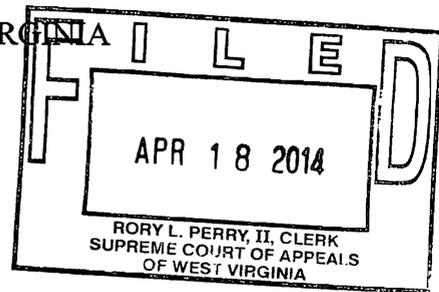


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON



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.

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

A. Procedural History

This case was initiated in the Circuit Court of Kanawha County, and involves Petitioner's claim for damages and declaratory and injunctive relief under the West Virginia Minimum Wage and Maximum Hours Standards (the "MWMHS" or the "Act"), W.Va. Code § 21-5C-1, *et seq.*

Upon receipt of the complaint, defendants below, Respondent, West Virginia's Choice, Inc. (hereafter "W.Va.'s Choice") and its co-defendant, Mulberry Street Management Services, Inc., (hereafter "Mulberry")¹ moved to dismiss the complaint, or in the alternative moved for summary judgment, arguing that they were not an "employer" as defined by W.Va. Code §21-5C-1(e) and, therefore, not governed by the wage and hour requirements set forth in the MWMHS. (AR 26-43). A hearing on this motion was conducted on November 19, 2012, and, at the circuit court's direction, the parties each later submitted proposed findings of fact and conclusions of law, adopting Petitioner's proposed findings of fact and conclusions of law. The circuit court denied the motion to dismiss, and entered an order accepting Petitioner's proposed findings of fact and conclusions of law *in toto*. (AR 130-136).

W.Va.'s Choice and Mulberry subsequently filed a motion requesting that the circuit court clarify whether the court's adoption of Petitioner's proposed findings of fact and conclusions of law indicated that the circuit court would not, after further discovery, entertain arguments on the merits of the defendants' claim that they were not an "employer" under the MWMHS. (AR 137-140). On January 3, 2013, the circuit court entered an order titled "Order Clarifying the Order Denying Defendant's Motion to Dismiss," (AR 141-142), wherein the

¹ Pursuant to the order entered by the Circuit Court on October 31, 2013, granting summary judgment to both W.Va.'s Choice and Mulberry, all claims asserted against Mulberry Management Services, Inc., were dismissed as a matter of law. Petitioner has not appealed the circuit court's ruling with respect to Mulberry.

circuit court said that the: "...Court did not intend for its findings, set forth above and in the Order as paragraphs 1.B and 1.C, to have the effect that the findings are rule of the case ... [and that] the Court will entertain arguments by the parties on the merits of the issue of whether Defendants are 'employers' under West Virginia's Minimum Wage and Maximum Hours Standards for Employees Act after discovery has been conducted on the issue." (AR 142).

Because Petitioner's claim to a right to recovery as alleged in her complaint was wholly dependent upon a determination that W.Va.'s Choice was an "employer" as defined by the MWMHS, defendants below moved to bifurcate discovery and sought a final resolution of this issue before proceeding with the remaining issues in the case, including possible class certification. (AR 171-189). The circuit court granted this motion, and with the exception of the taking of Petitioner's deposition stayed further discovery (which had been ongoing) and directed the parties to file briefs and dispositive motions on the issue of whether defendants below were an "employer" as defined by the MWMH. (AR 272-274).

Pursuant to the circuit court's directive, Petitioner's deposition was taken and a motion for summary judgment with supporting memorandum, exhibits and affidavits were submitted to the court. (AR 275-314, 341-345). Petitioner responded to this motion, (AR 315-340), and defendants replied. (AR 346-371). A hearing on the motion for summary judgment was conducted on August 28, 2013. After a review of the memoranda filed in support of and against the motion for summary judgment, and after giving due consideration to the arguments made by the parties at oral argument, the circuit court granted summary judgment to the defendants below on the record. (AR 372-391). Then, following a detailed analysis of the issues presented, including the issue of whether W.Va.'s Choice is an "employer" subject to the provisions of the

MWMHS, the circuit court journalized its grant of summary judgment to defendants below on October 31 2013, by entering detailed findings of fact and conclusions of law. (AR 1 – 19).

B. Statement of Relevant Facts

The relevant facts are not in dispute. W.Va.'s Choice is a West Virginia corporation that, following a medical assessment by a physician, and pursuant to a plan of care prepared by a trained nurse in accordance with that assessment, provides in-home companionship services to people who due to age or infirmity are unable to care for themselves. (AR 28-29). With offices in Morgantown, Parkersburg, Charleston, Huntington, Beaver, Moundsville, Elkins and Keyser, W.Va.'s Choice can employ as many as 2000 people at any given time. (AR 29). W.Va.'s Choice has an annual gross volume of sales made or business done which exceeds \$500,000.00 exclusive of excise taxes. (AR 344). All of W.Va.'s Choice's employees (including Petitioner) are referred to by W.Va.'s Choice as in-home direct care workers who provide in-home companionship services to the elderly or infirm. (AR 29). If any incidental general household work is performed by W.Va.'s Choice's direct care workers, which it rarely if ever is, any such incidental general household work does not, and did not, equal or exceed 20% of the work performed in any given week by any direct care worker, including but not limited to Petitioner. (AR 29, 297-299). None of W.Va.'s Choice's employees (including Petitioner) provide trained nursing services or any other type of services that would be equivalent to trained nursing services. (AR 29; 297-299).

