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NO. 101605

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

CHARLES W. LEE,

Petitioner,

v.

PATRICIA E. LEE,

Respondent.

Civil Action No.: 09-D-137

PETITION FOR APPEAL

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OF WEST VIRGINIA

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KIND OF PROCEEDING AND NATURE OF RULING OF THE LOWER COURT

Petitioner Patricia E. Lee seeks an appeal from an order of the Circuit Court of Upshur County, WV, entered on October 15, 2010, which affirmed an order of the Family Court of Upshur County, WV, entered July 2, 2010, denying the Petitioner the sole substantial monetary benefit of a prenuptial agreement which the Family Court affirmed, per motion of Petitioner. Petitioner contends the Court affirmed the acts of Respondent in bullying Petitioner into signing a prenuptial agreement just days before the parties' wedding, causing her great emotional distress, but denied to her the sole significant benefit of the agreement, applied to her standards that the Court refused to apply to the Respondent, refused to apply the WV standard relative to

construction of such contracts, erroneously refused to conclude that promissory estoppel existed, barred Respondent from denying Petitioner the benefit of her bargain, and denied the Petitioner equal protection under the law.

As a result thereof, Petitioner has become, essentially, homeless during a time of severe stress, and monetary distress, while she is recovering from serious personal injuries incurred in an automobile/pedestrian collision on April 16, 2010.

This petition is filed in accordance with Rule 4A of the WV Rules of Appellate Procedure. Quotations from the Court record are from a transcript of Charles Lee's testimony prepared by Petitioner's counsel's staff, the accuracy of which has not been challenged or corrected by Respondent's counsel.

ASSIGNMENT OF ERROR

1. The Court abused its discretion, and refused to follow applicable law, by interpreting the term “another relationship”, paragraph 10 of the parties' prenuptial agreement, contrary to its plain legal and grammatical meaning, to mean any sexual relationship.

2. Assuming that the term “another relationship” was ambiguous, as the Family Court clearly concluded, the Family Court erred, and the Circuit Court erred by sustaining the Family Court's refusal to follow applicable law relative to interpretation of contracts. The Family Court resolved the ambiguity in favor of the drafter of the Pre-nuptial Agreement Dated July 17, 2007. In fact, the Family Court constructed the ambiguity, contrary to the testimony of both parties, in a narrow manner grossly favorable to Respondent's interpretation. This failure is plain error and an abuse of discretion.

3. The Circuit Court and the Family Court erred by denying Petitioner Equal Protection under the Fourteenth Amendment and due process under the Fifth Amendment of the United States Constitution in denying her the benefit of the Pre-Nuptial Agreement dated July 17, 2007.

4. The Family Court's findings that Patricia E. Lee had sexual relations, after the parties' separation on June 12, 2009, with J. Shelly and Rodney Stalnaker are clearly erroneous and unsupported by the facts. The Court's only viable evidence of a sexual relationship by the Petitioner after the parties' separation came from her own testimony. That relationship was a very short term relationship to which Petitioner testified candidly.

STATEMENT OF FACTS

1. The parties met through mutual friends in approximately March, 2005. They became formally engaged in February, 2006. They lived together for 26 months before marrying.

2. On approximately July 15, 2007, two weeks before the wedding of July 28, 2007, after wedding clothes had been purchased, invitations sent, travel plans made, accommodations reserved, and emotions fully committed, Charles Lee informed Patricia Lee that he would not marry her unless she signed a prenuptial, or ante-nuptial, agreement which he had drafted from a form he downloaded from the Internet.

3. Ms. Lee wrote some notes relative to her demands. Mr. Lee made some changes to the original document, and the redrafted version was signed by the parties on July 17, 2007. Page 42 of the transcript of Charles Lee's testimony

4. It is disputed when, and how often, the parties had any discussion of a prenuptial agreement prior to July 15, 2007, but, the evidence, presented in its best light for Charles Lee, confirmed that while he had talked about a prenuptial agreement, he provided absolutely no proposed terms to that agreement until approximately July 15, 2007, thirteen (13) days before the

parties wedding date. That evidence, again construed in the light most favorable to Mr. Lee, reveals that the parties had angry, tearful conversation, off and on for approximately seventeen (17) hours, over a period of approximately seven (7) days, and any revisions to the agreement were prepared by Charles Lee and presented to Patricia Lee for signing or the wedding was off.

5. Mr. Lee's first proposal favored him nearly 100%. While Patricia Lee made some notes on the various drafts of the agreement, Mr. Lee testified that all drafting was done by him, especially the original draft. (pgs. 5, 39, 42 of Transcript of Charles Lee's Testimony)

6. Patricia was devastated by Charles' last minute request and its implications. Sadly, she realized it would not be a "marital partnership". Following discussions with family and friends, she gave serious thought to canceling the wedding. She testified she had considered Mr. Lee to be the most loving, considerate, reliable, and honest man she had ever met. She had great respect for him. She later learned that much of this was not true when he broke to her the devastating news, less than two (2) years after their wedding, that he had an extramarital relationship and no longer wished to be married to her.

7. Because of her love for him, and because of the two (2) years she had invested in their relationship, she attempted to overlook his inconsideration.

8. Charles never recommended that she consult counsel. (pgs. 29-30 of Transcript) He was the primary breadwinner. (pg. 25 of Transcript of Charles Lee's Testimony) Patricia had been working with and for him, helping to manage his properties, and acting in all regards as his wife. She had few resources of her own. (pg. 25 of Transcript of Charles Lee's Testimony) He never offered to pay for her to consult counsel. (pgs. 29-30 of Transcript of Charles Lee's Testimony) He insisted that they negotiate directly.

9. Mr. Lee did not disclose prior to the wedding that in spite of having many properties and an excellent income (\$120,000/yr.+), he had a negative net worth. (pg. 30-31 of Transcript of Charles Lee's Testimony)

10. There is no dispute that Patricia E. Lee's primary concern was her ability to take care of, provide a home for, and parent, her daughter Sherika Correia, then 8 years of age. (pg. 33-34 of Transcript of Charles Lee's Testimony)

11. Accordingly, Patricia requested that if the marriage failed during the first ten (10) years, Charles agree to provide her housing, and reasonable costs for the expenses of housing until such time as Sherika graduated from high school. This sole valuable benefit of the contract expired no earlier than June, 2017.

