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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

CAROL KING,
on behalf of herself and all others
similarly situated,

Petitioner,

v. No. 13-1255

WEST VIRGINIA'S CHOICE, INC.,
a West Virginia corporation,

Respondent.

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

The Circuit Court erred by granting Respondent's Motion for Summary Judgment. The Circuit Court wrongfully concluded that Respondent is not an "employer" pursuant to West Virginia's Minimum Wage and Maximum Hours Standards ("MWMHS"). The ruling was based upon a fallacious conclusion: since the Fair Labor Standards Act ("FLSA") says it "shall not apply" to workers like Ms. King, she is "subject to" the FLSA. The Circuit Court's conclusion is not only absurd, it is also contrary to this Court's prior rulings on the same statute, and would render the MWMHS meaningless.

II. STATEMENT OF THE CASE

A. Procedural History.

Petitioner Carol King initiated this civil action on September 5, 2012, by filing a class action Complaint in the Circuit Court of Kanawha County seeking to recover unpaid "overtime" compensation for herself and all other similarly-situated employees. (A.R. 20-25.)[1] Respondent filed a Motion to Dismiss or Alternative Motion for Summary Judgment on October 10, 2012, where it first argued that West Virginia's Choice Inc. ("WVC") is not controlled by the MWMHS because it is not an "employer" pursuant to *West Virginia Code* § 21-5C-1(e). (A.R. 26-43.) On December 7, 2012, after almost two months of presumably deep and deliberate consideration, the Circuit Court entered its Order Denying Defendants' Motion to Dismiss, logically concluding that Respondent is an "employer" under the MWMHS. (A.R. 130-136.)

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[1] The Complaint named Respondent and its affiliate, Mulberry Street Management Services ("MSM"), because Petitioner believed MSM also employed "companionship services" workers like Ms. King. However, discovery in the case indicates that all "companionship services" workers are employed by Respondent, WVC.

On December 18, 2012, Defendants filed a Motion Seeking Clarification of Order Denying Defendants' Motion to Dismiss. (A.R. 137-140.) Without a hearing, the Court entered the Order Clarifying the Order Denying Defendants' Motion to Dismiss, as prepared by Respondent's counsel. (A.R. 141-142.)

Petitioner filed a Motion for Class Certification on March 6, 2013, and a memorandum in support on June 18, 2013. (A.R. 163-170, 190-226.) On May 2, 2013, Respondent filed a Motion for Case Management Order and to Bifurcate Discovery, seeking to prevent Petitioner from further pursuing discovery until after Respondent conducted discovery and re-argued its Motion for Summary Judgment. (A.R. 171-189.) Both motions were opposed, and both were set for hearing on June 28, 2013. (A.R. 227-271.) The Circuit Court granted Respondent's motion, stayed discovery except for allowing Respondent to depose Ms. King, and held in abeyance Petitioner's class-certification motion. (A.R. 272-274.)

Respondent filed its Motion for Summary Judgment and supporting memorandum on August 14, 2013. (A.R. 275-314.) Petitioner filed her Memorandum in Opposition on August 26, 2013. (A.R. 315-340.) Additionally, Respondent filed an Affidavit in support of its motion on August 27, 2013, and a Reply memorandum during the hearing on its motion on August 28, 2013. (A.R. 341-371.)

After counsel for the Parties were heard on August 28, 2013, the Circuit Court immediately announced that it granted Respondent's Motion for Summary Judgment without making any comment as to why it completely reversed its well-reasoned decision of December 7, 2012. (A.R. 388.) The Circuit Court entered the subject Order, as prepared by Respondent's counsel, on October 31, 2013. (A.R. 1-19.)

B. Statement of Relevant Facts.

The operative facts are not in dispute. Petitioner began working for WVC on January 14, 2011, providing "companionship services." (A.R. 3, 279, 316.) After an elderly or infirm client of WVC is assessed by a physician, and a plan of care is prepared by a trained nurse, Ms. King provides "companionship services" in accordance with the medical professionals' assessment and plan. (*Id.*) Ms. King serves the client in the client's private home and assists with personal care, meal preparation, bed-making, prompting to take medications, washing clothing, dressing, and personal grooming. (A.R. 4, 280, 316.) Any incidental household work does not exceed 20% of the weekly work. (A.R. 3, 279, 317.) Ms. King is not a trained nurse, and does not provide trained nursing or healthcare services. (A.R. 317.)

Neither Petitioner nor Respondent is engaged in the production, shipping, or sale of "goods." (A.R. 335.) Petitioner only provided "companionship services" in the state of West Virginia; Respondent is licensed to do business only in West Virginia. (A.R. 336.)