Some of the in-home direct care workers employed by W.Va.'s Choice reside in other states surrounding West Virginia. These out-of-state employees travel into West Virginia, crossing the state line, to provide companionship services in the homes of homebound individuals residing in West Virginia. Direct care workers employed by W.Va.'s Choice, in the normal course of their duties, also take residents who reside in West Virginia into other states

surrounding West Virginia to obtain goods and services from out-of-state providers. W.Va.'s Choice also regularly uses the U.S. Mail to send paychecks to some of its out-of-state employees, and it also regularly makes use of direct deposit banking services to distribute pay from its West Virginia bank to the out-of-state banks of some of its out-of-state employees. (AR 344-345).²

Petitioner was hired by W.Va.'s Choice on January 14, 2011, as an in-home direct care worker who provides companionship services to the elderly or infirm. (AR 29-30). While employed by W.Va.'s Choice Petitioner, among other tasks of the same or similar nature, provided the following type of in-home companionship services to homebound individuals who, because of age or infirmity, could not care for themselves: assisting clients with personal care, meal preparation, bed-making, prompting to take medications, washing clothing, dressing and personal grooming. (AR 30, 297-299, 302-310, 363-365). Again, the in-home companionship services performed by Petitioner (and those performed by all other employees of W.Va.'s Choice) were provided following a medical assessment by a physician, and pursuant to a plan of care prepared by a trained nurse in accordance with that assessment. The services performed by Petitioner are typical of the in-home companionship care services provided by other direct care workers employed by W.Va.'s Choice. (AR 30).

Petitioner contends that W.Va.'s Choice violated the MWMHS by failing to pay her for hours worked in excess of 40 hours per week at a rate of one and one-half times her regular rate as provided by W.Va. Code § 21-5C-3. (AR 22-24). W.Va.'s Choice denies this allegation and, in accord with the view of the both the West Virginia Department of Labor and the United States Department of Labor, advocates that it appropriately paid its employees, including Petitioner, in full compliance with existing law.

² Although not of record, W.Va.'s Choice receives Medicaid payments for the services it provides; including Medicaid payments from surrounding states where its clients are taken to obtain goods and services.

II. SUMMARY OF ARGUMENT

Petitioner claims that W.Va.'s Choice violated the MWMHS by failing to pay overtime wages as required by W.Va. Code § 21-5C-3. W.Va.'s Choice is not, however, an "employer" as specifically defined by the MWMHS, and the mandates of that Act do not apply to W.Va.'s Choice. The MWMHS expressly provides that: "the term 'employer' shall not include any ... corporation ... if eighty percent of the persons employed by [it] are subject to any federal act relating to minimum wage, maximum hours and overtime compensation." The undisputed evidence in this case establishes that more than 80% of the persons employed by W.Va.'s Choice, including Petitioner, are subject to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (hereafter "FLSA") which sets forth substantive wage, hour and overtime standards under federal law. As such, W.Va.'s Choice is not an "employer" as defined by the MWMHS; both the West Virginia Department of Labor and the United States Department of Labor share this view. Petitioner attempts to avoid this obvious problem by arguing that she is not "subject to" the FLSA because the FLSA does not require the payment of overtime to her, and because W.Va.'s Choice is not engaged in interstate commerce which is necessary to trigger application of the FLSA. There is absolutely no support for either of Petitioner's arguments, as Petitioner is clearly subject to the FLSA despite not being entitled to overtime, and W.Va.'s Choice is engaged in enterprise coverage relating to interstate commerce. Petitioner also attempts to avoid the conclusion that W.Va.'s Choice is not an employer under MWMHS by making claim under the so-called Savings Clause set forth in the FLSA. This argument is equally frivolous. Although it is true that state law may provide more stringent wage and hour requirements than does the FLSA, the state's law must first be applicable to a given set of circumstances before the Savings Clause even comes into play. In this instance, the MWMHS does not apply to Petitioner's claim because W.Va.'s Choice, again, is not an employer as defined by the MWMHS.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

W.Va.'s Choice respectfully requests oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure. A Rule 19 argument is appropriate because the Petition alleges assignments of error in the application of settled law. Petitioners further believe that this case is appropriate for a memorandum decision.

IV. ARGUMENT

A. West Virginia's Choice, Inc., is not an "employer" as defined by the West Virginia Minimum Wage Maximum Hour Standards Act

Petitioner claims that W.Va.'s Choice violated the MWMHS by failing to pay her overtime wages as provided by W.Va. Code § 21-5C-3. (AR 22-24). It is true that the MWMHS generally requires the payment of a minimum hourly wage and overtime compensation for hours worked in excess of forty during a given work week. W.Va. Code § 21-5C-3; *Kucera v. City of Wheeling*, 158 W.Va. 860, 861, 215 S.E.2d 216, 217 (1975). However, the MWMHS applies only to "employers" defined by that Act, and W.Va.'s Choice is not such an "employer." In this regard, the MWMHS provides that:

the term 'employer' shall not include any ... corporation ... if eighty percent of the persons employed by [it] are subject to any federal act relating to minimum wage, maximum hours and overtime compensation.

W.Va. Code § 21-5C-1(e) (emphasis added).³ Here, the undisputed evidence establishes that more than 80% of the persons employed by W.Va.'s Choice, including Petitioner, are subject to

³ On March 8, 2014, W.Va. Code § 21-5C-1(e) was amended and beginning 90 days from the date of the passage of the amended statute, provides that an "Employer" as defined by the MWMHS shall include "any individual, partnership, association, public or private corporation, or any person or group of persons acting directly or indirectly in the interest of any employer in relation to an employee; and who employs during any calendar week six or more employees as herein defined in any one separate, distinct and permanent location or business establishment." The amendment deleted the provision of this definition which expressly stated that the term 'employer' shall not include any ... corporation ... if eighty percent of the persons employed by [it] are subject to any federal act relating to minimum wage, maximum hours and overtime compensation." The amended statute is not effective until May 30, 2014. Accordingly, the amended definition of "employer" under the MWMHS shall apply prospectively after that date. *See e.g.*

the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (“FLSA”) which sets forth substantive wage, hour and overtime standards under federal law.