12. In consideration thereof, she gave up claims to marital employment income of up to \$1,200,000 over the term of the contract. (pg. 22 of Transcript of Charles Lee's Testimony) Although Charles testified that he did not expect to make \$120,000 per year for twenty (20) years, he was just fifty (50) years old when the prenuptial agreement was signed.

13. Charles, at Patricia's request, inserted the following language into the prenuptial agreement,

10) In the event that there is a separation of the parties, the following will occur regarding spousal support:

- In the event of separation, Charles will provide Patti housing at no cost at Route #9, Box 368, Buckhannon until she decides to move or until she enters into another relationship. The provision of housing will include basic and "nationwide" phone service for the same period of time. As well as all other household expenses, with a limit of \$500.00 per month, **until such time as her minor children graduate from high school.**

- Patti will be provided one of the family vehicles in the event of separation or divorce. She will be responsible for maintaining it and its continued operation.(emphasis added)

14. The "prenupt" was "frontloaded" to the benefit of Patricia Lee. After ten (10) years, when Sherika is expected to graduate from high school, all benefits, except the car, accrue to Charles Lee. The Family Court's ruling denies Patricia Lee all significant benefits of the contract.

15. In regard to the phrase "another relationship" (Para. 10 of the Prenuptial Agreement), Patricia Lee testified that she inquired, "So you will be permitted to break this agreement without penalty, but I will have to remain celibate until Sherika becomes 18?"; and he replied, "Of course not. I just don't want some guy living in my house."

16. While Charles Lee at one point in his testimony claims not to remember this specific conversation, he does not deny that it may have taken place (pg. 12-13 of Transcript of Charles Lee's Testimony), but under questioning of his counsel, he substantially admits it!

17. During questioning by Charles Lee's own counsel, the following exchange took place,

... PJC: Then we come to paragraph 10. Whose idea was paragraph 10 (the housing provision), or was that a joint idea to put that in there?

CWL: We discussed that quite a bit. It was Patti's idea to put that in...(p.9 of Transcript)

... PJC: Ok. I am not going to ask you what her state of mind was, but I am going to ask you what she indicated to you. A statement has been attributed to you that you said, "of course not it just means I don't want somebody else living in my house". Did you make that statement to her?

CWL: **I don't recall if that is the only statement I made** or if I made it just that way or what.

PJC: **So it is possible that you may have said that** but are you saying that is not what...

CWL: That may have not been a part...

PJC: ...been part of it?

CWL: **Yeah. I don't know exactly the context of that or... I believe there was quite a bit of discussion about when she was entering another relationship whether or not that person would have a house for her to move to or whatever. I don't know the whole gist of the narrative.** It wasn't recorded that I know of...(p.12-13 of Transcript) (Emphasis added)

18. His other testimony, even during this examination by his own counsel, was surprisingly candid. Clearly, the two "bones of contention" were:

a. Her strong desire, at forty-three (43) years of age, to have financial security and a home for her eight (8) year old daughter and herself.

b. Her disappointment that he sprung on her his unconditional demand that she give up most of the financial benefit of being his wife.

19. The Circuit Court, in its opinion rendered October 15, 2010 stated, in pertinent part,

...In any event, if the Respondent were to present adequate proof that the alleged conversation took place, **the elements of estoppel might be satisfied with ease.** However, the Respondent failed to meet the applicable burden of proof...

...Here, the evidence supporting Ms. Lee's claim consists solely of her own testimony. Mr. Lee's testimony may not have directly contradicted Ms. Lee's testimony, but it is far from supportive. Ms. Lee has not carried the burden of proving by clear, precise, and unequivocal evidence that Mr. Lee is estopped from asserting his interpretation of the prenuptial agreement... (emphasis added)

20. This conclusion simply ignores the plain meaning of the quotation in paragraph 15 above. The Court does not explain how it can reject the parties' combined consistent testimony on this issue or why the Court required "clear, precise and unequivocal evidence" rather than a preponderance.

21. Petitioner had no knowledge that parties to an ante-nuptial agreement are required to disclose their full assets and debts, or consult counsel, and she did not know Charles had a negative net worth.

22. Mr. Lee represented himself to be financially well-off, a government employee, of the IRS, and a man with several income producing properties. He testified that Patricia Lee knew he had financial difficulty because he sometimes had trouble purchasing food. (pg. 31 of Transcript

of Charles Lee's Testimony) In addition to his four (4) rental properties, his monthly adjusted gross employment income was approximately ten thousand dollars (\$10,000.00).

23. Patricia Lee later learned Charles had a very large debt-load which placed strain on their finances and their relationship. Nevertheless, she loved him dearly, and was faithful to her marital vows.

24. Patricia Lee had no assets to disclose, and Charles Lee knew that. Her most precious "asset" was her then eight (8) year old daughter Sherika.

25. On or about June 4, 2009, Charles Lee broke the news to Patricia Lee of his ongoing affair. (pg. 3 of Transcript of Charles Lee's Testimony) Upon learning this news, Patricia was devastated, depressed, and hysterical. She had a severe "panic attack" where she became "violently ill" and had to be transported to the hospital by ambulance.

26. At the time of trial, the parties had been separated for 11 months. During that time, Patricia Lee met a person through a social Internet service and visited with and spent a total of approximately ten (10) days over the course of three (3) or four (4) visits with him in Kentucky. Later, he visited the house. She testified that the sexual component of the relationship occurred in KY and had ended by this time. No evidence to the contrary was admitted. She admitted he visited her briefly at the residence for a few days while the divorce was pending. There was no evidence they had sex in the home, and Patricia Lee testified they did not, nor was there evidence that it was anything but a brief visit.

