IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2026 Term

No. 24-412

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

HD MEDIA COMPANY, LLC d/b/a CHARLESTON GAZETTE-MAIL,
Petitioner,

v.

WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS,
Respondent.

Appeal from the Intermediate Court of Appeals of West Virginia
No. 23-ICA-248
Civil Action No. 20-C-300

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED

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JUSTICE KIRKPATRICK delivered the Opinion of the Court.

JUSTICE TRUMP and JUSTICE FLANIGAN concur, in part, and dissent, in part, and reserve the right to file a separate Opinion.

SYLLABUS BY THE COURT

1. "On appeal of a decision from the Intermediate Court of Appeals of West Virginia, the Supreme Court of Appeals of West Virginia applies a de novo standard of appellate review to a circuit court's entry of summary judgment." Syllabus Point 1, *Moorhead v. W. Va. Army National Guard*, 251 W. Va. 600, 915 S.E.2d 378 (2025).

2. "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." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

3. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus Point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975).

4. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus Point 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968).

5. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of

the courts not to construe but to apply the statute." Syllabus Point 5, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

6. "Under the provisions of Rule 56 of the West Virginia Rules of Civil Procedure, when the moving party presents depositions, interrogatories, affidavits or otherwise indicates there is no genuine issue as to any material fact, the resisting party to avoid summary judgment must present some evidence that the facts are in dispute." Syllabus Point 2, *Guthrie v. Northwestern Mutual Life Insurance Co.*, 158 W. Va. 1, 208 S.E.2d 60 (1974).

7. "When a public body closes an open meeting on the basis that the matters to be discussed in that meeting are exempt from the Act as a result of the attorney-client privilege and that claim is challenged, the circuit court should review in camera whether the communications do indeed fall within that privilege. In other words, a bare claim that the matters to be discussed in a meeting of a public body are privileged, if challenged, does not suffice to close the meeting." Syllabus Point 6, *Peters v. County Commission of Wood County*, 205 W. Va. 481, 519 S.E.2d 179 (1999).

KIRKPATRICK, Justice:

The petitioner, HD Media Company, LLC d/b/a Charleston Gazette-Mail ("HD Media"), appeals a decision of the Intermediate Court of Appeals ("ICA") affirming the grant of summary judgment to the West Virginia University Board of Governors ("Board") in this matter involving alleged violations of the West Virginia Open Governmental Proceedings Act ("WVOGPA"). *See* W. Va. Code §§ 6-9A-1 to 12. HD Media asserts, among other things, that the Board improperly entered into executive sessions[1] to discuss various topics during multiple meetings in 2020. The circuit court disagreed and concluded that exceptions to the WVOGPA justified discussion of those topics in executive sessions, and the ICA affirmed. For the reasons discussed below, we conclude that some, but not all, of the topics at issue fall within exceptions contained in the WVOGPA. We, therefore, affirm the ICA, in part. However, we conclude that the exceptions to the WVOGPA did not apply to the topic regarding social justice issues, and for this reason, we reverse the ICA in that respect. Further, we remand this case for consideration of fees.

I. Factual and Procedural Background

On October 19, 2020, HD Media filed a Complaint for Declaratory Judgment and Injunction in the Circuit Court of Monongalia County alleging that the Board violated

[1] "'Executive session' means any meeting or part of a meeting of a governing body which is closed to the public." W. Va. Code § 6-9A-2(3).

the WVOGPA by, among other things, conducting portions of its meetings in executive (closed) session during the summer of 2020. The meetings at issue occurred on June 19, 2020; July 24, 2020; August 14, 2020; September 4, 2020; and September 18, 2020. It is undisputed that the Board entered into executive session during portions of each of those meetings.

On October 21, 2020, HD Media amended its complaint and alleged that the violations occurred when the following topics were discussed in executive session: (1) West Virginia University's ("WVU" or the "University") ongoing response to the COVID-19 pandemic; (2) a petition accusing the University of being "systemically anti-Black" (social justice issues); (3) the University's budgets; (4) "a talk with the athletic director about the 'outlook for this upcoming season'"; (5) the business college; (6) an emergency pay policy; (7) federal Title IX regulations; (8) tuition and fees; and (9) capital projects. In its complaint, HD Media sought an order declaring that the Board violated the WVOGPA by "deliberating in executive session" as to the above enumerated topics. HD Media also sought an order enjoining the Board's noncompliance and ordering the Board to open its future meetings on these topics to the public. Finally, HD Media requested its attorney fees and expenses in connection with litigating these issues.