The circuit court correctly found that the undisputed evidence proffered in this case conclusively establishes that more than 80% of the persons employed by W.Va.’s Choice are subject to the FLSA. Petitioner and the other in-home direct care employees are “domestic service” employees who provide “companionship services” for individuals in private homes who, because of age or infirmity, are unable to care for themselves. (AR 28-30).

As stated in the Affidavit of Dennis R. Parrucci, President of W.Va.’s Choice:

- 5) All of WV Choice’s employees (including plaintiff Carol King) are referred to by WV Choice as in-home direct care workers who, following a medical assessment by a physician, and pursuant to a plan of care prepared by a trained nurse in accordance with that assessment, provide companionship services to homebound people who because of age or infirmity are unable to care for themselves. If any incidental general household work is performed by WV Choice’s direct care workers, which it rarely if ever is, any such incidental general household work does not, and did not, equal or exceed 20% of the work performed in any given week by any given WV Choice direct care worker, including but not limited to plaintiff, Carol King.

- 8) While employed by WV Choice, plaintiff, Carol King, among other tasks of the same or similar nature, provided the following type of in-home companionship services to homebound individuals who because of age or infirmity could not care for themselves: assisting clients with personal care, meal preparation, bed-making, prompting to take medications, washing clothing, dressing and personal grooming. All of the in-home companionship services performed by plaintiff, Carol King, and those performed by all other WV Choice employees were provided following a

Syl. Pt. 3, *Shanholtz. v. Monongahela Power Co.*, 165 W.Va. 305, 270 S.E.2d 178 (1980) (“A statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or is necessarily implied from the language of the statute”). There is no indication that the Legislature intended retroactive application. Thus, the statutory amendment to W. Va. Code 21-5C-1(e), made in March 2014, is inapplicable to the claims made by Petitioner in this case. Unless otherwise stated, all references to this statute shall refer to the statute and definition of “employer” in effect and applicable prior to May 30, 2014.

medical assessment by a physician, and pursuant to a plan of care prepared by a trained nurse in accordance with that assessment. These services are typical of the types of in-home companionship services that in-home direct care workers like Plaintiff and other employees of WV Choice provided.

(AR 28-30).

There is no genuine issue of material fact regarding Petitioner's duties or those of the other in-home direct care workers employed by W.Va.'s Choice. In fact, Petitioner admits that her employment position falls squarely within the definition of "domestic service" employment to which the FLSA applies. In particular, *she admits that:*

- she is employed as a "direct care worker;"
- she provides "companionship services" as that term is used in 29 C.F.R. §552.6;
- she is employed in "domestic service employment" to provide "companionship services for individuals who (because of age or infirmity) are unable to care for themselves as these terms are used in 29 C.F.R. § 213(a)(15);
- she provides companionship services in the private homes of homebound individuals;
- the companionship services that she provides include assistance with personal care, meal preparation, bed-making, assistance with taking medication, clothes washing, assistance with dressing, and assistance with personal grooming;
- any incidental general household work that she may perform does not equal or exceed 20% of the work that she performs in any given week; and
- she is not a trained nurse and does not provided trained nursing services.

(AR 47, 297-299, 305-309).

The law is clear that "domestic service" employees who provide "companionship services" - like Petitioner - are subject to the wage, hour and overtime provisions of the FLSA. *See e.g. Long Island Care at Home, LTD. v. Coke*, 551 U.S. 158 (2007). In 1974, Congress amended the FLSA to specifically include "domestic service" employees. Section 6(f) of these amendments to the FLSA extended minimum wage protection to "domestic service" employees and Section 7 extended maximum hours and overtime pay provisions to these employees. *See* 29

U.S.C. §§206(f) and 207(1). For the purpose of the FLSA and its related regulations, “domestic service employment” is described as follows:

...services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

29 C.F.R. §552.3.

The Supreme Court of the United States has held that “domestic service” employees who provide “companionship services” are subject to the FLSA’s wage, hour and overtime laws. *See Long Island Care at Home, LTD. v. Coke*, 551 U.S. 158 (2007). The plaintiff in *Coke* worked for a third-party agency as a domestic service employee who provided companionship services to the elderly and infirm. She alleged that her employer wrongfully failed to pay her the minimum and overtime wages to which she claimed she was entitled under the FLSA and New York law. *Id.* at 163. The U.S. Supreme Court disagreed, finding that:

1. The 1974 amendment to the FLSA made “domestic service” employees subject to the minimum wage and maximum hour provisions of the FLSA, 29 U.S.C. §§206(f) and 207(1);
2. Employees, like the plaintiff in *Coke*, who 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)”⁴ are exempt from the minimum wage and overtime provisions of the FLSA; and,

⁴ See 29 U.S.C. §213(a)(15). The Department of Labor describes “companionship services” as:

... those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: *Provided, however*, That such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term “companionship services” does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained

3. This exemption applies even if the employee is employed by a third party agency.

Id. at 163-176.

