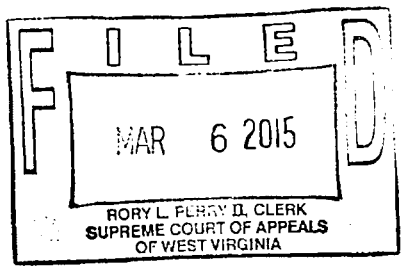
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Nos. 14-0791 and 14-0792

(Circuit Court of Kanawha County, Civil Action No. 11-C-829)



MORGAN DREXEN, INC.,

Defendant Below,
Petitioner,

v.

PATRICK MORRISEY,
ATTORNEY GENERAL,

Plaintiff Below,
Respondent.

And

LAWRENCE WILLIAMSON,

Defendant Below,
Petitioner,

v.

PATRICK MORRISEY,
ATTORNEY GENERAL

Plaintiff Below,
Respondent.

PETITIONERS' REPLY BRIEF

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Come now the Petitioners Morgan Drexen, Inc. ("Morgan Drexen") and Lawrence Williamson, by counsel, and hereby file their Reply in support of Petitioners' Brief. In support of their brief, Petitioners state as follows:

I. REBUTTAL OF RESPONDENTS' STATEMENT OF CASE

In accordance with Rules 10(g) and (d) of the West Virginia Rules of Appellate Procedure, Petitioners rely on their Statement of the Case in Petitioner's Brief. (Pet. Br. at 3-8.) However, Petitioners also dispute various asserted "facts" set forth in Respondents "Statement of Facts," that are devoid of support from the record below, incomplete recitations of testimony, or are otherwise taken out of context. Further, Respondent's Statement of Facts does not contain "a statement of facts of the case that are relevant to [Petitioner's] assignment of error." Rev. W. Va. R. App. P. 10(c)(4).

A. Respondent Misstates the Level of Involvement of Appellant Lawrence Williamson and Other Attorneys Utilizing Morgan Drexen.

Respondent spends much time discussing "further background" of Morgan Drexen's business, including irrelevant recitations of asserted past legal troubles in other jurisdictions, presumably to support its claim that "lawyers involved with the program did very little, if anything." (Resp. Brief 2.) Petitioner Lawrence Williamson and Morgan Drexen CFO David Walker testified at length regarding the involvement of Mr. Williamson, Vincent Howard of Howard | Nassiri, and Eric Rosen[1], in the development of Morgan Drexen's support services for attorneys subsequent to these legal disputes. (See generally A.R. 1494-1497, 1502-1503, 1509, and 1510.)

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[1] Mr. Rosen is an attorney practicing in Florida who also utilizes Morgan Drexen's program. (A.R. 1503, at Tr. p. 199.) The Bar investigation referenced by Respondent, (Resp. Br. 2), which was not part of the record before the Circuit Court, concluded that Morgan Drexen's work constituted non-attorney support for Mr. Rosen pursuant to Rule 5.3 of the Florida Rules of Professional Conduct. *The Florida Bar v. Eric A. Rosen*, SC12-392 (Bar File No. 2011-51, 326) (Fla. June 11, 2013).

In 2007, Walter Ledda, the CEO of Morgan Drexen, sought legal advice and assistance from attorneys Williamson, Rosen and Howard in the re-development of his attorney support program after the Federal Trade Commission brought action against him in 2005. (A.R. 1494, at Tr. p. 162-163.) Attorney advice and direction was provided in every step of the redeveloped program.

Specifically, these attorneys met with Mr. Ledda in California, reviewed Morgan Drexen's service model, its forms, disclosures and processes, and determined how to integrate Morgan Drexen's support into their law practices in compliance with state and federal consumer laws. (A.R. 1494, at Tr. p. 162-163.) Mr. Williamson reviewed the program documents and believed the problem was largely regarding disclosures, rather than client funds being misappropriated. (A.R. 1494-1495, at Tr. p. 163-164.) "It was regarding making sure that consumers understood exactly what they were doing and how they were doing it." (*Id.*)

After this meeting, Messrs. Williamson, Rosen and Nassiri began working on the program and drafting the proper disclosures. (A.R. 1495, at Tr. p. 164.) Mr. Williamson testified that there were "some things [about] . . . the product that didn't work," so they reviewed all of the documents used before 2007 and "determine[d] whether or not we're going to incorporate it, utilize it, scrap it and draft something totally brand new[.]" (A.R. 1496-1497, at Tr. p. 171-172.) Mr. Williamson further testified that "if you looked at whatever they did before 2007, what Vince, Eric and I helped put together after 2007, it's a completely different thing." (A.R. 1497, at Tr. p. 172.) Mr. Walker similarly testified that "[t]here's been very significant kind of adaptation [of the forms and] modifications as we have grown." (A.R. 1509, at Tr. p. 222-223.)

