

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOUNTAIN STATE COLLEGE,
Defendant/Petitioner,

v.

APPEAL NO. 11-1203
(Civil Action No. 98-C-1497
Circuit Court of Kanawha County
Judge Tod J. Kaufman)

SHERYL HOLSINGER,
SANDRA R. CARPENTER, and
MARY J. YEATER,
Plaintiffs/Respondents.

PETITIONER'S REPLY BRIEF

MOUNTAIN STATE COLLEGE
*Defendant Below and Petitioner
Before This Court*

By Counsel

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I. STATEMENT OF THE CASE

Mountain State College (the “College”) relies principally upon its opening brief, much of which Respondents have chosen to ignore. Based on the law and the evidence presented at trial, the trial court was without the authority to grant the relief in the Judgment Order. The College is entitled to judgment as a matter of law or, in the alternative, a new trial based on repeated violations of the pretrial orders and other errors.

The inflammatory, misleading commentary at the outset of Respondents’ Brief exemplifies counsel’s approach to this case over the last thirteen years. (*See* Resp’t Br. 1-2). Respondents’ disparagement of the College is an attempt to rationalize the outcome of the proceedings below as somehow acceptable, or to distract the Court from addressing the issues presented in this appeal. As this is its first experience before this Court, the College feels compelled to respond.

Respondents attempt to confuse the Court by noting the publicized troubles of Mountain State *University* (“MSU”) and its president. But the College is not now, nor has it ever been, affiliated with MSU or its administrators.¹ (Not that it matters, but MSU, contrary to Respondents’ characterization, is a *non*-profit institution). The College was established in 1888 and has been educating the people of the Mid-Ohio Valley for nearly 125 years. (App. 283). When the College discovered that the entity previously known as the College of West Virginia had changed its name to “Mountain State University,” the College objected due to possible confusion between the institutions, and then found itself the defendant in a declaratory judgment action filed by MSU. *Mountain State Univ., Inc. v. Mountain State College, Inc.*, No. 01-0151 (S.D. W. Va. 2001).

¹ Judy Sutton, the College’s current president, joined the College in 1973 and has served as one the College’s key administrators for nearly 40 years. (Trial Tr. 249:7-21).

Respondents' unsupported assertion that "[t]he litigation resulted in new legislative rules applicable to for-profit colleges, which were stonewalled by an unconstitutional legislative veto obtained by the college's lobbyist" (Resp't Br. 2), is similarly perplexing. To be sure, Respondents unsuccessfully attempted to sue the Secretary of State to force the enactment of some unspecified rules, one of the many twists and turns in their strangely litigated case. (*See* App. 47 (order dismissing Secretary of State)). But that aspect of the case is not the subject of this appeal, and appears to be another baseless attempt to demean the College in hopes of distracting this Court from the fundamental issues involved in this appeal.

Once they turn to the issues, Respondents' statement of the case makes numerous assertions that are either misleading or unsupported by the record. While Respondents did, in fact, complete the legal assisting program, there is no support for the proposition that they "earned the highest grades among their peers." (Resp't Br. 4 (citing Trial Tr. 69, 136, 173)). Nor was the legal assisting program "dissolved," (Resp. Br. 7); it evolved into Legal Office Technology, a program offered by the College to this day. (Trial Tr. 289:5-7). Similarly, there was no "bogus survey." (Resp't Br. 3). Six years after the survey by Marietta College that indicated a paralegal program for the Mid-Ohio Valley may be unnecessary, the College hired Dr. Judith Hughbert (actually Huber) to investigate whether conditions had changed such that offering a paralegal program would be warranted. (Trial Tr. 271:21-272:23). Dr. Huber conducted a survey of lawyers and also contacted Marshall University and the state bar association, and she concluded that, as a result of those discussions and an influx of lawyers in the Mid-Ohio Valley, it would be appropriate for the College to offer a paralegal program. (*Id.*) Furthermore, the Respondents' allegations of supposed "boasts of a 95% placement rate" are

contradicted by the placement data forms supplied to *and signed by each Respondent* during enrollment, which make no 95% placement representation. (App. 139, 193, 231).