27. Patricia Lee admitted this brief affair and sexual relationship even though Charles Lee had no other proof of it. This testimony should have enhanced her credibility. While the Family Court accepted this testimony as true, both Courts resolved every conflict between her testimony

and her husband's and Charles' one witness against her, even when Charles essentially admitted her assertions.

28. And, the Court chose to accept as true the speculative testimony of Christopher C. Cutright, who attempted to “take the 5th” and who admitted he is a liar. He insisted that he had provided false information to Mr. Lee because of a dispute between his fiancé and Ms. Lee. When sworn, he testified that Patricia picked up a fellow in a bar, brought him home with her, and had what “sounded like sex” in an adjoining room. The Court apparently considered, over counsel's objection, Mr. Cutright's hearsay testimony that this man later claimed they had sex. Charles did not call that man, J. Shelley, as a witness.

29. Patricia Lee scoffed at the idea she had sex with this “gentleman” who she contended promptly fell asleep in her car and never came into her house.

30. No one contended that this was a romantic relationship, merely a sexual dalliance.

31. Ms. Lee also denied a sexual relationship with former boyfriend Rodney Stalnaker, who was incarcerated at the time of trial. She admitted they had lunch a few times but denied a sexual relationship. The Court found that she had one.

32. The only male who occupied the house since the separation, Joseph Correia, was a frequent houseguest of the parties, before and during their marriage, a totally disabled and sexually impotent Vietnam War veteran, the father of her daughter Sherika Correia, with whom Patricia Lee has had no romantic involvement for 10 years. He stayed with her a while, at Charles Lee's suggestion, because of her fear to live alone and of their common interest in their daughter. This gentleman is subject to frequent bouts of depression and has since left the area and is not maintaining contact with Patricia Lee at this time, which is his pattern. **Respondent**

did not contend he was "another relationship". The Court properly determined that his presence was not "another relationship" as defined by the pre-nupt.

33. The term "another relationship" was not defined in the prenuptial agreement drafted by Charles Lee.

34. Therefore, any contention that Patricia has found "another relationship", as referenced in the contract, is ludicrous. As Ms. Lee admitted, the relationship she had when she signed the agreement, under duress, was a long term, live-in, relationship, engagement, and marriage with "free housing". She has found no such relationship and questions whether she ever will. It is this existing relationship to which paragraph 10, page 3 of the "pre-nupt" refers.

35. Counsel for Patricia Lee filed, on June 24, 2010, a Motion for Stay of Execution, which is annexed hereto, regarding the Court's ruling pertaining to Patricia Lee's continuing to reside in the former family residence.

36. On July 1, 2010, Counsel for Patricia E. Lee filed the Supplement to Motion for Stay of Execution.

37. Counsel for Patricia E. Lee filed the "Petition for Appeal" of the Family Court's Decree of Divorce to the Circuit Court on July 30, 2010.

38. On August 10, 2010, Counsel for Patricia E. Lee filed a Motion for Stay of Execution

39. On August 18, 2010, the Circuit Court entered the Order Denying Motion for Stay of Execution.

40. On August 20, 2010, Counsel for Patricia E. Lee filed a Motion for Extension of Stay of Execution.

41. On September 7, 2010, the Circuit Court heard oral argument on the Petition for Appeal filed by Counsel for Patricia E. Lee.

42. By Order entered October 5, 2010, the Family Court ordered, in pertinent part,

...There being no objection, the Court extends the stay of execution suspending its order compelling the Respondent to vacate the former family residence premises no later than forty-eight (48) hours after the entry of the Circuit Court's appeal order. It is so ordered...

43. The Circuit Court entered the "Order Denying Petition for Appeal" on October 15, 2010.

44. Page 4 of the Circuit Court's "Order Denying Petition for Appeal" states, in pertinent part, "'Another relationship' is not defined in the agreement." However, there was an existing relationship that could be referenced to define the ambiguous term "another relationship".

45. Page 5 of the Circuit Court's "Order Denying Petition for Appeal" correctly states, in pertinent part, "...they may also establish the conditions under which such support terminates,...". Patricia Lee respectfully points out that the benefit to her of the free housing and \$500 per month would end when her daughter graduated from high school, when Patricia Lee enters into "another relationship" (a relationship that could give her the security of housing), or when she decided to move. Therefore, the Court, by refusing to honor the agreement, denied Patricia Lee the benefit of her contract.

46. Page 6 of the Circuit Court's "Order Denying Petition for Appeal" states, in pertinent part,

...The Family Court read "another relationship" broadly, finding that even very short-term sexual affairs were other "relationships" under the terms of Paragraph 10.

Actually, the Court construed the term exceptionally narrowly to include even one act of sexual intercourse.

47. Page 6 of the Circuit Court's "Order Denying Petition for Appeal" also correctly observes, in pertinent part,

...Merriam Webster's Collegiate Dictionary, 10th ed. 1994, defines "another" as follows: 1) different or distinct from **the one first considered**; 2) **some other**; 3) being one more in addition to one or more **of the same kind**... (emphasis added)

48. Page 7 of the Circuit Court's "Order Denying Petition for Appeal" states, in pertinent part,

...Petitioner (husband) argues that the Family Court did not abuse its discretion by resolving any ambiguity in the agreement in favor of Petitioner, who was the principal drafter, when Respondent's proposed interpretation is nonsensical...

Patricia Lee's argument is that her interpretation is rational and not nonsensical. It is plain error for the Court to find otherwise and to refuse to resolve the ambiguity in her favor. The Family Court properly admitted parole evidence on this issue, and then ignored it.

49. Page 10 of the Circuit Court's "Order Denying Petition for Appeal" states, in pertinent part,

...In any event, if the Respondent were to present adequate proof that the alleged conversation took place, the elements of estoppel might be satisfied **with ease**... (emphasis added)

When Charles Lee was presented with Patricia Lee's contention that she had asked if she had to remain celibate, Charles Lee does not deny they may have said that and admits this conversation, or words to that effect, during his responses to his attorney. Therefore, the Circuit Court agrees that if Patricia Lee is telling the truth, she should win on this issue "with ease".

