Complaint, except it denies that Frontier or T. A. Chapman caused or contributed to any damages claimed by Plaintiff.

12. Frontier is without knowledge or information sufficient to admit or deny the allegations contained in paragraph 12 of Plaintiff's Second Amended Complaint, except it denies that Frontier or T. A. Chapman caused or contributed to any damages claimed by Plaintiff.

13. Frontier denies the allegations contained in paragraph 13 of Plaintiff's Second Amended Complaint.

14. Frontier denies the allegations contained in paragraph 14 of Plaintiff's Second Amended Complaint.

Frontier denies the allegations contained in the WHEREFORE clause of Plaintiff's Second Amended Complaint or that Plaintiff is entitled to any of the relief requested therein.

#### **Fourth Defense**

Frontier denies all allegations not specifically admitted herein.

#### **Fifth Defense**

Frontier breached no duty or obligation, if any, owed by it to Plaintiff. At all relevant times, Frontier acted reasonably and appropriately under the circumstances. Frontier denies that it is liable to Plaintiff in any amount, or that Plaintiff is otherwise entitled to a recovery against it.

#### **Sixth Defense**

Frontier affirmatively asserts that Plaintiff was guilty of comparative negligence which equaled or exceeded the negligence of all other tortfeasors. Therefore, Plaintiff's claims are barred by his own negligence.

#### **Seventh Defense**

Frontier affirmatively asserts that it did not act negligently and did not commit any acts or omissions to the detriment of the Plaintiff which proximately caused injuries or damages as alleged in Plaintiff's Second Amended Complaint.

#### **Eighth Defense**

The injuries and damages of Plaintiff, if any, were caused by the intervening or superseding acts and/or omissions of persons or parties other than Frontier.

#### **Ninth Defense**

Plaintiff has failed to mitigate any and all damages, the existence and extent of which Frontier expressly denies and demands strict proof thereof.

#### **Tenth Defense**

Plaintiff's damages, if any, were not proximately caused by the actions or inactions of Frontier but were caused by the actions or inactions of other entities and individuals for whose actions Frontier has no control and bears no legal responsibility.

#### **Eleventh Defense**

Frontier asserts that the injuries, damages and conditions complained of by Plaintiff may be the result of some cause or condition other than the event described in the Second Amended Complaint and, accordingly, Frontier is not liable therefore.

#### **Twelfth Defense**

Exemplary or punitive damages violate Frontier's rights to procedural and substantive due process as provided by the Fifth and Fourteenth Amendments to the United States Constitution and Article III, Section 10, and all other applicable provisions, of the Constitution of the State of West Virginia.

#### **Thirteenth Defense**

Exemplary or punitive damages violate Frontier's rights to equal protection under the law and are otherwise unconstitutional under the Fourteenth Amendment to the United States Constitution and Article III, Section 1, and all other applicable provisions, of the Constitution of the State of West Virginia, including, but not limited to, the protection from "excessive fines", protection from cruel and unusual punishment, and to proportional penalties as provided in Article III, Section 5, of the Constitution of the State of West Virginia.

#### **Fourteenth Defense**

Plaintiff must prove exemplary or punitive damages by clear and convincing evidence the necessary predicates or conditions in order to establish the threshold requirements for the recovery of punitive damages.

#### **Fifteenth Defense**

Exemplary or punitive damages claims should be bifurcated from the other claims alleged.

### **Sixteenth Defense**

Frontier hereby gives notice that it intends to rely on other defenses, including, without limitation, those defenses available under Rules 8(c) and 12(b) of the West Virginia Rules of Civil Procedure, as may become available or apparent during the course of discovery, and reserves its right to amend this Answer to assert any such defense.

WHEREFORE, Defendant Frontier West Virginia Inc., having fully answered the Second Amended Complaint, requests that the Second Amended Complaint filed against it be dismissed, with prejudice, and that it be awarded its costs and expenses incurred in the defense of this suit, including reasonable attorneys' fees; and for such other relief whether legal or equitable in character, that this Court deems just and appropriate.

