

**Senate Bill No. 420**

(By Senators Hall, K. Facemyer, Nohe, Barnes, Boley and Jenkins)

[Introduced January 25, 2012; referred to the Committee on the  
Judiciary; and then to the Committee on Finance.]

**FISCAL  
NOTE**

A BILL to amend the Code of West Virginia, 1931, as amended, by  
adding thereto a new chapter, designated §55A-1-1, §55A-1-2,  
§55A-1-3, §55A-1-4, §55A-2-1, §55A-2-2, §55A-2-3, §55A-2-4,  
§55A-2-5, §55A-2-6, §55A-2-7, §55A-2-8, §55A-2-9, §55A-3-1,  
§55A-3-2, §55A-4-1, §55A-4-2, §55A-4-3, §55A-4-4, §55A-4-5,  
§55A-4-6, §55A-5-1, §55A-5-2, §55A-5-3, §55A-5-4, §55A-5-5,  
§55A-5-6, §55A-5-7, §55A-5-8, §55A-6-1, §55A-6-2, §55A-6-3,  
§55A-6-4, §55A-6-5, §55A-7-1, §55A-7-2, §55A-7-3, §55A-7-4,  
§55A-7-5, §55A-7-6, §55A-7-7, §55A-7-8, §55A-8-1, §55A-8-2,  
§55A-9-1, §55A-9-2, §55A-10-1, §55A-10-2, §55A-10-3,  
§55A-11-1, §55A-11-2, §55A-11-3, §55A-11-4, §55A-11-5,  
§55A-11-6, §55A-11-7, §55A-11-8, §55A-11-9, §55A-11-10,  
§55A-11-11, §55A-11-12, §55A-12-1, §55A-12-2, §55A-12-3,  
§55A-12-4, §55A-12-5 and §55A-12-6, all relating to reforming  
the civil justice system; providing a short title; stating

1 legislative findings and declarations of purposes; providing  
2 that chapter is not applicable to certain actions; defining  
3 terms used in chapter; relating to authorizing a new court to  
4 be known as the Intermediate Court of Appeals; requiring the  
5 court to be operational by January 1, 2014; establishing  
6 northern and southern districts; providing three judges for  
7 each district; establishing qualifications for judges;  
8 establishing jurisdiction of the court; providing that all  
9 appeals will be reviewed and a written decision on the merits  
10 issued; providing that all appeals will be filed with Supreme  
11 Court of Appeals; providing that Supreme Court will either  
12 keep the appeal or send it to the Intermediate Court;  
13 providing that appeals in certain administrative cases are  
14 discretionary; authorizing appeals from Intermediate Court to  
15 the Supreme Court; authorizing Governor to make initial  
16 appointments by July 1, 2013; creating staggered terms;  
17 providing for elections for ten-year terms after initial  
18 appointments; authorizing a Chief Judge of the Intermediate  
19 Court; authorizing staff for the court and the judges;  
20 providing for compensation and expenses of judges and staff;  
21 providing for temporary assignment of circuit court judges;  
22 authorizing the Supreme Court to provide the facilities,  
23 furniture, fixtures and equipment for the Intermediate Court;  
24 establishing precedential effect of Intermediate Court orders

1 and decisions; providing that the budget of the Intermediate  
2 Court will be part of the Supreme Court budget; prohibiting  
3 medical monitoring relief absent manifest present injury or  
4 disease caused by a defendant; providing for venue reform;  
5 relating to the application of the doctrine of forum non  
6 conveniens when civil actions have both a resident and  
7 nonresident plaintiff; providing for parties to make a motion  
8 that a case would more properly be heard in a forum outside  
9 this state; providing for statute of limitations expiring in  
10 the alternative forum while the claim is pending in this  
11 state; providing for proper dismissal of an action for forum  
12 non conveniens purposes; providing for application to class  
13 representatives; requiring courts granting motions to stay or  
14 dismissal actions for forum non conveniens purposes to set  
15 forth specific findings of fact and conclusions of law;  
16 providing standards to determine the competency of expert  
17 witnesses; providing standards for opinion testimony by lay  
18 witnesses; providing standards of admission for expert witness  
19 testimony; requiring a basis for expert witness testimony;  
20 barring certain types of expert witness testimony; mandating  
21 pretrial hearings and disclosures of expert testimony;  
22 providing for the interpretation of the competency of expert  
23 witnesses; establishing a standard of review; regarding the  
24 recovery of punitive damages; establishing what a plaintiff

1 must prove and the trier of fact must find before the trier of  
2 fact may award punitive damages; stating circumstances when  
3 punitive damages may not be awarded and a defendant may not be  
4 held liable for punitive damages; providing the amount of  
5 punitive damages that may be awarded against large employers  
6 and the amount that may be awarded against all others;  
7 providing maximum amounts which may be awarded on multiple  
8 punitive damages awards for the same course of conduct;  
9 providing for the bifurcation of a civil action in which  
10 punitive damages are sought when requested by a defendant;  
11 stating the conditions under which punitive damages may be  
12 assessed against a principal or employer for an act of an  
13 agent or employee and against an association, limited  
14 liability entity or partnership for the acts of a member or  
15 partner; predicating actions for damages upon principles of  
16 comparative fault; establishing the comparative fault  
17 standard; abolishing joint liability and implementing several  
18 liability; establishing how to consider the fault of  
19 nonparties; establishing how to consider the fault of, and the  
20 amounts paid by, settling parties; providing for the use of  
21 special interrogatories; clarifying fault may be imputed to  
22 another person who was acting as an agent or servant of  
23 another; allowing the assessment of a percentage of fault for  
24 failing to take reasonable precautionary measures that are

1 available; precluding the allocation of fault to a person such  
2 as a seller, distributor or installer on a strict product  
3 liability theory where that person did not contribute to the  
4 alleged defect; providing for the burden of proof and  
5 limitations; providing for immunity of premises owners from  
6 civil liability in certain circumstances; reducing damage  
7 awards by collateral source payments; providing how damage  
8 reductions shall be determined; stating the effects of such  
9 determinations upon the trial; providing for a statute of  
10 repose; establishing a general eighteen-year warranty for  
11 products liability actions and an exception for cases where  
12 there is an express warranty for more than eighteen years;  
13 providing that noneconomic damages are recoverable in actions  
14 where damages were authorized at the time this bill became  
15 law; providing maximum amounts that may be recovered for  
16 noneconomic losses based on physical injury and nonphysical  
17 injury; providing for a loser pays civil justice system;  
18 providing for the recovery of attorney's fees by prevailing  
19 party in certain cases and against certain parties;  
20 establishing a procedure for recovery of attorney's fees;  
21 presuming usual and customary attorney's fees; providing  
22 courts may take judicial notice of the usual and customary  
23 attorney's fees; requiring the loser pays article be liberally  
24 construed to promote its underlying purpose; providing

1 defendants and plaintiffs with the option of electing to apply  
2 the provisions of the loser pays article to civil actions;  
3 allowing for the revocation of an election; providing an  
4 election does not apply to nonsuited or dismissed suited  
5 actions in certain cases; providing for awarding litigation  
6 costs; providing for the liability of attorneys; providing for  
7 the applicability of other law; requiring the West Virginia  
8 Supreme Court adopt rules to implement this chapter; providing  
9 for repeal of conflicting laws; providing for applicability  
10 and severability of this chapter; clarifying no additional  
11 cause of action is created by this chapter; and providing this  
12 chapter shall become effective immediately upon passage by the  
13 Legislature and approval by the Governor.

