

SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: May 11 2023  
02:30PM EDT  
Transaction ID 69996578

SOUTHERN JACKSON COUNTY  
PUBLIC SERVICE DISTRICT,

Plaintiff,

v.

Supreme Court Docket No. 23-226

Jackson County Circuit Court  
Civil Action No. CC-18-2022-C-91  
Honorable Lora Dyer

MASTER METER, INC., a Texas  
Corporation, FERGUSON ENTERPRISES,  
a Virginia Limited Liability Company, C.J.  
HUGHES CONSTRUCTION COMPANY, INC.,  
a West Virginia Corporation, and TRI-STATE  
PIPELINE, INC., an Ohio Corporation,

Defendants.

**PLAINTIFF'S REPLY MEMORANDUM IN OPPOSITION TO  
MOTION TO REFER TO THE WEST VIRGINIA BUSINESS COURT DIVISION**

Plaintiff, Southern Jackson County Public Service District, in opposition to Defendants' Motion to Refer to the West Virginia Business Court Division, respectfully requests this Court deny Defendants' motion. Plaintiff submits that this action is not an appropriate action for referral to business court under West Virginia Code § 51-2-15 and West Virginia Trial Court Rule 29. In support of its reply, Plaintiff states as follows:

**LEGAL STANDARD**

The West Virginia Legislature finds that, due to the complex nature of litigation involving highly technical commercial issues, there is a need for a separate and specialized court docket to be maintained in West Virginia's most populated circuit court districts with specific jurisdiction over actions involving such commercial issues and disputes *between businesses*.

W. Va. Code § 51-2-15(a) (emphasis added).

West Virginia Trial Court Rule 29.04 provides:

(a) **“Business Litigation”**--one or more pending actions in circuit court 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.

### **ANALYSIS**

#### **1) Plaintiff’s Claims are Not Claims Between Business Entities.**

This action does not involve matters between business entities. The Plaintiff here, Southern Jackson Public Service District (“Southern Jackson”), is not a “business entity.” West Virginia statutory and common law recognize that public service districts are not businesses.

Under West Virginia law, Plaintiff is a “public agency,” “political subdivision,” and/or “governmental agency.” West Virginia Code § 5-19-1 provides that “ ‘public agency’ means the state of West Virginia, counties, municipalities, towns, boards of education, *public service districts* and other political subdivisions of this state.” (emphasis added). *See also*, W. Va. Code § 16-13D-

2(b) (“The term ‘public agency’ shall mean any ... public service district, or other political subdivision of this state.”). Pursuant to West Virginia Code § 29-12A-3:

(c) “Political subdivision” means any county commission, municipality and county board of education; any separate corporation or instrumentality established by one or more counties or municipalities, as permitted by law; any instrumentality supported in most part by municipalities; any public body charged by law with the performance of a government function and whose jurisdiction is coextensive with one or more counties, cities or towns; a combined city-county health department created pursuant to article two, chapter sixteen of this code; *public service districts*; and other instrumentalities ...

(emphasis added). *See also, Zirkle v. Elkins Road Public Service Dist.*, 221 W.Va. 409, 655 S.E.2d 155 (2007) (Tort Claims Act's protection extended to public service districts, under the Act's definition of political subdivision, which included the term “public service districts.”). Pursuant to West Virginia Code § 22C-3-3:

(5) “Governmental agency” means the state government or any agency, department, division or unit thereof; counties; municipalities; watershed improvement districts; soil conservation districts; sanitary districts; *public service districts* ...

(emphasis added).

Plaintiff was organized and created exclusively to preserve public health, comfort and convenience to the citizens of Southern Jackson County. *See* W. Va. Code § 16-13A-1. Its purpose is not to conduct business, but to perform a government function. *See, id.*<sup>1</sup> *See also, State ex rel. McMillion v. Stahl*, 141 W. Va. 233, 243, 89 S.E.2d 693, 700 (1955) (distinguishing private corporations from public corporations which are created for public purposes). As further explained forth in *White v. Berryman*, 187 W. Va. 323, 329–30, 418 S.E.2d 917, 923–24 (1992):

