

STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS

MELISSA ROTRUCK

Petitioner,

v.

No. 14-1284

**JANICE SMITH DBA
INSURANCE QUEEN**

Respondent

PETITIONER'S BRIEF

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TABLE OF AUTHORITIES

CASES

Jones v. Tri-County Growers, Inc., 179 W.Va. 218, 366 S.E.2d 726, syl. pt. 3 (1988)

Clendenin Lumber and Supply Co. v. Carpenter, 172 W.Va. 375, 305 S.E.2d 332, page
338 (1983)

Western v. Hodgson, 494 F. Supp. 379, 381 (1974)

CODES

WV Code §33-44-4

WV Code §21-5-1

WV Code §21-5-3

Assignment of Error

1. The trial court incorrectly found that Petitioner did not explain how a “commission only contract” would be illegal for an employee to be paid a commission who did not have a license to sell insurance.
2. The trial Court incorrectly interpreted the West Virginia Wage Payment and Collection Act’s prohibition against wage assignments by employees to pertain to only consumer credit transactions where the employer is a creditor.

Statement of the Case

1. Petitioner worked for an insurance business and was to be paid a commission from the sale of insurance. Paragraphs Numbers 2 and 10 of Respondent's Answer, pages 15 and 16 of Appendix.
2. Respondent agreed to advance money to Petitioner in return for Petitioner's promise to repay the advancements from future commissions. Paragraph Numbers 5, 12, 17, and 20 of Respondent's Answer, pages 15 and 16 of Appendix.
3. Petitioner could not be paid a commission because she did not have an insurance license. Pages 15, 16, and 17 of Appendix.

Summary of Arguments

- A. It is illegal for an insurance agent to pay an employee a commission if the employee has not obtained a license.
- B. Assignment of future wages must meet the requirements of the statute or the assignments are void and unenforceable.

Oral Argument

Petitioner believes and, therefore, asserts that oral argument is necessary for the following reasons:

- (a) This case involves assignments of error in the application of settled law;
- (b) This case involves an unsustainable exercise of discretion where the law governing that discretion is settled;
- (c) This case involves a decision which was based upon insufficient evidence and the decision was against the weight of the evidence.

Argument

A. Illegal Contract

The order which remanded this matter, ordered the trial court to enter an order with findings and conclusions that addresses all of the issues raised in the Petitioner's motion for a new trial.

At page 3 of its order, the trial court found that "Ms. Rotruck was clearly hired as a commission-only sales associate." At page 5 the trial court found that Petitioner "does not explain how the employment agreement was an illegal contract." At page 8 of its order, the trial court found that Petitioner "did not pass the licensing examination that would allow her to earn commissions."

At trial Respondent testified that Petitioner could not be paid a commission until she obtained a license.¹ The trial court did not explain how the employment contract could be a commission only agreement if Petitioner could not receive a commission. However, Respondent testified that Petitioner was paid for assisting Respondent and "doing" some insurance policies. On page 37 of the appendix line 22, Respondent admitted that she could not pay Petitioner her commissions.

Respondent also testified that Petitioner was paid a percentage of premiums.² Respondent explained at trial that Respondent did not call it a commission because Petitioner did not have a license and could not be paid a commission.³ Respondent admitted that while Petitioner was employed,

¹Page 35 of Appendix, lines 1-25

²Page 38 of Appendix, lines 7-8

³Pages 35-37 of Appendix

Respondent documented that Petitioner was paid a commission not that Petitioner was paid something other than a commission.⁶ Respondent admitted that it was illegal to pay Ms. Rotruck a commission.⁷

West Virginia Code §33-44-3 (P (4) defines the transaction of insurance, in part, as receiving a commission or other consideration for obtaining or receiving insurance. West Virginia Code §33-44-3 (9) makes it illegal for a person to assist an unlicensed person to engage in the transaction of insurance. However the trial court found that the employment agreement allowed Respondent to pay Petitioner by commission. But such an agreement would be illegal until Petitioner received a license to transact insurance.

In Petitioner's Motion for Summary Judgment, it was explained to the trial court that the law prohibits paying a commission to an unlicensed person. At Respondent's deposition and at trial, it was admitted that Petitioner could not be paid a commission.

The trial court's findings and conclusions that find that Petitioner did not explain how the employment contract was an illegal contract, is not supported by the facts. Not only was it explained to the court by Petitioner, but Respondent admitted that it was illegal to pay Petitioner a commission. The fact that the employment agreement would be illegal if Respondent paid Petitioner a commission was an undisputed fact.

Contrary to this court's mandate for the trial court to make findings and conclusions that addresses all the issues raised in Petitioner's motion for a new

⁶Page 39, lines 1-4 of Appendix

⁷Page 39, lines 10-13 of Appendix

trial, the trial court ignored the undisputed facts and found that the employment agreement must be interpreted to make it a commission only contract. Such contracts are illegal agreements. Such an interpretation violates the law of this nation. See *McMullen v. Hoffman*, 174 US 639, 19 S. Ct. 839 (1899); and *Kaiser Steel Corp. v. Mullens*, 455 U.S. 72, 102 S. Ct. 851 (1982).