Other courts addressing the issue have similarly recognized that in-home direct care or home health aide workers, like Petitioner, are generally considered “domestic service” employees subject to the provisions of the FLSA. *See e.g. Sandt v. Holden*, 698 F.Supp. 64 (M.D.Pa. 1988) (finding that a home health aide’s in-home care of elderly clients which consisted of assisting with bedpans, walking the patients, giving baths, running for meals, serving meals and helping with feeding the patients constituted “companionship services” under the FLSA); *Ballard v. Community Home Care Referral Service, Inc.*, 264 A.D.2d 747 (2nd Cir. 1999) (finding that a home health aide was covered by the “companionship services” provision of the FLSA where she provided day-to-day care for elderly or disabled individuals including tasks such as meal preparation, bed-making, washing clothing, and other related domestic services); *Cox v. Acme Health Services, Inc.*, 55 F.3d 1304 (7th Cir. 1995) (the FLSA applied to the services of a certified nursing assistant and home health aide employed by a private agency whose tasks included caring for patients under a nurse’s supervision, assisting patients with personal care, assisting with rehabilitative activities, helping the patients take their medications, and performing specific procedures with nurses); *Terwilliger v. Home of Hope, Inc.*, 21 F.Supp2d 1294 (N.D. Oklahoma 1998) (employees who assisted their clients with dressing, grooming, and administering medication, performed household chores, and who provided household management training to aide their clients in becoming more independent fell under the FLSA); *Armani v. Maxim Healthcare Services, Inc.*, 53 F. Supp.2d 1120 (N.D. Colorado 1999)

personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

29 C.F.R. §552.6. The “companionship services” exemption to the FLSA applies when certain domestic and companionship services are performed for elderly or infirm individuals in a private home. *See* 29 C.F.R. § 552.3.

(FLSA applied to the work of an in-home certified nursing assistant for a quadriplegic patient whose tasks included dispensing medication, changing catheters, exercising, bathing, and dressing the patient, running errands, and helping with the patient's finances); *Cook v. Diana Hays and Options, Inc.*, 212 Fed. Appx. 295, (5th Cir. 2006), *cert. denied*, 552 U.S. 812 (2007) (FLSA applied to an employee who was not a trained professional but provided direct care services to home health care clients including simple physical therapy, and assistance with meal preparation, eating, baths, bed making, and teeth brushing); *Rodriguez v. Jones Boat Yard, Inc.*, 435 Fed. Appx. 885 (11th Cir. 2011) (live-in caregiver working 12–17 hours a day, seven days a week, provided “companionship services” under the FLSA where nearly all of her work related to personal care of the woman rather than housework or other duties).

Here, there is no dispute that Petitioner, in her employment as an in-home direct care worker, is a “domestic service” employee providing “companionship services” as defined by the FLSA. (AR 47, 257-258, 297-299, 305-309). As such, both the Supreme Court of the United States and the FLSA make it clear that Petitioner is subject to the minimum wage, maximum hour and overtime provision of this federal act. *See* 29 U.S.C. §§206(f) and 207(l); and, *Coke*, 551 U.S. at 163.

Again, the central issue in this case turns on whether W.Va.'s Choice is an “employer” as defined by the MWMHS, *W.Va. Code § 21-5C-1(e)*, and thereby required to pay overtime wages to Petitioner under that Act. Petitioner does not dispute that the FLSA is a federal act that relates to minimum wage, maximum hours and overtime compensation. Rather, Petitioner contends that because she and the other in-home direct care workers employed by W.Va.'s Choice do not receive overtime wages because of the clear and express provisions set forth in the FLSA, she and they are not “subject to” the FLSA; Petitioner is essentially arguing that she is not subject to

the FLSA because she was subject to the FLSA. This confused reading of W.Va. Code § 21-5C-1(e) and the FLSA contravenes the plain language of W.Va. Code § 21-5C-1(e) and the recognized intent and application of the MWMHS and FLSA.

The question of whether W.Va.'s Choice meets the definition of an "employer" as set forth in the MWMHS does not depend on whether Petitioner is *entitled to* overtime wages under the FLSA (as advocated by Petitioner). Rather, the issue is whether these workers are *subject to* this federal Act. The West Virginia MWMHS Act does not say that 80% of the persons employed must be "entitled to" minimum or overtime wages under a federal act. To the contrary, the definition in W.Va. Code § 21-5C-1(e) uses the phrase "subject to," which is defined as "governed by or affected by" according to Black's Law Dictionary. *See* Black's Law Dictionary 1278 (5th ed. 1979).

Contrary to Petitioner's contention, domestic service workers who provide companionship services like Petitioner are undeniably subject to the FLSA. Companionship service workers are, in fact, one type of domestic service worker under the express provisions of the FLSA. *See* 29 C.F.R. §552.3 (defining the term "domestic service employment" to include those who provide "services of a household nature performed ... in or about a private home ..."). There can be no question that "domestic service" employees who provide the type of "companionship services" provided by Petitioner are subject to the FLSA's wage, hour and overtime laws. *See Coke*, 551 U.S. at 163-176. In fact, Petitioner admits that she provides "companionship services" as that term is defined in 29 C.F.R. § 552.6 and that she is "employed in 'domestic service employment' to provide 'companionship services' ..." (AR 257).

Petitioner argues that because she and the other in-home direct care workers do not receive overtime wages *via* the FLSA they are not somehow subject to the FLSA. That is just

wrong! The fact that the FLSA does not automatically require the payment of overtime wages to companionship service workers does not contradict or change the fact that these workers are subject to (i.e. governed or affected by) the provisions of the FLSA. *W.Va. Code § 21-5C-1(e)*. *See also, Coke*, 551 U.S. 158. As the circuit court aptly noted, the issue of whether W.Va.’s Choice is an “employer” as defined by the MWMHS is not whether 80% of W.Va.’s Choice’s employees are “entitled to” overtime wages under the FLSA, but whether 80% of its employees are “subject to” the federal act. *W.Va. Code § 21-5C-1(e)*. The plain language and intent of the statute are clear and must be enforced. *See e.g. Syl. Pt. 1, Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975) (“The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature”); *Syl. Pt. 2, State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968) (“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”).