III. SUMMARY OF ARGUMENT

The Circuit Court wrongfully granted Respondent's motion for summary judgment. Petitioner Carol King initiated this lawsuit to recover "overtime" compensation (for herself and all similarly situated employees of Respondent) for hours worked in excess of forty hours per week, pursuant to the MWMHS.

Currently, 100% of WVC's employees are employed to provide "companionship services," as that term is defined by the FLSA, to elderly or infirm clients in the clients' private homes in West Virginia. As such, all of those employees are ***exempt*** from the

minimum wage and maximum hours (overtime) requirements of federal law. Obviously, those employees are **NOT** "subject to" the federal minimum wage and maximum hours (overtime) law as that term is used in the MWMHS, contrary to the lower Court's conclusion. Furthermore, neither WVC nor Ms. King is engaged in the types of "commerce" that trigger FLSA coverage, providing an additional reason why Petitioner and the putative class are not "subject to" the federal law.

If the Circuit Court and Respondent's position were correct – and both workers who receive some FLSA coverage ***and*** workers who are specifically exempt from FLSA minimum wage and overtime coverage are "subject to" the federal law – then 100% of the state's workforce is "subject to" the FLSA. If such were the case, the West Virginia MWMHS would never apply to any worker employed in West Virginia, and that entire chapter of the West Virginia Code would be meaningless.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner asserts that this case is appropriate for a Rule 19 oral argument because: (1) Petitioner assigns errors in the application of settled law; (2) Petitioner claims an unsustainable exercise of discretion where the law governing that discretion is settled; and (3) the case involves a narrow issue of law. The Court may find the case suitable for Rule 20 argument, because it involves issues of fundamental public importance.[2] Disposition by memorandum opinion is not appropriate, as Petitioner requests reversal of the decision of the lower tribunal.

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[2] Petitioner does not believe this case is one of first impression, because this Court implicitly addressed the key issue in *Adkins v. City of Huntington*, 191 W. Va. 317, 445 S.E.2d 500 (1994) and in *Haney v. County Commission of Preston County*, 212 W. Va. 824, 575 S.E.2d 434 (2002).

V. ARGUMENT

A. Standard of Review.

A circuit court's entry of summary judgment is reviewed *de novo*. *Wilson v. Daily Gazette Co.*, 214 W. Va. 208, 588 S.E.2d 197 (2003). The Supreme Court of Appeals, like the circuit court, must view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor. *Id.*

It bears repeating that at the summary judgment stage, all inferences drawn are to be made in favor of the nonmoving party. Therefore, the Circuit Court "must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." *Painter v. Peavy,* 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994).

B. The Circuit Court Erred by Finding That Petitioner Is "Subject to" the FLSA.

1. The Circuit Court Ignored Precedent Regarding Interpretation of *West Virginia Code* § 21-5D-1(e).

The core issue of liability centers upon whether Respondent is an "employer" obligated to abide by the MWMHS, as that term is defined by *West Virginia Code* § 21-5D-1(e). It is not disputed that Respondent is a corporation that acts as an employer to its employees and employs six or more employees in its business establishment(s), as described in the general portion of *West Virginia Code* § 21-5D-1(e). Interpretation of subsection 21-5D-1(e)'s proviso is the issue here; the proviso reads as follows:

> Provided, that the term "employer" shall not include any individual, partnership, association, corporation, person or group of persons or similar unit if eighty percent of the persons employed by him are subject to any

federal act relating to minimum wage, maximum hours and overtime compensation.

When interpreting the "exemption" from "employer" status found in *West Virginia* § 21-5D-1(e), this Court has uniformly held that the statute's language stating "eighty percent of the persons employed by him are *subject to* any federal act relating to minimum wage, maximum hours and overtime compensation" means eighty percent of the employees are *entitled to* minimum wages or overtime under the FLSA. First, when firefighters from Huntington attempted to pursue more favorable overtime compensation under the West Virginia MWMHS, this Court held that the City of Huntington was entitled to the § 21-5D-1(e) "exemption" because the firefighters (and at least 80% of Huntington's employees) were already entitled to specific overtime compensation under the FLSA. *Adkins v. City of Huntington*, 191 W. Va. 317, 318, 445 S.E.2d 500, 501 (1994).[3]