14 *Be it enacted by the Legislature of West Virginia:*

15 That the Code of West Virginia, 1931, as amended, be amended  
16 by adding thereto a new chapter, designated §55A-1-1, §55A-1-2,  
17 §55A-1-3, §55A-1-4, §55A-2-1, §55A-2-2, §55A-2-3, §55A-2-4, §55A-2-  
18 5, §55A-2-6, §55A-2-7, §55A-2-8, §55A-2-9, §55A-3-1, §55A-3-2,  
19 §55A-4-1, §55A-4-2, §55A-4-3, §55A-4-4, §55A-4-5, §55A-4-6, §55A-5-  
20 1, §55A-5-2, §55A-5-3, §55A-5-4, §55A-5-5, §55A-5-6, §55A-5-7,  
21 §55A-5-8, §55A-6-1, §55A-6-2, §55A-6-3, §55A-6-4, §55A-6-5, §55A-7-  
22 1, §55A-7-2, §55A-7-3, §55A-7-4, §55A-7-5, §55A-7-6, §55A-7-7,  
23 §55A-7-8, §55A-8-1, §55A-8-2, §55A-9-1, §55A-9-2, §55A-10-1, §55A-  
24 10-2, §55A-10-3, §55A-11-1, §55A-11-2, §55A-11-3, §55A-11-4, §55A-

1 11-5, §55A-11-6, §55A-11-7, §55A-11-8, §55A-11-9, §55A-11-10,  
2 §55A-11-11, §55A-11-12, §55A-12-1, §55A-12-2, §55A-12-3, §55A-12-4,  
3 §55A-12-5 and §55A-12-6, all to read as follows:

4 **CHAPTER 55A. CIVIL JUSTICE REFORM.**

5 **ARTICLE 1. SHORT TITLE; LEGISLATIVE FINDINGS AND DECLARATION OF**  
6 **PURPOSES; CHAPTER NOT APPLICABLE TO CERTAIN**  
7 **ACTIONS; AND DEFINITIONS.**

8 **§55A-1-1. Short title.**

9 This chapter shall be known as and may be cited as the "Civil  
10 Justice Reform Act of 2012."

11 **§55A-1-2. Legislative findings and declaration of purposes.**

12 (a) The Legislature finds and declares that:

13 (1) The citizens of this state are entitled to a fair civil  
14 justice system which provides adequate and reasonable compensation  
15 for those persons suffering injury under the state's civil  
16 liability law;

17 (2) It is the duty and responsibility of the Legislature to  
18 also ensure that the state's civil liability law is not abusive or  
19 unfair to those it is supposed to serve;

20 (3) In recent years, West Virginia's civil liability system  
21 has regularly ranked as one of the worst in the nation for legal  
22 fairness;

23 (4) Since 2007, West Virginia has been home to several of the

1 nation's largest lawsuit verdicts, despite the state's relatively  
2 small population;

3 (5) The current civil liability law of the state has actually  
4 resulted, and may continue to result, in excessive, unpredictable,  
5 and often arbitrary damage awards and unfair allocations of  
6 liability that:

7 (A) Adversely affect the ability of the state to retain jobs  
8 and attract new employers;

9 (B) Cause the withdrawal of products, producers, services, and  
10 service providers from the marketplace and result in excessive  
11 liability costs that are passed on to consumers through higher  
12 prices;

13 (C) Cause defendants, including boards of education and other  
14 governmental agencies, to settle cases out of fear of large  
15 verdicts rendered pursuant to the civil liability laws and in order  
16 to avoid the high costs, inconvenience, and uncertainty of  
17 litigation;

18 (D) Jeopardize the financial well-being and security of many  
19 individuals, small businesses, and even entire industries, and  
20 adversely affect government and taxpayers;

21 (E) Undermine the ability of companies in West Virginia to  
22 compete nationally and internationally, and decrease the number of  
23 jobs and the amount of production capital in the state's economy;

24 (F) Cause citizens and small businesses to live in fear of

1 lawsuits against them wherein they may be bankrupted or driven out  
2 of business by legal fees and expenses in defending them and by  
3 exorbitant settlements extorted by threat of trials that have taken  
4 on the characteristics of a lottery; and

5 (G) Add to the high cost of liability insurance, making it  
6 difficult for individuals, producers, consumers, volunteers, and  
7 nonprofit organizations to protect themselves with any degree of  
8 confidence at a reasonable cost.

9 (b) The Legislature, therefore, declares it to be in the best  
10 interests of its citizens to reform the civil liability law of the  
11 state in order to curtail or eliminate clear social and economic  
12 problems that:

13 (1) Deny citizens a meaningful right of appeal;

14 (2) Allow plaintiffs to recover damages in cases where there  
15 is no actual proof of injury;

16 (3) Allow out-of-state plaintiffs to take advantage of West  
17 Virginia courts when a more convenient venue exists elsewhere;

18 (4) Allow the admission of expert testimony from witnesses who  
19 are not properly qualified as experts;

20 (5) Allow excessive amounts to be awarded in punitive damages;

21 (6) Can unjustly and unfairly hold one defendant jointly  
22 liable for the total damages assessed against multiple defendants  
23 even though that one defendant may have been as little as one  
24 percent at fault in causing plaintiff's injuries;

1           (7) Deny any reduction in damage awards for compensatory  
2 payments received from collateral sources, such as workers'  
3 compensation and employer disability programs;

4           (8) Allow lawsuits to be brought for a claimed defective  
5 product made twenty, thirty, or more years ago;

6           (9) Allow excessive amounts to be awarded for noneconomic  
7 losses based on physical injury and actions other than those based  
8 on physical injury; and

9           (10) Require prevailing parties to bear substantial legal fees  
10 defending against meritless filings.

11           (c) The Legislature further finds and declares that there  
12 exists, for the foregoing reasons, clear social and economic  
13 problems associated with our civil justice system and a need to  
14 correct those problems by restoring rationality, certainty, and  
15 fairness to the civil justice system through the enactment of the  
16 Civil Justice Reform Act of 2012.

17 **§55A-1-3. Chapter not applicable to certain actions.**

18           This chapter is not applicable to:

19           (1) Those causes of action where a defendant's conduct  
20 constitutes driving a vehicle under the influence of alcohol, a  
21 controlled substance, or any other drug, or any combination  
22 thereof, as described in section two, article five, chapter  
23 seventeen-c of this code and is the proximate cause of the damages  
24 suffered by the plaintiff;

1           (2) Those causes of action where a defendant's actions  
2 constitute criminal conduct which is the proximate cause of the  
3 damages suffered by the plaintiff;

4           (3) Those causes of action where a defendant's conduct  
5 constitutes an illegal disposal of hazardous waste, as described in  
6 section three, article eighteen, chapter twenty-two of this code  
7 and is the proximate cause of the damages suffered by the  
8 plaintiff.

9 **§55A-1-4. Definitions.**

10           As used in this chapter:

11           (1) "Abusive civil action" means a civil action that a  
12 reasonable person would conclude is a misuse of the civil justice  
13 process.

14           (2) "Actual malice" means specific intent to cause personal  
15 injury, death, or damage to the property or the reputation of  
16 another.

17           (3) "Agent" means a person who is authorized to act for  
18 another through employment by contract or apparent authority.

19           (4) "Claim" means a request for monetary damages filed in a  
20 civil action, other than a request for reimbursement of attorney's  
21 fees or other costs of litigation in a civil action, if the request  
22 is for:

23           (A) Damages for alleged personal injury, property damage,  
24 breach of contract, or death, regardless of the legal theories or

1 statutes on the basis of which recovery is sought; or

2 (B) Damages other than for alleged personal injury, property  
3 damage, or death allegedly resulting from any tortious conduct,  
4 regardless of the legal theories or statutes on the basis of which  
5 recovery is sought.

6 (5) "Clear and convincing evidence" means that the evidence  
7 presented by a party during the trial is more highly probable to be  
8 true than not and the jury or judge has a firm belief or conviction  
9 the evidence proves the issue for which it is asserted.

10 (6) "Collateral source" means the United States Social  
11 Security Act, as amended; any state or federal disability, workers'  
12 compensation, or other act designed to provide income replacement,  
13 medical, or other benefits; any accident, health or sickness,  
14 income or wage replacement insurance, income disability insurance,  
15 casualty or property insurance including automobile and homeowners'  
16 insurance, or any other insurance except life insurance; any  
17 contract or agreement of any group, organization, partnership, or  
18 corporation to provide, pay for, or reimburse the cost of medical,  
19 hospital, dental, or other health care services or provide similar  
20 benefits; or any contractual or voluntary wage continuation plan  
21 provided by an employer or otherwise, or any other system intended  
22 to provide wages during a period of disability.

23 (7) "Collateral source payments" means money paid or payable  
24 by collateral sources for losses or expenses, including, but not

1 limited to, property damage, wage loss, medical costs,  
2 rehabilitation costs, services, and other costs incurred by or on  
3 behalf of a plaintiff for which that plaintiff is claiming recovery  
4 through a tort action commenced in any of the courts in this state.

5 (8) "Comparative fault" means the degree to which the fault of  
6 a person was a proximate cause of an alleged personal injury or  
7 death or damage to property, expressed as a percentage.