Petitioner’s suggested reading of *W.Va. Code § 21-5C-1(e)* ignores the fact that there are circumstances where employees are “subject to” the FLSA for several purposes, but not others. Although W.Va.’s Choice may not have to pay overtime wages *via* the FLSA under certain circumstances, it would have to pay overtime if a direct care worker spent more than 20% of its work hours doing general household work incidental to their companionship care services, or if a direct care worker was classified as trained personnel. *29 C.F.R. § 526.6, see fnnt 4, supra*. And, W.Va.’s Choice and its employees are still subject to other provisions of the FLSA when overtime wages are not required. For example, they are not exempted from the FLSA’s regulations regarding discrimination on the basis of sex (§206(d)(1)), obligations to make, keep, and preserve records of the persons employed by them and of wages, hours, and other conditions and practices of employment maintained by them and to make reports therefrom to the

Administrator as shall be required (§ 211), restrictions on the employment of minors (§212), and regulations regarding the employment of students (§ 214). Petitioner’s contention that W.Va.’s Choices and its employees are not “subject to” the FLSA is false.

Petitioner cites *Adkins v. City of Huntington*, 191 W.Va. 317, 445 S.E.2d 500 (1994) and *Haney v. County Commission of Preston County*, 212 W.Va. 824, 575 S.E.2d 434 (2002) for the incorrect proposition that “...courts have uniformly held [that W.Va. Code § 21-5C-1(e)’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.” See Response, p. 7. As with its other arguments, this is simply wrong! First, and crucially, under a plain reading of the MWMHS “*subject to*” and “*entitled to*” are not synonymous. And, contrary to Petitioner’s strained interpretation, *Adkins v. City of Huntington* and *Haney v. County Commission of Preston County* do not hold otherwise. The circuit court below considered Petitioner’s argument with respect to these cases and pointedly found that they do not support Petitioner’s proposition. (AR 10-12).

With respect to *Adkins, supra*, Petitioner contends that the West Virginia Supreme Court of Appeals “...held that the City of Huntington was entitled to the § 21-5D-1(e) ‘exemption’ *because* the firefighters ... were already entitled to specific overtime compensation under the FLSA.” See Petitioner’s Brief, p. 6 (emphasis added). The *Adkins* court made no such holding! Rather, the issue in *Adkins* was whether a political subdivision of the State (the City of Huntington) was an “employer” as defined by W.Va. Code § 21-5C-1(e). The court answered the question affirmatively. There was, however, no discussion of, let alone a holding by, the *Adkins* court which equated “subject to” in W.Va. Code § 21-5C-1(e) with “entitled to.” Indeed,

the parties in *Adkins* stipulated that eighty percent of the City's employees were subject to federal wage and hour laws. *Adkins*, 191 W.Va. at 318, 445 S.E.2d at 501.

In *Haney*, a *per curium* opinion, the West Virginia Supreme Court of Appeals, addressing an issue similar to the issue presented in *Adkins*, ruled that the Preston County Commission, as a political subdivision, also fell within W.Va. Code § 21-5C-1(e)'s definition of "employer." *Haney*, 212 W.Va. at 829, 575 S.E.2d at 439. The *Haney* court remanded the case, however, for a determination as to whether at least eighty percent of the county commission's employees, as opposed to only the Sheriff's employees, were subject to federal wage and hour laws. *Id.* The circuit court below correctly recognized that although the *Haney* court did use the terms "subject to" and "covered by," the *Haney* court did not discuss - much less conclude - as Petitioner suggests -- that the definition of "employer" set forth in W.Va. Code § 21-5C-1(e) only applies if eighty percent of one's employees are "entitled to" be paid overtime. (AR 11-12).⁵

Similarly, the holding by the federal district court in *Smith v. United Parcel Service, Inc.*, 890 F.Supp. 523 (S.D.W.Va. 1995) is equally inapposite and does not support Petitioner's position. The court there made no finding that the package handlers were not "subject to" the FLSA because they were not entitled to overtime wages under that federal act. Critically, the court *never* addressed the issue of whether UPS was an "employer" as defined by the MWMHS, nor is there any indication in that written opinion that that issue was ever raised or considered by either the parties or the court. The comment in that opinion that "state overtime protection laws apply also to employees exempt from the overtime provisions of the FLSA" was related to the court's recognition that 29 U.S.C. § 218(a), the so-called Savings Clause, allows states to set

⁵ Although the FLSA's requirements to pay overtime have not been triggered in this case, all W.Va.'s Choice employees, including Petitioner, are "entitled to" to receive overtime pursuant if certain criteria be met. *See* 29 C.F.R. § 526.6, *fn. 4, supra*. Simply because overtime has not been paid in this case does not mean that Petitioner is never "entitled to" receive overtime pay. And, it certainly does not mean that employees of W.Va.'s Choice are not "subject to" the FLSA's requirements relating to wages, hour and overtime. *W.Va. Code §21-5C-1(e)*

more stringent wage laws than those mandated by the FLSA. As pointed out in more detail *infra*, even if a state law is more favorable to an employee than is the FLSA, that state law (the MWMHS in this instance) must first apply to an “employer” in a given set of facts. This is undoubtedly not the case in the matter at hand, as was correctly found by the circuit court below.

