IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2003 Term

FILED

May 6, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30839

JAMES DUNLAP AND STEPHANIE GIBSON,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,
Plaintiffs Below, Appellants

v.

FRIEDMAN'S, INC., dba FRIEDMAN'S JEWELERS,
A DELAWARE CORPORATION,
AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, INC.,
AMERICAN BANKERS LIFE ASSURANCE COMPANY OF FLORIDA,
ALAN HOPKINS, WILLIAM PERRY, NANCY TANOUKHI,
ROY BATSON, JOHN DOE AND JANE DOE,
Defendants Below, Appellees

Appeal from the Circuit Court of Kanawha County
The Honorable Irene C. Berger, Judge
Civil Action No. 00-C-1155

REVERSED

Submitted: April 15, 2003
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JUSTICE ALBRIGHT delivered the Opinion of the Court.

CHIEF JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

JUSTICE DAVIS and JUSTICE MAYNARD dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995).

2. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

3. "Judicial interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent." Syl. Pt. 1, *Ohio County Comm'n v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983).

4. "A statute that is ambiguous must be construed before it can be applied." Syl. Pt. 1, *Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992).

5. "A statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. Pt. 1, *Consumer Advocate Division v. Public Service Comm'n*, 182 W. Va. 152, 386 S.E.2d 650 (1989).

6. West Virginia Code § 46A-5-101(1) (1996) (Repl. Vol. 1998) is a remedial statute to be liberally construed to protect consumers from unfair, illegal, or deceptive acts. In face of the ambiguity found in that statute, a consumer who is party to a closed-ended credit transaction, resulting from a sale as defined in West Virginia Code § 46A-6-102(d), may bring any necessary action within either the four-year period commencing with the date of the transaction or within one year of the due date of the last payment, whichever is later.

Albright, Justice:

This is an appeal by Stephanie Gibson and James Dunlap[1] (hereinafter "Appellants") from a final order of the Circuit Court of Kanawha County dismissing Consumer Credit and Protection Act (hereinafter "CCPA") claims for failure to file a complaint within the applicable statute of limitations period. On appeal, the Appellants assert that the lower court erred in finding that the applicable statute of limitations period was one year from the date of the last payment due; rather, the Appellants contend that the applicable statute of limitations period is four years from the date of the alleged violation.

I. Factual and Procedural History

On December 12, 1997, Appellant Stephanie Gibson purchased an item of jewelry from Friedman's Inc., doing business as Friedman's Jewelers (hereinafter "Friedman's"). The jewelry was priced at $949.00. With tax and "other charges," the total amount of the transaction was $1,156.62. Financing was accomplished through a retail installment sales contract requiring fifteen monthly payments beginning on January 1, 1998, and ending on February 25, 1999. With the addition of financing charges, the total sale price was $1,268.84. It is the imposition of the "other charges" that the Appellants attempted to challenge through the civil action. These "other charges" included $8.55 for credit life insurance, $22.45 for credit disability insurance, and $40.08 for property insurance, totaling $71.08 for all three insurance charges.

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[1]In *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265 (2002), cert. denied, *Friedman's, Inc. v. West Virginia ex rel. Dunlap*, 123 S.Ct. 695 (2002), this Court reversed the lower court's order compelling arbitration of Appellant James Dunlap's claims, holding that exculpatory clauses in adhesion contracts are presumptively invalid.

The Appellant alleges that she was charged for these insurance products without her knowledge or consent.[2] In her complaint, filed May 4, 2000, the Appellant alleged that conduct engaged in by Friedman's constitutes an unfair or deceptive trade practice in violation of the CCPA and that such conduct was part of a systematic scheme to deceive consumers and enhance business profit.[3]

The lower court entered an order dated September 14, 2001, granting the Appellees' motion to dismiss the complaint based upon the lower court's finding that the complaint had not been filed within the applicable one year statute of limitations. On appeal, the Appellants assert that the statutorily-mandated statute of limitations for this action is actually four years from the date of the alleged violation.

II. Standard of Review

In syllabus point two of *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995), this Court explained: "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." The lower court's decision to dismiss the claim in this matter was based upon statutory interpretation, and according to syllabus point one of *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995), "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." *See also Ewing v. Board of Educ. of County of Summers*, 202 W. Va. 228,

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[2]Ironically, because the Appellant is disabled, she is not even eligible for credit disability insurance.