STATEMENT OF LAW

1. Syllabus Point 1, in the case of Brenda Diane Ware v. David Gary Ware, 224 W.Va. 599, 687 S.E.2d 382 (W.Va. 2009), states,

In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.

2. The case of Brenda Diane Ware v. David Gary Ware, 224 W.Va. 599, 687 S.E.2d 382 (W.Va. 2009), states, in pertinent part,

...2. The validity of a prenuptial agreement is dependent upon its valid procurement, which requires its having been executed voluntarily, with knowledge of its content and legal effect, under circumstances free of fraud, duress, or misrepresentation; however, although, advice of independent counsel at the time parties entered into a prenuptial agreement helps demonstrate that there has been no fraud, duress or misrepresentation, and that the agreement was entered into knowledgeable and voluntarily, such independent advice of counsel is not a prerequisite to enforceability when the terms of the agreement are understandable to a reasonably intelligent adult and both parties have had the *opportunity* to consult with independent counsel...

...5. For the presumption of validity to apply to a prenuptial agreement, both parties to that agreement must be represented by independent counsel. Moreover, where one party to a prenuptial agreement is represented by counsel while the other is not, the burden of establishing the validity of that agreement is on the party seeing its enforcement. To the extent that *Gant v. Gant*, 174 W.Va. 740, 329 S.E.2d 106 (1985), and its progeny hold otherwise, they are overruled.

3. WV Code §48-1-203 defines ante-nuptial agreement or prenuptial agreement as follows:

"Antenuptial agreement or prenuptial agreement" means an agreement between a man and woman before marriage, but in contemplation and generally in consideration of marriage, by which the property rights and interests of the prospective husband and wife, or both of them, are determined, or where property is secured to either or both of them, to their separate estate, or to their children or other persons. An antenuptial agreement may include provisions that define the respective property rights of the parties during the marriage, or upon the death of either or both of the parties. The agreement may provide for the disposition of marital property upon an annulment of the marriage or a divorce or separation of the parties. A prenuptial agreement is void if at the time it is made either of the parties is a minor.

4. The law of contract does not protect a person from making a "bad bargain".

5. The case of Moore v. Chesapeake & O. Ry., 493 F.Supp. 1252 (S.D.W.Va. 1980), aff'd, 649 F.2d 1004 (4th Cir. 1981), states, in pertinent part,

A contract's language must be accorded its plain meaning and, where plain, the language must be given full effect.

6. The case of Melbourne Bros. Constr. Co. v. Pioneer Co., 181 W.Va. 816, 384 S.E.2d 857 (1989) states, in pertinent part,

A valid written instrument which expresses the intent of the party in plain unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.

7. Michie's Jurisprudence, Contracts, §40, book 4A, page 428, (1999), states,

It is only where the language of a contract is ambiguous and uncertain and susceptible of more than one construction that a court may, under the well-established rules of construction, interfere to reach a proper construction and make certain that which in itself is uncertain. Griffin v. Coal Co., 59 W.Va. 480, 53 S.E. 24 (1905);

8. Michie's Jurisprudence, Contracts, §40, book 4A, page 429, (1999), states,

The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court. Berkeley County Pub. Serv. Dist. v. Vitro Corp. of America, 152 W.Va. 252, 162 S.E.2d 189 (1968); Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 196 W.Va. 97, 468 S.E.2d 712 (1996); Jessee v. Aycoth, 202 W.Va. 215, 503 S.E.2d 528 (1998)

9. Michie's Jurisprudence, Contracts, §41, book 4A, page 429, (1999), states,

Where it is necessary to determine the meaning of words not of certain and definite import, consideration will be given to the situation of the parties, the subject matter of the contract, the acts of the parties thereunder, the purpose sought to be accomplished thereby, and the general circumstances attending its execution. Wetterwald v. Woodall, 83 W.Va. 647, 98 S.E. 890 (1919); Butler v. Carlyle, 84 W.Va. 753, 100 S.E. 736 (1919); Garrett v. Patton, 81 W.Va. 771, 95 S.E. 437 (1918); Raleigh Lumber Co. v. Wilson & Son, 69 W.Va. 598, 72 S.E. 651 (1911); Knotts v. Bartlett, 83 W.Va. 525, 98 S.E. 590 (1887); Bragg v. Peytona Lumber Co., 102 W.Va. 587, 135 S.E. 841 (1926)

10. Michie's Jurisprudence, Contracts, §42, book 4A, page 431-432, (1999), states,

Every contract ought to be construed so as to give effect according to the real intent of the parties, to be collected from all the terms of the agreement; and when the expressions are equivocal, such intent gathered from the whole of the instrument must determine the meaning of such expressions. If the terms conflict or are so inconsistent that the intent of the parties cannot be ascertained the contract may be nugatory by reason of such uncertainty, which is a consequence to be avoided, if possible. The parties must have intended something by their agreement, and they are presumed to have intended that which renders their agreement valid and capable of performance, not that which renders it void and impossible of execution. Taylor v. Taylor, 176 Va. 413, 11 S.E.2d 587 (1940); Bell v. Hagmann, 200 Va. 626, 107 S.E.2d 426 (1959)

11. Michie's Jurisprudence, Contracts, §43, book 4A, page 434, (1999), states,

A contract not clear and free from ambiguity must receive a reasonable construction found as a matter of intent in the nature and condition of the subject, the situation of the parties and the purposes they had in view, subject to the limitation of consistency with the terms used. Conklyn v. Shenandoah Milling Co., 68 W.Va. 567, 70 S.E. 274 (1911)

12. Michie's Jurisprudence, Contracts, §43, book 4A, page 435, (1999), states,

A contract will not be construed so as to inflict unreasonable hardship, unless its terms clearly impose it. Carper v. United Fuel Gas Co., 78 W.Va. 433, 89 S.E. 12 (1884)

13. The case of Williams v. First Fed. Sav. & Loan Ass'n, 651 F.2d 910 (4th Cir. 1981),
aff'g 500 F.Supp. 307 (E.D. Va. 1980), states,

While it is true that ambiguities are resolved against the party preparing the contract, where a document is clear and unambiguous, the doctrine does not apply.

