IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Thomas B., individually and as parent and next friend of A.B., a minor,
Plaintiffs Below, Petitioners,

v.

CASE NO.: 22-0468

U.S. Hotel and resort Management, Inc., and Regency Hotel Management, LLC,
Defendants Below, Respondents.

PETITIONERS THOMAS B. AND A.B.'S REPLY BRIEF

William C. Brewer, Esq.
West Virginia State Bar No. 448
Ramsey K. Jorgensen, Esq.
West Virginia State Bar No. 14074
P.O. Box 4206
Morgantown, WV 26504
wbrewer@brewerlaw.com
ramsey@brewerlaw.com
Counsel for the Petitioners Thomas B. and A.B.

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PETITIONERS THOMAS B. AND A.B.'S REPLY BRIEF

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2. The Circuit Court erred when it relied on *Travis and Morgan Bailey, on behalf of their minor son, Parker Bailey v. New Winterplace, Inc., a West Virginia Corporation* because the facts of that case are neither similar nor relevant to be indicative of the Legislature's intent in this case.

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II. STANDARD OF REVIEW

The standard of review in this case is *de novo* because the Circuit Court granted Respondents' Motion to Dismiss, filed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. *Elmore v. Triad Hospitals, Inc.*, 220 W.Va. 154, 157-58, 640 S.E.2d 217, 220-21 (2006). "Where the issue on an appeal from the circuit court is clearly a

question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

III. REQUEST FOR ORAL ARGUMENT

Petitioners hereby renew their request that they be permitted to present Oral Argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure due to the issues presented and assignments of error relating to facts, circumstances, and the law that may be expanded upon through oral argument. However, as stated in ***Petitioners' Objection to Untimely Filing and Motion to Strike Respondents' Response*** filed contemporaneously with this Reply Brief, Petitioners request Respondents be barred from participating in oral argument in this case due to their failure to adhere to the Scheduling Order set by this Court in this case.

IV. ARGUMENT

As stated above, Petitioners filed ***Petitioners' Objection to Untimely Filing and Motion to Strike Respondents' Response*** contemporaneously with this Reply Brief. This Reply Brief is submitted in the alternative to ***Petitioner's Objection to Untimely Filing and Motion to Strike Respondents' Response.***

A. The Circuit Court erred when it found that Petitioners claims were barred by the West Virginia Skiing Responsibility Act because the Resort has a duty to maintain the Resort in a reasonably safe manner and there are facts and evidence that must be discovered in order to determine whether the Resort met this standard.

Respondents argue in their Response that Petitioners are attempting to circumvent the plain language of the West Virginia Skiing Responsibility Act

("WVSRA"), codified at W.Va. Code § 20-3A-1 *et seq.*, and that Petitioners claims have been a "moving target" throughout the case. See Respondents' Response Brief at pg. 7.

Respondents mischaracterize Petitioners' claims. Petitioners have maintained the same claims and issues throughout this case: (1) that the plain language of the WVSRA provides that Respondents have a duty to maintain the skiing areas in a reasonably safe manner; and (2) that Respondents must be held to a higher standard due to their invitation of individuals with special needs, such as Anna, to participate in events at Respondents' resort.

The Legislature's intent in enacting the WVSRA was to "immunize ski area operators *only* for the '*inherent risks* in the sport of skiing which should be understood by each skier and *which are necessarily impossible to eliminate by the ski area operator*[.]'" *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 693, 408 S.E.2d 634, 643 (1991) (quoting W.Va. Code § 20-3A-1) (emphasis added). "[T]he West Virginia Legislature did not intent to immunize ski area operators from liability for negligence where it involves a violation of an *operator's duty to maintain the ski areas in a reasonably safe condition.*" *Hardin v. Ski Venture, Inc.*, 848 F. Supp. 58, 61 (N.D. W.Va. 1994) (emphasis added). Again, the intent of the West Virginia Legislature was not to provide ski area operators with *carte blanche* for their negligent actions. Ski area operators remain liable for violations of their duty to maintain the ski areas in a reasonably safe condition, which result in injuries. See generally *Lewis*, 185 W.Va. 684, 408 S.E.2d 634 (1991).