A “public corporation” has a well-recognized legal significance and is generally held to be one created by the State for political purposes and to act as an agency in the administration of government. We gave this explanation in *State ex rel. Sams v. Ohio Valley General Hospital Association*, 149 W.Va. 229, 140 S.E.2d 457, 460 (1965), in which we quoted

---

<sup>1</sup> Plaintiff is also excepted from the State’s business franchise tax. *See* W. Va. Code § 11-23-7.

this language from *Levin v. Sinai Hospital of Baltimore City*, 186 Md. 174, 46 A.2d 298 (1946): “ ‘A public corporation is an instrumentality of the State, founded and owned by the State in the public interest, supported by public funds, and governed by managers deriving their authority from the State.’ ” See also *Meisel v. Tri-State Airport Authority*, 135 W.Va. 528, 64 S.E.2d 32 (1951).

West Virginia Code § 16-13A-3 states: “From and after the date of the adoption of the order creating any public service district, it is a public corporation and political subdivision of the state.”

“Every district organized, consolidated, merged or expanded under this article is a public instrumentality created and functioning in the interest and for the benefit of the public...”. W.Va. Code § 16-13A-21.

The definition of “business” in Black's Law Dictionary (11th ed. 2019) is also instructive: “A commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain.” Whereas, Black's Law Dictionary (11th ed. 2019) defines “public corporation” and “public service corporation” as follows:

- **public corporation.** (17c) **1.** ... **2.** A corporation that is created by the state as an agency in the administration of civil government. — Also termed *political corporation*. **3.** A government-owned corporation that engages in activities that benefit the general public, usu. while remaining financially independent. • Such a corporation is managed by a publicly appointed board. — Also termed (in sense 3) *government corporation*; *public-benefit corporation*.

“A public corporation is a corporation created by the state for public purposes only, as an instrumentality to increase the efficiency of government, supply the public wants, and promote the public welfare. This class of corporations includes not only the municipal corporation, but also agencies of government, called ‘quasi corporations,’ whose objects are not the making of private profit nor supplying the wants of the members.” Henry H. Ingersoll, *Handbook of the Law of Public Corporations* 11 (1904).

\*\*\*\*\*

- **public-service corporation.** (1894) A corporation whose operations serve a need of the general public, such as public transportation, communications, gas, water, or electricity. • This type of corporation is usu. subject to extensive governmental regulation.

Inasmuch as Southern Jackson is not a “business” as a matter of law, this case does not involve “business litigation” and does not affect matters “between business entities.” Accordingly, referral of this case is not appropriate under West Virginia Trial Court Rule 29.

**2) Specialized Treatment of Plaintiff’s Case is Not Likely to Improve the Expectation of a Fair and Reasonable Resolution of the Case.**

Specialized treatment of Plaintiff’s claims is not likely to improve the expectation of a fair and reasonable resolution of Plaintiff’s claims. Plaintiff’s claims involve interpretation of contracts, breaches of warranties, negligence, misrepresentation, and fraud. There is no special law that applies to these issues. These are black-letter law issues, and the Circuit Court is well equipped to apply the already established law in these areas. Whether a product worked as represented, whether the product was installed and tested per written specifications, and whether a defendant failed or refused to replace the products do not require specialized knowledge or expertise.

Inasmuch as this case should be decided upon already established law, it should not have any implications for businesses beyond the decision. Likewise, there should be no significant interpretation of business or commercial statutes. Furthermore, there are not an unusual number of parties in the case and there should be no need for specialized judicial management to expedite the case. Accordingly, specialized treatment of Plaintiff’s case is unlikely to improve the expectation of a fair and reasonable resolution of the controversy and there is no need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable.

**3) Plaintiff is more akin to consumer than a sophisticated entity under the facts and circumstances here.**

Southern Jackson is more akin to a consumer rather than a sophisticated entity, and stands in the shoes of their water consumers, under the facts here. According to the definition of “consumer” in Black's Law Dictionary (11th ed. 2019): “Occasionally, even companies come within the definition, if acting outside their normal business activities ... . Deborah Parry, “Consumer,” in *The New Oxford Companion to Law* 213, 213 (Peter Cane & Joanne Conaghan eds., 2008).” The Plaintiff’s normal activities are preserving the public health, comfort and convenience to the citizens of Southern Jackson County. The Plaintiff does not enter into contracts such as the instant one on a regular basis and they are not a for-profit business. Moreover, Plaintiff’s knowledge nor their resources were comparable to the Defendants. Plaintiff was not operating on equal footing with the Defendants and certainly did not have equal business acumen.

