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Commercial

Charles D. Dunbar

West Virginia University College of Law

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COMMERCIAL

I. DEBTOR-CREDITOR RELATIONS

State ex rel. Frieson v. Isner, 285 S.E.2d 641 (W. Va. 1981)

McFoy v. Amerigas, Inc., 295 S.E.2d 16 (W. Va. 1982)

The West Virginia Supreme Court of Appeals recently made an important interpretation of two statutes authorizing and describing magistrate court proceedings.¹ In *State ex rel. Frieson v. Isner*² a collection agency obtained a default judgment in the Magistrate Court of Boone County against Woody Frieson for three unpaid debts. Frieson attacked the judgment of the magistrate court on two grounds. First, he contended that the complaint was insufficient in that it did not specify the amount of principal and interest of each debt and the court costs included in the claim. Next, Frieson claimed that the collection agency, by representing itself in magistrate court, engaged in the unauthorized practice of law.³

The court, in an opinion by Justice McGraw, agreed on both arguments. In a commercial setting, a creditor must itemize the principal and interest of each debt in a complaint in magistrate court.⁴ This information is required to allow the debtor to understand the precise nature of the claim against him or her and to formulate appropriate defenses.⁵ These amounts cannot be consolidated into one claim.

Also, the court held that the collection agency was practicing law when it represented itself in magistrate court, because the debts sued on were not owed to the collection agency. Therefore, the agency represented the true debtors in a court proceeding. This analysis led the court to the "inescapable" conclusion that the agency engaged in the unauthorized practice of law.⁶

The court made this conclusion despite assignments of the causes of action to the agency by the three creditors. The court deemed these assignments a "sham or fraud" which allowed the collection agency to sue in its own name, thereby attempting to avoid the unauthorized practice of law.⁷

Importantly, the court stated that the collection agency would be engaged in the unauthorized practice of law, even if it hired an attorney to represent it in magistrate court. This statement is dicta, but through it the court made its feelings on such a practice clear. The court felt that the collection agency was not a real party in interest to the collection suit. Instead, it would have been furnishing the legal services of its lawyers for consideration.⁸

¹ W. VA. CODE § 50-4-1 (1978); W. VA. CODE § 50-4-4a (1980).

² 285 S.E.2d 641 (W. Va. 1981).

³ *Id.* at 645-46.

⁴ The complaint must also list payments made and credits from the sale of repossessed collateral. W. VA. CODE § 50-4-1 (1978).

⁵ *Frieson*, 285 S.E.2d at 646.

⁶ *Id.* at 651.

⁷ *Id.* at 652.

⁸ *Id.* at 654.

Under *Frieson*, non-attorney agents who represent a party in any magistrate court proceeding must do so only on a casual, non-paid, non-recurring basis. The agency must only aid the party in appearing before the court *pro se*.⁹

This decision will have a profound effect on collection agencies in West Virginia. Under *Frieson*, a collection agency cannot represent itself on debt actions in magistrate court. Furthermore, an agency cannot hire an attorney to represent it. Therefore, commercial creditors must sue in their own names and cannot depend on collection agencies for representation.

In *McFoy v. Amerigas, Inc.*,¹⁰ the court interpreted the Consumer Credit and Protection Act¹¹ as it relates to billing practices. The court found that Amerigas' practices were reasonable and not abusive.

Amerigas sold liquid propane gas in Monongalia County. As part of its billing schedule, Amerigas established a minimum usage requirement. If a customer did not consume the minimum amount of gas for a year, the customer was still billed for the minimum amount.

The plaintiffs, customers of Amerigas, brought a class action suit claiming that Amerigas violated the Consumer Credit and Protection Act by billing for minimum usage without proper notice¹² and by removing a regulator from a gas tank when a customer refused to pay.¹³ The trial court had entered summary judgment for the plaintiffs.