Approximately one year after filing its Amended Complaint, HD Media filed a motion for partial summary judgment as to the following three alleged violations: (1) the University's ongoing response to the COVID-19 pandemic; (2) the University's budgets; and (3) social justice issues. HD Media's motion was based upon the Board's answer to

HD Media's Amended Complaint in which it admitted that it went into executive session to discuss the three topics identified above.[2]

The Board responded to HD Media's motion and filed a cross-motion for summary judgment seeking summary judgment on all nine topics identified in HD Media's amended complaint. With respect to the three issues identified in HD Media's motion for partial summary judgment—the University's response to the COVID-19 pandemic, the University's budgets, and social justice issues—the Board asserted that it properly entered into executive session to discuss these topics pursuant to exceptions found in the WVOGPA for "commercial competition" and for confidential matters. *See* W. Va. Code §§ 6-9-4(b)(9) and (12) (1999). In its cross-motion for summary judgment, the Board argued that summary judgment should be awarded to it on each of the topics at issue because the unrebutted testimony of the Board's Vice President and three expert witnesses proved that, among other things, the Board and its subcommittees followed the proper procedure when it entered into executive sessions to discuss the nine topics at issue.

On January 5, 2022, the circuit court held the first of two hearings on the competing motions for summary judgment. Following this hearing, the circuit court granted summary judgment in favor of the Board as to (1) the University's ongoing response to the COVID-19 pandemic; (2) University budgets; and (3) the social justice

[2] In its motion for partial summary judgment, HD Media indicated that the remaining six topics were not ripe for summary judgment as the Board denied those allegations in its answer.

issues, by order entered February 27, 2023. The circuit court concluded that the executive sessions related to these three topics involved commercial competition, which, if made public, might adversely affect the financial or other interests of the State. For this reason, the circuit court concluded that the commercial competition exception found at West Virginia Code § 6-9A-4(b)(9) applied and granted summary judgment to the Board on these three issues.

The circuit court ordered the parties to submit additional briefing on the remaining six topics, which the Board had discussed during a joint finance committee meeting on June 19, 2020, in executive session. Following that executive session, a Board member summarized the topics that had been discussed as: (1) "[a] talk with the [University's] athletic director about the 'outlook for this upcoming season;'" (2) the business college; (3) an emergency pay policy; (4) federal Title IX regulations; (5) tuition and fees; and (6) capital projects.

In its supplemental briefing, the Board generally asserted that it complied with the statutory requirements to enter into executive session to discuss the remaining six topics at issue and that the matters discussed during those executive sessions properly fit into exceptions contained in the WVOGPA. The Board argued that five of the six remaining topics fell within the "commercial competition" exception to the WVOGPA. With respect to the sixth topic—federal Title IX regulations—the Board asserted the attorney-client privilege applied. HD Media opposed the Board's motion for summary judgment as to the remaining six topics and argued that (1) it was entitled to summary

judgment on the remaining six topics because the Board failed to provide proper notice that the topics at issue were going to be addressed at the June 19, 2020, meeting; (2) the topics discussed during the executive session did not "meet the very limited exemptions under the WVOGPA;" and (3) the topics were inconsistent with the "narrow application" of the exemptions.

On March 28, 2022, the circuit court held a second hearing on the parties' cross-motions for summary judgment on the remaining six topics. On April 28, 2023, the circuit court entered an order granting summary judgment to the Board, concluding that the Board did not violate the WVOGPA by discussing the six topics in executive session. The circuit court did conclude, however, that the Meeting Agenda for the June 19, 2020, meeting did not meet the requirements of the WVOGPA. The circuit court deemed this violation to be "technical" and concluded that it did not warrant the award of attorney's fees or the invalidation of any actions that were taken at the June 19, 2020, meeting.

HD Media initially appealed the circuit court orders to this Court, but its appeal was rejected due to the ICA having appellate jurisdiction over final orders in civil cases that were entered after June 30, 2022. Thereafter, HD Media appealed to the ICA but also filed a motion seeking direct review with this Court pursuant to Rule 29(f) of the

West Virginia Rules of Appellate Procedure.[3] By order dated September 12, 2023, this Court refused the motion for direct review. [4]

[3] Rule 29(f) of the Rules of Appellate Procedure provides,

> *Motions for direct review*.—Within twenty days of the date a notice of appeal is filed in the Intermediate Court, a party to the appeal may file a motion in the Supreme Court for direct review of the final order on appeal. Any party may file a response in opposition to a motion within ten days of the filing of the motion. A reply to a response to a motion may not be filed without leave granted by order. A motion for direct review may only be granted in appeals that involve fundamental public importance and where exigencies, in which time is of the essence, warrant direct review. If the motion is granted, jurisdiction of the appeal is transferred from the Intermediate Court to the Supreme Court.

