
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TIMBER RIDGE, INC.

Petitioner (Plaintiff below),

v.

HUNT COUNTRY ASPHALT &
PAVING, LLC,
AND JEFFREY D. GREENBERG,

Respondents (Defendants below).

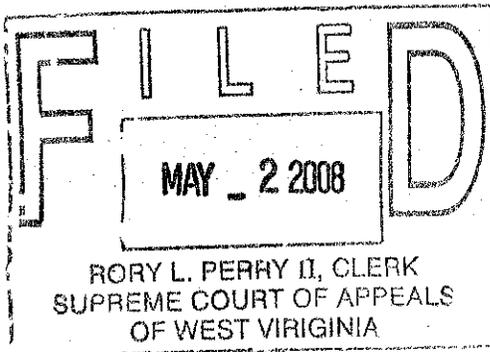
Docket No. 33877

Certified Question

From United States District Court for the
Northern District of West Virginia
(Martinsburg Division)

Civil Action No. 3:05-cv-00016
(Bailey, J.)

HUNT COUNTRY ASPHALT AND PAVING, LLC'S BRIEF ON THE
CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA



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I. NATURE OF PROCEEDING AND RULING BELOW

This matter comes before the Court upon certification of two questions of law from the United States District Court for the Northern District of West Virginia, Order Doc. 107. The certified questions of law are:

(1) Whether a contractor who does not have a West Virginia contractor's license may utilize the courts to maintain a claim or counterclaim against the property owner; and

(2) Whether a landowner's knowledge of the contractor's unlicensed status estops the landowner from raising the contractor's unlicensed status.

Both pose questions of law that have not been addressed by this Court. The District Court answered both questions in the negative.

II. SUMMARY OF RELEVANT FACTS

Plaintiff, Timber Ridge, Inc. ("Timber Ridge"), operates recreational camps in West Virginia. On or about September 23, 2003, Defendant, Hunt Country Asphalt & Paving L.L.C. ("Hunt Country"), entered an agreement to provide contracting services to Timber Ridge for approximately \$110,000. Hunt Country was licensed in compliance with contracting laws of Virginia, but did not hold a valid West Virginia contractor license at any time during contract execution or performance. Hunt Country performed phase I of a multi-phased project. Timber Ridge changed the nature of the work to be performed under phase I and then disputed the amount owed pursuant to a change order. Due to the dispute, Timber Ridge cancelled the remainder of the project and instituted this suit. Hunt Country filed a counterclaim alleging Timber Ridge's failure to pay the amount owed for completion of the work

performed to date. Timber Ridge responded by filing a motion for summary judgment, asserting that Hunt Country may not maintain a counterclaim on the contract because it did not comply with the West Virginia Contractor Licensing Act, W.Va. Code §21-11-1, et seq. (“Contractor Licensing Act” or “Act”). Hunt Country answered the motion by maintaining that the Contractor Licensing Act does not prevent an unlicensed contractor from suing on the contract, and even if the court were to impose such a ban, Timber Ridge knew of Hunt Country’s licensing status, therefore should be estopped from asserting the Act as a defense.

III. DISCUSSION OF LAW

A. STANDARD OF REVIEW

This Court reviews certified questions of law from a federal district court de novo. *See Preussag Intern. Steel Corp. v. March-Westin Co.*, 221 W.Va. 472 (2007).

B. STATUTE MUST BE STRICTLY CONSTRUED

The West Virginia Contractor Licensing Act W.Va. Code §21-11-1 et seq. was enacted in 1991, and requires contractors to obtain a license in order to perform work in the State. Prior to that date, a license was not required to perform contracting work in West Virginia. Accordingly, the Contractor Licensing Act imposes a burden or duty that did not exist at common law, and it must be strictly construed. *See Phillips v. Larry’s Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 647 S.E.2d 920 (2007)(noting prior decisions that require narrow construction of statutes in derogation of common law). This Court has repeatedly held that