Several courts considering the specific issue at issue in this case have found that being free from paying overtime as per the FLSA does not equate to a finding that the employer/employee is not “subject to” the FLSA for the purposes of state wage and hour law. In *Brown v. Ford Storage and Moving Company*, 224 P.3d 593 (Kan. App. 2010), the court, after recognizing that the plaintiff truck drivers were exempt from the overtime pay requirements of the FLSA, found that because the defendants were not “employers” under the Kansas Minimum Wage and Maximum Hours Law they had *no* duty to pay their drivers overtime wages under Kansas law. Syl. Pt. 7 and 8, *Brown*, 224 P.3d at 594. The Kansas statute at issue in *Brown v. Ford Storage and Moving Company* was similar to W.Va. Code § 21–5C–1(e). The Kansas statute provides that only “employers” are required to pay overtime compensation. K.S.A. 44–1204(a). The definition of “employer” in the Kansas Minimum Wage and Maximum Hours Law excludes those employers “*subject to*” the FLSA. *Brown*, 224 P.3d at 594, *citing*, K.S.A. 44–1202(d) (emphasis added). Recognizing the fact that the plaintiff drivers were exempt from the overtime pay requirements of the FLSA, the *Brown* court specifically held that “the claimed employers in the case at bar are *subject to* FLSA regulation, [therefore,] they are not ‘employers’ as that term is used in the Kansas Minimum Wage and Maximum Hours Law.” Syl. Pt. 8, *Brown*, 224 P.3d at 594. And, “[b]ecause they are not ‘employers’ pursuant to the Kansas Minimum Wage and Maximum Hours Law, they owe their employees no duty to pay overtime wages under Kansas law pursuant to the plain language of K.S.A., 44-1204(a).” *Id.* *See also*,

Jones v. OS Restaurant Services, Inc., 245 P.3d 624 (Okla. Civ. App. 2010) (holding that Oklahoma’s minimum wage and hour act’s definition of “employer” excluded the defendant restaurant owner from coverage under that act, including the requirement to pay overtime wages, because the employer was “subject to” and complying with FLSA); *Parker v. Schilli Transportation*, 686 N.E.2d 845, 850 (Ind. Ct. App. 1997) (holding that the plaintiff’s claim for overtime wages failed where the defendant employer was an “employer” within the meaning of the FLSA and where state law provided that an “employer” subject to state wage laws “shall not include any *employer* who is *subject to*” the wage provisions of the FLSA).

Petitioner’s argument that the plain and clear definition of “employer” set forth in W.Va. Code §21-5C-1(e) should be ignored simply because Petitioner is not entitled to overtime compensation under the FLSA defies the legislative intent of W.Va. Code § 21-5C-1(e) and essentially negates the practical effect of that statute. When the West Virginia Legislature decided to create a distinction between entities where 80% or more of its employees are subject to a federal act relating to minimum wage and overtime compensation, and entities where less than 80% of the employees are subject to a federal act relating to minimum wage and overtime compensation, the Legislature clearly recognized that there would be situations where application of the requirements set forth in the FLSA might result in no overtime being paid to a particular employees. Otherwise, the Legislature would not have made such a distinction.⁶ This does not mean, however, that the MWMHS “confers legal rights to no one” as Petitioner contends. *See* Petitioner’s Brief, p. 13. Indeed, as discussed, *infra*, to be subject to the provisions of the FLSA, employers must meet criteria (engagement in commerce and an annual

⁶ The Legislature’s recent amendment to W.Va. Code §21-5C-1(e) and the definition of an “employer” governed by West Virginia’s MWMHS provides further evidence of this recognition. According to the amendment which is effective beginning May 30, 2014, businesses that are subject to the hourly wage and overtime provisions of the FLSA are no longer excepted from the provisions of the MWMHS. *See* W.Va. Code §21-5C-1(effective May 20, 2014).

gross volume of sales made or business done of not less than \$500,000) that not all West Virginia businesses would satisfy.

As the circuit court below correctly recognized, both the West Virginia Division of Labor and the United States Department of Labor advanced the proposition that West Virginia law did not require the payment of minimum or overtime wages to in-home direct care workers, like Petitioner in this case. In an informational bulletin provided by the West Virginia Division of Labor, the Division, discussing minimum wage coverage and explaining who is a “covered ‘employer’ under West Virginia law,” expressly notes that, “[s]ome industries,” including “In-Home Health Care Providers” are “automatically covered under federal law and are therefore exempt from the West Virginia minimum wage provisions regardless of specific employee activity.” See West Virginia Division of Labor Establishing Minimum Wage Coverage <http://www.wvlabor.com/newwebsite/Documents/wageforms/newer%20forms/Minimum%20Wage%20Requirements%202009.pdf> (AR 313). See also, excerpt of the “U.S. Department of Labor – Wage and Hour Division (WHD) – State Minimum Wage and Overtime Coverage of Non-Publicly Employed Companions,” www.dol.gov/whd/flsa/statemap/#stateDetails (May 16, 2013) (discussing state minimum wage and overtime regulations and stating that “West Virginia does not apply minimum wage and overtime provisions to home health care workers”). (AR 314).