[4] HD Media also challenges the jurisdiction of the ICA to consider his appeal in 2023, arguing that it had sought an extraordinary remedy in circuit court, and the intermediate court did not then have appellate jurisdiction over matters involving extraordinary remedies. *See* W. Va. Code § 51-11-4(d)(10) (eff. Jan. 13, 2022, to June 5, 2024). HD Media's argument suffers several defects. First, HD Media fails to acknowledge that it also sought declaratory relief in circuit court. *See id*. § 51-11-4(b)(1) (eff. Jan 13, 2022, to June 5, 2024) (ICA has appellate jurisdiction over "[f]inal judgments or orders of a circuit court in civil cases, entered after June 30, 2022"); *see, e.g.*, *City of Weirton v. SWN Prod. Co., LLC*, 253 W. Va. 425, 931 S.E.2d 825 (2026) (reversing ICA's decision reversing a declaratory judgment in favor of the City of Weirton, and which was entered in August 2022). Second, HD Media has not specified what it would have the Court do to rectify this alleged error; the appeal is now before this Court, and we review the circuit court's orders de novo.

Apparently sensing the futility of its argument, HD Media asks only for "an explanation . . . providing the rationale for permitting the [ICA] to have jurisdiction over an appeal involving extraordinary remedies," to aid members of the Bar. Rather than issue the advisory opinion petitioner requests, we note that the Legislature amended West Virginia Code § 51-11-4(b)(1) and (d)(10) in 2024 and 2026. Subsection (b)(1) now states that the ICA has appellate jurisdiction over "[f]inal judgments or orders of a circuit court in all civil cases, including, but not limited to, those in which there is a request for legal or

Continued . . .

On June 14, 2024, the ICA issued a decision affirming the circuit court's decision that: (1) the Board sufficiently demonstrated the applicability of the commercial competition exception as to eight of the nine topics at issue; (2) the Board sufficiently demonstrated the applicability of the confidentiality exception as to five of the nine topics at issue; (3) the circuit court did not err in its in camera review of privileged materials; and (4) there was no reason to set aside the circuit court's conclusion that the executive session discussion regarding Title IX regulations constituted privileged attorney-client communications. *See HD Media Co., LLC v. W. Va. Bd. of Governors*, 251 W. Va. 249, 912 S.E.2d 12 (W. Va. Ct. App. 2024). Although the ICA disagreed with the circuit court's characterization of the June 19, 2020, Meeting Agenda violation as merely "technical," it found no "reversible error in the [circuit] court's application of the law or its refusal to award attorney fees in the overall context of the litigation below." *Id.* at 262, 912 S.E.2d at 25. HD Media appeals now appeals the decision of the ICA to this Court.

II. Standard of Review

Our review of this case is plenary: "On appeal of a decision from the Intermediate Court of Appeals of West Virginia, the Supreme Court of Appeals of West

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equitable relief, entered after June 30, 2022." Subsection (d)(10) now states that the ICA does not have appellate jurisdiction over "[j]udgments or final orders issued in proceedings where the relief sought is one or more of the following extraordinary remedies: writ of prohibition, writ of mandamus, writ of quo warranto, writ of certiorari, writ of habeas corpus, special receivers, arrests in civil cases, and personal safety orders."

Virginia applies a de novo standard of appellate review to a circuit court's entry of summary judgment." Syl. Pt. 1, *Moorhead v. W. Va. Army Nat'l Guard*, 251 W. Va. 600, 915 S.E.2d 378 (2025). Summary judgment "[s]hall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[5] W. Va. R. Civ. P. 56(c) (1998).

In addition, the parties' arguments require us to consider and apply the WVOGPA. *See* Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("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."). We have held that, "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). Consequently, "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). Likewise, "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the

[5] Following the entry of the orders on appeal, Rule 56 of the West Virginia Rules of Civil Procedure was amended. "Because the circuit court applied the pre-amendment version of the rule, we quote that language here." *Hardy v. 3M Company*, 252 W. Va. 654, 662 n.3, 925 S.E.2d 464, 472 n.3. In its current form, Rule 56 requires that "[t]he court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." W. Va. R. Civ. P. 56(a) (2025).

statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. Pt. 5, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959). With those parameters set, we turn to the parties' arguments.

III. DISCUSSION

HD Media's arguments on appeal require us to consider exceptions to the WVOGPA.

A. Exceptions to the WVOGPA

In enacting the WVOGPA, the Legislature declared that "[p]ublic agencies in this state exist for the singular purpose of representing citizens of this state in governmental affairs, and it is, therefore, in the best interests of the people of this state for the proceedings of public agencies be conducted openly, with only a few clearly defined exceptions." W. Va. Code § 6-9A-1 (1999). Realizing that it would be "unrealistic, if not impossible, to carry on the business of government should every meeting, every contact and every discussion seeking advice and counsel in order to acquire the necessary information, data or intelligence needed by a governing body were required to be a public meeting[,]" the Legislature created twelve exceptions to the requirement for open meetings. *See id*. § 6-9A-4 (1999).