### **FRONTIER'S CROSS-CLAIM AGAINST T. A. CHAPMAN, INC.**

Defendant Frontier West Virginia Inc., by counsel, Bowles Rice LLP, states for its Cross-Claim against Defendant T.A. Chapman, Inc. as follows:

1. Frontier incorporates the allegations contained in the Second Amended Complaint for reference purposes only and re-states and re-alleges all affirmative defenses, responses, and allegations set forth in the above Answer to Plaintiff's Second Amended Complaint as if fully set forth verbatim in its Cross-Claim against T.A. Chapman.
2. Plaintiff's Second Amended Complaint alleges that Frontier, along with T.A. Chapman, negligently removed a utility pole causing injury and damage to Plaintiff's property.
3. Frontier denies any and all liability.

4. Plaintiff's alleged injuries and damages were the direct and proximate result of the negligence of T.A. Chapman.

**Count I**

*(Common Law Indemnification)*

5. Frontier hereby adopts and incorporates by reference paragraphs 1 through 4 of its Cross-Claim as if fully set forth herein.

6. To the extent Frontier is found liable to Plaintiff for any damages, such liability was the result of acts, omissions and/or negligent conduct of T.A. Chapman.

7. As such, T.A. Chapman has a duty to indemnify Frontier from any such liability.

**Count II**

*(Common Law Contribution)*

8. Frontier hereby adopts and incorporates by reference paragraphs 1 through 7 of its Cross-Claim as if fully set forth herein.

9. To the extent Frontier is found liable to Plaintiff for any damages, such liability was the result of acts, omissions and/or negligent conduct on the part of T.A. Chapman.

10. As such, T.A. Chapman has a duty of contribution to the extent any liability is imposed upon Frontier pursuant to W. Va. Code Section 55-7-13 et seq., as well as West Virginia common law.

**Count III**

*(Contractual Indemnification/Contribution against T.A. Chapman)*

11. Frontier hereby adopts and incorporates by reference paragraphs 1 through 10 of its Cross-Claim as if fully set forth herein.



12. To the extent Frontier is found liable to Plaintiff for any damages, such liability was the result of acts, omissions and/or negligent conduct on the part of T.A. Chapman.

13. Frontier's predecessor, The Chesapeake and Potomac Telephone Company of West Virginia ("C&P"), and T.A. Chapman, Inc. were parties to a July 1, 1988, Agreement in connection with constructing, removing, and transferring telephone facilities (the 1988 Agreement).

14. T.A. Chapman is contractually obligated to indemnify and save harmless C&P and thus, Frontier, under Paragraph 13 of the Agreement as follows:

The CONTRACTOR shall indemnify and save harmless the COMPANY from and against any and all claims and suits for damages, including all costs, attorneys' fees, interest, and other expenses incidental thereto, for personal injuries, including death, and property losses and damage due to or in any manner growing out of the performance of, or failure to perform, the work required under the provisions of the contract, unless said damages are due to the sole negligence of the COMPANY, its employees, or agents. CONTRACTOR agrees to assume responsibility for the investigation, defense, and settlement of such claims or suits, including payment of attorneys' fees and interest, if requested to do so by the COMPANY.

15. The parties were subject to a second Agreement dated July 1, 1990, which provided similar, if not identical indemnity (1990 Agreement).

16. T.A. Chapman is contractually obligated to indemnify C&P and, thus, Frontier under Paragraph 13 of the 1990 Agreement as follow:

The CONTRACTOR shall indemnify and save harmless the COMPANY from and against any and all claims and suits for damages, including all costs, attorneys' fees, interest, and other expenses incidental thereto, for personal injuries, including death, and property losses and damage due to or in any manner growing out of the performance of, or failure to perform, the work required under the provisions of the contract, unless said damages are due to the sole negligence of the COMPANY, its employees, or agents. CONTRACTOR agrees to assume responsibility for the

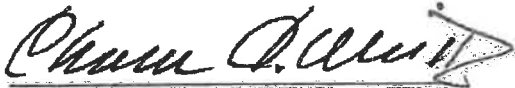
investigation, defense, and settlement of such claims or suits, including payment of attorneys' fees and interest, if requested to do so by the COMPANY.