Although it is possible that Petitioner agreed to come to work and make money for Respondent for no compensation, such special agreements must be approved by the West Virginia Commissioner of Labor. No such special arrangement was entered into evidence, because no such agreement existed. At page 181 of the appendix, the employment agreement stated that Petitioner would be paid by commission or a salary. The trial court interpreted this language to mean that the parties agreed to have Petitioner paid a commission. However Respondent admitted that it would be illegal to pay Petitioner a commission, and that Petitioner was not paid a commission. If no commission could be paid, then the only reasonable interpretation of the parties' agreement was that Petitioner was to be paid a salary.

Regardless, there was no factual basis for the trial court's finding that Petitioner would agree to work to obtain premiums for Respondent without compensation. The result of the trial court's finding was that Respondent was free to pay Petitioner when and if Respondent wanted to pay Petitioner. Such an interpretation would reverse almost a century of law in West Virginia.

Instead of following this court's instructions to enter a final order with finding and conclusions that addressed all of the issues raised in Petitioner's motion for a new trial, the trial court failed to explain how it concluded that the

parties' employment agreement could be interpreted as a commission only compensation for Petitioner. Contrary to the trial court's finding, page 5 of November 14, 2014 order, that Petitioner argued that an employee cannot be paid a salary by commission, Petitioner and Respondent agreed that Petitioner could not legally be paid a commission.

Petitioner requests that this court determine the question of whether a non-licensed individual can engage in the transaction of insurance in West Virginia.

Assignment of Wages

Western v. Hodgson, 494 F. Supp. 379, page 381 footnote 4 (1974), found that a wage assignment is a transfer of the right to receive wages effected by means of a contract.

In its amended order denying Petitioner's motion for a new trial, page 7, the trial court again found that Petitioner had not proved that Respondent was a creditor.

The trial court's first order denying a new trial found that Respondent "advanced Petitioner money" which was subsequently withheld from Petitioner's future wages. The trial court did not explain why it was Petitioner's burden of proof to show that Respondent was a creditor when it was undisputed that Respondent advanced wages to Petitioner and subsequently withheld the advancements from Petitioner's future wages. Pursuant to *Western Supra*, such an advance of wage which subsequently had to be repaid, constitutes an assignment of future wages.

This court in *Jones v. Tri-County Growers, Inc.*, 179 W.Va. 218, 366 S.E. 2d 726 (1988) found that compliance with all the requirements of West Virginia

Code §21-5-3 (e) is mandatory when assigning an employee's wages. *Clendenin Lumber and Supply Co., Inc. v. Carpenter*, 172 W.Va. 375, 305 S.E. 2d 332 (1983) held that an assignment of an employees' wages which does not comply with West Virginia Code §21-5-3 (e) is invalid and unenforceable.

In the case *sub judice*, it is undisputed that Respondent advanced wages which were subsequently withheld from Petitioner's future wages. Since Respondent failed to comply with any of the requirements of West Virginia Code §21-5-3 (e), the transaction was invalid and unenforceable. Respondent could not withhold the future wages under an invalid and unenforceable agreement, therefore Petitioner was not paid what she was owed. There is nothing within the statute or West Virginia case law that requires that Petitioner prove that her employer was a creditor.

Likewise there was no unjust enrichment to Petitioner. Petitioner could not legally be paid a commission. However Respondent paid Petitioner "from time to time" an advancement of the commissions which were subsequently withheld from Petitioner's future wages. Petitioner did not benefit from Respondent's illegal conduct, since all the payments were paid back to Respondent. However Respondent was unjustly enriched by recovering the fruits of Petitioner's labor for no compensation to Petitioner.

It was undisputed that the wage assignments in the case *sub judice* were: (a) Not in writing, and had no time limits; (b) not notarized; and (c) were not limited to three fourths (3/4) of Petitioner's periodic earnings or wages. In other words, Respondents advances of wages to Petitioner with a promise to repay the advances from Petitioner, did not meet even one of the requirements set forth in

West Virginia Code §21-5-3 (e).

The trial courts findings and conclusions were wrong as to the law since Petitioner did not need to prove that her employer was a creditor. Similarly the trial court was wrong as to the facts that Respondent could legally choose to pay Petitioner when and if she wanted to pay Petitioner

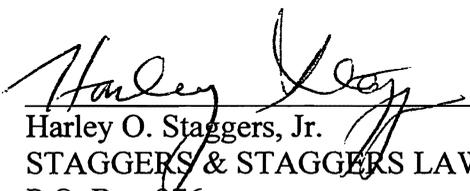
Conclusion

The trial court's finding that Petitioner asked Respondent for a job only highlights that Petitioner needed compensation for the services she rendered. Additionally, Respondent's assertions that she occasionally "helped" Petitioner by advancing wages, underlines that Petitioner did not agree to work without the expectation of compensation.

Respondent took advantage of a person in need and Respondent was unjustly enriched by Petitioner's service to her, which resulted in Respondent being paid commissions for the work Petitioner performed.

Petitioner should receive the compensation for the services she provided.

Respondent was required to follow the statute with the wage assignment she took from Petitioner. Since the statute was not followed, the wage assignments were void and unenforceable, and the withheld wages should be returned to Petitioner.



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CERTIFICATE OF SERVICE

I, Harley O. Staggars, Jr., a practicing attorney, hereby certify that a true copy of the **Petitioner's Brief and Petitioner's Appendix** has been served by United States Mail, postage prepaid, on this the 13th day of March, 2015, upon the following:

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