1. W. Va. Code § 6-9A-4(b)(9), Commercial Competition

HD Media asserts that the Board discussed nine topics in executive sessions, improperly, between June and September 2020. The circuit court determined that eight of the nine topics were properly discussed in executive session pursuant to the commercial competition exception of the WVOGPA, and the ICA agreed.[6] The commercial competition exception found at West Virginia Code § 6-9A-4(b)(9) permits a public agency, upon the majority affirmative vote of the members present of the governing body of such public agency, to hold an executive session,

> [t]o consider matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving commercial competition, which if made public, might adversely affect the financial or other interest of the state or any political subdivision: Provided, That information relied on during the course of deliberations on matters involving commercial competition are exempt from disclosure under the open meetings requirements of this article only until the commercial competition has been finalized and completed: Provided, However, that information not subject to release pursuant to the West Virginia Freedom of Information Act does not become subject to disclosure as a result of executive session[.]

W. Va. Code § 6-9A-4(b)(9).

On appeal, HD Media argues that the circuit court and the ICA misunderstood the word "commercial" as used in this exception, because the word "implies

[6] Of the nine topics, the circuit court also concluded that the internal memoranda exception to the WVOGPA applied to five of the topics, and the ICA affirmed that decision as well. Because we conclude that the commercial competition exception to the WVOGPA applies to the topics we are affirming, we decline to address whether another exception also applies.

that public funds or financial interests of some kind must be involved," and that cannot be said of the eight topics at issue. We disagree that the scope of the exception is so limited. As the ICA correctly pointed out, this exception is clearly applicable to "other matters" apart from public funds or financial interests. *See id*. § 6-9A-4(b)(9) ("[t]he investment of public funds *or other matters* involving commercial competition[.]") (emphasis added); *see also HD Media Co., LLC*, 251 W. Va. at 257, 912 S.E.2d at 20 ("The text of the exception readily contemplates its application to 'other matters' apart from the investment of public funds.").

The lower courts found the commercial competition exception applied to the following eight topics:

1. the University's response to the COVID-19 pandemic;
2. University budgets;
3. social justice issues;
4. discussions with the athletic director;
5. the business college;
6. capital projects;
7. an emergency pay policy; and
8. tuition and fees.

We will address these topics in the order they were addressed by the circuit court.

(a) Order of February 27, 2023

In the February 27, 2023, order, the circuit court granted partial summary judgment to the Board on the following three issues: (1) the University's ongoing response to the COVID-19 pandemic; (2) University budgets; and (3) social justice issues.

At the time of the hearing regarding these three issues, the circuit court had the following materials before it related to HD Media's position: (1) HD Media's motion seeking partial summary judgment on the grounds that the Board admitted in its Answer that it entered into executive session to discuss its response to the COVID-19 pandemic, the University's budgets, and social justice issues; (2) HD Media's assertion that an ongoing response to the COVID-19 pandemic is not a clearly-defined exception to the WVOGPA; and (3) HD Media's assertion that the topics at issue were not matters of commercial competition. The only exhibits provided by HD Media in support of its motion for partial summary judgment on these topics were meeting agendas for the five meetings referenced in its Amended Complaint. The Board submitted a response to HD Media's motion for partial summary judgment, and it filed its own cross-motion for summary judgment. In support of its motion, and in contrast to HD Media's approach, the Board submitted affidavits from the Vice President for Strategic Initiatives at WVU, Mr. Alsop, who was present for each of the meetings at issue in HD Media's Amended Complaint and three expert witnesses. Because HD Media did not submit any affidavits or other evidence in support of its motion for partial summary judgment, the circuit court noted that Mr. Alsop's testimony was unrebutted, and it remained unrebutted throughout this case. This fact results in a repeated refrain—"unrebutted testimony"—because it is both important and, at times, dispositive, especially in the context of summary judgment.

(i) COVID-19 Pandemic Response & Budgets

With respect to the Board's executive session discussions regarding the University's ongoing response to the COVID-19 pandemic, the circuit court concluded that such discussions were "commercially competitive" and that premature disclosure of these discussions would have harmed the University. The circuit court concluded that discussions regarding the University's budgets were "inextricably tied to the University's COVID-19 response" and "implicated sensitive commercial interests, the disclosure of which could adversely impact the University's financial interests[.]"

