

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
NO. 31792

SAMUEL J. SWIGER,

Appellee,

v.

UGI/AMERIGAS, INC., a foreign
corporation, d/b/a AMERIGAS, INC.,

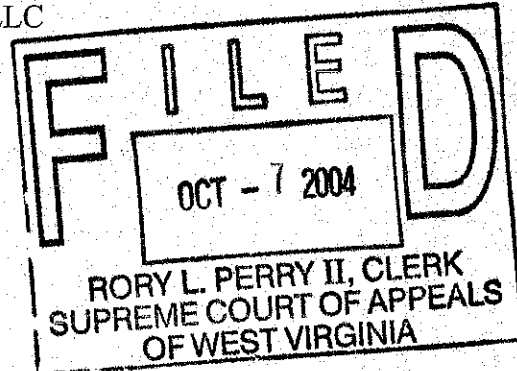
Appellant.

**WEST VIRGINIA TRIAL LAWYERS ASSOCIATION'S
AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE**

Paul T. Farrell, Jr. Esq. (WV State Bar #7443)
WILSON, FRAME, BENNINGER & METHENEY, PLLC
151 Walnut Street
Morgantown, West Virginia 26505
Phone: (304) 292-9429
Facsimile: (304) 292-9427
Email: ptf@wfbmlaw.com

On behalf of:

West Virginia Trial Lawyers Association
Suite 207, Boulevard Towers
1018 Kanawha Boulevard
Charleston, West Virginia 25301



**I. INTRODUCTION OF *AMICUS CURIAE*
WEST VIRGINIA TRIAL LAWYERS ASSOCIATION**

This *amicus* brief is submitted on behalf of the West Virginia Trial Lawyers Association (hereinafter "WVTLA"), a private, non-profit organization consisting of attorneys licensed in the State of West Virginia who represent, among other clients, citizens of the State of West Virginia injured and/or harmed by the wrongful conduct of others.

The issue presented in the matter *sub judice* involves three certified questions from the Circuit Court of Monongalia County involving the applicability of the State Fire Code to services provided by third-party contractors to "...buildings used wholly as dwelling houses for no more than two families." The resolution of these certified questions significantly impact the safety of residential homeowners in the State of West Virginia.

The WVTLA submits this *amicus* brief in support of the Appellee/Plaintiff Below.

II. OPERATIVE FACTS ON THE UNDERLYING MATTER

A recitation of the operative facts and procedural history is not necessary for purposes of this *amicus* brief. The West Virginia Trial Lawyers Association incorporates and references the operative facts as recited in the briefs previously filed in this matter.

III. DISCUSSION AND ARGUMENT

The Circuit Court of Monongalia County, West Virginia, determined that that the West Virginia State Fire Code applies to "...buildings used as dwelling houses for more than two families" and that the exemption found at 87 CSR 1, § 1.5 violates the "intent and purpose of the

West Virginia State Fire Code and the public policy of this State." In support of its conclusion, the Court declared:

[T]he Court finds that the one- and two-family dwelling exemption contained in the Fire Code regulations was never intended to apply to an entity such as AmeriGas, a sophisticated commercial business entity which installs and delivers a hazardous substance such as propane. This exemption is inconsistent with the clear mandate and legislative intent of the West Virginia Fire Prevention and Control Act which enabled the Fire Commission to adopt regulations. [W. Va. Code 29-3-1, et seq. (1976)]. After reviewing the language of the statute, and the origins of the current State Fire Prevention and Control Act which emanated from the State Fire Marshall Act of 1949 [W. Va. Code 29-3-1, et seq.], the Court is convinced that the legislature intended that the people and businesses of this State be safeguarded in their life and property from the hazards of fire and explosion that could be created from dangerous substances like liquid propane gas. [W.Va. Code 29-3-2 (1976)].

To adopt AmeriGas's theory would deprive the vast majority of citizens who live in homes, trailers, and small apartments, of any protection of the State Fire Code, and companies like AmeriGas would be able to install propane tanks and gas lines and other apparatus free from any control or regulation of the fire safety laws of this State. According to the list of jurisdictions adopting the State Building Code maintained by the Fire Marshal's Office, only two of the fifty-five Counties in this State have adopted the State Building Code, which would provide any type of regulation for the installation of propane gas lines. Plaintiff Class attached to its brief, facts from the United States Census Bureau demonstrating that 75.2% of all West Virginians own their own home. Obviously many of these West Virginia homeowners live in the fifty-three Counties that have not adopted the State Building Code and they would be totally unprotected if the one- and two-family dwelling exemption applied as AmeriGas has asserted in this case.