Further, courts across the country have held that ski area operators remain liable for injuries sustained as a result of risks that could have been eliminated. See *Huneau v.*

Maple Ski Ridge, Inc., 17 A.D.3d 848, 794 N.Y.S.2d 460 (N.Y. Sup. Ct. App. Div. 3d Dep't. 2005); *Nolan v. Mt. Bachelor, Inc.*, 317 Or. 328, 856 P.2d 305 (Or. 1993); *Kopeikin v. Moonlight Basin Management, LLC*, 981 F.Supp. 2d 936 (Dist. Mont. 2013); *Brown v. Stevens Pass, Inc.*, 97 Wash.App. 519, 984 P.2d 448 (Wash. Ct. App. Div. 1 1999); and *Verberkmoes v. Lutsen Mountains Corp.*, 844 F.Supp. 1356 (D. Minn. 5th Div. 1994).

Respondents argue that Petitioners' claims fail due to an exception to a ski area operator's duty to maintain the ski area in a reasonably safe manner for inherent risks within the sport of skiing. See Respondents' Response Brief at pg. 13. Petitioners agree that WVSRA is controlling in this case, however, Respondents conveniently ignore its plain language. The WVSRA makes clear that ski area operators are only immune from injuries that result from the "inherent risks in the sport of skiing which should be understood by each skier ***and*** which are ***necessarily impossible to eliminate*** by the ski area operator." W.Va. Code § 20-3A-1 (emphasis added).

In order for a ski area operator to acquire immunity, both clauses of the statute must be true. The injury must result from (1) an inherent risk in the sport of skiing; ***and*** (2) that risk must necessarily be ***impossible to eliminate*** by the ski area operator. Respondents argue that simply because a collision between skiers occurred and a collision between skiers is an inherent risk of skiing enumerated by the Legislature in W.Va. Code § 20-3A-5, they have immunity in this case. Respondents' assertion that all collisions are necessarily impossible to eliminate is fatal to their position. Respondents fail to address the question of whether the risk of Anna, a child with Down's Syndrome

known to and invited by the Respondents, being struck from behind by following tubers was necessarily impossible to eliminate.

The answer to that is, of course, no.

As set forth more fully in Petitioners' Brief in Section VI.A. at pg. 13 - 16, Mr. Currey noted at least Four (4) instances when Respondents' failed to maintain the snow tubing park in a reasonably safe condition, all of which would have drastically reduced the risk of injury to Anna. Those instances include, but are not necessarily limited to, (1) a safety and/or instructions video or a safety and/or an instructions speech before patrons are permitted to participate in the snow tubing park; (2) a person, often a supervisor, to accompany participants in the Adaptive Skiing Program; (3) a person at the landing area to communicate to the expeditor when it is safe to allow additional tubers to follow; and (4) emergency medical personnel on staff and present in the event of an emergency or injury, often the ski patrol.

Respondents did not take any of the steps noted by Mr. Currey, and thus were in violation of WVSRA's mandate to maintain the park in a reasonably safe condition.

Most notably, Respondents positioned an expeditor at the top of the Snow Tubing Park. The entire purpose of the expeditor is to ensure that the tubers are participating in the Snow Tubing Park safely. While skiing, there is no expeditor at the top of the ski slopes informing skiers when it is safe to enter the slope - it is the duty of the skier to make that decision.

Respondents have taken the step of placing an expeditor at the top of the snow tubing park, recognizing that tubing and skiing are different activities, treating the

activities differently, and ***attempting*** to ensure that the tubing patrons safely participate as tubers do not have control over their speed or course of direction.

However, as stated by Mr. Currey, additional steps were necessary. Another person, or observer, was required to be at the bottom of the snow tubing park to communicate to the expeditor that the lanes and/or landing area were clear for additional tubers. Or the expeditor himself/herself needed to ensure that the landing area was clear. These are requirements for fully able-bodied individuals participating at Respondents' resort. Respondents failed to meet these requirements for able-bodied individuals, and certainly did not meet any additional requirements of a heightened duty Petitioners assert Respondents owed, discussed in more detail in Section IV.D.