17. As such, because Plaintiff's Second Amended Complaint alleges damages caused by T.A. Chapman's work, T.A. Chapman has a contractual duty and obligation of indemnification and contribution to Frontier from any such liability.

WHEREFORE, Frontier West Virginia Inc., demands judgment against the T.A. Chapman, Inc. in the amount of any and all damages for which Frontier ultimately may be liable to Plaintiff, plus any and all pre-judgment and post-judgment interest, reasonable attorneys' fees and the costs of this action, and any other and further relief that this Court deems just and proper.

FRONTIER WEST VIRGINIA INC.

By Counsel,



Charles C. Wise III (WVSB # 4616)  
Bowles Rice LLP  
125 Granville Square  
Suite 400  
Morgantown, West Virginia 26501  
(304) 285-2500  
(304) 285-2575 facsimile

**IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA  
DIVISION NO. 1**

**HOWARD LISTON,**

**Plaintiff,**

**v.**

**Case No. 16-C-279  
Judge Susan B. Tucker**

**FRONTIER WEST VIRGINIA INC., and  
T.A. CHAPMAN, INC., as a West Virginia corporation,**


**Defendants.**

**CERTIFICATE OF SERVICE**

I, Charles C. Wise III, counsel for Frontier West Virginia Inc., do hereby certify that I have served a true and correct copy of the foregoing **Defendant Frontier West Virginia Inc.'s Answer to Plaintiff's Second Amended Complaint and Cross-Claim Against T.A. Chapman, Inc.** this 3rd day of July, 2019, upon counsel of record by placing a true copy of same in the United States mail, postage pre-paid and addressed as follows:

Kevin T. Tipton, Esquire  
Tipton Law Offices  
316 Merchant Street, Suite 100  
Fairmont, West Virginia 26554

J. Victor Flanagan, Esquire  
Pullin, Fowler, Flanagan, Brown & Poe PLLC  
252 George Street  
Beckley, West Virginia 25801

  
Charles C. Wise III (WVSB # 4616)

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

HOWARD LISTON,

Plaintiff,

v.

Civil Action No. 16-C-279  
(Judge Susan B. Tucker)

FRONTIER WEST VIRGINIA, INC.,  
a Connecticut Corporation, and  
T.A. CHAPMAN, INC., a West  
Virginia Corporation,

Defendants.

**T.A. CHAPMAN, INC.'S ANSWER TO PLAINTIFF'S  
SECOND AMENDED COMPLAINT**

Now comes Defendant, T.A. Chapman, Inc., by the undersigned counsel, and for its answer to the Plaintiff's Second Amended Complaint, states as follows:

**FIRST DEFENSE**

This Defendant states that the Plaintiff's Second Amended Complaint fails to state a claim against this Defendant upon which relief can be granted.

**SECOND DEFENSE**

This Defendant denies all facts and allegations contained in the Plaintiff's Second Amended Complaint not hereinafter specifically and affirmatively admitted, and further states as follows:

**PARTIES AND JURISDICTION**

1. Answering Paragraph 1 of Plaintiff's Second Amended Complaint, upon information and belief, this Defendant admits the allegations contained therein.

2. Answering Paragraph 2 of Plaintiff's Second Amended Complaint, this Defendant states that this paragraph contains allegations against parties other than this Defendant and, therefore, does not necessitate a response herein by this Defendant by

way of admission or denial. Nevertheless, to the extent said paragraph may be construed as alleging a claim, cause of action, or any unlawful conduct by or against this Defendant, the same expressly is denied.