See Order Denying Defendants' Motion for Reconsideration of Applicable Regulations to Burial Depth Standards for Propane Gas at pp. 4-5.

The WVTLA submits this amicus brief in support of the position adopted by the Circuit Court of Monongalia County, West Virginia. The position adopted by the lower court is fully supported by the public policy of the West Virginia FIRE PREVENTION AND CONTROL ACT, W. Va. Code § 29-3-1 *et seq.*, as plainly set forth by the Legislature:

- (a) A significant part of the population of this state needs improved fire prevention and control;
- (b) The establishment and maintenance of a coordination program for fire prevention and control for the entire state is necessary to promulgate the safety and well-being of the citizens and residents of this state;
- (c) Adequate fire prevention and control are not likely to become a reality unless certain administrative functions and procedures are enacted by law; and
- (d) Fire prevention and control are a public purpose and a responsibility of government for which public money may be spent.

W. Va. Code § 29-3-2 (2004). It is clear that the exemption relied upon by AmeriGas runs directly afoul to the expressed intention of the West Virginia Fire Code.

Applying the logic relied upon by AmeriGas, the State Fire Code would be inapplicable to third-party contractors when providing services to West Virginia homeowners. Taking AmeriGas' argument to its logical extreme:

- (a) Natural gas suppliers could provide odorless gas to residential homes;
- (b) Propane gas suppliers could lay pipe through the lawn, over rooftops or across the driveway on residential property;
- (c) Suppliers of goods and materials used in single family dwellings would not have to comply with fire safety retardation regulations regarding flammability and other requirements which have protected consumers for years in this State and elsewhere; and

- (d) Carpet Retailers could install carpet used as floor coverings which do not meet flammability requirements or the industry standards governing smoke generation properties.

Importantly, the logic relied upon by AmeriGas is a double-edged sword. If the State Fire Code does not apply to one family dwellings, then homeowners should not have to comply with the provisions of the State Fire Code governing the sale, possession and use of fireworks (87 CSR 1, § 14.5), the outdoor storage of used tires (87 CSR 1, § 14.3) or fire setting during forest fire season (87 CSR 1, § 14.1).

The State Fire Code was intended to protect the citizens of the State of West Virginia. The propane gas industry argues that the State Fire Code is inapplicable to third-party contractors when performing services on residential property in an attempt to avoid legal responsibility for negligently installing defective and dangerous propane gas lines in the State of West Virginia. The conduct of AmeriGas has already caused serious burns and injuries to a father and son while destroying the home of a West Virginia family. This Honorable Court should afford the State Fire Code the broad scope intended by Legislature to prevent another tragedy.

RESPECTFULLY SUBMITTED,



Paul T. Farrell, Jr., Esq. (WV State Bar #7443)
WILSON, FRAME, BENNINGER & METHENEY, PLLC
151 Walnut Street
Morgantown, West Virginia 26505
Phone: (304)292-9429
Facsimile: (304) 292-9427
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CERTIFICATE OF SERVICE

I, Paul T. Farrell, Jr., Esq., do hereby certify that I have served a copy of the foregoing
“WEST VIRGINIA TRIAL LAWYERS ASSOCIATION’S AMICUS CURIAE BRIEF IN
SUPPORT OF APPELLEE” and “MOTION FOR LEAVE TO FILE AN AMICUS CURIAE
BRIEF ON BEHALF OF THE WEST VIRGINIA TRIAL LAWYERS ASSOCIATION” and
“WEST VIRGINIA TRIAL LAWYERS ASSOCIATION’S MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF OUT OF TIME” upon the following by mailing a true and accurate
copy of the same, by United States Mail, postage prepaid, this 6th day of October, 2004, as
follows:

David J. Romano
Michael J. Romano
Romano Law Office
363 Washington Ave.
Clarksburg, WV 26301

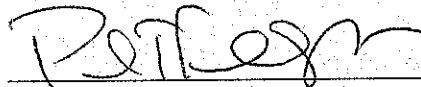
Jay N. Varon
Melinda F. Levitt
Amy Wilsey Miller
Foley & Lardner
3000 "K" Street, Suite 500
Washington D.C. 20007

Billy Atkins, Esquire
Atkins & Oblak
5000 Hampton Center, Suite 4
Morgantown, WV 26505-1709

Ancil G. Ramey, Esquire
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326-1588

An original and (9) copies have been filed with the Clerk of the Supreme Court via
Federal Express Mail.

WILSON, FRAME, BENNINGER & METHENEY, PLLC



Paul T. Farrell, Jr., Esq. (W.Va. State Bar No. 7443)
WILSON, FRAME, BENNINGER & METHENEY, P.L.L.C.
151 Walnut Street
Morgantown, WV 26505
(304) 292-9429