As the circuit court found, to ignore the plain meaning of W.Va. Code § 21-5C-1(e), as Petitioner suggests, would essentially render that statute meaningless; which, of course, is impermissible under West Virginia law. (AR 14). See e.g. *Davis Memorial Hosp. v. West Virginia State Tax Com’r*, 222 W.Va. 677, 686, 671 S.E.2d 682, 691 (2008) (recognizing that interpretation of a statute which renders a section, clause or word meaningless is contrary to the rules of statutory interpretation). The undisputed facts establish that more than 80% of the

persons employed by W.Va.'s Choice are subject to the FLSA. As correctly held by the circuit court below, W.Va.'s Choice does not meet the definition of an "employer" under the provisions of West Virginia's MWMHS, and it is not responsible for overtime pay as requested by Petitioner. Petitioner's Complaint, therefore, was correctly dismissed as a matter of law. W.Va. R. Civ. P. 56.

B. West Virginia's Choice, Inc., is an enterprise engaged in Interstate Commerce

Petitioner argues that W.Va.'s Choice is not subject to the FLSA because it is not engaged in "interstate commerce." See Petitioner's Brief, p. 13. This is incorrect! The minimum wage and maximum hour requirements of the FLSA applies to employees who are "engaged in commerce or in the production of goods for commerce," or who are "employed in an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. §§ 206(a), 207(a). The Act defines commerce as "trade, commerce, transportation, or communication among the several States or between any State and any place outside thereof," 29 U.S.C. § 203(b). An enterprise is engaged in commerce when it has:

- (i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and
- (ii) is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated).

29 U.S.C. § 203(s)(1)(A). Providing further clarification, the Code of Federal Regulations state:

An enterprise ... will be considered to have employees engaged in commerce or in the production of goods for commerce, including the handling, selling, or otherwise working on goods that have been moved in commerce by any person if ... it regularly and recurrently has at least two or more employees engaged in such activities. On the other hand, it is plain that an enterprise that has employees engaged in such activities only in isolated or sporadic occasions, will not meet this condition.

29 C.F.R. § 779.238.

When originally enacted, the jurisdictional reach of the FLSA was very narrow. There was no “enterprise coverage” concept. Instead, jurisdiction only applied to individuals “engaged in commerce.” *Dunlop v. Ind. Am. Corp.*, 516 F.2d 498, 500 (5th Cir.1975). To be engaged in commerce, an employee had to be directly engaged in the actual movement of goods in commerce. *See, e.g., McLeod v. Threlkeld*, 319 U.S. 491, 493 (U.S. 1943).

The coverage of the FLSA was significantly expanded by amendment in 1961. These amendments served (1) to introduce the concept of “enterprise coverage” which looks to the activities of the employer and (2) to “include as an ‘enterprise engaged in commerce’ one which had employees ‘handling, selling, or otherwise working on goods that have been moved in or produced for commerce.’ ” *Dunlop v. Industrial America Corp.*, 516 F.2d at 501. As the *Dunlop* Court explained, “[t]his change extended coverage to businesses with employees engaged in handling or utilizing goods after they had ceased the interstate portion of their movement. This approach reached those nearer the end of the chain of distribution, e.g., retail and service establishments whose businesses were otherwise local in character.” *Id.*

In 1974, Congress amended the congressional findings section of the FLSA to read “Congress . . . finds that the employment of persons in domestic service in households affects commerce.” 29 U.S.C. § 202(a). The Senate Committee on Labor and Public Welfare concluded “that coverage of domestic employees is a vital step in the direction of ensuring that all workers affecting interstate commerce are protected by the Fair Labor Standards Act,” and in the legislative history it was pointed out that employees in domestic service employment handle goods such as soaps, mops, detergents, and vacuum cleaners that have moved in or were produced for interstate commerce and also that they free members of the household to themselves to engage in activities in interstate commerce. *S. Rep. 93-690, pp. 21-22. See e.g.,*

Linn v. Developmental Services, 891 F.Supp. 574, 577. (N.D. Okla. 1995) (among other reasons, direct care service workers are involved with enterprise coverage when they communicate with out of state offices).

This expansion of the coverage of the FLSA has been recognized within the Fourth Circuit: "...it is well established that local business activities fall within the FLSA when an enterprise employs workers who handle goods or materials that have moved or have been produced in interstate commerce." See e.g. *Shomo v. Junior Corp.*, 2012 WL 2700498 (W.D. Va. 2012) at *4, citing *Brock v. Hamad*, 867 F.3d 804, 808 (4th Cir.1989) (*per curiam*). See also *Diaz v. HBT, Inc.*, 2012 WL 294749, at *3 (D.Md. Jan. 31, 2012) (Where materials used by employees during operations have traveled at some point in interstate commerce, enterprise coverage exists, even though the plaintiff could show that he was not directly engaged in the actual movement of goods in commerce).

Petitioner testified that she has handled goods that have been moved in commerce. For example, when cooking breakfast for a particular client, she testified that she handles eggs and makes toast. In addition, Petitioner testified that she shops for her client at Dollar General and opens the packages of food she purchases. Petitioner admitted that she handles linens and laundry detergent when doing laundry for her clients. Petitioner has picked up prescription medications for her client. She has also handled tooth brushes, shampoo and deodorant when assisting with client grooming. (AR 307-308). These activities - meal preparation, laundering client's linens and clothes, and performing grooming services - all make up the companionship services Petitioner is employed to provide. In each of these types of services, Petitioner is handling goods that have moved or have been produced in interstate commerce.