3. Answering Paragraph 3 of Plaintiff's Second Amended Complaint, this Defendant admits the allegations contained therein with clarification that this Defendant ceased all business operations in or around 2008.

4. Answering Paragraph 4 of Plaintiff's Second Amended Complaint, this Defendant admits the allegations contained therein.

#### **FACTS**

5. Answering Paragraph 5 of Plaintiff's Second Amended Complaint this Defendant re-alleges and incorporates herein all its responses to the allegations contained in paragraphs 1 through 4 as restated verbatim herein.

6. Answering Paragraph 6 of Plaintiff's Second Amended Complaint, this Defendant states that this paragraph contains allegations against parties other than this Defendant and, therefore, does not necessitate a response herein by this Defendant by way of admission or denial. Nevertheless, to the extent said paragraph may be construed as alleging a claim, cause of action, or any unlawful conduct by or against this Defendant, the same expressly is denied.

7. Answering Paragraph 7 of Plaintiff's Second Amended Complaint, this Defendant is without sufficient information upon which to form a belief as to the truth of the allegations asserted and therefore, denies the allegations contained therein and demands strict proof thereof.

8. Answering Paragraph 8 of Plaintiff's Second Amended Complaint, this Defendant is without sufficient information upon which to form a belief as to the truth of the allegations asserted and therefore, denies the allegations contained therein and demands strict proof thereof.

9. Answering Paragraph 9 of Plaintiff's Second Amended Complaint, this Defendant denies the allegations contained therein as to it and demands strict proof thereof.

10. Answering Paragraph 10 of Plaintiff's Second Amended Complaint, this Defendant denies the allegations contained therein and demands strict proof thereof.

11. Answering Paragraph 11 of Plaintiff's Second Amended Complaint, this Defendant denies the allegations contained therein and demands strict proof thereof.

12. Answering Paragraph 12 of Plaintiff's Second Amended Complaint, this Defendant denies the allegations contained therein and demands strict proof thereof.

13. Answering Paragraph 13 of Second Amended Plaintiff's Complaint, this Defendant denies the allegations contained therein as to it and demands strict proof thereof.

14. Answering Paragraph 14 of Plaintiff's Complaint, this Defendant denies the allegations contained therein as to it and demands strict proof thereof.

15. Answering Plaintiff's "Wherefore" clause, this Defendant denies that it owes Plaintiff any sum of money for any reason.

### **THIRD DEFENSE**

To the extent that any of the following affirmative defenses are applicable to Plaintiff's Second Amended Complaint for Damages, this Defendant invokes the

affirmative defenses of contributory negligence, assumption of the risk, acquiescence, unclean hands, laches, accord and satisfaction, statute of limitations, waiver, license, unavoidable accident, Act of God and any other matter constituting an avoidance or affirmative defense under any statute, constitution, common law or rule, including but not limited to those defenses available under Rule 8(c) of the West Virginia Rules of Civil Procedure, which prove applicable.

#### **FOURTH DEFENSE**

Defendant maintains that Plaintiff's Second Amended Complaint is barred by the applicable statute of limitations, the statute of repose or the equitable doctrine of laches.

#### **FIFTH DEFENSE**

Plaintiff's claims fail based upon an appropriate consideration of the rights, duties and interest of the parties and the equity of the relief requested.

#### **SIXTH DEFENSE**

This Defendant states that the injuries and damages about which Plaintiff complains were proximately caused or contributed to by supervening or intervening causes other than an act or omission on the part of this Defendant.

#### **SEVENTH DEFENSE**

This Defendant states that if Plaintiff sustained the injuries and damages about which he complains, all of which are specifically denied, said injuries and damages were proximately caused or substantially contributed to by reason of negligence on the part of Plaintiff herein, or by reason of negligence by other persons, firms, or corporations, and not this Defendant.