“statutes in derogation of the common law are allowed effect only to the extent clearly indicated by the terms used.” *Phillips* at 492, 647 S.E.2d at 928; *see also Bank of Weston v. Thomas*, 75 W.Va. 321 (1914). Further, “nothing can be added otherwise than by necessary implication arising from such terms.” *Id.* The primary rule of statutory construction is to ascertain and give effect to the intention of the legislature, and it is not for the appellate court to read into a statute that which it does not say. *See id.* at 491; 647 S.E.2d at 927. If the statute “is clear; if the statutory scheme is coherent and consistent; and if the law is within the constitutional authority of the lawmaking body that passed it, then the duty of interpretation does not arise and the rules for ascertaining uncertain language need no discussion.” *State ex. rel. Frazier v. Meadows*, 193 W.Va. 20; 454 S.E.2d 65 (1953)(internal quotations and citations omitted).

The Contractors Licensing Act explicitly sets forth penalties for violation of the licensing requirements but does not limit the unlicensed contractor’s right to sue or defend on the contract. West Virginia Code §21-11-13 requires the Contractor Licensing Board to enjoin companies that are operating without a license. *See* W.Va. Code §21-11-13(a)(1)¹. Additionally, the Board is authorized to impose monetary penalties between two hundred and one thousand dollars on contractors for conducting business without a valid license. *See* W.Va. Code §21-11-13(2). West Virginia Code §21-11-13 also provides criminal penalties for unlicensed contractors who continue to engage in contracting business without a

¹ West Virginia Code §21-11-13(a)(1) provides: “Upon determination that a person is engaged in contracting business in the state without a valid license, the board or commissioner shall issue a cease and desist order requiring such person to immediately cease all operations in the state.”

valid license.² In addition to the specific fines and penalties set forth in Code §21-11-13, the Board is given disciplinary powers, including the power to suspend or revoke a license, the power to censure or reprimand, the ability to impose limitations or conditions on licenses, and the ability to impose remedial education or probation. *See* Code §21-11-14. The plain language of the Act, therefore, is silent as to the additional penalty of barring suits by unlicensed contractors.

Defendant maintains that the statute is clear as to the penalties that the legislature intended to impose on the unlicensed contractor, and therefore, no further interpretation is necessary. Imposition of an additional penalty necessarily requires writing into the statute that which is not there.

West Virginia is one of the last states to enact licensing requirements for contractors. Accordingly, study of the evolution of similar requirements in other jurisdictions provides a great deal of history and context, both for the legislature and for this Court. Many of the states in which licensing has been required for decades initially enacted statutes, like West Virginia's, that did not have a prohibition on civil actions by the contractor. Several of these jurisdictions later amended the statutes to impose restrictions on the contractor's ability to sue or to

² West Virginia Code §21-11-13(b) provides: "Any person continuing to engage in contracting business in the state without a valid license after service of a cease and desist order is guilty of a misdemeanor and, upon conviction, is subject to the following penalties: (1) For a first offense, a fine of not less than two hundred dollars nor more than one thousand dollars; (2) For a second offense, a fine of not less than five hundred dollars nor more than five thousand dollars, or confinement in the county or regional jail for not more than six months, or both; (3) For a third offense, a fine of not less than one thousand dollars nor more than five thousand dollars, and confinement in the county or regional jail for not less than thirty days nor more than one year."

temper the result of a total ban that was imposed by the courts of their states.³ The West Virginia legislature was no doubt aware of the statutes that explicitly void contracts entered into by a unlicensed contractors or that circumscribe the contractors' remedies related to such contracts. Yet the West Virginia legislature omitted the remedy requested by Plaintiff—a complete bar on actions—and has failed to amend the Act to impose such a penalty. The omission supports Defendant's conclusion that to ban all civil actions by an unlicensed contractor does not follow the strict construction cases outlined above. If the legislature intended to circumscribe the civil remedies available to unlicensed contractors, it would have done so, given the history of the statutes in other states.