As evidenced by the Affidavit of David Wilson, Vice-President and Chief Administrative Officer of West Virginia's Choice, Inc., Petitioner further engages in interstate commerce by way of its employment of certain direct care workers. For example, some direct care workers employed by W.Va.'s Choice reside in states surrounding West Virginia. These out-of-state employees travel into West Virginia, crossing the state line, to provide companionship services in the homes of individuals residing in West Virginia. Direct care workers in the employ of W.Va.'s Choice, in the course and scope of their duties, also take residents who reside in West Virginia into other states surrounding West Virginia to obtain goods and services from out of state providers. W.Va.'s Choice has regularly made use of the U.S. Mail to send paychecks to some of its out-of-state employees, and it also regularly makes use of direct deposit banking services to distribute pay from its West Virginia bank to the out-of-state banks of some of its out-of-state employees. Some of its out-of-state employees regularly mail their Daily Care Logs from an out-of-state location to a W.Va.'s Choice office located in West Virginia. (AR 343-345). And, although not of record, W.Va.'s Choice receives Medicaid payments for the services it provides; including Medicaid payments from surrounding states where its clients are taken to obtain goods and services. See e.g., *BCB Anesthesia Care, LTD v. Passavant Memorial Area Hospital Association*, 36 F.3d 664 (7th Cir. 1994)(payments received from Medicare or Medicaid was interstate commerce sufficient to support Sherman Act violations); *McGuffey Health and Rehab. Center v. Jackson*, 864 So.2d 1061 (Ala. 2003)(receipt of Medicare payments is sufficient interstate commerce); *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 1061, 48 Tex. Sup. Ct. J. 805 (2005)(receipt of Medicare payments is sufficient interstate commerce). As these activities make evident, as well as those to which Petitioner testified, W.Va.'s Choice satisfies the first prong of the enterprise coverage test. See 29 U.S.C. § 203(s)(1)(A)(i).

The second prong of the enterprise coverage test requires the enterprise to have an annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated). *See* 29 U.S.C. § 203(s)(1)(A)(ii). W.Va.'s Choice satisfies that requirement as well. In his Affidavit, David Wilson affirms that W.Va.'s Choice "is a business enterprise that has an annual gross volume of sales made or business done which exceeds \$ 500,000.00, exclusive of excise taxes." (AR 344). There is no evidence in the record to dispute this fact.

W.Va.'s Choice is engaged in interstate commerce, and the legal precedent relied upon by Petitioner is inapplicable. For instance, Petitioner cites *McLeod v. Threlkeld*, 319 U.S. 491 (1943) and *Kirschbaum v. Walling*, 316 U.S. 491 (1943), for the outdated proposition that an employee had to be directly engaged in the actual movement of goods for purpose of the FLSA. These decisions date back over 70 years respectively, almost twenty years before the jurisdictional reach of the FLSA was significantly expanded by the 1961 amendments by introducing enterprise coverage.

Petitioner also relies upon the more recent decision of *Thorne v. All Restoration Svcs., Inc.*, 448 F.3d 1264 (11th Cir. 2006) in an attempt to claim that W.Va.'s Choice cannot satisfy enterprise coverage. Her reliance on *Thorne* is misplaced. There, the employee brought suit under the individual coverage provisions of the FLSA, not the enterprise coverage provisions which look to the activities of an employer.

In sum, W.Va.'s Choice employs direct care workers like Petitioner who, for purposes of enterprise coverage, are engaged in commerce in that they handle or otherwise work with goods or materials that have been moved in or produced for commerce. Further, W.Va.'s Choice's out-of-state employees cross state lines to get to work, some transport clients over state lines, and

W.Va.'s Choice otherwise conducts the business of and receive payment for providing companionship services in multiple states. The jurisdictional amount based upon annual gross volume of sale made and business done is sufficient. As such, W.Va.'s Choice satisfies the enterprise coverage requirements and the FLSA is therefore applicable in this case.

C. The so-called Savings Clause set forth in the Fair Labor Standards Act is of no consequence because the West Virginia Minimum Wage Maximum Hour Standards Act is not applicable in this case

Petitioner erroneously contends that the “savings clause” of the FLSA, 29 U.S.C. §218(a), requires this Court to compare the MWMHS to the FLSA and apply the law that is more favorable to her. The MWMHS does not apply in this case because, again, W.Va.'s Choice is not an “employer” as that term was defined by the Act. As a result, no comparison between federal law and West Virginia law can or should be made. Stated another way, only one law applies with respect to Petitioner's claim - - and that law is the FLSA.

Additionally, the court's holding in *Smith v. United Parcel Service, Inc.*, 890 F.Supp. 523, which is also cited by Petitioner and previously discussed herein, provides no support for Petitioner's arguments. The fact that “companionship services” is not included within the list of exemptions in W.Va. Code § 21-5C-1(f) is irrelevant. The issue here involves employer exclusion, not employee exemption. *See e.g. Brown*, 224 P.3d at 600. While states may set more stringent wage laws than those mandated by the FLSA, the more favorable state law must first apply to a given set of circumstances before the more favorable state protections can be enforceable. Again, in the case now before this court, in order to be covered under West Virginia's MWMHS one must *first* meet the definition of an “employer” as set forth in the Act, and the so-called Savings Clause set forth in the FLSA has nothing to do with whether or not one is or is not an employer under the MWMHS. If the state act does not apply, it does not apply!

And the fact that there may be a more stringent employee exemption or more favorable benefit given to an employee under state law than under the FLSA is immaterial.

V. CONCLUSION

Wherefore, for the reasons stated herein, W.Va.'s Choice respectfully requests that this Court affirm the decision of the Circuit Court of Kanawha County.

Respectfully submitted,

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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.

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We the undersigned counsel for Respondent, West Virginia's Choice, Inc., hereby certify that on April 18, 2014, that a true and accurate copy of Respondent's Brief was hand delivered to the law office of counsel for Petitioner, Carol King, as follows:

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