8 (9) "Compensatory damages" means money awarded to compensate  
9 a plaintiff for economic and noneconomic loss.

10 (10) "Conscious, reckless, and outrageous indifference to the  
11 health, safety, and welfare of others" means an act or omission  
12 which when viewed objectively from the standpoint of the defendant  
13 at the time of its occurrence involves an extreme degree of risk,  
14 considering the probability and magnitude of the potential harm to  
15 others, and of which the defendant has actual, subjective awareness  
16 of the risk involved, but nevertheless proceeds with conscious  
17 disregard of the rights, safety or welfare of others.

18 (11) "Damage" or "damages" means all claims under common law  
19 or statutory and equitable causes of action for actual damages,  
20 including economic and noneconomic damages, and additional damages,  
21 including knowing damages, punitive damages, treble damages,  
22 penalties, prejudgment interest, postjudgment interest, attorney's  
23 fees, litigation costs, costs of court, and all other damages of  
24 any kind.

1           (12) "Defendant" means, for purposes of determining an  
2 obligation to pay money to another under this chapter, any person  
3 against whom a claim is asserted by a plaintiff including a  
4 counterdefendant, cross-defendant or third-party defendant.

5           (13) "Durable good" means any product, or any component of any  
6 such product, which:

7           (A) Either has a normal life expectancy of three or more  
8 years, or is of a character subject to allowance for depreciation  
9 under the Internal Revenue Code of 1986;

10          (B) Is either used in a trade or business, held for the  
11 production of income, or sold or donated to a governmental or  
12 private entity for the production of goods, training,  
13 demonstration, or any other similar purpose; and

14          (C) Is used in a workplace, and is alleged to have caused harm  
15 that is covered under chapter twenty-three of this code.

16          (14) "Economic loss" means objectively verifiable monetary  
17 losses, such as medical expenses, loss of earnings and earning  
18 capacity, cost of replacement services, loss of income stream due  
19 to death, burial costs, loss of business or employment  
20 opportunities, lost profits, and loss due to property destruction  
21 or damage, to the extent recovery for any such monetary loss is  
22 allowed under any present applicable state law.

23          (15) "Employer" includes, but is not limited to, a parent,  
24 subsidiary, affiliate, division, or department of the employer. If

1 the employer is an individual, the individual shall be considered  
2 an employer under this chapter only if the subject of the tort  
3 action is related to the individual's capacity as an employer.

4 (16) "Fault" means an act or omission of a person which is a  
5 proximate cause of injury or death to another person or persons,  
6 damage to property, or economic injury, including, but not limited  
7 to, negligence, malpractice, medical professional liability, strict  
8 product liability, absolute liability, liability under section two,  
9 article four, chapter twenty-three of this code, or assumption of  
10 the risk.

11 (17) "Financial interest" means a financial interest held by  
12 an attorney under an agreement between the attorney and a plaintiff  
13 or defendant in which the amount or the payment of the fee for the  
14 attorney's legal services is contingent wholly or partly on the  
15 outcome of the civil action.

16 (18) "Large employer" means an employer who employs more than  
17 twenty-five persons on a full-time permanent basis, or its  
18 equivalent, or has annual revenues of more than \$5 million.

19 (19) "Legal resident" means an individual who is a resident of  
20 West Virginia at the time the cause of action arose or at the time  
21 the action is filed without regard to the individual's country of  
22 citizenship or national origin. The term does not include an  
23 individual who adopts a residence in this state in bad faith for  
24 purposes of avoiding the application of this chapter.

1           (20) "Natural person" means a human being that has the  
2 capacity for rights and duties.

3           (21) "Noneconomic loss" means subjective, nonmonetary losses,  
4 such as pain, suffering, inconvenience, mental anguish, emotional  
5 distress, loss of enjoyment of life, loss of society and  
6 companionship, loss of consortium, injury to reputation, and  
7 humiliation, to the extent recovery for any nonmonetary loss is  
8 allowed under any present, applicable state law.

9           (22) "Person" means any individual, corporation, trust,  
10 company, incorporated or unincorporated association, firm,  
11 partnership, society, joint stock company, business entity, and any  
12 agency, unit or instrumentality of federal, state or local  
13 government.

14           (23) "Physical injury" means an actual injury to the body  
15 proximately caused by the act complained of and does not include  
16 physical symptoms of the mental anguish or emotional distress for  
17 which recovery is sought when the symptoms are caused by, rather  
18 than the cause of, the pain, distress, or other mental suffering.

19           (24) "Plaintiff" means, for purposes of determining a right to  
20 recover under this chapter, any person asserting a claim.

21           (25) "Product" means any object, substance, mixture, or raw  
22 material in a gaseous, liquid, or solid state: (A) Which is capable  
23 of delivery itself or as an assembled whole, in a mixed or combined  
24 state, or as a component part or ingredient; (B) which is produced

1 for introduction into trade or commerce; (C) which has intrinsic  
2 economic value; and (D) which is intended for sale or lease for  
3 commercial or personal use.

4 The term "product" does not include: (A) Human tissue, human  
5 organs, human blood, and human blood products; (B) electricity,  
6 water delivered by a utility, natural gas or steam; or (C)  
7 intellectual property, including computer software.

8 (26) "Product liability action" means a civil action brought  
9 against any defendant, including defendants who did not manufacture  
10 or sell a product, on any theory for damage caused by a product.

11 **ARTICLE 2. THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS.**

12 **§55A-2-1. The West Virginia Intermediate Court of Appeals**  
13 **established; location.**

14 (a) In accordance with Article VIII, Section one of the West  
15 Virginia Constitution, the "West Virginia Intermediate Court of  
16 Appeals" is created. The court shall be established and operable  
17 on or before January 1, 2014. The West Virginia Intermediate Court  
18 of Appeals "Intermediate Court" shall be divided into two  
19 districts. The two intermediate courts of appeals shall be  
20 designated as "Intermediate Court, Northern District" or "Northern  
21 District" and "Intermediate Court, Southern District" or "Southern  
22 District." Each court shall be located in the district it serves.  
23 The Intermediate Court is a court of record and shall issue, as  
24 appropriate in each appeal, written opinions, orders and decisions.

1 (b) The Northern District shall be comprised of the following  
2 judicial circuits: first, second, third, fourth, fifth, fifteenth,  
3 sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-  
4 first, twenty-second, twenty-third, and twenty-sixth.

5 (c) The Southern District shall be comprised of the following  
6 judicial circuits: sixth, seventh, eighth, ninth, tenth, eleventh,  
7 twelfth, thirteenth, fourteenth, twenty-fourth, twenty-fifth,  
8 twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, and thirty-  
9 first.

10 (d) The Intermediate Court may be located in the seat of state  
11 government, any county seat for the purpose of hearing oral  
12 argument, or may be located in a fixed location.

13 **§55A-2-2. Judges; Qualifications.**

14 (a) The Intermediate Court shall consist of six judges, three  
15 judges in each district, initially appointed by the Governor in  
16 accordance with section four of this article.

17 (b) An Intermediate Court judge must be a resident of the  
18 district where he or she will preside, a member in good standing of  
19 the West Virginia State Bar, and admitted to practice law in this  
20 state for at least ten years prior to appointment or election.

21 (c) An Intermediate Court judge may not engage in any other  
22 business, occupation or employment inconsistent with the  
23 expeditious, proper and impartial performance of his or her duties  
24 as a judicial officer. An Intermediate Court justice is not

1 permitted to engage in the outside practice of law and shall devote  
2 full time to his or her duties as a judicial officer.

3 **§55A-2-3. Jurisdiction; defluctive rights of the West Virginia**  
4 **Supreme Court of Appeals; discretionary appeals.**

5 (a) The Intermediate Court shall not have original  
6 jurisdiction.

7 (b) Petitions for appeal shall be filed with the West Virginia  
8 Supreme Court of Appeals "Supreme Court". Those cases for which  
9 the Supreme Court elects not to grant petitions for appeal shall be  
10 transferred to the Intermediate Court.

11 (c) The Intermediate Court has jurisdiction to hear appeals  
12 from final judgments or orders entered by a circuit court in any  
13 civil or criminal case, appeals from the Workers' Compensation  
14 Board of Review, and the Public Service Commission.

