– five of which were unanimous – the Court reversed denials of qualified immunity in *per curiam*, summary dispositions. Of the four of the cases in which the Supreme Court granted *certiorari*, vacated, and remanded for reconsideration of the qualified immunity determination, the lower court thereafter granted immunity in three.[9]

The WV Supreme Court has also shown an affinity toward the qualified immunity doctrine. Since 2016, seven reported opinions have directly addressed qualified immunity. Four resulted in reversal of the lower courts' denial qualified immunity, two reversed the granting of qualified immunity, and one found that qualified immunity was applicable and remanded for a proper analysis. During that same period, eight Memorandum Decisions addressed qualified immunity, with seven affirming the lower courts' dismissal based on qualified immunity and one reversing the lower court's denial of qualified immunity and remanding for entry of a dismissal order.

So in answer to the question of whether qualified immunity is still a viable defense; yes, Virginia, there is a Santa Claus and yes, government officials, qualified immunity survives – at least for now.

9 *Id.* at 1887 - 1889

All Things in Their Proper Place: An Update on Evolving Venue and Forum Issues under the WV MPLA

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Recent Amendments to the West Virginia Medical Professional Liability Act, codified at WV § 55-7B-1 *et seq.* (MPLA), began in 2015 by broadening the definitions of a "health care provider," "health care facility," and "health care, which in turn widened the scope and application of the MPLA. Thankfully, some of these changes have afforded greater protections to Long Term Care (LTC) facilities such as Nursing Homes and Assisted Living Facilities (ALFs).

More recently, in the 2017 round of MPLA reform, Senate Bill 338 (effective June 29, 2017) was much publicized for establishing a one-year statute of limitations on medical professional liability lawsuits involving care that occurred in a nursing home, ALF, or intermediate/skilled care in a specific and designated wing of a hospital. However, to less fanfare, that same round of MPLA changes also revised West Virginia Code § 55-7B-4 as it pertains to venue. Under the 2017 changes, a lawsuit must now be filed in the circuit court of the county in which the malpractice allegedly occurred, unless both the plaintiff and the defendant facility mutually agreed to another venue. This was a key victory for the defense of LTC cases, because often these matters were being filed in a county where a sister facility of the defendant was located or in Kanawha County, where a lateral or up-chain corporation might be incorporated, a clear case of venue shopping.

Venue shopping is not the only recent fight in LTC litigation pertaining to where and how matters are most appropriately litigated. Many suits are filed in the inappropriate forum, despite the existence of a signed and duly executed arbitration agreement. This, of course, leads to motion practice and discovery to enforce the arbitration agreement, but a steady march of positive case law has aided in this forum fight, much the way the 2017 MPLA revision partially assuaged the venue problem.

First, the Supreme Court of the United States confirmed in a well-circulated opinion that arbitration agreements are to be broadly enforced and that the Federal Arbitration Act preempts any state law impediments to enforcing such agreements. "State and federal courts must enforce the Federal Arbitration Act, 9 U.S.C.S. § 1 et seq., with respect to all arbitration agreements covered by that statute." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 530 (2012). Next, The Supreme Court of Appeals of West Virginia noted that only if a party to a contract explicitly challenges the enforceability of an arbitration clause within the contract, **as opposed to generally challenging the contract as a whole**, is a trial court permitted to consider the challenge to the arbitration clause. *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 383, 787 S.E.2d 650, 654 (2016) (emphasis added). Finally, and most recently, Justice Bret Kavanaugh issued his first opinion, which was on the very issue of arbitration. In *Henry Schein Inc. v. Archer & White Sales Inc., 202 L. Ed.2d 480* (U.S. 2019), Justice Kavanaugh wrote for a unanimous Court, which concluded that the Federal Arbitration Act (FAA) does not contain a "wholly groundless" exception to arbitration contracts. *Id.* at 489. The decision specifically notes that "[w]hen the parties' contract delegates arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Id.*

While we are are sure to see more changes and reforms to the MPLA as time goes on, recent changes and case law have certainly aided in keeping both the venue and forum of Long Term Care litigation in their proper place.