Indeed, unlike Defendants, Plaintiff is a small, rural public entity, with seven full time employees and one part time employee. The Plaintiff operates in only part of Jackson County, with service to only 2500 customers within the county. There is a general manager, four laborers, one administrative employee, and two clerical employees. The average education of the employees is a high school diploma. Plaintiff is not a for profit entity, they are not funded by the State, and the proceeds received from the utilities are invested back into services for the public. Plaintiff’s resources are limited. Plaintiff enters into transactions such as the instant one only every 8-10 years. They do not have in-house counsel and they do not draft or negotiate contract terms. On projects such as the instant one, the PSD hires an engineer who handles all of the contractual matters. The PSD has no experience in drafting or negotiating such contracts themselves.

Plaintiff was solicited and approached by Defendants and Plaintiff was relying on Defendants’ specialization and expertise with regard to the Master Meter products. Plaintiff was

not sophisticated with regard to the Master Meter products and certainly did not share in Defendants' expertise. For instance, Master Meter has been described as follows:

The company [Master Meter] specializes in partnering with municipalities that are missing a sufficient level of internal resources to properly meet the demands of today's regulatory environment, address water scarcity, and deliver upon ever-demanding customer expectations. Master Meter's technology helps utilities mitigate these issues. Master Meter is present across all 50 states, Canada and Mexico. It has grown its business servicing the heartland of America, where small rural accounts favor and place value in close vendor partnerships that provide training, customized solutions, and consultation. Nevertheless, Master Meter enjoys and continues to expand its base of large major account customers such as Las Vegas, Seattle, and Philadelphia.

The Silicon Review 2016. "Master the Flow of Technology With Master Meter."

<https://thesiliconreview.com/.magazine/.profile/master-the-flow-of-technology-with-master-meter>.

Defendants Ferguson and Master Meter advertise as follows:

*Trust* Ferguson Waterworks to customize a meter system for your utility through our offering of Master Meter products. Whether your utility is in the market for a new advanced metering infrastructure (AMI) or automatic meter reading (AMR) meter system, our Meter and Automation Group. Or MAG, will work with you to implement the right Master Meter technology to help you solve inefficiencies in meter reading operations. We are your source for Master Meter products in the following states:

Connecticut  
Illinois  
Indiana  
Kentucky  
Maine  
Massachusetts  
New Hampshire  
New Jersey  
New York  
Ohio  
Rhode Island  
Vermont  
West Virginia

Discover the features and benefits of AMR and AMI technology from Master Meter, and contact us to request *expert assistance* from our MAG associates. Check Meter system availability by state for more information.

## MASTER METER AMR SOLUTIONS

*Trusted by utilities in more than a dozen countries and in millions of units, the underlying technology of the Master Meter 3G<sup>™</sup> AMR Network is proven to increase meter reading efficiencies...*

Ferguson 2023, *Ferguson website*, accessed May 10, 2023, <https://www.ferguson.com/.content/jobsite-solutions/water-meter-installation/master-meter>

(italics added).

Master Meter and Ferguson also publicly “encourage[d] water utilities and municipalities to invest in smart water management systems and their residents’ future.” GlobeNewswire. “A Smart Water Solution is a Smart Investment in Accomplishing More With Less.” Globenewswire.com, Mar. 23, 2021, <https://www.globenewswire.com/fr/news-release/2021/03/23/2197996/0/en/A-Smart-Water-Solution-is-a-Smart-Investment-in-Accomplishishng-More-With-Less.html>. Ferguson Waterworks and Master Meter were described on Globenewswire.com as follows:

### ABOUT FERGUSON WATERWORKS

Ferguson is the largest wholesale distributor of residential and commercial plumbing supplies and pipe, valves, and fittings in the U.S. The company is also a major distributor of HVAC equipment, fire protection systems, and industrial products and services. Additionally, Ferguson is one of the nation’s largest Waterworks companies, Ferguson Waterworks, and offers public and private water and sewer authorities, utility contractors, heavy highway contractors, and more services in water, sewer, groundwater, geosynthetics, and meter and automation. Founded in 1953 and headquartered in Newport News, Virginia, Ferguson has sales of \$18.9 billion and approximately 26,000 associates in 1,400 locations. Ferguson and its subsidiaries serve customers in all 50 states, Puerto Rico, Mexico, and the Caribbean. Ferguson is part of Ferguson plc, which is listed on the London Stock Exchange (LSE:FERG) and on the FTSE 100 index of listed companies.