Mr. Williamson and Stephen Nagin, Morgan Drexen's Chief Legal Officer, former Assistant Attorney General in Florida and Solicitor with the Federal Trade Commission, was also involved in the training of intake specialists. (A.R. 1503, at Tr. p. 197; A.R. 1509, at Tr. p. 220-221.) As explained by Mr. Walker, the intake specialists are trained on disclosure lists, "what they can and what they can't say," that "they can't give any legal advice," and "they are instructed how to describe the program to try and make sure that potential clients of the law firms understand what they're doing." (A.R. 1509, at Tr. p. 222.)

Even after Morgan Drexen began providing paraprofessional and administrative services to lawyers, the program continued to be revised according to the jurisdiction. In West Virginia, in particular, the forms and processes were modified at the direction of Ms. McIntyre Nicholson (hereinafter "Ms. Nicholson") to comply with state law regarding contact with creditors represented by an attorney. (A.R. 1509-1510, at Tr. p. 223-224.)

B. Respondent Misstates the Non-Compete Provision in Morgan Drexen's Contract with Affiliated Attorneys.

Respondent cites to a "poison pill" provision in the contract Ms. Nicholson signed with Morgan Drexen as evidence that she worked for Morgan Drexen and that it exercised control over her and, presumably, her clients. (Resp. Br. at 6, 18.) Respondent's description and analysis of this provision is incorrect and not supported by the clear language of the document.

This provision is a non-compete clause that requires the attorney utilizing Morgan Drexen to pay a one-time charge for each client being serviced by Morgan Drexen if the attorney wishes to compete with Morgan Drexen. Respondent omitted critical language in its recitation of the non-compete provision, namely what services the charge is intended to cover. (*See* Resp. Br. at 6.) Here is the language in its totality:

> "POISON PILL" PROVISION- A ONE-TIME CHARGE: MD will charge MCINTYRE-NICHOLSON a one-time charge of $1,100.00 for each debtor under

> management in the event MCINTYRE-NICHOLSON chooses to compete with MD and takes clients previously serviced by MD. This charge shall cover potential recovery of lost revenue from: *(a) providing paraprofessional services, (b) providing clients with toll-free access to paraprofessionals; (c) fielding telephone calls from clients; (d) providing all computer services including computer programming services, (e) services to handle intake of documents and responses to requests for information; (f) preparation of management reports, and (g) processing settlement documents and checks.* The above-stated one-time charge will be collected only after and to the extent fees are collected from a client.

(A.R. 1561) (emphasis added).)

This one-time fee provision in no way suggests an employer-employee relationship, nor any control of the attorney's provision of legal services. Non-compete clauses are neither illegal nor irregular. This clause does not support Respondent's claim that Morgan Drexen was operating a ruse whereby attorneys provided "no meaningful services;" rather, it evidences that Morgan Drexen provides paraprofessional, clerical and administrative services to attorneys.

C. Claim that Ms. Linville Had No West Virginia Licensed Attorney is Inaccurate.

Respondent did not assert the claim below that Ms. Linville did not have a West Virginia licensed attorney, nor was this part of the Circuit Court's ruling. Moreover, this claim is incorrect. Ms. Nicholson was retained to serve as West Virginia Counsel in August 2009. (A.R. 1472, at Tr. p. 72.) However, prior to Ms. Nicholson, the Williamson Law Firm associated with another local attorney, Matt Rollins. (A.R. 1505, at Tr. p. 207.)

Ms. Linville was served with a complaint and summons "in the latter part of November '09," (A.R. 1461, at Tr. p. 31.) She sent the complaint to Mr. Williamson and claims "it took them over a week to get a reply back to me," (A.R. 1462, at Tr. p. 32.) The Williamson Law Firm did send her a limited scope representation agreement via letter dated December 2, 2008, which incorrectly identified "Williamson Law Firm, LLC, who is our attorney licensed to practice law in your jurisdiction." (A.R. 1462, at Tr. p. 34; A.R. 1525-1526.) Three days later,

Williamson Law Firm engaged Matt Rollins, who is licensed to practice law in West Virginia. (A.R. 1486, at Tr. p. 130-131.) While Ms. Linville signed the limited scope agreement on December 2, 2008 (AR 1526), she dropped representation very shortly thereafter and before any services could be rendered on her behalf. (A.R. 1461, at Tr. p. 30.)[2] Ms. Linville was represented by the Williamson Law Firm only eight or nine months. (A.R. 1461.)