More recently, a deputy sheriff sought overtime under the West Virginia MWMHS; but "law enforcement" personnel are entitled to overtime under the FLSA, unless they work in a tiny police department with five or fewer employees. 29 U.S.C. § 213(b)(20). This Court confirmed that the Preston County Commission was entitled to the § 21-5D-1(e) "exemption" if 80% of its employees are ***covered*** by federal minimum wage or overtime law. *Haney v. County Commission of Preston County*, 212 W. Va. 824, 827, 575 S.E.2d 434, 437 (2002) (emphasis added.) The Court wrote, ". . . if 80% of [the County Commission's] employees are ***covered*** by a federal act relating to minimum wage, maximum hours, and overtime compensation, the [deputy] is prevented from

[3] The unique FLSA overtime formula for firefighters is found at 29 U.S.C. § 207(k), which requires overtime compensation after the firefighter works 212 hours in a 28-day period. 191 W. Va. at 318 n. 4, 445 S.E.2d at 501 n. 4.

bringing his claim under state wage and hour law ***and must bring it instead under federal wage and hour laws***." *Id.* (emphasis added). The parties in *Haney* agreed that 80% of the Sheriff's Department employees were covered by the FLSA, but it was unclear whether 80% of the various employees of the County Commission were "covered under federal wage and hour laws." 212 W. Va. at 829-830, 575 S.E.2d at 439-440. If Section 21-5D-1(e)'s phrase "subject to" included county employees who are exempt from FLSA coverage, then there would have been no need for this Court to remand *Haney* "to determine whether 80% of the employees of the Preston County Commission are subject to any federal act relating to minimum wage, maximum hours and overtime compensation." *Id.*

In both *Adkins* and *Haney*, the term "subject to" was clearly equated with "covered by" the FLSA, because it is the only reasonable, logical, and commonsense interpretation – too obvious to require explanation in the text of the opinions. The Circuit Court gave no weight to these West Virginia precedents. (A.R. 11-12.)

In the only federal court case to analyze *West Virginia Code* § 21-5D-1(e), the United States District Court for the Southern District of West Virginia recognized that package handlers were **NOT** "subject to" the FLSA because they were not entitled to overtime under the FLSA. *Smith v. United Parcel Service, Inc.*, 890 F. Supp. 523, 528-529 (S.D.W. Va. 1995). In addition, the U.S. District Court recognized that employees who are not subject to (covered by) the FLSA could be covered by the West Virginia MWMHS: "It is undisputed state overtime protection laws apply also to employees exempt from the overtime protections of the FLSA." *Id.* Unlike "companionship services" workers, the package drivers, feeder drivers, and mechanics who were plaintiffs

in *Smith* were exempt from overtime coverage under ***both*** the FLSA and the West Virginia MWMHS. *Id.* at 529.

2. The Circuit Court Failed to Apply the FLSA's "Savings Clause."

The United States District Court in *Smith v. UPS* recognized a key provision that the Circuit Court herein failed to heed: the FLSA's "savings clause." The FLSA specifically provides, "No provision of this chapter or of any order there under shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter." 29 U.S.C. § 218(a). Known as the "savings clause," this provision has consistently been interpreted to mean that when viewing state law in conjunction with the FLSA, the law which governs is the law most complementary to the employee. *See Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409 (9th Cir. 1990), *cert. denied*, 504 U.S. 979, 112 S. Ct. 2956, 119 L.Ed.2d 578 (1992) (Savings clause of FLSA makes clear Congressional intent not to disturb traditional exercise of states' police powers with respect to wages and hours more generous than federal standards).

If the FLSA exempts a category of employees from overtime standards (such as "companionship services"), but state law does not contain that exemption, state law applies and confers the right to overtime compensation. *Baxter v. M.J.B. Investors*, 128 Or. App. 338, 346, 876 P.2d 331, 336 (Ore. 1994), *citing Williams v. W.M.A. Transit Co.*, 472 F.2d 1258, 1261 (D.C. Cir. 1972). *Baxter* is analogous to the case at bar, because the Oregon Court recognized that even if Ms. Baxter was a "companionship services" employee exempt from overtime under the FLSA, Oregon wage and hour law did not

contain a similar "companionship services" exemption, and Ms. Baxter was thus free to pursue her overtime claim under Oregon law. 128 Or. App. at 347, 876 P.2d at 336-337.

West Virginia's MWMHS does not contain the "companionship services" exemption found in the FLSA. Specifically, *West Virginia Code* § 21-5C-1(f) lists nineteen categories of employment which are exempt from some or all of the MWMHS requirements (who are not "employees" for purposes of the Act), but "companionship services" or any analogous description is not included in the list of exemptions.