15 (d) All appeals shall be reviewed and a written decision on  
16 the merits issued by either the Supreme Court or Intermediate Court  
17 as a matter of right except for the following appeals, which shall  
18 be discretionary with the courts:

19 (1) Appeals from the Workers' Compensation Board of Review  
20 established by section eleven, article five, chapter twenty-four of  
21 this code;

22 (2) Appeals from orders of the Public Service Commission  
23 established by article one, chapter twenty-four of this code;

24 (3) Appeals from decisions of circuit courts of administrative

1 appeals of an agency as defined in article one, chapter twenty-  
2 nine-a of this code; and

3 (4) Appeals of misdemeanor convictions.

4 (e) Within thirty days after a decision by the Intermediate  
5 Court, any aggrieved party may petition the Supreme Court by  
6 petition for writ of certiorari as provided by the West Virginia  
7 Rules of Appellate Procedure.

8 **§55A-2-4. Number of Intermediate Court Judges; initial**  
9 **appointment; election; term of office; vacancy;**  
10 **chief judge.**

11 (a) There shall be three judges for each district of the  
12 Intermediate Court. The Governor shall, on or before July 1, 2013,  
13 appoint the initial judges from names submitted by the Judicial  
14 Vacancy Advisory Committee established pursuant to section three-a,  
15 article ten, chapter three of the West Virginia Code. The  
16 committee shall recommend three qualified nominees for each  
17 position for Intermediate Court judge. If the Governor does not  
18 select a nominee for the position of judge from the names provided  
19 by the committee, he or she shall notify the committee of that  
20 circumstance and the committee shall provide additional names for  
21 consideration by the Governor.

22 (b) The committee is responsible for reviewing and evaluating  
23 candidates for possible appointment to the Intermediate Court by  
24 the Governor. In reviewing candidates, the committee may accept

1 applications from any attorney who believes himself or herself  
2 qualified for the judgeships. The committee may accept comments  
3 from and request information from any person or source.

4 (c) Of the initial appointments for each district, one judge  
5 shall be appointed for a term of four years, one judge shall be  
6 appointed for a term of six years and one judge shall be appointed  
7 for a term of eight years. Upon the expiration of each term, the  
8 judge's position shall be filled by election, for a ten-year term,  
9 in the same manner as with the Supreme Court.

10 (d) After the initial appointments are made, vacancies in  
11 office shall be filled in the same manner as vacancies on the  
12 Supreme Court.

13 (e) One judge of the Intermediate Court shall be chosen chief  
14 judge of the Intermediate Court. The manner of choosing the chief  
15 judge and providing for periodic rotation of the position of chief  
16 judge shall be determined by rules to be established by the Supreme  
17 Court.

18 **§55A-2-5. Compensation and expenses of Intermediate Court Judges**  
19 **and staffs.**

20 (a) The annual salary of an Intermediate Court judge shall be  
21 \$118,000. Reimbursement for expenses shall be at a rate  
22 established by the Supreme Court.

23 (b) Each judge of the Intermediate Court may employ two law  
24 clerks and one secretary. The Intermediate Court may employ a

1 clerk and the necessary staff to carry out the administrative  
2 duties of the court or, with the permission of the Supreme Court,  
3 the administrative and other support staff of the Supreme Court may  
4 carry out the administrative duties of both courts. The  
5 compensation of the staff of the Intermediate Court shall be  
6 established by the judges of the Intermediate Court with the  
7 approval of the Supreme Court.

8 **§55A-2-6. Temporary assignment of circuit court judges.**

9       Upon the occurrence of a vacancy in the office of Intermediate  
10 Court judge, the disqualification of an Intermediate Court judge or  
11 the inability of an Intermediate Court judge to attend to his or  
12 her duties because of illness, temporary absence, or any other  
13 reason, the Chief Justice of the Supreme Court may assign any  
14 senior status circuit judge or circuit judge of any judicial  
15 circuit that is not from the same circuit as the appeal before the  
16 Intermediate Court to hear and determine any and all matters then  
17 or thereafter pending in the Intermediate Court to which the absent  
18 Intermediate Court judge is assigned.

19 **§55A-2-7. Facilities.**

20       (a) The Administrative Director of the Supreme Court shall  
21 provide the necessary physical facilities, furniture, fixtures and  
22 equipment necessary for the efficient operation of the Intermediate  
23 Court.

24       (b) In order to minimize costs, the director may: (1) Contract

1 with the Department of Administration, county commissions and  
2 private parties to provide for space that is suitable for the  
3 Intermediate Court; and (2) shall make existing courtrooms  
4 throughout the state available for use by the Intermediate Court at  
5 times convenient both to the Intermediate Court and the local  
6 court.

7 **§55A-2-8. Precedential effect of court and decisions.**

8 Unless stated by the court to be per curiam or unpublished,  
9 all court orders and decisions shall have precedential effect.

10 **§55A-2-9. Budget.**

11 The budget for the payment of the salaries and benefits for  
12 the Intermediate Court judges and staff, facilities, furniture,  
13 fixtures and equipment shall be included in the appropriation for  
14 the Supreme Court. To the extent possible, the Supreme Court shall  
15 designate existing facilities and existing staff members for use by  
16 the Intermediate Court to minimize costs for establishing and  
17 operating the Intermediate Court.

18 **ARTICLE 3. MEDICAL MONITORING.**

19 **§55A-3-1. Claims for medical monitoring.**

20 Notwithstanding the decision of the Supreme Court in the case  
21 of *Bower v. Westinghouse*, 522 S.E.2d 424 (W. Va. 1999), in any  
22 civil action in which an individual seeks relief of any kind  
23 including damages and equitable relief for the wrongful or tortious

1 acts of any person, relief may not include future medical  
2 monitoring, testing, treatment, services, surveillance, or  
3 procedures of any kind, including the costs and expenses associated  
4 therewith, unless the future medical monitoring, testing,  
5 examination, treatment, services, surveillance or procedures are  
6 directly related to a present manifest physical injury or disease  
7 which was caused by or directly related to tortious or wrongful  
8 acts and which was found to have caused present physical  
9 impairment.

10 **§55A-3-2. Overruling *Bower v. Westinghouse*, 522 S.E. 2d 424 (W.Va.**  
11 **1999).**

12 It is the intent of the Legislature that this legislation  
13 overrules the decision of the Supreme Court in the case of *Bower v.*  
14 *Westinghouse*, 522 S.E.2d 424 (W. Va. 1999).

15 **ARTICLE 4. VENUE.**

16 **§55A-4-1. Forum non conveniens.**

17 In any civil action if a court of this state, upon a timely  
18 written motion of a party, finds that in the interest of justice and  
19 for the convenience of the parties a claim or action would be more  
20 properly heard in a forum outside this state, the court shall  
21 decline to exercise jurisdiction under the doctrine of forum non  
22 conveniens and shall stay or dismiss the claim or action or dismiss  
23 any plaintiff. The plaintiff's choice of a forum is entitled to

1 great deference but this preference may be diminished when the  
2 plaintiff is a nonresident and the cause of action did not arise in  
3 this state. In determining whether to grant a motion to stay or  
4 dismiss an action or dismiss a plaintiff under the doctrine of forum  
5 non conveniens, the court shall consider:

6 (1) Whether an alternate forum exists in which the claim or  
7 action may be tried;

8 (2) Whether maintenance of the claim or action in the courts  
9 of this state would work a substantial injustice to the moving  
10 party;

11 (3) Whether the alternate forum, as a result of the submission  
12 of the parties or otherwise, can exercise jurisdiction over all the  
13 defendants properly joined to the plaintiff's claim;

14 (4) The state in which the plaintiff(s) reside;

15 (5) The state in which the cause of action accrued;

16 (6) Whether the balance of the private interests of the parties  
17 and the public interest of the state predominate in favor of the  
18 claim or action being brought in an alternate forum, which shall  
19 include consideration of the extent to which an injury or death  
20 resulted from acts or omissions that occurred in this state. Factors  
21 relevant to the private interests of the parties include, but are  
22 not limited to, the relative ease of access to sources of proof;  
23 availability of compulsory process for attendance of unwilling  
24 witnesses; the cost of obtaining attendance of willing witnesses;

1 possibility of a view of the premises, if a view would be  
2 appropriate to the action; and all other practical problems that  
3 make trial of a case easy, expeditious and inexpensive. Factors  
4 relevant to the public interest of the state include, but are not  
5 limited to, the administrative difficulties flowing from court  
6 congestion; the interest in having localized controversies decided  
7 within the state; the avoidance of unnecessary problems in conflict  
8 of laws or in the application of foreign law; and the unfairness of  
9 burdening citizens in an unrelated forum with jury duty;

10 (7) Whether not granting the stay or dismissal would result in  
11 unreasonable duplication or proliferation of litigation; and

12 (8) Whether the alternate forum provides a remedy.