The College did not ignore the recommendations of James Skidmore of the West Virginia Council for Community and Technical College Education (“Council”), as suggested by Respondents. (*See* Resp’t Br. 5-6). The College intensely disagreed with his “findings” and recommendations, and his views were apparently not shared by the Council, which declined to take any further action on Respondents’ complaints – notwithstanding Mr. Skidmore’s views – after receiving the College’s documented refutation of Respondents’ allegations. (*See* Trial Tr. at 303:9-11; 342:22-346:18).

Perhaps most critically, Respondents misstate that, at trial, they testified that the College told them there *was* a great demand for paralegals in the region. (Resp’t Br. 3). In fact, Respondents claimed they were told what the demand for paralegals *would be* when they graduated. (*Id.* (citing Trial Tr. 64:4-5 (“we [paralegals] *would be in high demand* by the time we would graduate”); 125:2-3 (“the paralegal program *was going to be in great demand*”); 134:20-22 (“they had told us that they [paralegals] *were going to be in great demand*”); 169:18-24 (“Like I said, there was a great demand for them. *There would be at least*”))). The College denies that its representatives ever made such representations or made any guarantees of employment on graduation, but the distinction is an important one nevertheless, because it eviscerates any basis for Respondents’ fraud and related claims, which cannot be based on a prediction of future events.

II. ARGUMENT²

A. Respondents' claims were time barred.

Respondents graduated in 1992. They filed this action in 1998. Respondents contend that a ten year statute of limitations applies to their claims, because they arise out of written agreements, namely the enrollment agreements. (Resp't Br. 11 (citing W.Va. Code § 55-2-6)). But the written enrollment agreements are unambiguous and make no guarantee of job placement or salary upon graduation. (E.g., App. 133-34; 144). Indeed, Respondents make no claim that *any* provision of *any* written agreement was breached. Respondents are muddling tort and contract in an attempt to extend the statute of limitations. *See Sansom v. Sansom*, Syl. Pt. 1, 148 W.Va. 603, 137 S.E.2d 1 (1964) (“In order for the ten year statute of limitations to be applicable, the obligation or liability must grow immediately out of the written instrument and not remotely.”)

Importantly, the College was granted judgment as a matter of law on Respondents' fraud claim at the close of their case-in-chief (Trial Tr. 225:24-226-10).³ Respondents' assertion that their claims for fraud sought only equitable relief does not mesh with the Judgment Order. (See App. 435-36 (awarding each Respondent “\$50,000, each of said judgments is comprised of \$30,000 for restitution to holders of the student loans.”)). As made clear in its opening brief, the College has never tried to enforce any agreement -- the Judgment Order's directive that the

² The College relies on its opening brief as to the trial court's unfair limitations on the College's surrebuttal (Pet'r's Br. 30-31) and errors in instructions to the jury (*id.* at 31-32).

³ The trial court ruled that the fraud claim was time barred. The trial court allowed special interrogatories on fraud to be submitted to the jury for consideration of possible equitable relief on the enforceability of Respondents' student loans (*see* Trial Tr. 225:24-226-10), but as made clear herein (and in the College's opening brief), no such equitable relief can be had against the College, which has never held or attempted to enforce the student loans in question.

College pay \$30,000 on each Respondent's student loan is not "equitable" relief. (Pet'r's Br. 21-22).

B. Respondents' claims for unconscionable contracts were not supported by the law or the evidence

1. The CCPA is not applicable to Respondents' claims against the College.

Respondents contend that the West Virginia Consumer Credit and Protection Act ("CCPA") applies to the College because "claims for violations under the act may be brought against the 'person' who violated the act." (Resp't Br. 14 (quoting W.Va. Code § 46A-5-101(1)). This Court rejected Respondents' argument in *Barr v. NCB Management Services, Inc.*, 227 W.Va. 507, 711 S.E.2d 577 (2011). In answering a certified question, the *Barr* Court reasoned that the CCPA applied to debt collectors because they are essentially creditors, but rejected the argument that the CCPA applies to "persons" generally:

Turning now to our analysis of W. Va. Code § 46A-5-101(1), we note that, while we agree that the statute is vague, we disagree with Ms. Barr's position that this vagueness arises because the statute begins with a reference to a "creditor" in identifying the alleged violator of the provisions of the chapter, and then later uses the term "person" to identify the party from whom a consumer may recover damages and a penalty through a cause of action. Insofar as the statute begins by referring to "a creditor" who has violated the act, we find the later use of the term "the person" plainly refers to the earlier-identified creditor who has violated the act.