The first issue addressed in Justice Neely's opinion was whether Amerigas' billing for minimum usage, which had been briefly outlined in the service application, was an "unfair or deceptive act or practice."¹⁴ The court ruled that the test for a challenged practice was whether the activity was "reasonable in relation to the development and preservation of business. . . ."¹⁵

The court found that Amerigas had acted reasonably in that the minimum charge was nondiscriminatory and outlined in the application for service. The amount charged (\$200.00) appeared to be reasonable and, at least, warranted submission to the jury on the issue of reasonableness.¹⁶ The court found no abusive debt collection in removing the regulator from the tank when the customer no longer wanted service by Amerigas. The court "would almost conclude as a matter of law" that this was fair.¹⁷

On a procedural issue in *McFoy*, the court held that either a denial or a

⁹ *Id.* at 655. For the statutory authorization of non-attorney agents to appear in magistrate court, see W. VA. CODE § 50-4-4a (1980).

¹⁰ 295 S.E.2d 16 (W. Va. 1982).

¹¹ W. VA. CODE §§ 46A-6-101 to -108 (1980), -109 (Supp. 1982).

¹² Specifically, the suit was brought under W. VA. CODE § 46A-6-104 (1980), which outlaws "deceptive acts or practices" in a commercial setting.

¹³ This was deemed by the plaintiffs as an abusive debt collection practice under W. VA. CODE § 46A-2-124 (1980), and an unfair and deceptive act under W. VA. CODE § 46A-6-104 (1980).

¹⁴ See *supra* note 12.

¹⁵ *McFoy*, 295 S.E.2d at 20.

¹⁶ *Id.*

¹⁷ *Id.* at 21.

grant of class action status was appealable.¹⁸ Additionally, the court ruled that, under limited circumstances, the costs of notifying class members could be shifted to the defendant.¹⁹

II. CONTRACTS

Environmental Products Co. v. Duncan, 285 S.E.2d 889 (W. Va. 1981)

Brand v. Lowther, 285 S.E.2d 474 (W. Va. 1981)

The court struck down a covenant not to compete in an employment contract as being void for lack of consideration in *Environmental Products Co. v. Duncan*.²⁰ Danny Duncan began work for Environmental Products in 1978. Three months later, he was promoted to salesman. He received two raises—one in January 1979 and one in March 1979. In April 1979, he signed an employment contract.

The contract contained a clause whereby Duncan agreed not to work for any competition within two hundred fifty miles of Environmental Products' principal place of business for two years following his termination of employment. In January 1981 Duncan left Environmental Products and went to work for a competitor. Environmental Products filed suit, and Duncan defended by saying that the covenant not to compete was void for lack of consideration.

The court found for Duncan. Justice Harshbarger noted that no more pay or new benefits had been given to Duncan when the contract was signed. Since Environmental Products gave no new consideration, the covenant not to compete was void.²¹

Environmental Products argued that the continued employment of Duncan was sufficient consideration to support the new clause. The court had decided a similar case, *Pemco Corp. v. Rose*,²² applying Virginia substantive law in 1979. The court held in *Pemco* that mere continued employment was not sufficient consideration to support the covenant not to compete.²³ In *Environmental Products*, the court held that the *Pemco* result was also supported by West Virginia law.

In his dissent in *Environmental Products*, Justice Neely distinguished *Pemco*, saying that it related to an additional condition made to an already existing contract. Further, Justice Neely found no prior contract and felt that there were new benefits given to Duncan under the contract.²⁴ The majority viewed the benefits mentioned as existing in substance, if not form, prior to

¹⁸ *Id.* at 22-23. The grant of class action status is only appealable under a writ of prohibition. Previously, only a denial of class action status was appealable. *Mitchem v. Melton*, 277 S.E.2d 895 (W. Va. 1981).

¹⁹ *McFoy*, 295 S.E.2d at 24-25. The plaintiffs must show "with reasonable certainty that the ends of justice are served and no irremedial damage will be visited on the defendant."