#### **EIGHTH DEFENSE**

In response to Plaintiff's claims for punitive or exemplary damages, this Defendant invokes its rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article III § 5 of the West Virginia Constitution to the extent any award of punitive or exemplary damages violates any of the conditions or protections afforded to it by the federal or state constitutions.

#### **NINTH DEFENSE**

This Defendant asserts that the assessment and award of punitive or exemplary damages violates the Fifth Amendment and Eighth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment of the United States Constitution and West Virginia Constitution because the award potentially constitutes an excessive fine and deprivation of property without the protection of fundamental due process.

#### **TENTH DEFENSE**

To the extent that any punitive or exemplary damages are awarded at trial, the imposition of such damages against this Defendant is unconstitutional pursuant to the Excessive Fines Clause of the United States Constitution and the West Virginia Constitution because: a) the punitive or exemplary damages do not bear a reasonable relationship to the harm allegedly caused by its conduct; b) the punitive or exemplary damages are excessive when compared to the reprehensibility of its conduct; and/or c) the punitive or exemplary damages are based on the overall wealth of the Defendant and not on the basis of the financial gain realized from the specific misconduct alleged.

Garnes v. Fleming Landfill, Inc., 186 W. Va. 656, 413 S.E.2d 897 (1991); TXO



Production Corp. v. Alliance Resources Corp., 187 W. Va. 457, 419 S.E.2d 870 (1992)  
*aff'd* 509 U.S. 443 (1993).

#### **ELEVENTH DEFENSE**

This Defendant adopts and incorporates the requirements and procedures established by West Virginia Code §55-7-29 as if set forth fully herein.

#### **TWELFTH DEFENSE**

This Defendant states that there is no causal connection between the actions or omissions complained of against this Defendant, and the injuries allegedly sustained by Plaintiff.

#### **THIRTEENTH DEFENSE**

This Defendant, not being fully advised of all the circumstances surrounding the allegations set forth in the Second Amended Complaint, reserve unto itself the affirmative defense that any injuries and damages that incurred to any party, if any, were the result of a superseding and/or intervening negligence or other acts or omissions of other individuals, corporations, or entities, for whose actions this Defendant bears no legal responsibility.

#### **FOURTEENTH DEFENSE**

The action described in the Second Amended Complaint was a result of a cause or causes over which this Defendant had no control.

#### **FIFTEENTH DEFENSE**

This Defendant, not being fully advised of all the circumstances surrounding the allegations set forth in the Second Amended Complaint, reserve unto itself the affirmative defense that the injuries, if any, resulting from the occurrence upon which this Second Amended Complaint is based are the result of a pure accident and none of

the parties were negligent or otherwise liable; therefore, none of the parties can recover from this Defendant.

#### **SIXTEENTH DEFENSE**

This Defendant reserves the right to assert that defense that Plaintiff failed to mitigate his damages, if any.

#### **SEVENTEENTH DEFENSE**

This Defendant, not being fully advised of all the circumstances surrounding the allegations set forth in the Second Amended Complaint, reserve unto itself the affirmative defense that the Plaintiff's negligence and/or the negligence, fault, or liability of some person or persons, firm or firms, other than this Defendant was primary in the happening of the incident described in Plaintiff's Second Amended Complaint.

#### **EIGHTEENTH DEFENSE**

Inasmuch as this Defendant is not advised of all the facts and circumstances surrounding the events referred to in the Second Amended Complaint, this Defendant incorporates herein by reference thereto, any and all defenses asserted by any other defendant in this matter.

#### **NINETEENTH DEFENSE**

This action and the relief sought by the Plaintiff is or may be barred, in whole or in part, by additional defenses of which this Defendant is not yet aware; accordingly, it reserves the right to supplement this Answer and to raise additional defenses as may appear after discovery of additional information.