Barr v. NCB Management Services, Inc., 227 W.Va. 507, 711 S.E.2d 577, 582-83 (2011). Here, the College does not resemble a creditor in any way, and the CCPA, therefore, does not apply to it.

Even if the CCPA applied to the College, Respondents' reliance on the CCPA's unconscionability provision is still misplaced. The enrollment agreements are not consumer loans, nor are they consumer credit sales. But even if they were, the only remedy that a court can provide (if it concludes an agreement is unconscionable as a matter of law) is to declare it

unenforceable. W. Va. Code § 46A-2-121. Respondents' unwillingness to appreciate the distinction notwithstanding (Resp't Br. 16), the College has never attempted to enforce any agreement against Respondents – neither the enrollment agreements nor the student loans.

Respondents continue to avoid this problem with their case with the misleading statement that, “Because the students’ loans had been consolidated – in other words refinanced – the holders of their loans were dismissed from the action.” (Resp’t Br. 2) In fact, as the College has been pointing out for more than a decade, “Plaintiffs well knew but consistently failed to sue two actual holders of the loans -- the Secretary of Education of the United States and United Student Aid Funds, Inc. – apparently because counsel did not wish to have Plaintiffs’ claims adjudicated in federal court.” (Pet’r’s Br. 3, fn. 2). Respondents continue to misrepresent these facts because they know that the only remedy available to the trial court was to refuse to enforce an agreement (relief that plainly could not be had against the College), not order that the College pay “\$30,000 for restitution to the holders of the [Respondents’] student loans.” (App. 436).

2. *The Judgment Order’s finding of unconscionability was unsupported by the evidence.*

In attempting to defend the Judgment Order’s finding of unconscionability, Respondents assert that the evidence demonstrated that the bargaining positions between the College and themselves were grossly unequal, but they make no effort to explain how the bargaining positions were different from any college and a prospective student – most likely because no such distinction can be made. Under Respondents’ view of the law, any enrollment agreement between any school and any student can be deemed “unconscionable” for anything, even unwritten promises of employment.

Respondents also claim that they testified that the alleged misrepresentations were about then-current demand for paralegals, not predictions about future events. (Resp’t Br. 13). But the

record citations purportedly supporting this assertion demonstrate the purported representations were indeed predictions about what future demand *would be*. (*Id.* (citing Trial Tr. 64:4-5 (“we [paralegals] *would be in high demand* by the time we would graduate”); 125:2-3 (“the paralegal program *was going to be in great demand*”); 134:20-22 (“they had told us that they [paralegals] *were going to be in great demand*”); 169:18-24 (“Like I said, there was a great demand for them. *There would be at least*”))). As explained in the College’s opening brief, predictions of future events cannot form the basis of a fraud claim – or a materially indistinguishable unconscionability claim. *Thacker v. Tyree*, 171 W.Va. 110, 113, 297 S.E.2d 885, 888 (1982); *Janssen v. Carolina Lumber Co.*, 137 W.Va. 561, 570, 73 S.E.2d 12, 17 (1952).

Respondents’ claim that job placement services were not provided (Resp’t Br. 14) is contradicted by their own brief. (*Compare* Resp’t Br. 13-14 (alleging that no job placement services were provided), *with* Resp’t Br. 4-5 (describing (in Respondents’ words) the job placement services provided by the College)). Moreover, Respondents utterly ignore the un rebutted testimony of the College’s placement director, Jonelle Merritt, who worked at the College from 1969 to 1984 and again from 1991 to 1994 and explained that “guarantees” simply were not made in detailing the various job placement assistance that she provided, including preparing resumes, help with interview etiquette and preparation, and supplying graduates with information on potential employers and job openings. (Trial Tr. 238:1-240:19). Additionally, there was no demonstration at trial that the College was obligated to schedule “interviews.”

Respondents continue to complain about the quality of the education provided by the College. (Resp’t Br. 14). The College vehemently disputes this allegation, but the trial court had determined before trial that “plaintiffs are precluded from arguing or presenting evidence to the effect that they received an inadequate education at the College or that the College violated any

ACICS or other accreditation or regulatory standards.” (App. 88). As demonstrated in the College’s opening brief, claims of educational malpractice are not cognizable, and Respondents should not be permitted to force such a claim into some other theory of recovery. (Pet’r’s Br. 22-23).