Under a proper application of the law, including the FLSA "savings clause," even though Petitioner (and those similarly-situated) is not subject to the FLSA and has no claim to overtime under the FLSA, she is subject to and covered by the West Virginia MWMHS, and is entitled to overtime compensation pursuant to state law.

3. The Circuit Court Failed to Properly Distinguish "Companionship Services" from "Domestic Services" and "Home Healthcare."

Petitioner, as a "companionship services" employee, is not entitled to minimum wage or overtime under the FLSA, so she is neither "covered by" nor "subject to" the FLSA. As such, 100% of Respondent's employees who provide "companionship services" are ***not*** "subject to" any federal wage and hour law, and Respondent is thus an "employer" under *West Virginia Code* § 21-5C-1(e).

However, the Circuit Court concluded that WVC is not an "employer" required to pay overtime under the MWMHS because 100% of the approximately 2,000 "companionship services" workers employed by Respondent are "subject to" the FLSA. The opposite is true because employees providing "companionship services" are among the few employees in the United States who are ***exempt from*** the minimum wage ***and***

overtime requirements of the FLSA. 29 U.S.C. § 213(a)(15); 29 C.F.R. §§ 552.3 and 552.6.

In finding that Petitioner is "subject to" the FLSA, the Circuit Court's Order lumps Petitioner's job providing "companionship services" in with other "domestic services" jobs that may, depending on the circumstances, be entitled to minimum wage (but not overtime) under the FLSA.

The statutory language of the FLSA contradicts the lower Court's conclusion. The pertinent portions of 29 U.S.C. § 213(a) read as follows:

> The provisions of section 206[4] and section 207[5] of this title ***shall not apply*** with respect to –
> (15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).

(Emphasis added.)

Obviously, the term "domestic service employment" includes numerous jobs other than "companionship services" and "babysitters," which may be subject to the FLSA's minimum wage and overtime provisions, but those two narrowly-defined jobs are the only "domestic service" jobs to which minimum wage and overtime provisions "***shall not apply***." Contrast, for instance, the "domestic service" jobs which are exempt only from the FLSA's overtime requirements (and thus, *subject to* the minimum wage requirements):

> The provisions of section 207 of this title shall not apply with respect to –
> (21) any employee who is employed in domestic service in a household and who resides in such household.

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[4] 29 U.S.C. § 206 generally requires minimum wage.
[5] 29 U.S.C. § 207 generally requires "overtime" compensation.

29 U.S.C. § 213(b)(21). While "domestic service" employees may include cooks, waiters, maids, and the like, the exemption from overtime does not always mean an exemption from minimum wage.

Even though the FLSA distinguishes "companionship services" from other "domestic services" that may be subject to FLSA minimum wage or overtime requirements, the Circuit Court failed to acknowledge the distinction. The leading case of *Long Island Health Care at Home, Ltd. v. Coke*, 551 U. S. 158, 127 S. Ct. 2339 (2007) distinguished "companionship services" from other "domestic services" which are generally covered by FLSA minimum wage and/or overtime provisions, and confirmed that the ***exemption*** from FLSA coverage of "domestic services" extended to "companionship services" provided by persons employed by third-party companies (as opposed to those employed directly by the elderly/infirm client's household).

Similar to its failure to distinguish "companionship services" from other "domestic services," the Circuit Court also fails to distinguish "companionship services" (which are exempt from FLSA minimum wage and overtime provisions) from "home healthcare services," which are not exempted from FLSA coverage. The cases of *Sandt v. Holden*, 698 F. Supp 64 (M.D. Pa. 1988), *Ballard v. Community Home Care Referral Service, Inc.*, 264 A.D.2d 747 (2nd Cir. 1999), *Cox v. Acme Health Services, Inc.*, 55 F.3d 1304 (7th Cir. 1995), *Armani v. Maxim Healthcare Services, Inc.*, 53 F. Supp. 2d 1120 (N.D. Colorado 1999), and *Cook v. Diana Hays and Options, Inc.*, 212 Fed. Appx. 295 (5th Cir. 2006) all concluded that the domestic services provided by plaintiffs fell within the FLSA's exemption for "companionship services," as plaintiffs did ***not*** provide home healthcare services which require and are performed by trained personnel, such as a

registered or practical nurse. All of the claims for overtime sought in those cases were denied because plaintiffs were employed to provide "companionship services" which were *exempt* from FLSA coverage. Similarly, Petitioner provides "companionship services" and not "home healthcare services," but the Circuit Court failed to acknowledge any distinction. As such, the Circuit Court's reliance upon state and federal agencies' "interpretations" in the form of website pages referring to coverage of "home healthcare" workers is completely misplaced, because "companionship services" are not the same thing as "home healthcare" pursuant to the definition of "companionship services."