²⁰ 285 S.E.2d 889 (W. Va. 1981).

²¹ *Id.* at 890-91.

²² 257 S.E.2d 885 (W. Va. 1979).

²³ *Id.* at 889.

²⁴ *Environmental Products*, 285 S.E.2d at 891.

the contract.²⁵

Another recent decision, *Brand v. Lowther*,²⁶ provides an excellent recap by the court of the doctrines of specific performance and laches under West Virginia law. Leon Lowther and his wife, Mary, each owned half of the common stock of Rest Haven Memorial Gardens, a cemetery in Fairmont. Mr. Lowther had agreed to sell the corporation to Brand. Some time later the deal fell through and Brand sued Lowther for specific performance on the contract for sale.

The court, in an opinion by Justice McGraw, ruled that specific performance was not available in this case. Because Mrs. Lowther was an equal shareholder, the court refused to allow Mr. Lowther to sell the corporation without her consent, which had not been obtained.²⁷

The court rejected Brand's contention that Mr. Lowther was acting as Mrs. Lowther's agent. No presumption of agency exists, even in the case of kinship or marital relation. In order to obtain specific performance on a contract allegedly made with an agent, "the agency must be established by clear, certain and specific proof."²⁸ Brand failed to establish the agency relationship. Also, Lowther did not have the inherent power to sell the corporation simply by virtue of his position as president.²⁹

Finally, the court determined that the use of laches as a defense was not available to Lowther, since he had not been prejudiced by any delays attributable to Brand.³⁰

III. PARTNERSHIPS

Barker v. Smith & Barker Oil and Gas Co., 294 S.E.2d 919 (W. Va. 1982)

The court made one of its few interpretations of the Uniform Partnership Act³¹ in *Barker v. Smith & Barker Oil and Gas Co.*³² Creed Barker had entered into a partnership with Edward and Walter Smith in 1955. The partnership promoted interests in oil and gas leases to investors and drilled the wells. Profits were divided equally among the partners.

In 1958, the partners formed the Smith and Barker Oil and Gas Company, Inc., a West Virginia corporation. The equipment and tools of the partnership were transferred to the corporation, but the leases were retained either in the partnership name or the name of one of the partners.

The nature of business operations did not change. The corporation only served as a funnel for the income from the leases. In 1960 or 1961 the partners

²⁵ *Id.* at 890-91.

²⁶ 285 S.E.2d 474 (W. Va. 1981).

²⁷ *Id.* at 480.

²⁸ *Id.* at 481.

²⁹ *Id.*

³⁰ *Id.* at 482-83.

³¹ W. VA. CODE §§ 47-8A-1 to -8A-45 (1980).

³² 294 S.E.2d 919 (W. Va. 1982).

began to disagree about details of the business operations. However, all partners continued to work on the oil and gas leases until Barker's retirement in 1970. In 1972 Barker ceased to receive profits from the leases.³³

Barker brought suit, contending that the Smiths breached their fiduciary duties to the corporation and to the partnership by diverting business opportunities to themselves for their own personal gain. The trial court ruled that the partnership ended with the corporation's birth in 1958 and that the statute of limitations had run on the partnership claim.³⁴

The supreme court, in an opinion by Justice McGraw, reversed. It noted that a partnership is assumed to continue in existence until it is shown to have been dissolved by one or more of the partners or by the operation of law.³⁵ Incorporation did not, by itself, dissolve the partnership. This was especially true here, since not all of the partnership assets had been transferred to the corporation and since the parties continued to carry on business as they had in the partnership.³⁶

The court could find no action by the partners that ended the partnership until at least 1971.³⁷ Since the complaint was first filed in 1972, the statute of limitations had not run.³⁸ The case was remanded to the trial court to determine whether the Smiths breached their fiduciary duties as partners.³⁹ The court found no evidence of a breach of fiduciary duties to the corporation.