14. Michie's Jurisprudence, Contracts, §43, book 4A, page 437, (1999), states,

It is said that uncertainties should be resolved against the party who prepares an intricate and involved contract. Charleton v. Chevrolet Motor Co., 115 W.Va. 25, 174 S.E. 570 (19234); Correct Piping Co. v. City of Elkins, 308 F. Supp. 431 (N.D.W.Va. 1970)

15. Michie's Jurisprudence, Contracts, §43, book 4A, page 437, (1999), states,

Provisions of a contract effecting a forfeiture or exacting a penalty are strictly construed **against** the party for whose benefit they were incorporated in the instrument. Peerless Carbon Black Co. v. Gillespie, 87 W.Va. 441, 105 S.E. 517 (1920) (emphasis added)

16. Michie's Jurisprudence, Contracts, §48, book 4A, page 449, (1999), states,

When a contract is to be construed, a well-settled rule based on common sense is that the whole contract should be considered in determining the meaning of any or all its parts. Heatherly v. Farmers' Bank, 31 W.Va. 70, 5 S.E. 754 (1888); Johnson v. Welch, 42 W.Va. 18, 24 S.E. 585 (1896); Huddleston v. Mariotti, 143 W.Va. 419, 102 S.E.2d 527 (1958)

17. The "hornbook law" on promissory estoppel in this regard may be found in Restatement (Second) of Contracts § 139 where the text provides:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

18. Michie's Jurisprudence, Estoppel, §14, book 7A, page 486, (1998), states,

The general rule of equitable estoppels, or, as it is frequently called, *estoppels in pais*, is that when one person, by his statements, conduct, action, behavior, concealment, or even silence, has induced another who has a right to rely upon those statements, or the like, and who does rely upon them in good faith to believe in the existence of the state of facts with which they are compatible and act upon that belief, the former will not be allowed to assert, as against the latter, the existence of a different state of facts from that indicated by his statements or conduct, if the latter had so far changed his position that he would be injured thereby. Stone v. Tyree, 30 W.Va. 687, 5 S.E. 878 (1888); Weaver v. Burr, 31 W.Va. 736, 8 S.E. 743 (1888); Hanly v. Watterson, 39 W.Va. 214, 19 S.E. 536 (1894)

19. Michie's Jurisprudence, Estoppel, §14, book 7A, page 488, (1998), states,

Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who, on his part, acquires some corresponding right, either of property, of contract, or of remedy. Norfolk & W.R. Co. v. Perdue, 40 W.Va. 442, 21 S.E. 755 (1895)

20. Carolyn S. Cunningham and Phares L. Cunningham, et. al. v. Catherine Mae Riley and

State Farm Mutual Automobile Insurance Company, etc., 375 S.e.2d 778 (WV 1988). The facts of

that case are as follows:

...On appeal the appellants' claim that the record indicates that the Appellee, State Farm Mutual Automobile Insurance Company, was guilty of inequitable conduct which induced them to refrain from filing their complaint within the time period specified by the statute of limitations and that State Farm should be deemed estopped from asserting the limitations defense.

...According to the Appellants, after they had retained attorneys in the case, State Farm acted in such a way as to lead them, or their attorneys, to believe that State Farm would settle the case.

...In their memorandum and response the appellants indicates that State Farm had made assurances that the Appellants' claim would be paid once proof of special damages was received, that State Farm had virtually admitted liability, that the insurance company had made requests for delay, that there had been mutual agreement that final negotiation of a settlement would occur after certain doctors' reports were obtained, that State Farm had been silent when it became apparent that final proof could not be submitted until after the statute had run, that State Farm's adjuster had agreed that the statute would not be a problem in the case, and that the procedures which State Farm and the appellants' attorney had agreed to had the effect of extending the period of the statute of limitations. ...

21. The decision was as follows:

In view of the fact that a State Farm representative specifically stated on December 23, 1985, that "we will settle with you as soon as possible", and in view of the other representations, this Court believes that the record strongly suggests that State Farm was involved in conduct of a type sufficient to suggest estoppel under the guidelines set forth in Humble Oil & Refining Co. v. Lane, supra. Under the circumstances, this Court believes that, at very least, additional inquiry into the facts is desirable for application of the law and that summary judgment was improper under the rule set forth in Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, supra.

The judgment of the Circuit Court of Upshur County is, therefore, reversed and this case is remanded for further development.

22. The WV Supreme Court in Ryan v. Rickman, 213 W.Va. 646; 584 S.E.2d 502 stated,

3. "The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel in pais there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; that party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the other to whom it was made must have relied on or acted on it to his prejudice."

23. The WV Supreme Court in Ross v. Midelburg, 42 S.E.2d 185 (W. Va. 1947), stated,

...It was said in *Glass v. Hulbert*, 102 Mass. 24, 35, 3 Am.Rep. 418: 'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm to be estopped from setting up the statute of frauds.' This statement has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise. See *Browne on Statute of Frauds*, § 457a...

24. WV Code § 48-5-707, "Reduction or Termination of Spousal Support Because of De Facto Marriage", states, in pertinent part,

(a)(1) In the discretion of the court, an award of spousal support may be reduced or terminated upon specific written findings by the court that since the granting of a divorce and the award of spousal support a de facto marriage has existed between the spousal support payee and another person.