Therefore, the Circuit Court erred in holding that Petitioners' claims were barred by the WVSRA, and that Respondents had immunity from liability in this case despite their statutory duty to maintain the ski area in a reasonably safe condition.

B. The Circuit Court erred when it relied on *Travis and Morgan Bailey, on behalf of their minor son, Parker Bailey v. New Winterplace, Inc., a West Virginia Corporation* because the facts of that case are not similar and relevant to be indicative of the Legislature's intent in this case.

Respondents argue that the Circuit Court did not err in relying on the Raleigh County case *Travis and Morgan Bailey on behalf of their minor son, Parker Bailey v. New Winterplace, Inc., a West Virginia Corporation* because (1) Petitioners and the plaintiffs in *Bailey* both allege that the snow tubing park at each location was not maintained in a reasonably safe manner, (2) both of the injured persons were minor children, and (3) the facts are "as close as one could reasonably expect to get to the case at bar." Respondents

further state that "[a] person can almost always find minor, inconsequential distinctions between cases." See Respondents' Response Brief at pg. 17.

However, the facts between this case and those of *Bailey* are not "minor" or "inconsequential." The child in *Bailey* was injured through no fault of any person or entity other than his own size and ability to generate enough momentum to carry the tube over the small hump in the lane to the landing area. As stated in Petitioners' Brief, the resort in *Bailey* could not have done any additional thing or taken any additional steps to ensure that the minor in *Bailey* would reach the end of the snow tubing park in that case.

Three key consequential differences exist between this case and *Bailey*: (1) Anna finished her descent down the snow tubing park, where any person watching the landing area would have had a clear vision of her; (2) Respondents could have taken numerous additional steps to ensure Anna's safety, as noted in Petitioner's Brief Section VI.B. and above; and (3) Respondent invited individuals with special needs, such as Anna, an individual with Down's Syndrome, to participate in activities at the Resort, implying that the Respondents had taken the proper precautionary steps to ensure the safety of Anna and those similarly situated.

Again, Respondents in this case could have taken any number of steps to ensure the safety of Anna They failed to take any of those steps, and, as a result of their failures, Anna was injured.

The differences between *Bailey* and this case are not "minor" or "inconsequential," and the Circuit Court erred in relying upon it to dismiss Petitioners' claims.

C. The Circuit Court erred when it found that Anna, or the tubers that struck Anna, had the duty to avoid collision because when tubing, unlike when skiing, the tuber does not have the ability to determine the course or speed of the tube.

Respondents claim that because Anna was snow tubing, under the WVSRA, Anna was skiing, and as a result, Respondents are immune from liability because of the provision providing that skiers are liable for collisions with other skiers.

Petitioners do not disagree that Anna, under the WVSRA, was skiing. Furthermore, Petitioners do not disagree that tubers are skiers and tubing is included in the definition of skiing, for purposes of the WVSRA.

Petitioners argue that the language of the WVSRA requires the person in control of the speed and route of the tube to be held liable for injuries sustained when there is a collision between tubers that is not necessarily impossible to prevent.

Respondents rely on *Lanzilla v. Waterville Valley Ski resort, Inc.*, 517 F.Supp. 2d 578 (D. Mass. 2007), *Maddocks v. Whitcomb*, 896 A.2d 265 (Me. 2006), and *Bazarewski v. Vail Corporation*, 23 F.Supp.3d 1327 (D. Colo. 2014) to state that "'snow tubing' [is] synonymous with 'skiing.'" See Respondents' Response Brief pg. 20.

Again, Petitioners do not contend that snow tubing is not covered by the WVSRA, but rather that it was the duty of the ski area operator that had the duty to reasonably prevent collision.

Nevertheless, the cases cited by Respondents are factually distinguishable from this case. In *Lanzilla*, the plaintiff was injured when he struck another tuber that was walking up the snow tubing park lane in order to get to the top of the lane. *Lanzilla*, 517 F.Supp.2d at 579. There, the tubers at the bottom were required to walk to the top of the snow tubing park along the tubing lanes in order to begin their descent down. *Id.* at 579. The person struck by the plaintiff was walking "in the middle of the slope pulling two tubes filled with children," causing the plaintiff to strike the person walking up and children in tow, sending the plaintiff into an embankment with metal poles holding snow fence. *Id.* at 79. The District Court of Massachusetts ruled that tubing was covered by the New Hampshire law regarding immunity for ski area operators.