[3]The Appellant Stephanie Gibson and co-Appellant James Dunlap filed this action on behalf of themselves and all others similarly situated.

503 S.E.2d 541 (1998); Syl. Pt. 1, *University of West Virginia Board of Trustees ex rel. West Virginia University v. Fox*, 197 W. Va. 91, 475 S.E.2d 91 (1996). In *Scott Runyan*, this Court also clarified that "[a]s a result of this inquiry being strictly a matter of statutory construction, our power of interpretive scrutiny is plenary." 194 W. Va. at 776, 461 S.E.2d at 522.

III. Discussion

A. West Virginia Code § 46A-5-101(1)

West Virginia Code § 46A-5-101(1) (1996) (Repl. Vol. 1998)[4] provides as follows:

> If a creditor has violated the provisions of this chapter applying to collection of excess charges, security in sales and leases, disclosure with respect to consumer leases, receipts, statements of account and evidences of payment, limitations on default charges, assignment of earnings, authorizations to confess judgment, illegal, fraudulent or unconscionable conduct, any prohibited debt collection practice, or restrictions on interest in land as security, assignment of earnings to regulated consumer lender, security agreement on household goods for benefit of regulated consumer lender, and renegotiation by regulated consumer lender of loan discharged

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[4]This Court explained the intent of the West Virginia Consumer Credit and Protection Act as follows in syllabus point three of *Arnold v. United Companies Lending Corp.,* 204 W. Va. 229, 511 S.E.2d 854 (1998):

> "'The legislature in enacting the West Virginia Consumer Credit and Protection Act, W.Va.Code, 46A-1-101, *et seq*., in 1974, sought to eliminate the practice of including unconscionable terms in consumer agreements covered by the Act. To further this purpose the legislature, by the express language of W.Va.Code, 46A-5-101 (1), created a cause of action for consumers and imposed civil liability on creditors who include unconscionable terms that violate W.Va.Code, 46A-2-121 in consumer agreements.' Syl. pt. 2, *U.S. Life Credit Corp. v. Wilson*, 171 W. Va. 538, 301 S.E.2d 169 (1982)." Syl. pt. 1, *Orlando v. Finance One of West Virginia, Inc*., 179 W. Va. 447, 369 S.E.2d 882 (1988).

> in bankruptcy, the consumer has a cause of action to recover actual damages and in addition a right in an action to recover from the person violating this chapter a penalty in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars. **With respect to violations arising from consumer credit sales or consumer loans made pursuant to revolving charge accounts or revolving loan accounts, or from sales as defined in article six [§ 46A-6-101 et. seq.] of this chapter, no action pursuant to this subsection may be brought more than four years after the violations occurred. With respect to violations arising from other consumer credit sales or consumer loans, no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement.**

W. Va. Code § 46A-5-101(1) (emphasis supplied). "Sale" as defined in West Virginia Code § 46A-6-102(d) "includes any sale, offer for sale or attempt to sell any goods for cash or credit or any services or offer for services for cash or credit."

The Appellees contend that the one-year statute of limitations applies to this cause of action based upon the fact that this was a closed-ended contract, including fifteen payments,[5] and, as such, is not encompassed within the "revolving charge accounts or revolving loan accounts" to which the four-year statute of limitations applies, pursuant to statute. The Appellees further contend that such application of the statutory language is consistent with the Uniform Consumer Credit Code upon which the West Virginia Legislature allegedly based its provisions. The Appellees claim that the West Virginia Legislature combined various model codes to formulate the current provision, and that it must have intended to create a statute

[5]Because the installment sales contract envisions fifteen monthly payments, it is a closed-ended contract rather than an open-ended contract in which there is no fixed monthly payment required.

of limitations distinction between open-ended and closed-ended contracts. The statute, however, does not specifically address the concept of closed-ended contracts; the Appellees only assume that the legislature's use of the term "other contracts" embraced closed-ended contracts. Thus, while the Appellees' approach presents an intriguing analytical framework, it does not definitively resolve the issue because the legislature in fact enacted a statute which is different in form from the various model codes it may have relied upon in its formulation of the present language.

The Appellants contend that this closed-ended contract is included within the definition of sales, West Virginia Code § 46A-6-102(d), to which the four-year statute of limitations explicitly applies, pursuant to statute.