13 **§55A-4-2. Timely motion.**

14 A motion pursuant to section one of this article is timely if  
15 it is filed either concurrently or prior to the filing of either a  
16 motion pursuant to Rule 12 of the West Virginia Rules of Civil  
17 Procedure or a responsive pleading to the first complaint that gives  
18 rise to the grounds for such a motion. A court may, for good cause  
19 shown, extend the period for the filing of such a motion.

20 **§55A-4-3. Statute of limitations.**

21 If the statute of limitations in the alternative forum expires  
22 while the claim is pending in a court of this state, the court shall  
23 grant a dismissal under this article only if each defendant waives  
24 the right to assert a statute of limitation defense in the

1 alternative forum. The court may further condition a dismissal  
2 under this article to allow for the reinstatement of the same cause  
3 of action in the same forum in the event a suit on the same cause  
4 of action or on any cause of action arising out of the same  
5 transaction or occurrence is commenced in an appropriate alternative  
6 forum within sixty days after the dismissal under this article and  
7 such alternative forum declines jurisdiction.

8 **§55A-4-4. Proper dismissal.**

9 Except as provided in section two of this article, if an action  
10 involves both legal resident and nonresident plaintiffs, the court  
11 may not stay or dismiss the action under section one of this article  
12 if the plaintiffs who are legal residents of this state are properly  
13 joined in the action and the action arose out of a single  
14 occurrence. The court shall dismiss a claim under section one of  
15 this article if the court finds by a preponderance of the evidence  
16 that a party was joined solely for the purpose of obtaining or  
17 maintaining jurisdiction in this state and the party's claim would  
18 be more properly heard in a forum outside this state.

19 **§55A-4-5. Class representative(s).**

20 In actions filed pursuant to Rule 23 of the West Virginia Rules  
21 of Civil Procedure, the provisions of this article shall apply only  
22 to the class representative(s).

23 **§55A-4-6. Stay or dismissal specific findings of fact and**  
24 **conclusions of law.**

1 A court that grants a motion to stay or dismiss an action  
2 pursuant to this article shall set forth specific findings of fact  
3 and conclusions of law.

4 **ARTICLE 5. COMPETENCY OF EXPERT WITNESSES.**

5 **§55A-5-1. Opinion testimony by lay witnesses.**

6 If a witness is not testifying as an expert, the testimony of  
7 the witness in the forms of opinions or inferences is limited to  
8 those opinions or inferences which are: (1) Rationally based on the  
9 perception of the witness; (2) helpful to a clear understanding of  
10 the witness' testimony or the determination of a fact in issue; and  
11 (3) not based on scientific, technical, or other specialized  
12 knowledge within the scope of section two of this article.

13 **§55A-5-2. Testimony by experts.**

14 If scientific, technical or other specialized knowledge will  
15 assist the trier of fact to understand the evidence or to determine  
16 a fact in issue, a witness qualified as an expert by knowledge,  
17 skill, experience, training or education may testify thereto in the  
18 form of an opinion or otherwise, if: (1) The testimony is based  
19 upon sufficient facts or data; (2) the testimony is the product of  
20 reliable principles and methods; and (3) the witness has applied the  
21 principles and methods reliably to the facts of the case.

22 **§55A-5-3. Basis of expert opinion testimony.**

23 The facts or data in the particular case upon which an expert

1 bases an opinion or inference may be those perceived by or made  
2 known to the expert at or before the hearing. If of a type  
3 reasonably relied upon by experts in the particular field in forming  
4 opinions or inferences upon the subject, the facts or data need not  
5 be admissible in evidence in order for the opinion or inference to  
6 be admitted. Facts or data that are otherwise inadmissible shall  
7 not be disclosed to the jury by the proponent of the opinion or  
8 inference unless the court determines that their probative value in  
9 assisting the jury to evaluate the expert's opinion substantially  
10 outweighs their prejudicial effect.

11 **§55A-5-4. Bars to expert testimony.**

12 (a) A witness qualified as an expert by knowledge, skill,  
13 experience, training, or education may only offer expert testimony  
14 with respect to a particular field in which the expert is qualified.

15 (b) An expert witness may receive a reasonable and customary  
16 fee for the rendering of professional services provided that the  
17 testimony of an expert witness shall not be admitted if any the  
18 compensation is contingent on the outcome of any claim or case with  
19 respect to which the testimony is being offered.

20 **§55A-5-5. Mandatory pretrial hearing.**

21 If the witness is testifying as an expert, then upon motion of  
22 a party, the court shall hold a pretrial hearing to determine  
23 whether the witness qualifies as an expert and whether the expert's  
24 testimony satisfies the requirements of sections two, three and four

1 of this article. The court shall allow sufficient time for a  
2 hearing and shall rule on the qualifications of the witness to  
3 testify as an expert and whether or not the testimony satisfies the  
4 requirements of sections two, three and four of this article. The  
5 hearing and ruling shall be completed no later than the final  
6 pretrial conference contemplated in Rule 16(d) of the West Virginia  
7 Rules of Civil Procedure. The trial court's ruling shall set forth  
8 the findings of fact and conclusions of law upon which the order to  
9 admit or exclude expert evidence is based.

10 **§55A-5-6. Mandatory pretrial disclosure of expert testimony.**

11 (a) Whether or not any party elects to request a pretrial  
12 hearing contemplated in section five of this article, all parties  
13 shall disclose to other parties the identity of any person who may  
14 be used at trial to present expert evidence.

15 (b) Except as otherwise stipulated or directed by the court,  
16 this disclosure shall, with respect to a witness who is retained or  
17 specially employed to provide expert testimony in the case or whose  
18 duties as an employee of the party regularly involve giving expert  
19 testimony, be accompanied by a written report prepared and signed  
20 by the witness. The report shall contain a complete statement of  
21 all opinions to be expressed and the basis and reasons therefor; the  
22 data or other information considered by the witness in forming the  
23 opinions; any exhibits to be used as a summary of or support for the  
24 opinions; the qualifications of the witness, including a list of all

1 publications authored by the witness within the preceding ten years;  
2 the compensation to be paid for the study and testimony; and a  
3 listing of any other cases in which the witness has testified as an  
4 expert at trial or by deposition within the preceding four years.

5 (c) These disclosures shall be made at the times and in the  
6 sequence directed by the court. In the absence of other directions  
7 from the court or stipulation by the parties, disclosures shall be  
8 made at least ninety days before the trial date or the date the case  
9 is to be ready for trial, or if the evidence is intended solely to  
10 contradict or rebut evidence on the same subject matter identified  
11 by another party under subsection (b) of this section, within thirty  
12 days after the disclosure made by the other party.

13 (d) A party may depose any person who has been identified as  
14 an expert whose opinions may be presented at trial. If a report  
15 from the expert is required under subsection (b) of this section,  
16 the deposition shall not be conducted until after the report is  
17 provided.

18 **§55A-5-7. Interpretation.**

19 In interpreting and applying this article, the courts of this  
20 state shall follow the opinions of the Supreme Court of the United  
21 States in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579  
22 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), *Kumho*  
23 *Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999), *Weisgram v.*  
24 *Marley*, 528 U.S. 440 (2000), and their progeny; moreover, the courts

1 of this state may draw from other precedents binding in the federal  
2 courts of this state applying the standards announced by the Supreme  
3 Court of the United States in the foregoing cases.

4 **§55A-5-8. Standard of review.**

5 (a) As the proper construction of the expert evidence  
6 admissibility framework prescribed by this section is a question of  
7 law, the Supreme Court and Intermediate Court shall apply a de novo  
8 standard of review in determining whether the circuit court fully  
9 applied the proper legal standard in considering the admissibility  
10 of expert evidence.

11 (b) As the application of this section to determine the  
12 admissibility of expert testimony is a question of fact, the Supreme  
13 Court and Intermediate Court shall apply an abuse of discretion  
14 standard in determining whether the circuit court properly admitted  
15 or excluded particular expert evidence.