(2) In determining whether an existing award of spousal support should be reduced or terminated because of an alleged de facto marriage between a payee and another person, the court should elicit the nature and extent of the relationship in question. The court should give consideration, without limitation, to circumstances such as the following in determining the relationship of an ex-spouse to another person:

(A) The extent to which the ex-spouse and the other person have held themselves out as a married couple by engaging in conduct such as using the same last name, using a common mailing address, referring to each other in terms such as "my husband" or "my wife", or otherwise conducting themselves in a manner that evidences a stable marriage-like relationship;

(B) The period of time that the ex-spouse has resided with another person not related by consanguinity or affinity in a permanent place of abode;

(C) The duration and circumstances under which the ex-spouse has maintained a continuing conjugal relationship with the other person;

(D) The extent to which the ex-spouse and the other person have pooled their assets or income or otherwise exhibited financial interdependence;

(E) The extent to which the ex-spouse or the other person has supported the other, in whole or in part;

(F) The extent to which the ex-spouse or the other person has performed valuable services for the other;

(G) The extent to which the ex-spouse or the other person has performed valuable services for the other's company or employer;

(H) Whether the ex-spouse and the other person have worked together to create or enhance anything of value;

(I) Whether the ex-spouse and the other person have jointly contributed to the purchase of any real or personal property;

(J) Evidence in support of a claim that the ex-spouse and the other person have an express agreement regarding property sharing or support; or

(K) Evidence in support of a claim that the ex-spouse and the other person have an implied agreement regarding property sharing or support.

(3) On the issue of whether spousal support should be reduced or terminated under this subsection, the burden is on the payor to prove by a preponderance of the evidence that a de facto marriage exists. If the court finds that the payor has failed to meet burden of proof on the issue, the court may award reasonable attorney's fees to a payee who prevails in an action that sought to reduce or terminate spousal support on the ground that a de facto marriage exists...

25. The WV Supreme Court, in the case of Gary D. Wachter v. Sylvia L. Wachter, 216

W.Va. 489, 607 S.E.2d 818 (2004), stated,

3. When a court is asked to determine whether a relationship rises to the level of a de facto marriage under W. Va.Code § 48-5-707(a)(2)(2001) (Repl.Vol.2001), the court should use the factors enumerated within that section of the code as a guide for its decision, and should also consider any other evidence presented by the parties that is relevant to establishing the existence or non-existence of a de facto marriage.

4. Where the payor of spousal support seeks to have his or her support obligation reduced or terminated based upon the existence of a de facto marriage between the recipient of the spousal support and another, the burden is on the payor to prove by a preponderance of the evidence that a de facto marriage exists.

ARGUMENT AND DISCUSSION

1. While this Court's opinion in Brenda Diane Ware v. David Gary Ware, 224 W.Va. 599, 687 S.E.2d 382 (W. Va. 2009) provides clear guidance on the requirements for an enforceable prenuptial agreement, authorities are not clear on how a trial Court should proceed when the party who has been coerced into the agreement elects to enforce it. The lack of such guidelines may have contributed to the Family and Circuit Courts' errors in this case. Here, all ambiguities and presumptions were resolved against the wrongdoer. Even his admissions were not considered.

2. If this ruling stands, controlling and abusive people will be encouraged in this behavior and get away with it.

3. Clearly, if Patricia Lee were endeavoring to be freed of the obligations of the prenuptial agreement, she could do so. But this is the rare situation in which the party who was pressured into signing a prenuptial agreement prefers to have it enforced and the person who drafted it and insisted it be signed as a condition of saying "I do" now wishes to say, "I don't".

4. The situation falls under the saying, "be careful what you ask for..."

5. Clearly, if this were an "alimony" case, Ms. Lee's post separation relationship(s) was not a "de facto marriage". Just as clearly, if Mr. Lee engaged in relations with a prostitute, he would not have "another relationship".

6. The analysis of this issue requires a full understanding of the concept of "promissory estoppel" and "detrimental reliance".

7. Three examples are illustrative, the last two of which are cases which the wife's counsel successfully appealed to the West Virginia Supreme Court Of Appeals:

a. The classic law school example is the confused neighbor who miscalculates his boundary line and commences to build a barn on his neighbor's land while his neighbor and the neighbor's wife sit on the porch, smirking and sipping tea. The barn is finished. The land owners stroll down to the construction site and thank the neighbor for their new barn....NOT, at least in WV.

b. **Everett v. Brown, 174 W.Va. 35, 321 S.E.2d 685 (W.Va. 1984)**: In this case, Mr. Everett, a Buckhannon real estate agent, had a signed listing agreement for the sale of Mr. and Mrs. Brown's home. The listing was for 90 days, and it expired. Of course, a few days after the expiration, potential buyers appeared seeking a home which fit nearly exactly the Browns'. Mr. Everett called Mr. Brown, reminded him of the listing had expired, and sought permission to show the house, in spite of the fact that West Virginia has a "statute of frauds" specifically addressing listings and requiring that they be in writing. Mr. Brown readily agreed to Mr. Everett's showing the property.

The potential buyers appeared to be enamored with the property, but several weeks passed, and the buyers advised they were no longer interested. Mr. Everett later learned that the buyers purchased the property from the Browns. The West Virginia Supreme Court of Appeals, stated,

...In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant: (a) the availability and adequacy of other remedies, particularly cancellation and restitution; (b) the definite and substantial character of the action or forbearance in relation to the remedy sought; (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence; (d) the reasonableness of

the action or forbearance; (e) the extent to which the action or forbearance was foreseeable by the promisor...

... There is no question in this case that Griffin Real Estate was the "efficient or procuring cause of the sale of the property," *Kimmell v. Mohler*, 102 W.Va. 355, 135 S.E. 175 (1926). We conclude that: (1) an oral agreement to extend the prior written contract existed; (2) the defendants, by their conduct, are stopped to assert the statute of frauds; and, (3) the plaintiffs performed each and every obligation that they had under the oral agreement. Plaintiffs' damages, then, are measured by the amount of their lost profits, which in this case is their 5% commission.

The award to the plaintiffs of their broker's commission is in accord with the general rule that a broker is entitled to his commission when he procures a person able, ready and willing to purchase the property on the specified terms. His commission is not denied him because the seller refuses to complete the transaction, *Dotson v. Milliken*, 209 U.S. 237, 28 S.Ct. 489, 53 L.Ed. 768 (1908)...

c. **Cunningham v. Riley, 180 W.Va. 146, 375 S.E.2d 778 (W.Va. 1988):**

Mr. Cunningham was driving, and Mrs. Cunningham was his front seat passenger, on the Elkins Road, in Buckhannon, when Ms. Riley drove through a stop sign, striking the Cunningham vehicle, and crushing Ms. Cunningham's foot. When they returned home, to Ohio, they hired a lawyer. When the lawyer could not settle the case, he associated with a Buckhannon attorney, just three months before the running of the statute of limitations. Efforts were made to obtain an examination by a Weston orthopedic surgeon, but two appointments were canceled by the doctor at the last minute. Cunningham's attorney called to explain to the adjuster there would be a delay in submitting the claim, temporarily unaware of the eminent running of the statute. The adjuster replied, "okay".