D. Respondent Misrepresents the Involvement and Availability of Mr. Ohaebosim in Negotiating Settlements.

In response to questions regarding Mr. Williamson's debt negotiation activities, Mr. Williamson testified that another attorney in his firm, Mr. Ohaebosim, engaged in negotiations for the clients. (A.R. 1498, at Tr. p. 176.) Petitioner admits that Mr. Ohaebosim's law license was suspended for a short period of time due to failure to properly communicate with his clients. (A.R. 1498, at Tr. p. 177-178.) However, prior to his suspension, Mr. Ohaebosim was a partner of Mr. Williamson in the law firm of Shores, Williamson & Ohaebosim. (A.R. 1644-1646.) Also, before he began working for the Williamson Law Firm in March 2011, he subcontracted with the firm to perform debt negotiations for clients. (A.R. 1498, at Tr. p. 178.)

E. Respondent Misstates Testimony as it Relates to Television Advertisements it Purports Were Aired in West Virginia.

Respondent takes the testimony of both Ms. Nicholson and Mr. Williamson out of context to support its claim that both attorneys were independently and fully aware of television advertisements being run in West Virginia. Specifically, Respondent states "Both Petitioner Williamson and Nicholson admitted they knew Morgan Drexen was airing televisions ads in West Virginia[.]" (Resp. Br. at 5.) Mr. Williamson's testimony is as follows:

> Q. Are you aware of the television ads that Morgan Drexen has run in West Virginia?

[2] Ms. Linville testified that she dropped out of the program "[e]ither the last part of November or early part of December" of 2008. (A.R. 1461, at Tr. p. 30.)

A. I have some understanding of that, and I know that the ads are supposed to say that -- excludes West Virginia, *if any ad is running*. It's supposed to exclude West Virginia.

(A.R. 1499, at Tr. p. 183) (emphasis added).)

* * *

A. I don't have a -- I have a vague knowledge that it was running, but I don't know the ad.

(A.R. 1500, at Tr. p. 184.)

As to Ms. Nicholson, it is clear that she *was not at all aware* of any television advertisements being aired in West Virginia until counsel for Respondent advised her of this. The only knowledge she had was an assumption that her name was not listed on any television advertisement *if it was aired*:

(Cross-Examination by Mr. Davis, Assistant Attorney General)

Q. Okay. Were you also aware that there were television ads being run in West Virginia at that time?

A. *You informed me of that.*

Q. Okay. And we talked about a lot of different toll-free numbers that Morgan Drexen uses in the advertising; is that right?

A. Yes.

Q. Were you aware that the television ads that were being aired here in West Virginia did not list you as the responsible counsel?

A. *I suppose I was aware of that, because if it had listed me, someone would have called me to tell me they saw it.*

(A.R. 1480-1481, at Tr. p. 107-108) (emphasis added).)

This testimony does not establish that Ms. Nicholson had any independent knowledge that advertisements were airing or that she knew what counsel for Petitioner suggested. The person with the best information of whether such advertisements were aired in West Virginia is

Mr. Walker, and he was unaware of any such advertisements being aired in the name of Morgan Drexen. (A.R. 1511, at Tr. p. 229.)

Regardless, their knowledge is irrelevant to the issue of whether Morgan Drexen is a telemarketer or engaged in any other act in violation of the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-1-101, *et seq.* ("WVCCPA"). There was no evidence presented as to the content of the television advertisement, who was identified in it, or what representations were made except for the vague testimony of Ms. Martin, who stated: "It just said to call and you could be out of debt within months instead of 25 years." (A.R. 1483, Tr. p. 118.) This was the only evidence, testimony or otherwise, presented regarding the actual content or representations made in the television commercials supposedly aired by Morgan Drexen.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent did not style its response a "Summary Response," and so it was required to respond to Petitioners' request for oral argument. *See* Rev. W. Va. R. App. P. 10(d)-(e). Respondent did not. Accordingly, Petitioners assume that Respondent agrees that oral argument is proper under Rule 19 for the reasons identified in "Petitioner's Brief."