Mr. Alsop[7] testified that the COVID-19 pandemic resulted in students being sent home with all learning being forced online in the spring of 2020. Many contracts could not be fulfilled, some planned construction projects were postponed, and some research projects had to be postponed or extended beyond their current deadlines. Decisions regarding implementation of remote instruction and "whether and when to bring students back to campus impacted WVU's financial health." Further, according to Mr. Alsop, "[a]s a result of COVID-19, every line item of the University's budget was in question." Anticipated budgetary shortfalls required consideration of changes to paid leave policies, furloughing employees and restructuring the University's debt portfolio. This testimony is unrebutted.

[7] Mr. Alsop's first affidavit was executed on December 9, 2021. On March 1, 2022, Mr. Alsop executed a supplemental affidavit.

HD Media submitted no affidavits or other evidence in support of its argument on these topics. Instead, it asserted that a university's "response to the COVID-19 pandemic is not a clearly-defined exception" to the WVOGPA. HD Media is correct that none of the exceptions to the WVOGPA specifically state that a response to a global pandemic is an exception to the WVOGPA. However, this assertion, much like HD Media's arguments that the response to COVID-19 and discussions regarding annual budgets were not "matters involving commercial competition," provide HD Media no relief when faced with a motion for summary judgment.

Despite HD Media's arguments to the contrary, the Board provided an affidavit from Mr. Alsop detailing the commercially competitive nature of these topics, *supra*. "Under the provisions of Rule 56 of the West Virginia Rules of Civil Procedure, when the moving party presents depositions, interrogatories, affidavits or otherwise indicates there is no genuine issue as to any material fact, the resisting party to avoid summary judgment must present some evidence that the facts are in dispute." Syl. Pt. 2, *Guthrie v. Nw. Mut. Life Ins. Co*., 158 W. Va. 1, 208 S.E.2d 60, (1974).

Accordingly, we find no error with the ICA's decision affirming the circuit court's grant of summary judgment to the Board on the topics of the University's response to the COVID-19 pandemic and University budgets, and we affirm the ICA as to these topics.

(ii) Social Justice Issues

According to the unrebutted testimony of Mr. Alsop, on June 17, 2020, the University received a petition from its "campus community calling for changes in diversity and inclusion on campus." In its Amended Complaint, HD Media alleged that the petition was "signed by more than 800 people calling WVU 'systematically anti-Black.'" According to Mr. Alsop, following the murder of George Floyd,[8] "social unrest affected every college and university in the nation."

In its order granting summary judgment to the Board on the topic involving social justice issues, the circuit court found that the Board's discussion of this topic had

[8] The killing of George Floyd was detailed in *Alsaada v. City of Columbus*:

> On May 25, 2020, George Floyd, a Black American, presented a counterfeit $20 bill at a convenience store. Police arrived. Moments later, Mr. Floyd showed no signs of life. After Officer Derek Chauvin kneeled on Mr. Floyd's neck for approximately nine minutes and 29 seconds, Mr. Floyd died. "I can't breathe"—a cry for help gasped by an incalculable number of Americans dying at the hands of government officials, including Mr. Floyd—became an international rallying cry. Days after the killing, protests began across the nation, and Columbus, Ohio was no exception. Most of the demonstrations occurred between May 28 and June 21, 2020, with further protests on either end of that period in response to deaths of other Americans at the hands of law enforcement.

536 F. Supp. 3d 216, 229-30 (S.D. Ohio 2021); *see also Williams v. The City of Columbus*, No. 2:22-cv-01831, 2024 WL 111674, at *1 (S.D. Ohio Jan. 10, 2024). Other courts from around the country described the aftermath of the George Floyd killing similarly. *See*, *e.g.*, *Tinius v. Choi*, 77 F.4th 691, 696 (D.C. Cir. 2023) ("masses of people poured onto the streets to express their outrage against police killings of Mr. Floyd and other Black Americans").

been "limited." In addition, the circuit court noted the timing of the University's receipt of the petition—"within weeks of George Floyd's murder and during a time of great protest and social unrest." Finally, the circuit court acknowledged that "[t]he University's response to concerns about racism on campus and efforts to promote diversity is deeply important to current and future students, faculty, and staff." These findings, however, do not support the circuit court's conclusion that the commercial competition exception to the WVOGPA applies to the Boards discussion of this topic.

Upon our review, the circuit court's conclusion regarding this topic tracked the arguments of the Board and the testimony provided by Mr. Alsop: (1) the discussion on this topic was described as a quick briefing; (2) the petition was received two days before the June 19, 2020, meeting; and (3) "[c]urrent and future students, faculty, and staff care deeply" about the University's response to concerns about racism and diversity. We agree with HD Media that these findings do not support the conclusion that the discussion of this topic met the commercial competition exception. We find no support for the circuit court's conclusion that a response to these concerns necessarily involves commercial competition.