Lanzilla is distinguishable from this case. It cannot be said that it was the ski area operator's negligence that caused the person walking up the snow tubing park to walk "in the middle of the slope" and in direct line with tubes coming down the lane. It can only be the negligence of the person who made that unwise decision. In this case, the tubers following Anna down the snow tubing park did not make the decision to begin their descent down the lane. It was the decision of the expeditor that allowed the following tubers to continue down the lane. Much like the person walking in the middle of the snow tubing lane in *Lanzilla*, the expeditor made the unwise decision that created the risk of harm to Anna below.

In *Maddocks*, the plaintiff was injured when her tube went over a "bump or hillock of snow in the chute, became airborne on her tube, and was injured upon landing." *Maddocks*, 896 A.2d at 267. The Supreme Judicial Court of Maine held that the

plaintiff's claims were barred because "collisions with or falls resulting from natural and manmade objects such as the hillock" are barred from recovery. *Id.* at 268. Unlike issues presented in this case, the statute the court relied on in *Maddocks* expressly provided immunity for the type of injury at issue. The injury in this case was not the result of a bump in the lane, but rather the operator's willingness to send a barrage of additional tubers down the lane immediately after a special needs child – notably not considered by the WVSRA.

In *Bazarewski*, the plaintiff was injured when his tube spun backwards struck "rubber stops," causing him to fly out of the tube and land on his head and neck. *Bazarewski*, 23 F.Supp.3d at 1329. The main issue there was whether the rubber stops were contemplated as an inherent risk in the sport or skiing, and therefore the activity of tubing. *Id.* at 1330. The court concluded that the plaintiff's claims were barred as the Colorado statute explicitly provided immunity to ski area operators for collisions with "lift towers, signs, posts, fences or enclosures, hydrants, water pipes, or other man-made structures and their components." *Id.* at 1331. The District Court of Colorado further stated that plaintiff's claims are inherently a complaint of the slope design, terrain modification, or other course conditions "expressly referenced in the Act." *Id.* at 1331. Again, the statute the court relied on in *Bazarewski* expressly provided immunity for the type of injury at issue. The WVSRA does not provide for any such immunity for the injuries Anna sustained.

Maddocks and *Bazarewski* are factually and legally similar to *Pinson v. Canaan Valley Resorts, Inc.*, 196 W.Va. 436, 473 S.E.2d 151 (1996) and *Addis v. Snowshoe Mountain,*

Inc., 2013 WL 5162356 (W.Va. Nov. 22, 2013). The plaintiffs in *Maddocks* and *Bazarewski* claim that the alteration in terrain caused their injuries, but attempt to circumvent the immunity of the ski area operators for those injuries by claiming a failure to maintain. *Maddocks* and *Bazarewski*, much like *Pinson* and *Addis*, are not persuasive in determining this case.

The Legislature contemplated persons attempting to circumvent the WVSRA immunity of ski area operators by bringing suit for injuries sustained during activities other than the actual sport of skiing. The Legislature explicitly included tubers as skiers and tubing as skiing in its definition in order to combat that circumvention.

However, and most importantly, the Legislature did not contemplate that a person tubing is not able to control their speed, course of direction, or any another action a person may do while participating in any of the other activities listed under the WVSRA. While skiing, snowbiking, snowboarding, or other similar activities, a person has the absolute control over his or her speed, direction, and may alter both in order to avoid collision.

The WVSRA places the burden on avoiding collision and injury on the person following other skiers, or tubers, to avoid collision. See W.Va. Code § 20-3A-5(f). "Before beginning to ski from a stationary position or before entering a ski slope or trail from the side, the skier shall have the duty to avoid moving skiers already on the ski slope or trail." W.Va. Code § 20-3A-5(j).