16 **ARTICLE 6. PUNITIVE DAMAGES.**

17 **§55A-6-1. General rules.**

18 (a) Punitive damages may be awarded in a civil action against  
19 a defendant only if the plaintiff establishes by clear and  
20 convincing evidence that the damages suffered were the result of  
21 conduct that was carried out by the defendant with actual malice  
22 toward the plaintiff or a conscious, reckless, and outrageous  
23 indifference to the health safety, and welfare of others.

24 (b) Punitive damages may only be awarded in civil actions

1 seeking money for damages.

2 (c) Punitive damages may be awarded in a civil action against  
3 a defendant only if compensatory damages have been awarded against  
4 a defendant to the plaintiff for the same course of conduct of the  
5 defendant.

6 (d) Punitive damages may not be awarded on a claim for breach  
7 of contract.

8 (e) A defendant may not be held liable for punitive damages  
9 unless the trier of fact finds that its award of compensatory  
10 damages alone is not sufficient to punish the defendant for the  
11 conduct and to deter the defendant from like conduct in the future.

12 **§55A-6-2. Proportional awards.**

13 (a) The amount of punitive damages that may be awarded for a  
14 claim in a civil action shall not exceed the greater of three times  
15 the amount of compensatory damages or \$250,000 where the punitive  
16 damages are recoverable from large employers.

17 (b) The amount of punitive damages that may be awarded for a  
18 claim in a civil action shall not exceed the lesser of three times  
19 compensatory damages or \$100,000 where the punitive damages are  
20 recoverable from a defendant which is not a large employer.

21 (c) This section shall be applied by the circuit court and  
22 shall not be disclosed to the jury.

23 (d) If a jury returns a verdict for punitive damages against  
24 the defendant in excess of these amounts, the circuit court shall

1 reduce the award so that it will not exceed the applicable amount  
2 set forth in this section.

3 **§55A-6-3. Multiple awards.**

4 (a) If the jury returns a verdict of punitive damages against  
5 a defendant in the case at bar and if the total amount of any prior  
6 punitive damages awards obtained by the same or other plaintiffs in  
7 any state or federal court against that defendant for the same  
8 course of conduct as alleged in the case at bar exceeds the  
9 applicable amount set forth in section two of this article then no  
10 further punitive damages may be awarded against that defendant in  
11 the case at bar.

12 (b) If the total amount of any prior punitive damages awards  
13 is less than the applicable amount set forth in section two of this  
14 article, then the amount of any punitive damages awarded in the case  
15 at bar shall be reduced if necessary so that the combined total  
16 amount of punitive damages awarded in the case at bar and the prior  
17 actions shall not exceed the applicable amount set forth in section  
18 two of this article.

19 (c) This section shall be applied by the circuit court and  
20 shall not be disclosed to the jury.

21 **§55A-6-4. Bifurcation.**

22 (a) In a civil action in which punitive damages are sought, the  
23 court shall bifurcate the trial of the action if requested by a  
24 defendant.

1           (b) In the first stage of a bifurcated trial, the trier of fact  
2 shall determine liability for compensatory damages, and the amount  
3 of compensatory damages. If the trier of fact determines during the  
4 first stage of a bifurcated trial that a defendant is liable for  
5 compensatory damages, then the court shall determine whether the  
6 evidence was sufficient to permit the jury to consider punitive  
7 damages.

8           (c) If determined sufficient, that same trier of fact shall  
9 determine, in a second stage of the trial, whether the defendant is  
10 liable for punitive damages and, if applicable, the amount of  
11 punitive damages that should be awarded.

12           (d) If a bifurcated proceeding is requested, evidence relevant  
13 only to the claim of punitive damages shall be inadmissible in the  
14 first stage of the trial.

15 **§55A-6-5. Complicity rule.**

16           (a) A principal or employer who is a natural person may be  
17 liable for punitive damages as a result of conduct of his or her  
18 agent or employee only when the plaintiff proves by clear and  
19 convincing evidence that the damages suffered were the result of  
20 conduct that was carried out by the principal or employer with  
21 actual malice toward the plaintiff or with a conscious, reckless and  
22 outrageous indifference to the health, safety, and welfare of  
23 others.

24           (b) A principal or employer that is other than a natural person

1 may be liable for punitive damages as a result of the conduct of its  
2 agent or employee only when the plaintiff proves by clear and  
3 convincing evidence that the damages suffered were the result of  
4 conduct that was carried out by a senior manager of the principal  
5 or employer with actual malice toward the plaintiff or with  
6 conscious, reckless and outrageous indifference to the health,  
7 safety, and welfare of others.

8 (c) A person may be liable for punitive damages as a result of  
9 the conduct of members or partners only when the plaintiff proves  
10 by clear and convincing evidence that the damages suffered were the  
11 result of conduct that was carried out by a senior manager in the  
12 employment of a person with actual malice toward the plaintiff or  
13 with a conscious, reckless and outrageous indifference to the  
14 health, safety, and welfare of others.

15 **ARTICLE 7. COMPARATIVE FAULT.**

16 **§55A-7-1. Comparative fault standard established.**

17 (a) In any action for damages, recovery shall be predicated  
18 upon principles of comparative fault and the liability of each  
19 person, including plaintiffs, defendants, and nonparties who caused  
20 the damages shall be allocated to each person in direct proportion  
21 to that person's percentage of fault.

22 (b) The total of the percentages of comparative fault allocated  
23 by the trier of fact with respect to a particular incident or injury  
24 must equal either zero percent or one hundred percent.

1 **§55A-7-2. Several liability.**

2 (a) In any action for damages, the liability of each defendant  
3 for compensatory damages shall be several only and shall not be  
4 joint. Each defendant shall be liable only for the amount of  
5 compensatory damages allocated to that defendant in direct  
6 proportion to that defendant's percentage of fault and a separate  
7 judgment shall be rendered against the defendant for that amount.  
8 The fault allocated under this subsection to an immune defendant or  
9 a defendant whose liability is limited by law shall not be allocated  
10 to any other defendant.

11 (b) To determine the amount of judgment to be entered against  
12 each defendant, the court, with regard to each defendant, shall  
13 multiply the total amount of compensatory damages recoverable by the  
14 plaintiff by the percentage of each defendant's fault and that  
15 amount shall be the maximum recoverable against said defendant.

16 **§55A-7-3. Fault of nonparties.**

17 (a) In assessing percentages of fault, the trier of fact shall  
18 consider the fault of all persons who contributed to the alleged  
19 damages regardless of whether the person was or could have been  
20 named as a party to the suit. The fault shall include the fault  
21 imputed or attributed to a person by operation of law, if any.

22 (1) Fault of a nonparty may be considered if the plaintiff  
23 entered into a settlement agreement with the nonparty or if a

1 defending party gives notice no later than sixty days before the  
2 date of trial that a nonparty was wholly or partially at fault.

3 (2) The notice shall be given by filing a pleading or discovery  
4 response in the action designating a nonparty and setting forth the  
5 nonparty's:

6 (A) Name and last-known address; or

7 (B) The best identification of the nonparty which is possible  
8 under the circumstances; and

9 (C) A brief statement of the basis for believing the nonparty  
10 to be at fault.

11 (3) In all instances where a nonparty is assessed a percentage  
12 of fault, any recovery by a plaintiff shall be reduced in proportion  
13 to the percentage of fault chargeable to the nonparty.

14 (4) Where a plaintiff has settled with a party or nonparty  
15 before verdict, that plaintiff's recovery will be reduced by the  
16 amount of the settlement or in proportion to the percentage of fault  
17 assigned to the settling party or nonparty, whichever is greater.

18 (5) The plaintiff shall promptly and fully inform all other  
19 persons against whom liability is asserted of the terms of any  
20 settlement.

21 (b) Nothing in this article is meant to eliminate or diminish  
22 any defenses or immunities which exist as of the effective date of  
23 this article, except as expressly noted herein.

24 (c) Assessments of percentages of fault for nonparties are used

1 only as a vehicle for accurately determining the fault of named  
2 parties. Where fault is assessed against nonparties, findings of  
3 fault shall not subject any nonparty to liability in that or any  
4 other action, or be introduced as evidence of liability or for any  
5 other purpose in any other action.

6 (d) In all actions involving fault of more than one person,  
7 unless otherwise agreed by all parties to the action, the court  
8 shall instruct the jury to answer special interrogatories or, if  
9 there is no jury, shall make findings, indicating the percentage of  
10 the total fault that is allocated to each party and nonparty  
11 pursuant to the provisions of this article. For this purpose, the  
12 court may determine that two or more persons are to be treated as  
13 a single person.