Some courts have held that allowing lawsuits by unlicensed contractors would obviate the intent of the relevant licensing act because an unlicensed contractor could avoid the licensing requirements while continuing to work as a contractor and profiting from contracting jobs. This logic, however, overlooks the clearly stated penalties that are in the licensing statutes. There are sufficient deterrents in the Act to motivate compliance with the statute, while recognizing that a complete bar on actions involving contracts by unlicensed contractors could encourage inequitable conduct. *See e.g. Nevada Equities, Inc. v. Willard Pease Drilling Co.*, 84 Nev. 300 (1968)(noting that the licensing statute provided adequate incentives for compliance without imposing additional ban on suits).

³ *See e.g.* Tennessee Code §62-6-103 (amended in 1980 to allow only recovery of actual documented expenses upon a showing of clear and convincing evidence); Virginia Code §54.1-1115 (amended in 1994, recognizing bar on filing suit if unlicensed, but providing exception when contractor substantially performed in good faith without knowledge of licensing requirement).

Additionally, completely restricting unlicensed contractors from accessing the courts would invite unscrupulous behavior and unjust results. A party could, upon learning that the contractor is unlicensed, refuse to pay despite receiving high quality work or goods. "Under these circumstances, a windfall of the first magnitude should not be the product of inflexible rule, particularly where the statute is silent." *Todisco v. Econopouly*, 155 A.D.2d 441, 446, 547 N.Y.S.2d 103, 106 (N.Y.App.Div. 1989)(dissent). The dissent in *Todisco v. Econopouly* noted that the jurisprudence on the issue has fluctuated. *See id.* Many decisions hold that a ban is necessary, but numerous decisions attempt to avoid the inequity of a complete ban and recognize an unlicensed contractor's right to litigate. *See e.g. C.B. Jackson & Sons v. Davis*, 365 So.2d 207 (Fla.Dist.Ct.App. 1978)(holding suit allowed in quantum meruit); *Platt v. Locke*, 358 P.2d 95 (Utah 1961)(holding that contractor may file suit when he was without knowledge of statute); *Warren v. Bill Ray Construction*, 269 So.2d 25 (1972)(holding that statute did not preclude suit, but imposed other penalties); *Kessler v. Mandel*, 40 A.2d 926 (Pa. Super. Ct. 1945)(holding that express penalties are only penalties); *J.R. Hagberg v. John Bailey Contractor*, 435 So.2d 580 (La.Ct.App. 1983)(holding that statute cannot be invoked to avoid payment); *Todisco v. Econopouly*, 155 A.D.2d 441, 547 N.Y.S.2d 103 (N.Y.App.Div. 1989)(noting cases that seek to prevent unjust enrichment)(dissent).

The question for this Court, therefore, is whether the West Virginia legislature intended to ban suits by unlicensed contractors when it enacted the Contractor's Licensing Act, and if so, whether this Court will recognize exceptions

when equity necessitates it. The legislature's silence, in light of decades of jurisprudence on the matter, is a clear indication that West Virginia did not intend to provide the remedy the Plaintiff seeks. Strict construction of the Contractor's Licensing Act requires this conclusion.

C. CASES ALLOWING SUIT BY UNLICENSED CONTRACTORS WHEN STATUTE SILENT

In *D'Angelo Development and Construction Co. v. Cordovano*, 278 Conn. 237, 897 A.2d 81 (Conn. 2006), the Supreme Court of Connecticut held that the legislature did not intend to render contracts unenforceable under a New Home Construction Contractors Act when a contractor failed to comply with the licensing statute. The Connecticut court emphasized the importance of giving effect to the legislative intent, first looking to the text of the statute and its relationship to other statutes, then only looking to extrinsic evidence when the text is not plain and unambiguous. *See id.* at 243, 897 A.2d at 84. The new home construction statute was silent with regard to the enforceability of contracts that fail to comply with the statutory requirements, while a separate home improvement statute specifically invalidated and declared unenforceable contracts entered into by an unregistered contractor. *See id.* at 245, 897 A.2d at 86. The omission of the remedy in the new home contractor's statute, in light of its inclusion in the home improvement statute, provided evidence that the legislature did not intend to invalidate new home construction contracts that were not in compliance with the applicable statute. *See id.* at 247-48; 897 A.2d at 87. The court further determined that the legislative history of the statutes did not support invalidation of contracts failing to comply with the new home construction statute. The court said that the imposition of civil

and criminal penalties on a person who violates the act would prevent abuse and violation of the law. Specifically the court noted that, “the act’s existing scheme of multiple, cumulative and qualitatively different penalties well serves the underlying public policy of the act to protect consumers against unscrupulous new home construction contractors.” *Id.* at 250, 897 A.2d at 89. This conclusion provided independent support for their holding that noncompliant contracts are not unenforceable under the act. *See id.*