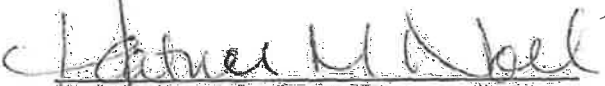
WHEREFORE, T.A. Chapman, Inc., respectfully requests that Plaintiff's Second Amended Complaint filed herein against it be dismissed, with prejudice; that the relief prayed for therein be denied; and that it recover of and from the Plaintiff its reasonable costs, including necessary attorney fees expended on its behalf, in the defense of this action.

THIS DEFENDANT DEMANDS A TRIAL BY JURY.

T.A. CHAPMAN, INC.,  
By Counsel,

 w/permission  
by Heather M. Noel

Jonathan J. Jacks, Esq., WV State Bar # 11731  
J. Victor Flanagan, Esq., WV State Bar # 5254  
Pullin, Fowler, Flanagan, Brown & Poe, PLLC  
2414 Cranberry Square  
Morgantown, WV 26508  
(304) 225-2200 telephone  
Co-Counsel for T.A. Chapman, Inc.



Heather M. Noel, WV State Bar #7814  
Sara E Brown, WV State Bar #11999  
MacCorkle Lavender PLLC  
2004 White Willow Way  
Morgantown, WV 26505  
(304) 599-5600 telephone  
(304) 599-8141 facsimile  
Co-Counsel for T.A. Chapman, Inc.

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

HOWARD LISTON,

Plaintiff,

v.

Civil Action No. 16-C-279  
(Judge Susan B. Tucker)

FRONTIER WEST VIRGINIA, INC.,  
a Connecticut Corporation, and  
T.A. CHAPMAN, INC., a West  
Virginia Corporation,

Defendants.

**CERTIFICATE OF SERVICE**


I, Heather M. Noel, co-counsel for Defendant, T.A. Chapman, Inc., a West Virginia Corporation, does hereby certify that, on January 24, 2020, a true copy of the foregoing **T.A. CHAPMAN, INC.'S ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT** was served upon all counsel/parties of record, by U.S. Mail and addressed as follows:

Kevin T. Tipton, Esq.  
Tipton Law Offices  
316 Merchant Street, Suite 100  
Fairmont, WV 26554  
*Counsel for Plaintiff*

Charles C. Wise III, Esq.  
Bowles Rice LLP  
125 Granville Square, Suite 400  
Morgantown, WV 26501  
*Counsel for Frontier West Virginia, Inc.*

J. Victor Flanagan, Esq.  
Pullin, Fowler, Flanagan,  
Brown & Poe, PLLC  
252 George Street  
Beckley, WV 25801  
*Co-Counsel for T.A. Chapman, Inc.*

Jonathan J. Jacks, Esq.  
Pullin, Fowler, Flanagan,  
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*Co-Counsel for T.A. Chapman, Inc.*

  
Heather M. Noel, WV Bar No. 7814  
Sara E. Brown, WV Bar 11999  
MacCorkle Lavender PLLC  
2004 White Willow Way  
Morgantown, WV 26505  
Telephone: 304/599-5600  
Facsimile: 304/599-8141

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

HOWARD LISTON,

Plaintiff,

v.

Civil Action No. 16-C-279  
(Judge Susan B. Tucker)

FRONTIER WEST VIRGINIA, INC.,  
a Connecticut Corporation, and  
T.A. CHAPMAN, INC., a West  
Virginia Corporation,

Defendants.

**T.A. CHAPMAN, INC.'S ANSWER TO  
FRONTIER WEST VIRGINIA, INC.'S CROSS-CLAIM**

Now comes Defendant, T.A. Chapman, Inc., by the undersigned counsel, and for its answer to the Cross-Claim filed by Frontier West Virginia Inc., states as follows:

**FIRST DEFENSE**

This Defendant states that the Cross-Claim of Frontier West Virginia Inc., fails to state a claim against it upon which relief can be granted.