We, therefore, conclude that the Board violated the WVOGPA when it entered into an executive session to discuss these social justice issues. Accordingly, we reverse the decision of the ICA as to this topic. Our conclusion that a violation occurred

with respect to this topic requires this case to be remanded to the circuit court for consideration of fees pursuant to West Virginia Code § 6-9A-7(b) (1999).[9]

(b) Order of April 28, 2023

In its April 28, 2023, order, the circuit court granted summary judgment to the Board on the remaining topics discussed in executive session. As noted *supra*, there were a total of nine topics discussed in executive session that are at issue in this case. The circuit court disposed of eight of those topics by finding that the commercial competition exception applied to those topics. The ninth topic, federal Title IX regulations, did not implicate the commercial competition exception and is discussed *infra*. The second order granted summary judgment to the Board on the following five topics:

1. discussions with the athletic director;
2. the business college;
3. capital projects;
4. an emergency pay policy; and
5. tuition and fees.

At the time of the hearing regarding these five issues, the circuit court had before it: (1) the initial motions for summary judgment; (2) the Board's supplemental motion for summary judgment; (3) HD Media's brief in opposition to the Board's motion

[9] *See* W. Va. Code § 6-9A-7(b) ("A public agency whose governing body is adjudged in a civil action to have conducted a meeting in violation of the provisions of this article may be liable to a prevailing party for fees and other expenses incurred by that party in connection with litigating the issue of whether the governing body acted in violation of this article, unless the court finds that the position of the public agency was substantially justified or that special circumstances make an award of fees and other expenses unjust.").

for summary judgment and a cross-motion for summary judgment on the six remaining topics; and (4) the Board's reply in support of its supplemental motion for summary judgment. In support of its motion for summary judgment on the remaining topics, HD Media provided copies of three Open Meetings Advisory Opinions issued by the West Virginia Ethics Commission. In support of its motion for summary judgment on the remaining topics, the Board provided copies of the previously provided affidavits from Mr. Alsop and three experts as well as a supplemental affidavit from Mr. Alsop. In its cross-motion for summary judgment, HD Media indicated that it "deliberately did not retain any experts" because the circuit court had exclusive authority to rule on questions of law.

(i) Discussion with the Athletic Director

Following the executive session on June 19, 2020, a board member indicated that, while in executive session, the Board had "a talk with the athletic director about the 'outlook for this upcoming season.'" On its face, it is difficult to understand how such a discussion with the athletic director may implicate commercial competition. However, a more thorough review of this topic reveals that the discussion involved considerations of how the University could plan for athletic events in light of the COVID-19 pandemic. According to Mr. Alsop's unrebutted supplemental affidavit, at that time, the University did not know whether the football season could proceed. Further, given the amount of revenue that home football games provide to the athletic department—$3 to $6 million per game—premature, public disclosure could have adversely affected "media contracts and contracts with stadium vendors, as well as ticket sales and athlete retention." In support of

its conclusion that the commercial competition exception applied to this topic, the circuit court relied upon Mr. Alsop's unrebutted testimony, and we find no error in this regard.

Accordingly, we find no error with the ICA's decision affirming the circuit court's grant of summary judgment to the Board on this topic, and we affirm the ICA as to this topic.

(ii) The Business College and Capital Projects

The circuit court addressed the topics of the business college and capital projects together as they were related. Mr. Alsop's unrebutted testimony on these issues is dispositive. According to Mr. Alsop, these discussions related to "ongoing capital projects, including the construction of Reynolds Hall, the new facility for the John Chambers College of Business and Economics." Although the design had been approved and construction was underway, the discussion involved the "economic feasibility of moving forward with this and other capital projects in light of the ongoing COVID-19 pandemic" as well as whether the University should "continue forward with [its] contracts with third-party vendors." Similar to the previous topic, the circuit court relied upon the unrebutted testimony of Mr. Alsop, and we find no error in this regard.

Accordingly, we find no error with the ICA's decision affirming the circuit court's grant of summary judgment to the Board on these topics, and we affirm the ICA as in this regard.

(iii) Emergency Pay Policy

According to the unrebutted testimony of Mr. Alsop, the topic of the University's emergency pay policy was part of a broader discussion of the COVID-19 pandemic and its budgetary impacts. Prior to the date of this discussion, the Board approved implementation of a special emergency leave with pay plan for faculty and staff. The discussion involved whether the Board would approve extending the special emergency leave through the fall of 2020. Accordingly, we find no error with the ICA's decision affirming the circuit court's grant of summary judgment to the Board on these topics, and we affirm the ICA as to these topics.