Similarly, Nevada’s general contracting law barred an unlicensed contractor from bringing suit, but the licensing statute for well drilling did not. When faced with the question of whether a drilling company could bring suit when it did not have the required license, the Supreme Court of Nevada held that when a licensing statute “provides for sanctions other than forfeiture of the right to sue on the contract, an unlicensed person is not precluded from maintaining an action to recover on the contract.” *Nevada Equities, Inc. v. Willard Pease Drilling Co.*, 84 Nev. 300, 440 P.2d 122 (Nev. 1968). The *Nevada Equities* court was hesitant to remove a right to sue when there was no ascertainable public policy reason to do so. *See id.* Under the particular facts of the case, there was no concern of risk to the public because the contractor demonstrated sufficient experience and financial responsibility for the project. *See id.* The Ninth Circuit later relied on the rules set forth in *Nevada Equities* and noted that the primary concern should be whether the public is adequately protected under the specific facts of the case. *See MGM Grand Hotel, Inc. v. Imperial Glass Co.*, 533 F.2d 486 (9th Cir. 1976). The Ninth Circuit held that “a policy of protecting the public would in no way be furthered by

imposing upon [plaintiff] such a harsh penalty as barring it from bringing its suit.”

Id. at 490.

Similarly, the Superior Court of Pennsylvania held that a mechanic’s lien was enforceable even though the underlying contract was executed when the contractor did not have the requisite permit because penalties for non-compliance are limited to those expressly provided in the ordinance. *See Kessler v. Mandel*, 156 Pa.Super. 505, 40 A.2d 926 (1945).

When interpreting a statute that is silent regarding contract enforceability, many jurisdictions have focused on the equity of the result. For example, Louisiana recognized the general rule that prohibits an unlicensed contractor from suing to recover on the contract, but allowed the contractor to assert equitable remedies, including unjust enrichment and the doctrine of *culpa in contrahendo*.⁴ *See J.R. Hagberg v. John Bailey Contractor*, 435 So.2d 580 (La.Ct.App. 1983). The court recognized that the statute’s purpose was to protect the general public from injury at the hands of unlicensed contractors. The facts in *J.R. Hagberg*, however, did not present such threats. The court held that “[w]here incompetency or inexperience or fraudulence is not involved, the licensing statute can not be invoked to avoid payment of valid charges.” *J.R. Hagberg* at 586. The court cited a prior case that said, “[u]nder the particular circumstances here presented the doctrine of ratification and estoppel is peculiarly applicable, and the defendant is

⁴ The doctrine of *culpa in contrahendo* advances the thesis that “damages should be recoverable against the party whose blameworthy conduct during negotiations for a contract brought about its invalidity or prevented its perfection.” Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 401 (1964).

not entitled to invoke a penal statute to which one may be amenable in avoidance of civil obligations flowing from a contract the terms of which are not inherently evil or immoral or repugnant to public policy and good order.” *Id.* at 586 (*citing* *Boxwell v. Department of Highways*, 203 La. 760, 14 So.2d 627 (La. 1943)).

The Supreme Court of Utah also permitted a contractor to maintain an action on the contract for equitable reasons, despite recognizing that failure to obtain a license would ordinarily prevent recovery. In *Platt v. Locke*, 358 P.2d 95, 97 (1961), the law changed to require a specialty license for contractors who install swimming pools, where the prior law required only a general contractor’s license. The contractor at issue was unaware of the new requirement when he entered the contract. Upon learning of the new law, the contractor acted diligently to obtain the necessary license. Under these facts, the court determined that it would be unfair to bar the contractor from recovering for honest and efficient services. *See id.*

The District Court of Appeal of Florida likewise held that the licensing statute for contractors did not bar recovery on the contract. The court in *C.B. Jackson & Sons Construction Co. v. Davis*, 365 So.2d 207 (Fla. Dist. Ct. App. 1978) held that the statute provided other remedies; therefore, an action in quantum meruit was appropriate. *See id.* at 208.