## ABOUT MASTER METER

Master Meter is a high-service provider of water management solutions specializing in advanced digital water metering, data delivery, and Utility Intelligence software. Master Meter continues to expand its portfolio of new and innovative smart water technologies in support of today's dynamic water utility business environment, and the water department's rapidly evolving role within a Smart City and IoT strategic plan.

*Id.*

Master Meter is a subsidiary of Israel-based Arad LTD, a world leader in the field of water measurement solutions and services. This direct pipeline to world-class innovation allows Master Meter to provide North American Water utilities with precise digital measurement, data delivery, and water management software that optimizes revenue, improves efficiencies and promotes water stewardship through enhanced customer engagement...

GlobeNewswire. "Master Meter Selected as Offering the Best Smart Water Solution."

Globenewswire.com, Sept. 29, 2021, <https://www.globenewswire.com/news-release/2021/09/29/2305561/0/en/Master-Meter-Selected-as-Offering-the-Best-Smart-Water-Solution.html>.

According to Master Meter, at [mastermeter.com](https://www.mastermeter.com/): "Utilities of all sizes across North America trust our products and solutions across millions of metered connections in homes and businesses." Master Meter 2023, *Master Meter website*, accessed May 10, 2023, <https://www.mastermeter.com/>. Indeed, the ultimate users of these products are the public, the water consumers, the citizens of southern Jackson County, that the Plaintiff was created to serve.

Moreover, Defendants have offered no support for their conclusory assertion that Plaintiff is a sophisticated business entity. Plaintiff is not a business entity and whether a plaintiff is sophisticated is ordinarily a question of fact to be decided by a jury. *See Breaux v. Goodyear Tire & Rubber Co.*, 320 So. 3d 1197, 1203–04 (La. App. 2021) (citations omitted). As further explained in *Vill. of Big Lake v. BNSF R. Co.*, 433 S.W.3d 460, 470–71 (Mo. Ct. App. 2014):

[T]he Respondents summarily stated that "the Pipeline Permits were negotiated between two sophisticated parties." Though no Missouri court has declared the subject of this

statement to be a question of fact, we believe the proposition to be self-evident. In *Purcell*, the Supreme Court went to great lengths to set forth the apparently uncontroverted credentials of the parties before concluding that the parties were sophisticated businesses in the “*type of transaction*” involved in the case. 59 S.W.3d at 510–11 (emphasis added). Similarly, in *Caballero v. Stafford*, 202 S.W.3d 683, 695 n. 2 (Mo.App.S.D.2006), the Southern District reversed a trial court's determination that *Alack* did not apply to the release provision at issue because “we can find nothing in the record supporting the proposition that Caballero is a sophisticated commercial entity.” Other jurisdictions have expressly held that the level of sophistication of a party is question of fact, not a question of law. See *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 355 Ill.App.3d 546, 291 Ill.Dec. 158, 823 N.E.2d 168, 181 (2005) (“[T]he plaintiff's level of sophistication ... [is a] question[ ] of fact for the trier of fact to determine.”); *Appletree Square I Ltd. Partnership v. Investmark, Inc.*, 494 N.W.2d 889, 894 (Minn.App.1993) (“The unique qualifications of the buyers and sellers in this case create questions of fact regarding the relative sophistication of the parties. The fact-finder must weight this evidence to determine whether the buyers' reliance on disclosures was reasonable.”); *McGeorge v. Van Benschoten*, 1988 WL 163063, \*7, No. Civ. 87–1050 PHX CAM (D.Ariz.Dec. 8, 1988) (not reported in F.Supp.) (the party's lack of sophistication raises a question of fact precluding judgment as a matter of law). See also Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 Mo. L. Review 493, 494–96, 520 (2010) (examining the need for courts to define sophistication; noting that the extensive contract treatises of Williston, Corbin and Farnsworth do not clarify what is meant by the term; and argues that because the level of sophistication is treated as a question of fact, a “more exacting analysis (rather than unstated presumptions)” would provide better results; “the court should apply a rigorous fact-driven analysis to determine whether \*471 assignment of the sophistication label is appropriate.”)