Subsequent litigation revealed internal memoranda of the adjuster and his supervisor wherein the adjuster recognized the attorney might overlook the statute and was instructed, "Say nothing." The case was salvaged when a concurrent memoranda of

the conversation with the adjuster was found on the attorney's carbon copy. The Supreme Court ruled:

In view of the fact that a State Farm representative specifically stated on December 23, 1985, that "we will settle with you as soon as possible", and in view of the other representations, this Court believes that the record strongly suggests that State Farm was involved in conduct of a type sufficient to suggest estoppel under the guidelines set forth in Humble Oil & Refining Co. v. Lane, supra. Under the circumstances, this Court believes that, at very least, additional inquiry into the facts is desirable for application of the law and that summary judgment was improper under the rule set forth in Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, supra.

The judgment of the Circuit Court of Upshur County is, therefore, reversed and this case is remanded for further development.

8. Each of these cases has two things in common:

a. The persons at risk above were in the wrong by (a) building a barn on the wrong property, (b) failing to get the listing in writing, and (c) missing the statute of limitations;

b. In each instance, the person at risk relied on the actions or forbearance of the other party to his own detriment.

c. The property owner could have stopped the building of the barn at the first instance. The Browns could have prohibited Mr. Griffin from showing the property. And, the insurance adjuster did not have to say "okay" when the attorney proposed a delay, past the statute, of three weeks. All were later barred from denying the effect of their actions, as Mr. Lee should be. He induced Ms. Lee to sign the "pre-nupt", to rely on his written promises, AND to marry him, and cannot now deny his obligations under the contract.

9. Patricia Lee relies on the doctrine of "promissory estoppel" in that she relied upon what she was told by her fiancé, signed the "pre-nupt", and changed her position to her detriment by relying on Charles Lee's promises, and got married.

10. Likewise, Patricia Lee, perhaps naïvely but in good faith, acquiesced to Mr. Lee's insistence that she sign a prenuptial agreement. There was no verified disclosure of the parties' assets and debts. Had there been, it is possible Ms. Lee would have been scared off by Mr. Lee's debt load. Nevertheless, she changed her position to her own detriment by saying, "I do", by waiving certain claims that Mr. Lee wanted her to waive, including potential claims to over one million dollars in marital income, and by trusting that if the marriage failed within ten (10) years, she would at least have the security of free housing for her and her daughter. Note: That protection disappeared half way into the term of the contract.

11. Given, that the demand for a prenuptial agreement was Mr. Lee's, that he is an analyst with the Internal Revenue Service, that he is a propertied individual, a college graduate, obviously intelligent, and capable of getting on the Internet, researching prenuptial agreements, downloading a form, and drafting the prenuptial agreement, he certainly knew, or upon inquiry could have known, of his right to consult an attorney. He could have had an attorney draft the agreement or assist him in negotiations. He did none of these things.

12. Mrs. Lee did not either, but she was not the drafter of the agreement or the person demanding an agreement be signed. If any coercion took place, it had to be Mr. Lee's presenting the "prenuptial" two weeks before the wedding, after plans had been made, travel plans of guests made, and motel reservations made. The bride was under threat of severe embarrassment and humiliation. She reacted as could be anticipated, with tears and anxiety, and even second

thoughts about the marriage. The engagement would have been "blown up" but for Mr. Lee's agreement to provide for Patricia Lee's daughter's security in the event of a failed marriage.

13. The Family Court clearly determined that the prenuptial agreement is not completed to the standards of Brenda Diane Ware v. David Gary Ware, 224 W.Va. 599, 687 S.E.2d 382 (W.Va. 2009).

14. The prenuptial agreement was not signed voluntarily by Patricia Lee.

15. There was no full disclosure of debts and assets or that Mr. Lee had a "negative net worth". There was clearly misrepresentation, and probably fraud, which the Family Court implicitly conceded when it gave Patricia the option of "opting out" of the agreement and asserting her right as if there were no prenuptial agreement.

16. The Family Court ignored all of Charles Lee's wrongful behavior; first, coercing Patricia Lee into signing the prenuptial; second, violating his marital vows, and demanding a divorce; and third, interpreting the undefined phrase "another relationship" to include any sexual encounter, no matter how brief or inconsequential.

17. The marriage did fail, and the reasons therefore are shown in a quotation of a letter, undated, but postmarked July 8, 2009, handwritten by Mr. Lee, duly admitted, annexed hereto, and stating, in pertinent part,

Patti & I are separating & she is having a hard time dealing with the reality. I am taking the blame as **I had an affair**. (emphasis added)

18. It is now irrelevant to inquire as to the "reasonableness" of the housing provision, because the person who is entitled to repudiate the prenuptial agreement because of coercion, lack of full disclosure, lack of an opportunity to consult counsel, or unfairness, is the very person who wishes to enforce the agreement. That language is,

10) In the event that there is a separation of the parties, the following will occur regarding spousal support:

- In the event of separation, Charles will provide Patti housing at no cost at Route #9, Box 368, Buckhannon until she decides to move or until she enters into another relationship. The provision of housing will include basic and "nationwide" phone service for the same period of time. As well as all other household expenses, with a limit of \$500.00 per month, until such time as her minor children graduate from high school.

- Patti will be provided one of the family vehicles In the event of separation or divorce. She will be responsible for maintaining it and its continued operation.

19. **Analysis of the meeting of the term "another relationship":** The meaning of "another relationship" is not defined. However, "another" grammatically ensures that there is a previous or existing relationship to which "another relationship" must be compared. That relationship was a "live-in relationship" of several years, culminating in engagement and marriage.