Respondents’ assertion that, “job placement services ... were the material consideration for the [enrollment] agreement[s]” (Resp’t Br. 16), is belied by the written agreements themselves – they contain nothing about job placement. (*e.g.*, App. 133-34; 144). What post-secondary educational institution could or would guarantee employment? Are graduates of West Virginia University or Marshall University entitled to sue their *alma maters* if they don’t land jobs? Rendition of educational services to Respondents was the consideration for the written enrollment agreements, and it was undisputed at trial that Respondents attended classes and graduated from the College. (*Id.*)

As shown in the College’s opening brief, the doctrine of restitution – typically invoked to require repayment of funds paid under the mistaken belief or obligation – is not applicable here. (Pet’r’s Br. 22). Indeed, the case cited by Respondents in defense of the Judgment Order’s restitution award simply stands for the uncontroversial proposition that, if an individual pays a judgment (or decree) and the judgment is later reversed (or voided), then the party who made the payment is entitled to have the payment returned. *Simmons v. Simmons*, 91 W.Va. 32, 112 S.E. 189 (1922).

C. Respondents were not entitled to offer extrinsic evidence of the terms of the enrollment agreements.

Respondents contend that they were entitled to present extrinsic evidence regarding the terms of the enrollment agreements because they were “ambiguous” or induced by fraud. As explained above, predictions of the future – job demand in later years – are not a basis for fraud.

Furthermore, the trial court dismissed Respondents' fraud claim at the close of their case-in-chief. (Trial Tr. 226:9-10). Extrinsic evidence was not admissible on the basis of any fraud theory.

Respondents appear to contend that the enrollment agreements are "ambiguous" because they state nothing about job placement services. This argument is unprecedented and absurd. The lack of any discussion of job placement services in the enrollment agreements makes them entirely *unambiguous* on that front. Extrinsic evidence of their nonexistent terms should not have been considered.⁴ Because the written enrollment agreements do not provide for guaranteed job placement or make any representations about job demand, the College was entitled to judgment as a matter of law on Respondents' (unpled) contract claim. (Pet'r's Br. 24-25).

D. The Judgment Order's award of actual damages (independent of the student loan obligations) was not supported by the evidence.

Other than their outstanding student loan obligations, Respondents offered no evidence that would enable the jury to do anything more than speculate as to their actual damages. Speculative damages are prohibited because the plaintiff bears the burden of proving damages to a degree of reasonable certainty. *See, e.g., Taylor v. Elkins Home Show, Inc.*, Syl. Pt. 5, 210 W.Va. 612, 558 S.E.2d 611 (2001). Respondents gave fleeting, general testimony that their credit was damaged, but provided no discrete examples or what, if any, damages were suffered as a result. *Cf., City Nat'l v. Wells*, 181 W.Va. 763, 772-74, 384 S.E.2d 374, 383-85 (1989) (concluding damage from impaired credit was "reduced to a reasonably certain sum" because plaintiff provided discrete examples of being denied financing and detailed resulting damages).

⁴ Respondents erroneously assert that the College "agreed at trial that job placement was the primary purpose of enrollment in Mountain State College." (Resp't Br. 18). The College made no such admission; the College simply acknowledged that helping place its students in jobs in their respective fields was an important objective of the College. (Trial Tr. 293:11-14).

The Judgment Order's damage award of \$20,000 to each Respondent in actual damages was without supporting evidence, and it should be reversed.

E. Respondents had no right to recover attorney fees.

As already addressed, the CCPA is not applicable to the College. Thus, the Judgment Order's award of attorney fees was erroneous. *See* W.Va. Code § 46A-5-104 ("In any claim *brought under this chapter* applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice, the court may award all or a portion of the costs of litigation, including reasonable attorney fees, court costs and fees, to the consumer.") (emphasis added).

Respondents' assertion that they are entitled to attorney fees for fraud is also without merit. As explained above, predictions of future events do not support recovery under a fraud theory. Furthermore, the College was granted judgment as a matter of law on Respondents' fraud claim at the close of their case. (Trial Tr. 226:9-10).