Defendant maintains that the reasoning provided by the above cases allows flexibility that promotes equity and protects both the public policy of the Act and the contractor’s rights. Accordingly, if this Court determines that the West Virginia legislature intended to limit unlicensed contractors’ rights to sue on their contracts, despite omission of the remedy in the statute, then the court should not

adopt a strict rule of unenforceability, but should look at the facts of the individual cases and allow contractors to sue when equity mandates.

B. EVEN IF COURT ADOPTS RULE THAT CONTRACTS ARE UNENFORCEABLE, EXCEPTION SHOULD BE RECOGNIZED WHEN CONTRACTING PARTY KNOWS THAT CONTRACTOR LACKS LICENSE

The second certified question before this Court asks whether there should be an exception to any ban imposed on lawsuits involving unlicensed contractors when the opposing party knew that the contractor lacked a license. Many courts that have deemed contracts unenforceable when the contractor was unlicensed carve out such an exception because the court recognizes that it should balance the equities of the parties and not impose a greater penalty on the contractor than was contemplated by the legislature when the law was enacted.

For example, the Supreme Court of Nevada recognized the need for flexibility in the rule that contracts with unlicensed contractors are unenforceable. In *Magill v. Lewis*, 74 Nev. 381, 333 P.2d 717 (Nev. 1959), the court said that it normally would not enforce an illegal agreement or one against public policy, but nor would it blindly extend the rule to every case. *See Magill* at 386, 333 P.2d 717, 719. The court cautioned that “the fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered.” *Id.* In adopting a case-by-case analysis, the court set forth the following criteria to apply to the facts of each case before deciding whether to enforce the contract or not: “Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to

permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.” The *Magill* court reasoned that the analysis should look to the equity of the end result because courts should not impose penalties for noncompliance in addition to those provided by statute, whether expressly or by necessary implication.

Magill involved a contract between plaintiff, a licensed contractor in California, and defendant, a licensed contractor in Nevada. The parties entered into a contract to construct a building in Nevada. The plaintiff alleged that he informed defendant that he did not have a license for contracting in the state of Nevada, yet the defendant induced him to accept the job, representing that the lack of license was immaterial to him. Plaintiff further alleged that he furnished quality labor and materials in the amount of \$130,000, and defendant refused to pay the balance due to him under the contract. *Magill* at 381, 333 P.2d at 718. Plaintiff maintained that defendant fraudulently induced him into signing the contract with the intent of asserting his lack of license as a defense when final payment was due. The court concluded that allegations of fraud and unjust enrichment are sufficient to invoke the court’s power to relieve the innocent contractor. *See id.* at 387, 333 P.2d at 720.

The same rule was later applied by the Supreme Court of Nevada in *Day v. West Coast Holdings, Inc.*, 101 Nev. 260, 699 P.2d 1067 (Nev. 1985), when a contractor knowingly employed an unlicensed subcontractor. The court used its equitable powers to allow the unlicensed subcontractor to collect under the contract despite a provision in the Nevada contractor’s licensing statute that specifically

makes such contracts unenforceable.⁵ *See Day* at 265, 699 P.2d at 1071. The court reasoned that the defendant should not be permitted to “claim the benefit of the contract and then seek to avoid its liability,” and it was within the court’s power to prevent such unjust enrichment. *Id.*

Other jurisdictions recognize the exception that a party should be estopped from asserting lack of licensure as a defense when the party knew that the contractor did not hold a valid license. For example, the Court of Appeals of Arizona held that all of the elements of estoppel are present when a party knowingly enters a contract with an unlicensed contractor. *See Herman Chanen Construction Company, Inc. v. Northwest Tile and Terrazzo Company of Montana*, 6 Ariz.App. 490, 433 P.2d 807 (Ariz.Ct.App. 1967). The Arizona court noted that the remedy of estoppel is “based on the grounds of public policy and good faith, and is interposed to prevent injury, fraud, injustice, and inequitable consequences.” *Id.* at 492, 433 P.2d at 809 (citations omitted). Further, “[t]he vital principle of equitable estoppel is that a person who by his language or conduct leads another to do what he would not otherwise have done may not subject such person to loss or injury” as a result of his actions. *Id.*