4. The Circuit Court Construed the Statute so as to Render it Meaningless.

While the Circuit Court correctly cites West Virginia precedents regarding statutory construction, its decision turns those principles on their ears. The Court should have interpreted the MWMHS in a way to give it effect:

> A statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law applicable to the subject-matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Syl. Pt. 4, *Davis Memorial Hospital v. W.Va. State Tax Comm'r*, 222 W. Va. 677, 671 S.E.2d 682 (2008).

Petitioner humbly asserts that when enacting the MWMHS, West Virginia's Legislature intended to confer legal rights (to minimum wage and maximum hours/overtime restrictions) to *someone*. More specifically, in light of the definition of "employer," the Legislature intended to provide rights to West Virginia workers who do

not already receive minimum wage or overtime benefits under the FLSA and who comprise more than 20% of their employer's workforce. In other words, if a category of workers represents a significant part of their employer's workforce (more than 20%), and those workers are excluded from both minimum wage and overtime coverage under the FLSA, then the West Virginia MWMHS confers rights to those small categories workers.

The Circuit Court's interpretation, however, would mean that the MWMHS confers legal rights to no one. As discussed above, the Court concluded that employees "subject to" the FLSA include both those entitled to minimum wage or overtime and those specifically excluded from those benefits. The Court further finds that because Petitioner and Respondent are allegedly required to abide by FLSA provisions that have nothing to do with minimum wage or maximum hours – such as prohibitions against discrimination, record-keeping requirements, and restrictions on employment of minors and students – then they are "subject to" the FLSA and Respondent is thus not an "employer" under the MWMHS. Under the Circuit Court's analysis, 100% of West Virginia's employees are always "subject to" the FLSA, there are absolutely no "employers" as defined by the MWMHS, and the entire MWMHS was passed to confer benefits to absolutely no one.

C. The Circuit Court Erred in Finding the FLSA Applies to Respondent.

There is another reason why Petitioner *and* Respondent are not "subject to" the FLSA: they are not engaged in "interstate commerce" as required in order for the FLSA to have any application to them. Traditional FLSA coverage exists when an employee is engaged in interstate commerce, or the production of goods for interstate or foreign commerce. *See generally, Kirschbaum v. Walling,* 316 U.S. 517, 62 S. Ct. 1116 (1942).

The intent of Congress in enacting the FLSA was to regulate only activities constituting interstate commerce, not activities merely affecting commerce. *McLeod v. Threlkeld*, 319 U.S. 491, 497, 63 S. Ct. 1248 (1943) (Plaintiff's activities merely cooking and cleaning for railroad workers were purely local, not engaged in interstate commerce so as to qualify for FLSA coverage). Contrary to the Circuit Court's conclusion, the mere purchase of goods that have traveled in interstate commerce or the use of a credit card is not sufficient "interstate commerce" so as to invoke FLSA coverage. *Thorne v. All Restoration Services, Inc.*, 448 F.3d 1264, 1267 (11th Cir. 2006).

WVC employs Petitioner and the putative class members to provide "companionship services" to West Virginia residents in their homes within the state of West Virginia. All services provided by Ms. King were within the state of West Virginia. WVC is not licensed to do business in any state besides West Virginia, and it is not engaged in the production of goods. (A.R. 336-337.) As such, Petitioner is not engaged in "interstate commerce," and Respondent is not an "enterprise engaged in [interstate] commerce or in the production of goods for commerce" as that term is defined by the FLSA.

VI. CONCLUSION

Wherefore, Petitioner respectfully requests that the Supreme Court of Appeals reverse the decision of the Circuit Court.

Respectfully submitted,

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v. No. 13-1255

WEST VIRGINIA'S CHOICE, INC.,
a West Virginia corporation,

Respondent.

CERTIFICATE OF SERVICE

I, Cameron S. McKinney, counsel for Petitioner, do hereby certify that I have this 4th day of March, 2014, served a true and accurate copy of the foregoing ***Petitioner's Brief*** and ***Petitioner's Appendix*** upon counsel of record, via U.S. Mail, as follows:

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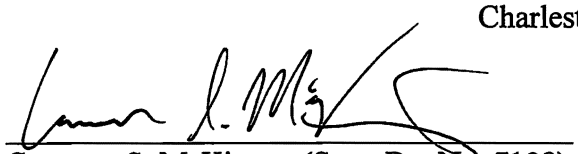

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