III. ARGUMENT

A. Mr. Williamson's Use of Morgan Drexen's Services and Outside Local Counsel Was Appropriate and Disclosed.

The Circuit Court's ruling that Mr. Williamson is liable for $1,225,000 for engaging in unfair, deceptive and misleading practices in violation of § 46A-6-104 is based upon its finding that he failed to perform any "meaningful" settlement work on behalf of West Virginia consumers after contracting with them as clients to do so. (A.R. 68, ¶ 143; A.R. 71, ¶ 153.) With respect to West Virginia clients, Mr. Williamson admittedly does not review those settlements, as they were all referred to local counsel. (A.R. 1498, at Tr. p. 178; A.R. 1505-

1506, at Tr. p. 207-208.) Mr. Williamson was not licensed to practice law in this state and, as such,he properly arranged for local counsel such as Ms. Nicholson and Mr. Matt Rollins to review and approve settlements and to represent clients when and if they are sued. (A.R. 1493, at Tr. p. 159.) Clients were expressly advised in the Attorney-Client Agreement that a local attorney and outside company may be utilized to assist the firm in providing debt settlement services:

> 3. Utilization of Outside Services You understand and agree that Attorneys may utilize the services of outside companies to assist Attorneys in performing the services under this Agreement. You hereby acknowledge that you understand that Attorneys may utilize these outside services and you consent to such utilization, including any necessary disclosure of confidential information to the outside service companies.
>
> 4. Utilization of Local Counsel You authorize Attorneys with the discretion to select any attorney licensed in your jurisdiction ("local counsel") to assist Attorneys in providing services under this Agreement. Attorneys' use of local counsel will not increase the fees and charges you agreed to pay under this Agreement. If Attorneys need to transfer your case from one local counsel to another, your consent to such transfer will be implied unless you object in writing within seven (7) days. By signing this Agreement, you are consenting to Attorneys sharing part of the contingent fee or any other fee paid to Attorneys under this Agreement.

(A.R. 1518.)

More importantly, Williamson Law Firm's use of Morgan Drexen for support services and Ms. Nicholson as local counsel is completely in accordance with West Virginia's Rules of Professional Conduct. Lawyers are permitted to use non-lawyers outside the firm to assist the lawyer in rendering legal services to the client. W. Va. R. of Prof. Conduct 5.3. Also, lawyers not licensed to practice in this jurisdiction who wish to provide legal services to a client in this state *must* associate with a lawyer licensed in West Virginia. *See* W. Va. R. of Prof. Conduct 5.5(c) (emphasis added). If an attorney's use of outside support services and local counsel are authorized by the Rules of Professional Conduct, then how can the Circuit Court determine that

he engaged in "unfair and deceptive practices with regard to 245 consumers in West Virginia"? (A.R. 71.)

There was one letter sent in error to one person stating that legal services would be provided directly by the Williamson Law Firm and that the Williamson Law Firm is licensed to practice law in West Virginia. There were no other such letters submitted into evidence. Like most law firms, the cover letters, introductory correspondence and engagements letters used by Williamson Law Firm are automated form documents. (*See* A.R. 1502-1503, Tr. p. 195-196.) As with any automated form letter, mistakes will be made.

Mr. Williamson explained that the attorneys approve the general form letter to be used, but individuals at Morgan Drexen enter fields that are then populated by the computer software program to fill out the particularized information. (A.R. 1502, at Tr. p. 195.) Mr. Williamson testified that the Linville letter contained an error in field insert and that the programmer most likely "selected the engagement counsel as opposed to the local counsel." (A.R. 1502-1503, at Tr. p. 195-196.) No witness provided evidence to contradict Mr. Williamson. Further, the letter is clearly a mistake. It displays the Williamson Law Firm letterhead and states: "WILLIAMSON LAW FIRM, LLC, who is our attorney who is licensed to practice law in your jurisdiction[.]" (A.R. 1525.) The Williamson Law Firm then carbon-copies itself. (*Id.*)

Instead of recognizing this is as an anomalous communication sent in error, the Circuit Court relies upon this letter to support its finding that "Mr. Williamson has deceived consumers by representing that his law firm will provide legal services to consumers in West Virginia when it does not." (A.R. 50, ¶ 96.) This finding was then used to support a $1,225,000 million verdict against Mr. Williamson. (A.R. 71, ¶ 153.)

Even if this Court agrees with the Circuit Court and Respondent's argument that Mr. Williamson was do-less as it relates to West Virginia clients, and that he had an independent legal responsibility towards them despite the retention of Ms. Nicholson, such facts do not indicate a tort or crime. At most, it would be a standard legal malpractice claim that is properly the subject of disciplinary proceedings.

B. Respondent's Assailing of Mr. Williamson for Not Providing Legal Services to West Virginia is Misplaced.

Curiously, Respondent complains that Mr. Williamson provided no services to West Virginia and, pages later, castigates him for not being licensed to practice law in West Virginia or seeking *pro hac vice* admission. (Resp. Br. at 14, 17, 24.) As stated above, Mr. Williamson utilized West Virginia-licensed attorney Rachel McIntyre-Nicholson to represent clients in West Virginia. (A.R. 1505, at Tr. p. 206-207.) There is nothing wrong with doing this. It is a common and routine occurrence in the legal community both to engage and be engaged as local counsel.