(iv) Tuition and Fees

The unrebutted testimony of Mr. Alsop regarding this topic indicated that "limited" discussions regarding tuition and fees and their impact on "ongoing enrollment and retention strategies" were part of a broader discussion regarding COVID-19 budgetary discussions. Consideration of options to cover anticipated budgetary shortfalls included "exploring new enrollment and retention strategies." Further, both the University's budget and tuition and fee schedules were subsequently discussed and approved in a public session. Accordingly, we find no error with the ICA's decision affirming the circuit court's grant of summary judgment to the Board on these topics, and we affirm the ICA as to these topics.

B. Attorney-Client Privilege

The ninth and final discussion topic relates to federal Title IX regulations. On appeal to this Court, HD Media argues that the ICA erred by approving the procedure the Board used to assert the attorney-client privilege with respect to discussions between General Counsel Stephanie D. Taylor and the Board regarding new federal Title IX regulations. Specifically, HD Media argues that the Board was required to present actual testimony to be heard in camera at the second summary judgment hearing, which occurred on March 28, 2022. Because the Board did not present in person testimony and because it submitted the privileged material for review after the hearing, HD Media contends that the submission was improper and untimely.

According to the unrebutted testimony of Mr. Alsop, on June 19, 2020, the University's General Counsel Stephanie D. Taylor briefed the Joint Finance and Facilities and Revitalization/Strategic Plans and Initiatives Committee on changes to federal Title IX regulations by presenting "legal analysis relevant to new federal Title IX regulations and discuss[ing] the Administration's plans for implementing them." For this reason, the Board took the position that this topic was properly exempted from the WVOGPA due to the attorney-client privilege.

During supplemental briefing, HD Media argued that for this exemption to be upheld, the Board was required to present the circuit court with a summary of Ms. Taylor's communications with the Board for an in camera review so that the circuit court could determine whether the communications fell within the attorney-client privilege. This argument was based upon our holding in *Peters v. County Commission of Wood County*,

205 W. Va. 481, 519 S.E.2d 179 (1999), wherein this Court established the following procedure for public bodies who wish to close an open meeting due to the attorney-client privilege:

> When a public body closes an open meeting on the basis that the matters to be discussed in that meeting are exempt from the Act as a result of the attorney-client privilege and that claim is challenged, the circuit court should review in camera whether the communications do indeed fall within that privilege. In other words, a bare claim that the matters to be discussed in a meeting of a public body are privileged, if challenged, does not suffice to close the meeting.

Id. at 483, 519 S.E.2d at 181, Syl. Pt. 6.

On April 20, 2022, the Board submitted privileged materials for in camera review. Following its review of this submission, the circuit court concluded that the discussion between Ms. Taylor and the Board was covered by the attorney-client privilege, and the ICA affirmed this decision.

In support of its assertion that the attorney-client privilege exempted the discussion between Ms. Taylor and the Board, the Board submitted the following unrebutted affidavits: (1) a supplemental affidavit of Mr. Alsop stating that during the executive session on June 19, 2020, Ms. Taylor presented "legal analysis relevant to new federal Title IX regulations and discussed the Administration's plans for implementing them;" and (2) an affidavit of Ms. Taylor, which stated that her communications with the Board during the executive session on June 19, 2020, "consisted of [her] legal analysis"

related to the new Title IX regulations. According to Ms. Taylor's unrebutted affidavit, on May 6, 2020, the U.S. Department of Education established new requirements for responses to reports of sexual harassment under Title IX, which required educational institutions to follow a specific process when responding to reports of sexual harassment. During the June 19, 2020, executive session, Ms. Taylor provided a "broad overview of the changes" to Title IX and their "impact on the University" as well as her "legal analysis" regarding the new Title IX regulations.

The *Peters* requirement for the circuit court to review whether communications fall within the attorney-client privilege does *not* specify or limit the circuit court's review to in-person testimony. As affidavits are acceptable as testimonial evidence in motions for summary judgment, and because HD Media does not provide support for its argument that in-person testimony is required, we affirm the ICA on this issue.

C. Denial of Fees Related to June 19, 2020 Meeting Agenda

HD Media also assigns error to the lower courts' decisions denying its request for attorney fees under West Virginia Code § 6-9A-7, despite concluding that the Board violated the notice requirements of the WVOGPA. Although the propriety of the

circuit court's finding of a violation is not before us,[10] we will provide a summary of the violation. Prior to the June 19, 2020, meeting, the Board published a Meeting Agenda that indicated that there may be a "potential executive session" to discuss the following:

> (a) Deliberative matters regarding Fiscal Year 2020 and 2021 budgets, including current year retention and enrollment; (b) Matters relating to improvements to, or potential contractual relationships regarding facilities, infrastructure, and real property; (c) Potential strategic initiatives relating to academic health sciences priorities, corporate collaboration, and legislative and regulatory matters; and, (d) Confidential legal, personnel, and deliberative matters relating to West Virginia University's ongoing response to the COVID-19 pandemic.