Employing similar reasoning, the Michigan appellate court in *Kirkendall v. Heckinger*, 105 Mich.App. 621, 307 N.W.2d 699 (Mich.Ct.App. 1981), allowed an unlicensed contractor to recover the value of the services it provided because the

⁵ The Nevada statute, NRS 624.320, provides in pertinent part: “No person . . . engaged in the business or acting in the capacity of a contractor shall bring or maintain any action in the courts of this state for collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that such person . . . was a duly licensed contractor . . .”

other party knew that the contractor was not licensed. The court determined that the remedy did not violate the public policy underlying the statute—protecting homeowners from incompetence and inexperience—because the contractor was not inexperienced and had competently performed the work. *See Kirkendall* at 628, 307 N.W.2d at 703.

Likewise, the District Court of Appeal of Florida held that a party was estopped from using the contractor's failure to acquire a license as a defense because the party continued to deal with the contractor after learning of the deficiency. *See Plaza Builders v. Regis*, 502 So.2d 918 (Fla. Dist. Ct. App. 1987).

The cases discussed above demonstrate that a strict rule barring the enforcement of contracts with unlicensed contractors does not always effectuate the legislative intent underlying the licensing statutes. A more equitable approach is needed in light of the realities of the transactions. For this reason, it is more prudent to give the trial courts flexibility when the facts warrant departure from the rule. Knowledge of a contractor's lack of licensure is one situation that warrants equitable estoppel, particularly when money and labor have been expended and the knowledgeable party serves to be unjustly enriched if the contract is wholly unenforceable.

IV. CONCLUSION

In order to answer the questions certified by the District Court, this Court must determine whether the legislature intended to bar unlicensed contractors from accessing the courts when it enacted the West Virginia Contractor Licensing Act. As a statute that is in derogation of the common law, it must be strictly construed.

There is no indication that the legislature intended the harsh result suggested by Timber Ridge. Conversely, the inclusion of penalties other than a restriction on lawsuits is clear indication that the legislature did not intend to bar access to the courts. Any other conclusion would require this Court to read a term into the statute that does not exist.

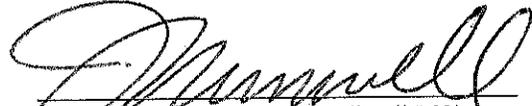
Even if this Court determines that the underlying public policy of the Act warrants imposition of a penalty not set forth therein, this Court has the power to limit the harsh result by allowing an unlicensed contractor to maintain an action when equity necessitates. For example, this Court may choose to allow suits in quantum meruit, when the job was performed properly, or when the other party to the contract knew that the contractor was unlicensed. In the present action, equity would permit Hunt Country to introduce evidence that it performed in a workmanlike manner, that it was duly licensed in Virginia, and that Timber Ridge knew Hunt Country was unlicensed.

Accordingly, Hunt Country prays that the Court will not restrict its access to the courts, either by strictly construing the statute and allowing Hunt Country to maintain its counterclaim, or by estopping Timber Ridge's use of the statute as a defense because it knowingly entered the contract with an unlicensed contractor.

Respectfully submitted,

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By: Counsel



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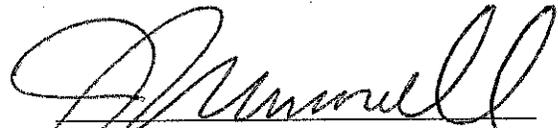
CERTIFICATE OF SERVICE

Type of Service: United States Postal Service

Date of Service: May 1, 2008

Persons served and
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Item Served: Hunt Country Asphalt & Paving, LLC and Jeffrey D.
Greenberg's Brief on the Certified Question for the United
States District Court for the Northern District of West
Virginia



J. Michael Cassell