As for Mr. Williamson's failure to be admitted *pro hac vice,* this would only be required where the client is sued in state court *and* an attorney from the Williamson Law Firm wished to represent the client in the proceedings and file pleadings, motions and other legal documents on the client's behalf. Given that West Virginia counsel was retained for this client, it was not necessary for Mr. Williamson or any of the attorneys in his firm to seek *pro hac vice* admission.

C. Overwhelming Evidence That Mr. Williamson Was Actively Involved in Forms, Documents and Processes Used to Service His Clients.

The Circuit Court found Mr. Williamson's testimony regarding his involvement in servicing debt settlement clients not credible because "[t]he documents Ms. Linville received from Morgan Drexen are the same documents Ms. Martin received from the Williamson Law Firm." (A.R. 14, ¶ 14.) However, Respondent and the Circuit Court ignored evidence that Morgan Drexen's forms and processes were significantly redeveloped and reorganized in August

2007 due to the direction and involvement of Petitioner Williamson, attorneys from the firm of Howard | Nassiri, and attorney Eric Rosen for integration into their law practices. As discussed above, these attorneys, who planned to utilize the services of Morgan Drexen, reviewed all forms, client communications and processes, and revised them where necessary to comply with the law and their professional responsibilities. (A.R. 1494-1497, 1502-1503, 1509, 1510.) Petitioner Williamson was also involved in training of Morgan Drexen's intake specialists. (A.R. 1503, 1509). Program communications and processes were further revised where necessary to comply with local laws, and specifically done so at the request of West Virginia attorney Ms. Nicholson. (A.R. 1509-1510.)

D. Cases Relied Upon to Assert the Personal Liability of Mr. Williamson for $1.2 Verdict are Inapposite to the Fact and Issues Before This Court.

Respondent's position, at its very core, is that a litigant should be able to pursue claims against individual officers of a corporation without meeting the requirements for piercing the corporate veil. The impact of this position is that a lawyer would never have the protection of a LLC or Corporation. It obliterates the purpose of legal liability corporations, transforming them into a hollow shell, without serving any legitimate public interest. Respondent cites various cases in support of its claim that Mr. Williamson, versus his firm, should be liable for violations of WVCCPA related to his acts and/or inactions as a lawyer. These cases are neither factually nor legally relevant, nor are they even binding on this Court.

Specifically, *In re Sinnot*, 176 Vt. 596, 845 A.2d. 373 (2004), did not involve a lawyer being personally sued for violations of consumer protection or debt-settlement laws. It was a disciplinary proceeding wherein the attorney was disciplined for charging an unreasonable fee in connection with debt settlement services. *Id.* The attorney argued that restitution should be made by his firm versus by him personally, but the Court declined to do so solely because the

disciplinary panel "has jurisdiction over individual lawyers admitted to practice in Vermont, but lacks jurisdiction over the legal entities lawyers create to facilitate their practice." 845 A.2d at 380–81. Finally, the restitution order was $1,200.00, not $1,225,000.00 as the Circuit Court ordered against Mr. Williamson. 845 A.2d at 380.

Similarly, the cases of *Street v. Sugerman*, 202 So.2d 749 (1967) and *First Bank & Trust Co. v. Zagoria*, 250 Ga. 844, 846, 302 S.E.2d 674 (1983) (overruled by *Henderson v. HIS Fin. Servs., Inc.*, 266 Ga. 844, 471 S.E.2d 885 (1996)), also do not involve claims brought against the attorney for violations of any consumer protection laws or tortious acts. *Street v. Sugerman*, addressed whether stock owned by attorney shareholders in a professional service corporation is exempt from levy and sale, under execution, as a result of a creditor judgment against some of the shareholders. 202 So.2d at 750.

First Bank & Trust Co. v. Zagoria, dealt with a partnership of attorneys and whether an attorney would be personally liable for dishonored checks issued by another attorney in the firm. The Supreme Court declined to decide the case based upon interpretations of statutes providing for the creation and operation of professional corporations. 302 S.E.2d at 845. Rather, exercising the court's authority to regulate the practice of law, it held that "when a lawyer holds himself out as a member of a law firm the lawyer will be liable not only for his own professional misdeeds but also for those of other members in his firm." 302 S.E.2d at 846.

In *Henderson v. HIS Fin. Servs., Inc.*, the Georgia Supreme Court revisited this decision and overruled *Zagoria*, holding: "Although this court defined whether lawyers may practice in their profession in a partnership, professional corporation, or other group structure, the relevant statutes govern whether a particular structural form provides its members with exemptions from personal liability." 471 S.E.2d at 886.