A person participating at the Snow Tubing Park does not have the ability to choose when they will enter the lane and begin their descent downhill. The person

making that decision is the "expeditor" at the top that signals participants when it is ***safe*** to begin their descent down the Snow Tubing Park. In this instance, "safe" is with respect to both the person about to descend the hill and those already on Respondents' hill. The WVSRA put the onus on the person making the decision of when the tuber will begin his or her descent down the ski area, in this case the expeditor, (1) to avoid those already on the ski area and (2) to "maintain a proper lookout so as to be able to avoid other skiers and objects." See W.Va. Code § 20-3A-5(f) and (j).

A ski area operator is liable for injuries sustained in a collision between skiers if that collision is with "an obviously intoxicated person of whom the ski area operator is aware." W.Va. 20-3A-5(a). This provision explicitly permits that a ski area operator may be liable for injuries sustained from a collision between skiers when there is a risk known by the ski area operator, and the ski area operator takes no steps to rectify or prevent the risk from resulting in injuries.

This exception for "an obviously intoxicated person of whom the ski area operator is aware" exists for the same reason other exceptions to a ski area operator's immunity exists: **it is a risk that is capable of elimination by the ski area operator**.

The same goes for an expeditor permitting tubers to go down a lane in the Snow Tubing Park. The risk exists because of the expeditor's permission to begin descent. The risk may be easily eliminated by the expeditor not permitting additional tubers to begin their descent. The risk may be easily eliminated by the Respondents maintaining an employee at the bottom of the lane to signal to the expeditor when it is safe to permit additional tubers to begin their descent.

Respondents have already contemplated this burden shift to Respondents and its employees to diminish risks that are capable of being eliminated by placing an expeditor at the top of the snow tubing park. As stated above in Section IV.A., expeditors are not present when entering a ski slope, but only at snow tubing parks. This exemplifies that skiing and snow tubing are different activities that require different steps to ensure safety.

Respondents recognized that different safety measures need to be in place to ensure safety while participating in snow tubing. However, Respondents did not ensure that all safety measures were taken. The sole purpose of an expeditor is to ensure the safe participation of tubers, but it is not the only step required to maintain the snow tubing park in a reasonably safe manner. The expeditor must actually ensure the safe participation by keeping a proper lookout below and/or the Respondents must actually ensure the safe participation by placing an individual at the landing area to communicate or signal to the expeditor when it is safe to permit additional tubers.

The expeditor did not keep a proper lookout. The Respondents did not place another individual at the landing area to communicate or signal to the expeditor.

The risk may be easily eliminated by the Respondents maintaining the Snow Tubing Park in a reasonably safe condition. The Respondents failed to do so, and the Circuit Court erred in determining that the expeditor, and therefore the Respondents, did not have the duty to avoid collision in this case.

D. The Circuit Court erred in finding that the Resort should not be held to a higher standard because the Resort advertised and enticed families having children with special needs to attend the Resort, but it did not have the proper precautions in place to care for and aid individuals with special needs, such as Anna.

Petitioners state that a heightened duty is not required in order for Petitioners to have pleaded a plausible claim for relief in this case for the reasons noted above and within Petitioners' Brief. However, Petitioners further state that Anna should have been afforded a heightened duty owed by Respondents.

Respondents argue that the WVSRA does not provide a higher standard of care for individuals with special needs, and therefore, any heightened standard of care is unnecessary. See Respondents' Response Brief at pg. 20. Respondents then shockingly state "it would be a terrible step in the wrong direction to create a public policy that those who offer opportunities to persons with special needs must do so under the burden of a higher standard of care in negligence cases."

However, Respondents completely ignore decades of law in this country that provide a heightened standard of care for individuals with special needs. The Americans with Disabilities Act of 1990 ("ADA") provides a private cause of action for individuals injured by violations of the ADA.

While skiing is certainly not a federally protected activity covered by the ADA, it certainly shines a light on the existence of public policy to protect those individuals with special needs.

Again, the West Virginia Legislature has also contemplated the same in enacting W.Va. Code § 61-8F-1. While this is a criminal statute, and as argued by Respondents

and conceded by Petitioners in Petitioners' Brief, it has no civil authority or private right of action, it, again, provides insight to this Court that individuals with special needs require, and should be afforded, certain protections when individuals or entities are dealing with individuals with special needs and those special needs are known to the individual or entity.