14 **§55A-7-4. Imputed fault.**

15 Nothing in this article may be construed as precluding a person  
16 from being held responsible for the portion of comparative fault  
17 assessed against another person who was acting as an agent or  
18 servant of such person, or if the fault of the other person is  
19 otherwise imputed or attributed to such person by statute or common  
20 law.

21 **§55A-7-5. Failure to take reasonable precautionary measures.**

22 In any civil action, the finder of fact may assess a percentage  
23 of fault against a plaintiff who is injured as a proximate result  
24 of that plaintiff's failure to take reasonable precautionary

1 measures that are available.

2 **§55A-7-6. Fault of person not a manufacturer.**

3 A person who is not the manufacturer of a product but is merely  
4 in the chain of its distribution, such as a seller, distributor or  
5 installer, and who did not alter, change, or modify the product in  
6 a way that created or contributed to the alleged defect, may not be  
7 assessed a percentage of comparative fault under the theory of  
8 strict product liability for accidents, injuries, or damages  
9 proximately caused, in whole or in part, by the product.

10 **§55A-7-7. Burden of proof.**

11 The burden of alleging and proving comparative fault shall be  
12 upon the person who seeks to establish such fault.

13 **§55A-7-8. Immunity of premise owners from civil liability.**

14 No owner, occupant, lessee or managing agent of property shall  
15 be liable for the death or injury of an independent contractor's  
16 employees resulting from dangers of which the contractor knew or  
17 reasonably should have known.

18 **ARTICLE 8. COLLATERAL SOURCES.**

19 **§55A-8-1. Reduction in compensatory damages for collateral sources**  
20 **payments.**

21 Notwithstanding any other provision of this code, in all tort  
22 actions, regardless of the theory of liability under which they are  
23 commenced, the total amount of compensatory damages awarded to a

1 plaintiff under the action shall be reduced, in accordance with  
2 section two of this article, by any collateral source payments made  
3 or to be made to the plaintiff, except insurance for which the  
4 plaintiff, spouse of the plaintiff, or parent of the plaintiff, has  
5 paid a premium, insurance that is subject to a right of subrogation,  
6 workers' compensation benefits that are subject to a right of  
7 subrogation, or insurance that has any other obligation or  
8 repayment.

9 **§55A-8-2. Postverdict determination of reduction in compensatory**  
10 **damages.**

11 (a) The reduction in compensatory damages required under  
12 section one of this article shall be determined by the court after  
13 the verdict and before judgment is entered. Reduction may be made  
14 only if the collateral source payments are compensation for the same  
15 damages for which recovery is sought in the action. At trial no  
16 evidence shall be admitted as to the amount of any charges,  
17 payments, or losses for which a plaintiff has received payment from  
18 a collateral source or the obligation for which has been assumed by  
19 a collateral source, or is, or with reasonable certainty will be,  
20 eligible to receive payment from a collateral source or the  
21 obligation for which will, with reasonable certainty, be assumed by  
22 a collateral source.

23 (b) A plaintiff who has received or is to receive collateral  
24 source payments may introduce evidence before the court, but not at

1 trial, of any amount which the plaintiff has paid or contributed to  
2 secure his or her right to any such collateral source payments, any  
3 recovery by the plaintiff is subject to a lien by a collateral  
4 source, that a provider of the collateral source payments has a  
5 statutory right of recovery against the plaintiff for reimbursement  
6 of the payments, or that the provider of the collateral source  
7 payments has a right of subrogation to the rights of the plaintiff.  
8 After considering the evidence of collateral source introduced by  
9 any party, the court shall make a determination as to the amount by  
10 which a plaintiff's compensatory damages will be reduced by any such  
11 collateral source payments.

12 **ARTICLE 9. STATUTE OF REPOSE.**

13 **§55A-9-1. Eighteen-year warranty.**

14 No product liability action concerning a durable good as  
15 defined in article one, section four of this chapter may be filed  
16 after the eighteen-year period beginning at the time of delivery of  
17 the product to the first purchaser or lessee.

18 **§55A-9-2. Extended express warranty.**

19 Section one of this article does not bar a product liability  
20 action against a defendant who made an express warranty in writing  
21 as to the safety or life expectancy of the specific product involved  
22 which is for a period of time exceeding eighteen years, except that  
23 section one of this article shall apply at the expiration of that

1 warranty.

2 **ARTICLE 10. DAMAGES FOR NONECONOMIC LOSS.**

3 **§55A-10-1. Causes of action where damages were authorized upon**  
4 **this legislation's effective date.**

5 Damages for noneconomic loss shall be recoverable for cases  
6 where causes of action for those damages are authorized at the time  
7 this chapter becomes effective.

8 **§55A-10-2. Civil actions based on physical injury.**

9 (a) Damages for noneconomic loss shall be recoverable in civil  
10 actions based on physical injury.

11 (b) The plaintiff who experienced the physical injury on which  
12 the action is based and all plaintiffs who derive their claims from  
13 or through such plaintiff may recover damages for noneconomic loss  
14 in a total amount for all such plaintiffs not to exceed the greater  
15 of \$250,000 or three times economic damages to a maximum of  
16 \$500,000.

17 (c) In the event that the physical injury is permanent and  
18 severe physical deformity, loss of use of limb or loss of a major  
19 bodily organ system or permanent physical functional injury that  
20 permanently prevents the injured person from being able to  
21 independently care for himself or herself and perform life  
22 sustaining activities, then the plaintiff who experienced the  
23 physical injury and all other plaintiffs who derive their claims

1 from or through the plaintiff may recover damages for noneconomic  
2 loss in a total amount for all such plaintiffs not to exceed the  
3 greater of \$1 million or the product of the amount calculated on  
4 an annual basis pursuant to article four, chapter twenty-three of  
5 this code, which represents the maximum average weekly wage,  
6 annualized, for a worker employed in this state times the number of  
7 years remaining in the plaintiff's expected life, regardless of the  
8 number of parties against whom the action is brought or could have  
9 been brought or the number of claims asserted or actions brought or  
10 that could have been asserted or brought with respect to the injury.

11 **§55A-10-3. Civil actions not based on physical injury.**

12 (a) Damages for noneconomic loss shall be recoverable in all  
13 actions other than those based on physical injury.

14 (b) The plaintiff who experienced the economic loss on which  
15 the action is based and all plaintiffs who derive their claims from  
16 or through the plaintiff may recover damages for noneconomic loss  
17 in a total amount for all such plaintiffs no greater than the award  
18 of damages for economic loss or \$1 million, whichever is less,  
19 regardless of the number of parties against whom the action is  
20 brought or could have been brought or the number of claims asserted  
21 or actions brought or that could have been asserted or brought with  
22 respect to the economic loss.

23 **ARTICLE 11. LOSER PAYS.**

24 **§55A-11-1. Recovery of attorney's fees by prevailing party;**

1                   **applicability to causes of action and parties.**

2           (a) The prevailing party with respect to a claim may recover  
3 reasonable attorney's fees from an individual, corporation, or other  
4 legal entity if the claim is for:

- 5           (1) Rendered services;
- 6           (2) Performed labor;
- 7           (3) Furnished material;
- 8           (4) Freight or express overcharges;
- 9           (5) Lost or damaged freight or express;
- 10          (6) Killed or injured stock;
- 11          (7) A sworn account; or
- 12          (8) An oral or written contract.

13          (b) The prevailing party with respect to a claim may not  
14 recover reasonable attorney's fees from an individual, corporation,  
15 or other legal entity if the claim is for:

- 16          (1) Any civil action primarily governed by the family law  
17 chapters of this code;
- 18          (2) A class action;
- 19          (3) A shareholder's derivative action;
- 20          (4) An action filed in magistrate court.
- 21          (5) A civil action in which the amount in controversy,  
22 including all requests for damages, reimbursement of attorney's  
23 fees, and litigation costs, is less than \$100,000 and the plaintiff  
24 has made an election to proceed.

1 (c) This article applies to any party who is a claimant or  
2 defendant, including, but not limited to:

3 (1) A county;

4 (2) A municipality;

5 (3) A public school district;

6 (4) A public junior college district;

7 (5) A charitable organization;

8 (6) A nonprofit organization;

9 (7) A hospital district;

10 (8) A hospital authority;

11 (9) Any other political subdivision of the state; and

12 (10) The State of West Virginia.