Petitioner does not dispute that a director or an officer of a corporation can incur personal liability for tortious acts he engaged in or sanctioned. *State ex rel. Richardson v. McCompton & Son Lumber Co., Inc.*, 192 W. Va. 10, 13-14, 449 S.E.2d 71, 74-75 (1994). However, there is no evidence that Mr. Williamson, personally, either participated in or sanctioned any wrongful act. Specifically, there is no evidence that Mr. Williamson personally spoke to anyone in West Virginia. There is no evidence that Mr. Williamson personally instructed anyone to provide misleading information. There is no evidence that Mr. Williamson personally misled any in West Virginia. Mr. Williamson did not personally contract with any West Virginia client. Rather, those contracts were with the Williamson Law Firm and they did do not specify which lawyer in the firm would undertake the work. (See A.R. 1497, at 175; A.R. 1518.)

E. Respondent Relies on Facts Not Before the Court to Support Claim That Attorneys Provided No Meaningful Services.

In Respondent's Brief, it relies on facts not presented before the Circuit Court and then only "half-states" them.[3] Specifically, Respondent cites to statements an affidavit of Rita Augusta, Chief Operating Officer, and the deposition testimony of Rachel Nicholson, (*see* Resp. Br. at 3), neither of which were admitted into evidence. It is improper for the Respondent to cite and rely upon such extraneous and non-admitted evidence in this tribunal.

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[3] Respondent's claim that Ms. Augusta's affidavit indicates "Morgan Drexen provided all meaningful services for the debt settlement program," (*see* Resp. Br. at 3), is a gross oversimplification. Ms. Augusta clearly states that "[a]ll of the services that Morgan Drexen performs are for law firms responsible for reaching these settlements." (A.R. 826). Further, "Morgan Drexen's business model for providing services to law firms is predicated on automating processes for the administrative and paraprofessional aspects of law," that "do not entail the exercise of legal judgment, but are under the responsibility of a lawyer." (A.R. 826.)

Respondent also cites Ms. Nicholson's deposition testimony as an admission that she provided no provided no meaningful services, (*see* Resp. Br. at 3), but omits her explanation that she has direct contact with the client "when litigation occurs or when I'm reviewing settlements, whether or not litigation is in place," and, further, that she "review[s] every settlement" (A.R. 697.) Again, the Circuit Court found *no wrongdoing* on the part of Ms. Nicholson, who was sued on the same grounds as Mr. Williamson.

This Court has held that an appellate court shall deal only with evidence submitted to the lower tribunal. *Adkins v. Gatson*, 218 W. Va. 332, 337, 624 S.E.2d 769, 774 (2005) (citing *Maxwell v. Maxwell*, 67 W. Va. 119, 122-123, 67 S.E. 379, 380-381 (1910) ("[An appellate court] shall deal only with evidence taken below and brought up for the purpose of a review of an order or decree made upon it below. It means that in using our appellate powers we shall consider no other evidence[.]"); *see also Pearson v. Pearson*, 200 W. Va. 139, 145 n. 4, 488 S.E.2d 414, 420 n.4 (1997) ("This Court will not consider evidence which was not in the record before the circuit court."); *Powderidge Unit Owners Assoc. v. Highland Props., Ltd.*, 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996) ("[T]his Court . . . will not consider evidence or arguments that were not presented to the circuit court for its consideration [.]") In sum, affidavits in support of motions that are part of the record, but not presented at the hearing, should not receive consideration here. *See Arnold v. Reynolds*, 2 S.E.2d 433, 434-435 (W. Va.1939).

F. No finding of Liability Against Ms. Nicholson is Incongruent with Finding of Mr. Williamson's Liability for 1.2 Million Dollars.

Respondent spends much time emphasizing that neither Mr. Williamson nor Ms. Nicholson had communication with consumers nor did either provide any debt settlement negotiations. (Resp. Br. at 17.) Notwithstanding the fact neither Mr. Williamson nor anyone in his firm is licensed to practice law in West Virginia so those clients were referred to Ms. Nicholson for representation, the Court found *no liability* against Ms. Nicholson for any claims.

The State's claim against Ms. Nicholson was the same against Mr. Williamson: that they both allegedly deceived consumers to believe they would receive legal services when they did not. (A.R. 48-51) (Discussing the State's Sixth and Seventh Cause of Action).) While Ms. Nicholson was the responsible lead attorney for West Virginia clients, the Circuit Court found "the State failed to provide by a preponderance of the evidence that Ms. Nicholson misled

consumers to believe they were receiving legal representation in violation of West Virginia Code . . . § 46A-6-104." (A.R. 68, ¶ 144.) However, the Circuit Court found Mr. Williamson liable and assessed penalties against him to the tune of $1,225,000. (A.R. 68, ¶ 143; A.R. 71.)