Here, the uncontroverted facts in Respondents' summary judgment motion are devoid of *any* facts from which the trial court could have concluded as a matter of law that the pipeline permits were negotiated at arm's length between business or commercial entities of equal power and sophistication in such transactions. The Respondents' uncontroverted facts state only that Big Lake is “a Missouri municipality.” The Respondents cite to no authority suggesting that this admitted fact supports the conclusion as a matter of law that the pipeline permits were negotiated between parties sophisticated in such transactions.

(footnotes omitted). See also, *Appletree Square I Ltd. P'ship v. Investmark, Inc.*, 494 N.W.2d 889, 893–94 (Minn. Ct. App. 1993) (“The unique qualifications of the buyers and sellers in this case create questions of fact regarding the relative sophistication of the parties”); *Nationstar Mortg.*,

*LLC v. West*, 237 W. Va. 84, 90, 785 S.E.2d 634, 640 (2016), *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W.Va. 341, 358, 752 S.E.2d 372, 389 (2013), *W. Virginia Mut. Ins. Co. v. Adkins*, 234 W. Va. 226, 235–36, 764 S.E.2d 757, 766–67 n. 22 (2014), and *Barber v. Union Carbide Corp.*, 172 W. Va. 199, 204, 304 S.E.2d 353, 357–58 (1983) (suggesting facts and circumstances should be considered in determining sophistication of parties).

Accordingly, Southern Jackson is more akin to a consumer rather than a sophisticated entity, and stands in the shoes of their water consumers, under the facts here. Furthermore, inasmuch as Defendants have offered no support to the contrary, Plaintiffs should not be treated as a sophisticated business entity.

### **CONCLUSION**

For the reasons set forth above, Plaintiff respectfully requests that this Court deny Defendants’ Motion to Refer this civil action to the West Virginia Business Court Division.

**SOUTHERN JACKSON COUNTY  
PUBLIC SERVICE DISTRICT,**

By counsel,

/s/ Marvin W. Masters  
Marvin W. Masters  
West Virginia State Bar No. 2359  
April D. Ferree  
West Virginia State Bar No. 8034  
The Masters Law Firm lc  
181 Summers Street  
Charleston, West Virginia 25301  
(304) 342-3106  
Counsel for Plaintiff  
F:\4\365\b001.docx

## **CERTIFICATE OF SERVICE**

I hereby certify that on the 11<sup>th</sup> day of May, 2023, I electronically filed “Plaintiff’s Reply Memorandum in Opposition to Motion to Refer to the West Virginia Business Court Division” with the Clerk of the Court using the File & Serve Xpress system, which will send notification of such filing to the following File & Serve Xpress participant:

David K. Hendrickson  
Hendrickson & Long, PLLC  
214 Capital Street  
Post Office Box 11070  
Charleston, West Virginia 25339  
daveh@handl.com  
*Counsel for Defendant Master Meter, Inc.*

I hereby certify that on May 11, 2023, I mailed the documents by United States Postal Service to the following:

Honorable Lora Dyer  
Jackson County Courthouse  
Post Office Box 800  
100 Court Street  
Ripley, West Virginia 25271

Bruce DeWees, Clerk  
Jackson County Circuit Court  
Jackson County Courthouse  
Post Office Box 427  
100 Court Street  
Ripley, West Virginia 25271

Carol Miller  
Berkely County Judicial Center  
Business Court Division  
380 W. South Street, Suite 2100  
Martinsburg, West Virginia 25401

William Slicer  
Shuman McCuskey Slicer PLLC  
1411 Virginia Street, East, Suite 200  
Charleston, West Virginia 25301  
*Counsel for Ferguson Enterprises*

Daniel J. Konrad  
Matthew L. Ward  
Dinsmore & Shohl LLP  
611 Third Avenue  
Huntington, West Virginia 25701  
*Counsel for C.J. Hughes Construction Company, Inc.*

/s/ Marvin W. Masters  
Marvin W. Masters  
West Virginia State Bar No. 2359