F. The admission of James Skidmore's evidence was prejudicial error.

Before trial, the trial court ruled that James Skidmore would not be permitted to testify. (App. 90-91). This was entirely correct, as Mr. Skidmore had no personal knowledge of anything relevant to this case. His opinion was informed only by Respondents and similarly situated former students who wanted to avoid repaying their student loan obligations. In initially excluding his proffered hearsay testimony, the trial court appreciated that his opinion (and related "report") was inherently untrustworthy as a result. (*See* App. 90 (pretrial order precluding testimony of James Skidmore)). Mr. Skidmore's evidence should not have been admitted and it was extremely and unfairly prejudicial. (Pet'r's Br. 26-28).

Nor did the College open the door for Mr. Skidmore's testimony. Respondents insinuate that Ms. Sutton testified that she was unaware of complaints about the paralegal program. (*See*

Resp't Br. 21 (citing Trial Tr. 279-81)). To the contrary, Ms. Sutton stated that she was aware that Respondents and other students had complained about the program to the state agency – i.e., Mr. Skidmore. (*Id.*). Respondents' assertion that Mr. Skidmore was called to rebut the testimony of Ms. Sutton is simply without merit.⁵

G. The admission of Timothy Amos's evidence was prejudicial error.

The quality of education provided by the College was not even an issue to be tried. (App. 88). But even in the absence of such a (proper) pretrial ruling, Mr. Amos was not practicing law until years after Respondents graduated from the College, and he was thus in no position to testify about the demand for paralegals in the Mid-Ohio Valley in the relevant time period. (Trial Tr. 316:11-317:10). He did not testify as an expert and had no knowledge of any of the alleged misrepresentations of the College. He was simply called in to disparage the College's purported "reputation." As a lawyer in Parkersburg, the jury likely gave substantial weight to his negative – albeit irrelevant – testimony, and his testimony should not have been admitted.

Furthermore, Respondents' contention that the College had "ample opportunity" to call witnesses to rebut the evidence offered by Mr. Amos and Mr. Skidmore is undermined by the fact that, prior to trial, the trial court had limited the issues at trial to specific misrepresentations. (App. 88). The quality of education, the reputation of the College, and the alleged regulatory violations were not supposed to be discussed at trial. The College relied upon the trial court's pretrial orders, and did not prepare to defend issues outside of the alleged misrepresentations. It cannot fairly be said that the College had "ample opportunity" to call witnesses to rebut the sweeping assertions made by Respondents' witnesses in rebuttal.

⁵ Respondents' assertion that Mr. Skidmore was called to "rebut" Ms. Sutton's testimony about the quality of the program ignores the pretrial ruling that this was not even to be an issue at trial, a ruling which Respondents' counsel violated almost immediately. *See* Pet'r's Br. 5, 8.

H. Respondents' counsel's reference to Mr. McPeek in violation of the agreed pretrial order compels a new trial.

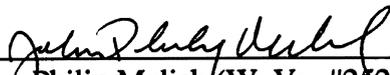
Respondents essentially contend that counsel did not read and was unaware of the order it agreed to prohibiting any mention of Mr. McPeek. (Resp't Br. 22-23). This does not cure the error. This was not a harmless accident on the part of counsel; at the outset of his cross examination of Ms. Sutton, counsel pointlessly and deliberately elicited information about Mr. McPeek and identified him in the gallery. (Trial Tr. 270:10-18). By agreeing to the order making reference to Mr. McPeek off limits, the parties agreed that discussion of him was unfairly prejudicial. *See Jones v. Setser*, Syl. Pt. 3, 224 W.Va. 483, 686 S.E.2d 623 (2009) (observing that a deliberate violation of an order on a motion in limine is the "intentional introduction of prejudicial evidence into a trial."). If this court concludes that the College is not entitled to judgment as a matter of law, the College is entitled to a new trial.

III. CONCLUSION

The College respectfully requests that this Court reverse the Judgment Order and direct entry of judgment in favor of the College. In the alternative, the College requests that the repeated violations of the trial court's pretrial orders and other errors entitle the College to a new trial.

MOUNTAIN STATE COLLEGE

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MOUNTAIN STATE COLLEGE,
a corporation,
Defendant/Appellant.

CERTIFICATE OF SERVICE

I certify that on January 25, 2012, I caused to be served a copy of the forgoing
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