G. Respondent's Debt-Pooling Argument Contorts the Plain-Language of the Statute.

i. Client Funds are Not Distributed Among Creditors.

Petitioner relies on its arguments regarding the inapplicability of the debt-pooling statute to the activities of Morgan Drexen and Mr. Williamson. (Pet. Br. 25-32.) As argued previously, here there is no plan for the distribution of funds among creditors as required by W. Va. Code § 61-10-23. Rather, moneys are accumulated and each debt is settled, in full, separately, independently, and sequentially. (A.R. 1505.) The very concept is antithetical to funds being distributed among creditors. *Cf.* W. Va. Code § 61-10-23.

Debt-pooling is a very different beast than debt settlement; neither the Circuit Court nor the Respondent should be permitted to engage in linguistic acrobatics to make a statute say what it does not. Generally, "[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syl. pt. 1, *Miners in Gen. Grp. v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), overruled on other grounds by *Lee–Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982); *Barr v. NCB Mgmt. Servs., Inc.* 227 W. Va. 507, 512, 711 S.E.2d 577, 582 (2011).

While the Federal Trade Commission has issued regulations expressly addressing the area of debt settlement, our Legislature has not. The Legislature could have easily changed the statute to include this very separate and distinct area of practice, but it did not. Respondent's assertion that Petitioners used "hypotheticals, foreign law and model legislation enacted by other states" in an attempt "to distract or confuse this Court" is itself a red herring. These are proper

subjects of discussion as they add guidance regarding the meaning of debt settlement and how other states treat this area of practice. They also illustrate the practical result of the Circuit Court's contorted application of the debt pooling statute to the concept of debt settlement.

Indeed, Petitioners respectfully submit that debt settlement is a valid and important service for scores of West Virginians who find themselves drowning in debt. This practice will inevitably end where attorneys cannot be paid more than two percent of the amount distributed for their fees and expenses, and precious few in debt can afford to pay an hourly rate. It is highly relevant that the Circuit Court's interpretation, while purporting to be pro-consumer, will invariably result in fewer options for indebted West Virginians who wish to avoid bankruptcy.

ii. Cases cited do not stand for the proposition that clear language should be twisted to apply to every act the Attorney General believes is fraudulent.

Interestingly, while Respondent complains of Petitioner's citation of foreign law, which it believes "distract[s] and confuse[s] the Court," it cites several foreign cases that are simply irrelevant to this case. (*See* Resp. Br. at 23.) Respondent asserts that the cases cited "have held that a violation of a statute designed to protect the public is also a violation of the state's consumer protection statutes." (*Id.*) However, here there is no statute violated. Respondent simply distorts the language of the debt-pooling statute to create a wrong where there is none.

iii. Licensed Attorney exception does not require West Virginia licensure.

Petitioners rely on their arguments in their Opening Brief, namely that the plain wording of the statute does not restrict the debt-pooling attorney exemption to those licensed in West Virginia. (Pet. Br. at 32.) If the Legislature wished to limit the exemption to West Virginia licensed attorneys, it could have done so. Indeed, other provisions of the West Virginia Consumer Protection Act do expressly limit the attorney exemption to only those licensed in West Virginia. Specifically, § 46A-2-123 restricts certain debt collection activities to only

attorneys licensed in this state. Also, W. Va. Code § 46A-6C-2, which defines "credit services organizations," exempts a person "licensed to practice law in this state acting within the course and scope of the person's practice as an attorney." W. Va. Code § 61-10-23 does not.

This Court has long observed the tenet that "'[i]n the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.'" Syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984); *see also Young v. Apogee Coal Co., LLC*, 232 W. Va. 554, 561-562, 753 S.E.2d 52, 59-60 (2013). "The *expressio unius* maxim is premised upon an assumption that certain omissions from a statute by the Legislature are intentional." *Id.* at 492, 647 S.E.2d at 928 (emphasis added). Applying this canon of construction, one must presume that the Legislature intended not to so limit the attorney exemption in W. Va. Code § 61-10-23, given that it expressly did so in other provisions of this very same Chapter.

H. Respondent's Interpretation of the Telemarketing Statute is Overly Broad and Contrary to the Wording of the Statute.

The Court based its ruling that Morgan Drexen is a telemarketer upon the finding that a television advertisement constitutes a "communication" as set forth in § 46A-6F-112(a)(2) and (b).[4] A communication means "a written or oral notification or advertisement transmitted from a telemarketer to a consumer by any means." W. Va. Code § 46A-6F-112(b). W. Va. Code § 46A-6-102 defines an "advertisement" as follows:

> (1) "Advertisement" means the publication, dissemination or circulation of any matter, oral or written, including labeling, which tends to induce, directly or indirectly, any person to enter into any obligation, sign any contract or acquire

[4] (a) (2) The telemarketer communicates with a consumer by any means and invites or directs the consumer to respond by any means to the telemarketer's communications, and the telemarketer intends to enter into an agreement with the consumer for the purchase of consumer goods or services at some time during the course of one or more subsequent telephone communications with the consumer.
(b) For purposes of this article, "communication" means a written or oral notification or advertisement transmitted from a telemarketer to a consumer by any means.