**SECOND DEFENSE**

This Defendant denies all facts and allegations contained in the Cross-Claim of Frontier West Virginia Inc., not hereinafter specifically and affirmatively admitted, and further states as follows:

1. Answering Paragraph 1 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant states that Plaintiff's Second Amended Complaint speaks for itself and this Defendant re-states and re-alleges all affirmative defenses, responses, and allegations set forth in its Answer to Plaintiff's Second Amended Complaint.

2. Answering Paragraph 2 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant states that Plaintiff's Second Amended Complaint speaks for itself and this

Defendant re-states and re-alleges all affirmative defenses, responses, and allegations set forth in its Answer to Plaintiff's Second Amended Complaint.

3. Answering paragraph 3 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant states that said paragraph contains no allegations against this Defendant and therefore, does not necessitate a response by this Defendant by way of admission or denial. Nevertheless, to the extent said paragraph may be construed as alleging a claim, cause of action, or any unlawful conduct by or against this Defendant, the same expressly is denied.

4. Answering paragraph 4 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant denies the allegations contained therein and demands strict proof thereof.

**Count I**  
(Common Law Indemnification)

5. Answering paragraph 5 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant hereby adopts and incorporates by reference its answers and responses to paragraphs 1 through 4 as if fully set forth herein.

6. Answering paragraph 6 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant denies the allegations contained therein and demands strict proof thereof.

7. Answering paragraph 7 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant denies the allegations contained therein and demands strict proof thereof.

**Count II**  
(Common Law Contribution)

8. Answering paragraph 8 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant hereby adopts and incorporates by reference its answers and responses to paragraphs 1 through 7 as if fully set forth herein.

9. Answering paragraph 9 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant denies the allegations contained therein and demands strict proof thereof.

10. Answering paragraph 10 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant denies the allegations contained therein and demands strict proof thereof.

**Count III**

*(Contractual Indemnification/Contribution against T.A. Chapman)*

11. Answering paragraph 11 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant hereby adopts and incorporates by reference its answers and responses to paragraphs 1 through 10 as if fully set forth herein.

12. Answering paragraph 12 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant denies the allegations contained therein and demands strict proof thereof.

13. Answering paragraph 13 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant admits the allegations contained therein.

14. Answering paragraph 14 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant states that the July 1, 1988, Agreement speaks for itself.

15. Answering paragraph 15 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant admits the allegations contained therein.

16. Answering paragraph 16 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant states that the 1990 Agreement speaks for itself. This Defendant states further that it denies the remaining allegations contained therein and demands strict proof thereof.

17. Answering paragraph 17 of Frontier West Virginia Inc.'s Cross-Claim, this Defendant denies the allegations contained therein and demands strict proof thereof.

18. Answering Frontier West Virginia Inc.'s Cross-Claim's prayer for relief, this Defendant denies that it owes Frontier West Virginia Inc., any sums of money for any reason.

19. To the extent that Frontier West Virginia Inc.'s Cross-Claim utilizes headings to separate its claims, and, to the extent said headings may be construed as alleging a claim, cause of action, or any unlawful conduct by or against this Defendant, the same expressly is denied.

### **THIRD DEFENSE**

This Defendant states that Co-Defendant Frontier West Virginia Inc., Plaintiff and/or other persons or parties were at fault or negligent, which fault or negligence caused or contributed to cause Plaintiff claimed damages, thereby barring recovery in whole or in part against T.A. Chapman, Inc. as provided by the applicable law of West Virginia.

### **FOURTH DEFENSE**

This Defendant states that it is entitled to a set-off or credit in the amount of any settlement or compromise reached by Plaintiff with any other person for any of Plaintiff's alleged damages, if any.

### **FIFTH DEFENSE**

This Defendant invokes all affirmative defenses applicable herein including, but not limited to, improper venue, lack of personal jurisdiction, lack of subject matter jurisdiction, insufficiency of service of process, accord and satisfaction, estoppel, laches, statute of limitations, statute of repose, waiver, and reserves the right to assert



any other affirmative defenses which are established by the evidence to be applicable in this matter.