Finally, the court stated that Barker's right to a formal accounting of partnership affairs depended on whether the Smiths breached their fiduciary duties as partners and returned that issue to the trial court.⁴⁰

IV. UNIFORM COMMERCIAL CODE

First National Bank v. Linn, 282 S.E.2d 52 (W. Va. 1981)

In *First National Bank v. Linn*,⁴¹ the court considered the capacity of signatories to a negotiable instrument. George Linn and Ray Thompson were officers of P & S Trailer Sales. P & S Trailer had received a finance contract and security agreement on the sale of a trailer to a customer. P & S Trailer later discounted the note at the First National Bank of Ceredo. Unsatisfied with the customer's ability to pay, the bank required P & S Trailer to sign the back of

³³ *Id.* at 923.

³⁴ *Id.* at 924.

³⁵ *Id.* The requirements for dissolution are found in W. VA. CODE § 47-8A-31 (1980).

³⁶ 294 S.E.2d at 925.

³⁷ *Id.* Interestingly, W. VA. CODE § 47-8A-31 (1980), only requires the express will of a partner to dissolve a partnership with no definite term. The court used the further requirement of notice to the other partners and used a Virginia case, *O.L. Standard Dry Goods Co. v. Hale*, 148 Va. 640, 139 S.E. 300 (1927), as support for the further requirement.

³⁸ *Barker*, 294 S.E.2d at 926.

³⁹ *Id.* at 926. The court declined an opportunity to discuss fiduciary duties between partners and to shed light on an uninterpreted portion of the Uniform Partnership Act, W. VA. CODE § 47-8A-21 (1980).

⁴⁰ *Barker*, 294 S.E.2d at 926. See W. VA. CODE § 47-8A-22 (1980).

⁴¹ 282 S.E.2d 52 (W. Va. 1981).

the note, with recourse.

Some time later, Linn and Thompson, as principals of P & S Trailer, were asked to sign the back of the note. They did so, directly under the guarantee made by P & S Trailer. Subsequently, the customer defaulted on the note. The bank repossessed and sold the trailer, but the sale proceeds did not cover the debt.⁴²

P & S Trailer had gone out of business, so the bank sought recovery against Linn and Thompson as guarantors of the note.⁴³ Linn and Thompson denied liability in that they did not guarantee the note; they merely indorsed it. As indorsers, they were entitled to presentment and notice of dishonor,⁴⁴ neither of which was given in this case.

After determining that the language of the guarantee implied that only the seller (P & S Trailer) was the guarantor, the court relied on the statutory presumption of indorsement: "Unless the instrument clearly indicates that a signature is made in some other capacity it is an indorsement."⁴⁵

The instrument did not "clearly indicate" that Linn and Thompson were guarantors "and thus" the court held that they signed as indorsers. Since presentment and notice of dishonor were not given, the indorsers in this case were not liable.⁴⁶ The court went on to find that Linn and Thompson were "accommodating" indorsers, but that designation had no effect on their liability.⁴⁷

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⁴² *Id.* at 53.

⁴³ *Id.* The suit was brought under W. VA. CODE § 46-3-416 (1966).

⁴⁴ These are terms of art. "Presentment" is a demand for acceptance or payment of the note. W. VA. CODE § 46-3-504(1) (1966). "[N]otice of dishonor" is required, unless excused, to hold the indorser liable under W. VA. CODE § 46-3-501 (1966). Notice of dishonor is outlined in W. VA. CODE § 46-3-508 (1966).

For negotiable instruments made outside the United States, the further requirement of "protest" must be met to hold an indorser liable. *See* W. VA. CODE § 46-3-509(1) (1966).

⁴⁵ *First Nat'l Bank*, 282 S.E.2d at 54 (quoting W. VA. CODE § 46-3-402 (1966)).

⁴⁶ *First Nat'l Bank*, 282 S.E.2d at 56.

⁴⁷ *Id.*; *see* W. VA. CODE § 46-3-415 (1966).