13 **§55A-11-2. Procedure for recovery of attorney's fees.**

14 Attorney's fees may be recovered under this article if:

15 (1) The person seeking to recover attorney's fees is  
16 represented by an attorney;

17 (2) The plaintiff presents the claim to the opposing party or  
18 to a duly authorized agent of the opposing party; and

19 (3) Payment for the just amount owed is not tendered before the  
20 expiration of the thirtieth day after the claim is presented.

21 **§55A-11-3. Presumption.**

22 It is presumed that the usual and customary attorney's fees for  
23 a claim of the type described in section one of this article are  
24 reasonable. The presumption may be rebutted.

1 **§55A-11-4. Judicial notice.**

2 The court may take judicial notice of the usual and customary  
3 attorney's fees and of the contents of the case file without  
4 receiving further evidence in:

5 (1) A proceeding before the court; or

6 (2) A jury case in which the amount of attorney's fees is  
7 submitted to the court by agreement.

8 **§55A-11-5. Liberal construction.**

9 This article shall be liberally construed to promote its  
10 underlying purposes.

11 **§55A-11-6. Defendant election.**

12 (a) A defendant may elect to apply the provisions of this  
13 article to any civil action in which a plaintiff has asserted a  
14 claim against the defendant.

15 (b) An election under this section must identify each plaintiff  
16 against whom the election is made.

17 (c) An election may not be made before the sixtieth day after  
18 the date the defendant filed an answer to the plaintiff's civil  
19 action or within sixty days of the date of trial.

20 (d) The election must be:

21 (1) In writing;

22 (2) Signed by the attorneys of record of the defendant;

23 (3) Filed with the papers as part of the record; and

1 (4) Served on all plaintiffs against whom the election is made.

2 (e) A deadline under this section may be amended or modified  
3 by agreement of the parties or by order of the court in a discovery  
4 control plan as provided by Rule 26, West Virginia Rules of Civil  
5 Procedure.

6 **§55A-11-7. Plaintiff election.**

7 (a) Plaintiffs may elect to apply the provisions of this  
8 article in a civil actions which:

9 (1) The total amount of damages the plaintiff seeks to recover  
10 for all claims is not less than \$10,000 and not more than \$100,000;  
11 and

12 (2) The plaintiff files and serves a written election.

13 (b) A plaintiff election must be made at the time the electing  
14 plaintiff first files a claim in the action.

15 (c) A plaintiff may make an election not later than the  
16 sixtieth day after the date the last defendant has filed an answer.

17 (d) An election made by a plaintiff under this section is  
18 binding on all parties to the expedited civil action unless a  
19 defendant files a claim more than sixty days before trial and in  
20 that claim makes a good faith claim that the recovery of monetary  
21 damages might be in excess of \$100,000.

22 **§55A-11-8. Revocation of election.**

23 (a) An election made under sections six and seven of this  
24 article may be revoked wholly or partly by agreement of the parties.

1 (b) A revocation under this section must identify the  
2 plaintiffs and defendants for whom the revocation is made. A  
3 revocation may be made at any time before an award is made under  
4 section ten of this article based on the election. The revocation  
5 must be:

6 (1) In writing;

7 (2) Signed by the attorneys of record of all parties to whom  
8 the revocation applies; and

9 (3) Filed as part of the record.

10 **§55A-11-9. Dismissal or nonsuit of action.**

11 If a plaintiff against whom an election is made by a defendant  
12 under section six of this article nonsuits or voluntarily dismisses  
13 with prejudice the civil action for which the election is made not  
14 later than the fifteenth day after the date the plaintiff was served  
15 with the election, the election does not apply to the nonsuited or  
16 dismissed civil action.

17 **§55A-11-10. Award of litigation costs.**

18 (a) If an election is made under this article, the prevailing  
19 party may recover the prevailing party's litigation costs.

20 (b) The determination of which party is the prevailing party  
21 is a question of law for the court.

22 (c) Litigation costs under this article are costs directly  
23 related to the civil action between the plaintiff and the defendant.  
24 Litigation costs include:

- 1           (1) Reasonable and necessary attorney's fees;
- 2           (2) Reasonable and necessary travel expenses;
- 3           (3) Reasonable fees for not more than two testifying expert  
4 witnesses; and
- 5           (4) Court costs.
- 6           (d) A fee agreement that results in a fee that is fixed or  
7 contingent on results obtained or uncertainty of collection before  
8 the legal services have been rendered may not be considered in the  
9 determination of the amount of reasonable and necessary attorney's  
10 fees.

11 **§55A-11-11. Liability of attorney.**

12           (a) This section applies to a civil action if:

- 13           (1) A party is entitled to recover litigation costs under  
14 section eleven of this article;
- 15           (2) The election under sections six and seven of this article  
16 states that the party making the election will seek litigation costs  
17 under section ten; and
- 18           (3) An attorney of record for the party against whom litigation  
19 costs are recoverable has a financial interest in the civil action.

20           (b) If the trier of fact determines that a civil action is an  
21 abusive civil action, an attorney of record for the party against  
22 whom litigation costs are recoverable is liable to the prevailing  
23 party, jointly and severally, for the amount of the litigation costs  
24 awarded.

1 (c) The determination of whether an attorney has a financial  
2 interest in a civil action is a question of law for the court. An  
3 attorney is not an attorney of record for the purposes of this  
4 section if the attorney withdraws as attorney of record and  
5 relinquishes any financial interest in the civil action more than  
6 sixty days before trial.

7 (d) The determination of whether a civil action is an abusive  
8 civil action is a question of fact. In a case in which the  
9 determination of whether a civil action is an abusive civil action  
10 is submitted to a jury, the charge to the jury must ask whether the  
11 civil action filed by the plaintiff was an abusive civil action.  
12 The following instruction must be included in the charge: "You are  
13 instructed that an abusive civil action is a civil action that a  
14 reasonable person would conclude is a misuse of the civil justice  
15 process."

16 **§55A-11-12. Applicability of other law.**

17 If an election is made under sections six or seven of this  
18 article, this article controls over any other law to the extent the  
19 other law requires, authorizes, prohibits, or otherwise governs the  
20 award of attorney's fees or other costs of litigation in connection  
21 with the civil action.

22 **ARTICLE 12. THE SUPREME COURT ADOPTION OF RULES, CONFLICTING LAWS**  
23 **REPEALED, APPLICABILITY, SEVERABILITY, NO ADDITIONAL**  
24 **CAUSE OF ACTION CREATED BY THIS CHAPTER AND EFFECTIVE**

1                   **DATE.**

2 **§55A-12-1. Supreme Court adoption of rules.**

3           (a) The Supreme Court shall adopt rules to implement this  
4 chapter not later than January 1, 2013.

5           (b) The rules shall at a minimum:

6           (1) Require documents filed in all courts of this state to be  
7 filed electronically;

8           (2) Require all courts of this state to electronically file and  
9 publish orders and decisions;

10          (3) Require the prompt, efficient, and cost-effective  
11 resolution of an expedited civil action, including the discovery  
12 between the parties and early dismissals of actions;

13          (4) Provide for pleading, practice and procedure in matters  
14 before the Intermediate Court;

15          (5) Allow interlocutory appeals to the Supreme Court and the  
16 Intermediate Court.

17 **§55A-12-2. Conflicting laws repealed.**

18          This chapter supersedes, invalidates, and repeals all other  
19 state laws which conflict with its provisions.

20 **§55A-12-3. Applicability.**

21          This chapter applies to all causes of action arising on or  
22 after the effective date of this chapter.

23 **§55A-12-4. Severability clause.**

1       The provisions of this chapter and each article, section,  
2 subsection, subdivision, paragraph, and subparagraph thereof shall  
3 be severable from the provisions of each other subparagraph,  
4 paragraph, subdivision, subsection, section, article, or chapter of  
5 this code so that if any provision of this chapter be held void, the  
6 remaining provisions of this chapter and this code shall remain  
7 valid.

8 **§55A-12-5. No additional cause of action created by this chapter.**

9       Nothing in this chapter may be construed to create a cause of  
10 action.

11 **§55A-12-6. Effective date.**

12       This chapter shall become effective immediately upon passage  
13 by the Legislature and approval by the Governor.

NOTE: The purpose of this bill is to reform the civil justice system.

This chapter is new; therefore, strike-throughs and underscoring have been omitted.