20. There is a body of law in WV, analogous to the "other relationship" issue in this case. That is this Court's cases involving the parameters of a "de facto marriage".

21. If the drafter used the term "de facto marriage" instead of "another relationship" and fails to define it, but admits that a key component of the negotiation was Patricia Lee's desire for "housing" and "security" for her daughter, why should her, more reasonable, interpretation of the phrase not prevail? Or, why can she not ask the Court to apply the rule it has in alimony cases, so that mere sexual encounters (because of a moralistic judgment by the Court's against women, or simply a disinclination to the concept of alimony) bar the spouse in need from the benefits of the bargain?

22. None of the encounters found by the Court to have occurred would constitute a de facto marriage under WV Code §48-5-707 (*Reduction or Termination of Spousal Support because of De Facto Marriage*).

23. By denying her the benefit of the de facto analysis, the lower courts effectively shift the burden, taking away from the Husband any duty to prove that his wife has established "another relationship", which ended her need for the benefit of his support.

24. As for the equitable estoppel concept, equity constitutes an interpretation of the law designed to avoid the "gotcha" element. Here, the bully imposed a contract on his victim; grudgingly, after a week of fighting and 17 hours of discussions, he inserts a provision to his fiancé's benefit, cheats on her, and bids her to leave, and avoids the only significantly favorable provision she was able to negotiate!

25. And, this woman, who had no attorney to advise her she needed to define the term "another relationship", naively believed that if she tells her fiancé such a relationship must include housing and security (only during her daughter's minority), she is now told by the Courts, "You lose, and your husband's asserted definition will prevail.", or words to that effect.

26. There is no evidence of Patricia Lee having a romantic, long-term, committed engagement, marriage, or relationship. And there is no evidence of a "de facto" marriage. Charles Lee is, simply, "Coach Rod", a man trying to avoid the terms of his contract.

27. It is important to keep in mind that the only person who testified to any sexual relationship by the Petitioner after the separation of the parties, except the Petitioner, was Christopher C. Cutright, an admitted liar, who attempted to take the 5th Amendment and who testified only because the Family Court threatened to "throw him jail". His testimony of an alleged encounter was of brief sexual encounters.

28. It appears the Family Court penalized Ms. Lee for the Court's perception she is promiscuous. If so, the Court ignored the fact that she was a loving faithful wife during the

nearly two (2) year marriage, and that the marriage ended solely because Charles Lee had an affair with a co-worker and "dropped that bomb" on Ms. Lee on June 4, 2009.

29. Ms. Lee was induced to waive any opportunity for the Court to penalize Mr. Lee for his inequitable behavior under WV Code §48-6-301, "Factors Considered in Awarding Spousal Support, Child Support or Separate Maintenance", and WV Code §48-8-101, et. seq., "Spousal Support" in order to get the benefit of this bargain which was a benefit to her only during the first ten (10) years of the marriage since after that every single provision of the prenuptial agreement accrued to the benefit of Charles Lee.

30. Ms. Lee simply seeks the financial security she was promised by Mr. Lee if the marriage ended.

31. Also, since Mr. Lee specifically refused to deny the likelihood that Ms. Lee asked him, "So you will be permitted to break this agreement without penalty, but I will have to remain celibate until Sherika becomes 18?", and that he responded, "Of course not. I just don't want some guy living in my house.", his testimony which has "the ring of truth" should have been accepted by both courts.

32. Remember that when asked by his lawyer if he said this, he testified,

PJC: Ok. I am not going to ask you what her state of mind was, but I am going to ask you what she indicated to you. A statement has been attributed to you that you said, "of course not it just means I don't want somebody else living in my house". Did you make that statement to her?

CWL: I don't recall if that is the only statement I made or if I made it just that way or what.

PJC: So it is possible that you may have said that but are you saying that is not what...

CWL: That may have not been a part...

PJC: ...been part of it?

CWL: Yeah. I don't know exactly the context of that or... I believe there was quite a bit of discussion about when she was entering another relationship whether or not that person would have a house for her to move to or whatever. I don't know the whole

gist of the narrative. It wasn't recorded that I know of. (p.12-13 of Transcript of Charles Lee's Testimony)

At the very least, Mr. Lee's admission that Petitioner's primary concern was her child's security and that she expressed to him that another relationship would include a relationship providing her with such housing and security, any denial to the Petitioner of this benefit, whether based upon prudishness, punishment for perceived promiscuity subsequent to the parties' separation, or desire to impose what the Court thought the prenuptial agreement should be based upon the length of the marriage, is misguided, and, therefore, arbitrary and capricious.

33. In making its findings of fact and reaching its conclusions of law, the Court utterly ignores the stream of legal authorities cited in pages 15 through 21 of this petition, that the contract be construed so as not to deprive a party of the benefit of their bargain, that ambiguities in an agreement must be resolved against the drafter of those agreements, and that the intent of the parties be implemented to the extent the Court is able to do that.

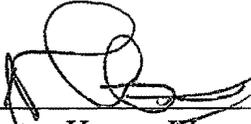
34. In this case, the innocent party is the dutiful wife who relied on her fiancé's promises to her detriment, and, ironically, after the passing of ten (10) years, the prenuptial agreement is entirely favorable to Charles Lee, and the benefits to Patricia Lee, primarily the security of a home, begin to diminish immediately and by the tenth year of the contract disappear entirely.

35. The Court has denied all of these benefits in spite of the fact the agreement was imposed upon Patricia Lee by Charles Lee, that the terms of the prenuptial were violated by Charles Lee, that the terms of the marital vows were violated by Charles Lee, and that Patricia Lee has simply not found "another relationship" remotely equivalent to or similar to her long term committed engagement which became a marriage to Charles Lee. For the Court to have ruled that she entered into "another relationship" is an abuse of discretion and plain error.

RELIEF REQUESTED

In consideration of the foregoing, the Respondent has not entered into "another relationship". She certainly has not entered into any relationship that could be interpreted as a *de facto marriage*. Thus, she is entitled to the relief granted to her in the "pre-nupt".

Respectfully Submitted,
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EXHIBITS

ON

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