Despite Respondents' shocking assertion that individuals with special needs should not be afforded special accommodations, accommodations for individuals with special needs are made every day. Without public policy providing special protections to individuals with special needs, there would be no cracks or bumps in sidewalks leading to intersections, no beeping emitted from traffic light poles, no elevators in two-floor buildings, no handicap stalls in public restrooms, and a litany of other common, everyday accommodations for individuals with special needs.

Respondents, in this case, held themselves out as willing and able to accommodate the special needs of individuals with special needs, such as Anna. The Respondents made that assertion, and provided no accommodations.

Nothing can be stated more accurately and succinctly than stated in *Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 743 (1997): "**This is a duty required by law as well as the dictates of humanity**."

Respondents state "[t]his begs the question how Canaan could be found liable for failing to meet a duty of care which did not yet exist and of which it could not have had notice." See Respondents' Response Brief at pg. 21, footnote 67.

However, the duty did exist. Respondents did have notice. In fact, it was Respondents that created the duty and provided themselves notice.

Respondents advertised to elicit individuals with special needs to participate in snow and skiing activities at the Resort on the particular weekend Anna, an individual with special needs, was injured. No person or entity forced Respondents to advertise. No person or entity forced Respondents to make accommodations that Respondents themselves did not already hold themselves out as being capable of making.

When Respondents invited individuals with special needs, those individuals with special needs could have required any number of special accommodations. The individual could have been cognitively impaired, physically impaired, hearing impaired, visually impaired, or any number of combinations between those impairments. Respondents were required to ensure their safe participation and make any reasonable and necessary accommodations as a result of their invitation.

The law requires that Respondents adhere to the higher standard of care they placed **upon themselves** by advertising their ability to accommodate for individuals with special needs, such as Anna.

Even still, while Petitioners argue that a heightened duty existed, and should be applied, as a result of Respondents' invitation of individuals with special needs, Petitioners claims would exist under any standard of care. Respondents failed to take the necessary and required steps to ensure the safety of any able-bodied individual, let alone an individual with special needs.

The Circuit Court erred in holding that Respondents are not held to a heightened standard of care in this case, and the Circuit Court erred in determining that Respondents are not liable under any standard of care.

V. CONCLUSION

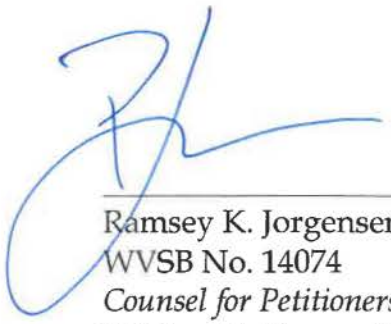
As set forth within ***Petitioners' Objection to Untimely Filing and Motion to Strike Respondents' Response***, Petitioners request this Court strike Respondents' Response and not consider same, and bar Respondents from participating in the oral argument of this matter, should this Court deem it necessary. In the alternative, as set forth herein and within Petitioners' Brief, the Circuit Court erred when it granted Respondents' Motion to Dismiss as there is a claim for relief stated in the Complaint, and Petitioners' claims are not barred by the WVSRA. This Court should reverse the Circuit Court's granting of Respondents' Motion to Dismiss and remand the case back to the Circuit Court for further proceedings and discovery.

William C. Brewer, Esq.
WVSB No. 448
Ramsey K. Jorgensen, Esq.
WVSB No. 14074
Counsel for Petitioners
William C. Brewer & Assoc. PLLC
P.O. Box 4206
Morgantown, WV 26504
(304) 291-5800
wbrewer@brewerlaw.com
ramsey@brewerlaw.com

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served a true and accurate copy of the within ***Petitioners Thomas B. and A.B.'s Reply Brief***, on this 29th day of November, 2022, via United States mail, postage prepaid, upon the following:

John R. Merinar, Jr.
Bonnie J. Thomas
Steptoe & Johnson PLLC
400 White Oaks Blvd
Bridgeport, WV 26330



Ramsey K. Jorgensen, Esq.
WVSB No. 14074
Counsel for Petitioners
William C. Brewer & Assoc. PLLC
P.O. Box 4206
Morgantown, WV 26504
(304) 291-5800
ramsey@brewerlaw.com