Following the executive session, a Board member summarized the topics discussed during the executive session as: (1) "a talk with the athletic director about the 'outlook for this upcoming season;'"; (2) the Business College; (3) the University's emergency pay policy; (4) Title IX regulations; (5) tuition and fees; and (6) capital projects. HD Media argued that the Meeting Agenda was inadequate because it failed to inform the public that the six topics described by the Board member were going to be discussed, and the circuit court agreed.

In its April 28, 2023, order, the circuit court found that the Board's Meeting Agenda for the June 19, 2020, meeting was inadequate because it contained "generic

[10] Although Board does not concede that its meeting agenda for the June 19, 2020, meeting was deficient, its brief does not assert a cross-assignment of error on this issue.

descriptions [which were] insufficient to provide enough information to adequately place the public and the media on notice of the particular items that it intended to discuss[.]" Although the circuit court determined that a violation of the WVOGPA occurred, it found that the Board "demonstrated that it believed it had adequately identified the issues to be discussed in executive session and was able to correlate each of the [Board member's] comments into a general agenda item." The circuit court deemed this violation to be "technical" and ruled that it did not warrant an award of attorney fees. The ICA disagreed with the circuit court's characterization of this violation as "technical," but it found no error or abuse of discretion in the circuit court's ultimate determination that an award of attorney fees was not warranted.

On appeal to this Court, HD Media argues that the circuit court erred by not awarding it attorney fees, and it requests that the case be remanded to the circuit court for development of a record on this issue.

West Virginia Code § 6-9A-7(b) (1999) provides that

> [a] public agency whose governing body is adjudged in a civil action to have conducted a meeting in violation of the provisions of this article *may* be liable to a prevailing party for fees and other expenses incurred by that party in connection with litigating the issue of whether the governing body acted in violation of this article, unless the court finds that the position of the public agency was substantially justified or that special circumstances make an award of fees and other expenses unjust.

(Emphasis added).

The circuit court was not required to award attorney fees. As noted above, the Board *may* be liable to a prevailing party unless the circuit court found that the Board's position was "substantially justified or that special circumstances" make such an award unjust. *Id*.; *see* Syl. Pt. 6, in part, *Pioneer Pipe, Inc. v. Swain*, 237 W. Va. 722, 791 S.E.2d 168 (2016) ("[T]he Legislature's use of the word 'may' usually renders the referenced act discretionary, rather than mandatory, in nature."). Despite finding the Meeting Notice to be insufficient, the circuit court found that the Board "demonstrated that it believed it had adequately identified the issues discussed in executive session and was able to correlate each of [the Board member's] comments into a general agenda item.[11] This finding is tantamount to a finding that the Board's position was "substantially justified" as required in West Virginia Code § 6-9A-7(b), and this finding is left to the discretion of the circuit court. *See Capriotti v. Jefferson Cnty. Plan. Comm'n*, No. 13-1243, 2015 WL 869318, at *8 (W. Va. Feb. 26, 2015) (memorandum decision) ("The remedies provided in W. Va.

[11] The Board asserted that the Board member's comments corresponded to an agenda item on the Meeting Agenda as follows: (1) a talk with the athletic director corresponded to the University's ongoing response to the COVID-19 pandemic; (2) the business college corresponded to matters relating to improvements to, or potential contractual relationships regarding facilities, infrastructure, and real property and the University's ongoing response to the COVID-19 pandemic; (3) the emergency pay policy corresponded to budgets, enrollment and the University's ongoing response to the COVID-19 pandemic; (4) Title IX regulations corresponded to potential strategic initiatives relating to academic health sciences priorities, corporate collaboration, and legislative and regulatory matters; (5) tuition and fees corresponded to budgets, retention, enrollment and the University's ongoing response to the COVID-19 pandemic; and (6) capital projects corresponded to matters relating to improvements to, or potential contractual relationships regarding facilities, infrastructure, and real property and the University's ongoing response to the COVID-19 pandemic.

Code § [] 6-9A-7 (1999) are left to the discretion of the circuit court."). Given the Board's correlation of the topics to the Meeting Agenda, we find no abuse of discretion or error, and we affirm the ICA's ruling on this issue.[12]

IV. Conclusion

For the foregoing reasons, we affirm the portion of the ICA's decision that affirmed the circuit court's grant of summary judgment to the Board on all issues except on the topic involving social justice issues. We reverse the ICA's decision as to social justice issues and remand for the consideration of fees.

Affirmed, in part; reversed, in part; and remanded.

[12] Although we find no abuse of discretion in the denial of fees related to this issue, our conclusion, *supra*, reversing the ICA's decision regarding social justice issues requires the circuit court to consider whether fees are appropriate on that issue.