> any title or interest in any goods or services and includes every word device to disguise any form of business solicitation by using such terms as "renewal", "invoice", "bill", "statement" or "reminder" to create an impression of existing obligation when there is none or other language to mislead any person in relation to any sought-after commercial transaction.

Respondent's argument is flawed because § 46A-6F-112(a)(2) clearly requires that "telemarketer intends to enter into an agreement with the consumer for the purchase of consumer goods or services at some time during the course of one or more subsequent telephone communications with the consumer." No evidence was presented that Morgan Drexen entered into any agreement or contract with any consumer. It provides paralegal, administrative and marketing services to law firms with whom it contracts. (A.R. 1507, at Tr. p. 215.) All of the clients in West Virginia are clients of law firms[5] who utilize Morgan Drexen for their services. (A.R. 1507, at Tr. p. 213-214.) Admittedly, Morgan Drexen does obtain a benefit if the consumer becomes a client of the law firm; however, it does not enter into any agreement with the client.

Further, Petitioners disagree that a television advertisement constitutes telemarketing because it is not "a written or oral notification or advertisement" as contemplated by W. Va. Code § 46A-6F-112(b) and W. Va. Code § 46A-6-102. This Court has yet to rule upon the definition of telemarketing. However, if this interpretation is accepted, every television advertisement by every plaintiff attorney that is broadcast in West Virginia constitutes telemarketing and is therefore subject to the provisions of the West Virginia Telemarketing Act, W. Va. Code § 46A-6F-101, *et seq.* Similarly, every infomercial and QVC broadcast also constitutes telemarketing as consumers are also invited to contact the company via telephone to purchase items or services. The result? Every attorney who does not receive a favorable result

[5] Mr. Walker testified that he is aware of two West Virginians who are represented by a bankruptcy trustee. (A.R. 1508, at Tr. pp. 213-214.)

for his/her client and every product that does not deliver will now also be liable for violations of the West Virginia Telemarketing Act, *in addition* to the present common law remedies already available to consumer and client.

I. An Attorney-Client Agreement is not Advertisement Under the Telemarketing Act.

Respondent's claim that an attorney-client agreement is an advertisement is not supported by the language of the statute and, frankly, strains credulity. Additionally, the Circuit Court never expressly ruled that an attorney-client agreement is an advertisement. Nothing in the language suggests that statute intended to cover private contracts between an attorney and client. The very definition of "advertisement" refers to the "publication, dissemination or circulation of any matter, oral or written," which is contrary to the notion of a private contract already agreed upon.

Such an interpretation also runs afoul of two canons of construction: (1) that "when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed," and (2) that "the meaning of an unclear word or phrase should be determined by the words immediately surrounding it." *Davis Mem'l Hosp. v. W. Va. State Tax Comm'r*, 222 W. Va. 677, 684, 671 S.E.2d 682, 689 (2008).

Consumers do not receive the attorney-client agreement until they request to become client. (A.R. 1509, at Tr. p. 220.) Indeed, there would be no use for the phrase "any matter, oral or written, including labeling, which tends to induce, directly or indirectly, any person to enter into any obligation, sign any contract or acquire any title or interest in any goods or services" if a contract, itself, is an advertisement. This interpretation runs afoul of the plain language, and common rules of grammar. Moreover, suggesting an attorney-client agreement is now an

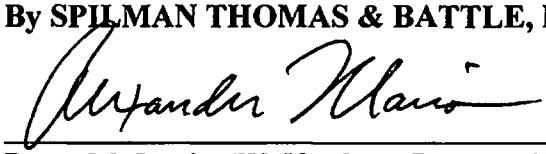
advertisement subject to violations of the WVCCPA has far-reaching implications for every attorney in this state and does not serve the purposes of WVCCPA.

CONCLUSION

For the above reasons, Petitioners respectfully request that the Circuit Court Order be reversed, the penalties assessed against them both be vacated, and judgment entered in their favor, as well as such other and further relief as this Court deems just and proper.

MORGAN DREXEN, INC. and LAWRENCE WILLIAMSON,

By SPILMAN THOMAS & BATTLE, PLLC



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