WHEREFORE, this Defendant, T.A. Chapman, Inc. prays that Frontier West Virginia Inc.'s Cross-claims filed herein against it be dismissed, with prejudice; that the relief prayed for therein be denied; and that it recover of and from Frontier West Virginia Inc. its reasonable costs, including necessary attorney fees expended in its behalf, in the defense of this action.

T.A. CHAPMAN, INC. DEMANDS A TRIAL BY JURY ON THIS CROSS-CLAIM.

**T.A. CHAPMAN, INC.'S CROSS-CLAIM  
AGAINST FRONTIER WEST VIRGINIA INC.**

COMES NOW the Defendant, T.A. Chapman, Inc., by counsel, and so as to preserve this Defendant's right to contribution and/or implied indemnification, asserts the following cross-claim against Frontier West Virginia Inc., and further states as follows:

1. Plaintiff has filed a Second Amended Complaint making various allegations against Defendants, including T.A. Chapman, Inc., in connection with this matter, all of which this Defendant denies.

2. In the event that T.A. Chapman, Inc. is found liable to the Plaintiff, which liability is specifically denied, then in such event the liability of T.A. Chapman, Inc. is passive and secondary to the liability of Frontier West Virginia Inc., and/or other parties, whose liability was active and/or primary and, as a result thereof, T.A. Chapman, Inc. is entitled to indemnification by Frontier West Virginia Inc., for all sums, if any, which may


be adjudged against T.A. Chapman, Inc. in favor of the Plaintiff, including, without limitation, costs, expenses and attorney's fees.

3. In the alternative, if it is determined that T.A. Chapman, Inc. participated in any conduct which would render it liable to the Plaintiff, which participation and conduct T.A. Chapman, Inc. specifically denies, then in such event the liability of T.A. Chapman, Inc. would be such as to entitle T.A. Chapman, Inc. to contribution from Frontier West Virginia Inc., and/or other parties towards any sums that may be adjudged against T.A. Chapman, Inc. in favor of the Plaintiff, including, without limitation, costs, expenses and attorney's fees.

WHEREFORE, T.A. Chapman, Inc., respectfully prays and demands judgment in its favor against Frontier West Virginia Inc., for any and all such sums which may be adjudged against T.A. Chapman, Inc., including without limitation, costs, expenses and attorney's fees.

T.A. CHAPMAN, INC. DEMANDS A TRIAL BY JURY UPON ITS CROSS-CLAIM.

T.A. CHAPMAN, INC.,  
By Counsel,

  
Jonathan J. Jacks, Esq., WV State Bar # 11731  
Victor Flanagan, Esq., WV State Bar # 5254  
Pullin, Fowler, Flanagan, Brown & Poe, PLLC  
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Co-Counsel for T.A. Chapman, Inc.

permission  
by HAN  
TFLA



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Sara E Brown, WV State Bar #11999

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(304) 599-8141 facsimile

Co-Counsel for T.A. Chapman, Inc.

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

HOWARD LISTON,

Plaintiff,

v.

Civil Action No. 16-C-279  
(Judge Susan B. Tucker)

FRONTIER WEST VIRGINIA, INC.,  
a Connecticut Corporation, and  
T.A. CHAPMAN, INC., a West  
Virginia Corporation,

Defendants.

**CERTIFICATE OF SERVICE**


I, Heather M. Noel, co-counsel for Defendant, T.A. Chapman, Inc., a West Virginia Corporation, does hereby certify that, on January 24, 2020, a true copy of the foregoing **T.A. CHAPMAN, INC.'S ANSWER TO FRONTIER WEST VIRGINIA, INC.'S CROSS-CLAIM** was served upon all counsel/parties of record, by U.S. Mail and addressed as follows:

Kevin T. Tipton, Esq.  
Tipton Law Offices  
316 Merchant Street, Suite 100  
Fairmont, WV 26554  
*Counsel for Plaintiff*

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