B. Ambiguity of Statute

In resolving this issue raised in this appeal, we note that this Court has consistently acknowledged that statutes of limitations serve a significant function in the operation of the law. "The basic purpose of statutes of limitations is to encourage promptness in instituting actions; to suppress stale demands or fraudulent claims; and to avoid inconvenience which may result from delay in asserting rights or claims when it is practicable to assert them." *Morgan v. Grace Hospital, Inc.*, 149 W. Va. 783, 791, 144 S.E.2d 156, 161 (1965) (citations omitted). In *Perdue v. Hess*, 199 W. Va. 299, 484 S.E.2d 182 (1997), for instance, this Court reviewed the numerous cases in which this Court has encouraged strict compliance with statutes of limitations as a means of requiring "the institution of a cause of action within a reasonable time." 199 W. Va. at 303, 484 S.E.2d at 186.

Where, however, the legislature has not expressed its intended statutes of limitation with clarity, such a laudable goal of strict compliance is unattainable. Although this Court has invariably recognized that clear and unambiguous statutes are not subject to interpretation,[6] we have also observed:

> Ambiguity is a term connoting doubtfulness, doubleness of meaning of indistinctness or uncertainty of an expression used in a written instrument. It has been declared that courts may not find ambiguity in statutory language which laymen are readily able to comprehend; nor is it permissible to create an obscurity or uncertainty in a statute by reading in an additional word or words.

Crockett v. Andrews, 153 W. Va. 714, 718-19, 172 S.E.2d 384, 387 (1970). A finding of ambiguity must be made prior to any attempt to interpret a statute. As the Court stated in syllabus point one of *Ohio County Comm'n v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983), "Judicial interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent." Likewise, in syllabus point one of *Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992), this Court further explained: "A statute that is ambiguous must be construed before it can be applied."

Our reading of West Virginia Code § 46A-5-101(1) compels the conclusion that the statute is ambiguous with regard to the distinction between open and closed-ended credit agreements and the statute of limitations applicable to those two types of credit. While the statute clearly states that the

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[6]"Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714,172 S.E.2d 384 (1970). "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 3, *Francis O. Day Co., Inc. v. Director, Div. of Envtl. Protection*, 191 W. Va. 134, 443 S.E.2d 602 (1994).

four-year statute of limitations is applicable to revolving charge accounts, revolving loan accounts, and sales as particularly defined, it also specifically subjects "other consumer credit sales or consumer loans" to a one-year statute of limitations period. While the Appellees and lower court contend that closed-ended credit sales must in included within "other consumer credit sales or consumer loans," the Appellants argue that closed-ended credit sales come within the purview of "sales" to which the four-year statute of limitations is applicable. Both sides have presented compelling and persuasive arguments in support of their respective theories. Even if, however, this Court were convinced of the superiority of one theory over another, this Court cannot substitute its own judgment for that of the legislature and significantly rewrite the statute. If, for instance, this Court agreed with the Appellees that the most rational method of dealing with statute of limitations issues would be to permit four years on open-ended loans, due to their longer term nature, and only one year on closed-ended loans, due to the finality of such constructs, this Court is not permitted to rewrite the statute to state such conclusion with clarity. The Court has expressed this prohibition concisely on numerous occasions. In *Williamson v. Greene*, 200 W. Va. 421, 490 S.E.2d 23 (1997), for instance, this Court stated:

> "[i]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." *Banker v. Banker*, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996) (*citing Bullman v. D & R Lumber Company*, 195 W.Va. 129, 464 S.E.2d 771 (1995).

Id. at 426, 490 S.E.2d at 28 (citations omitted). "A statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. Pt. 1, *Consumer Advocate Division v. Public Service Comm'n*, 182 W. Va. 152, 386 S.E.2d 650 (1989).

In *Hereford v. Meek*, 132 W. Va. 373, 52 S.E.2d 740 (1949), this Court stated: "A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Id.* at 386, 52 S.E.2d at 747. We addressed a statute regarding annual salary increases for deputy sheriffs in *Lawson v. County Comm'n of Mercer County*, 199 W. Va. 77, 483 S.E.2d 77 (1996), and found that the statute in question was susceptible to differing constructions, to the extent that the term "receive an annual salary increase" could mean either an increase to become part of the annual salary or an increase in addition to the annual salary. *Id.* at 81, 483 S.E.2d at 81. Based upon the Court's finding that the statute could be read by reasonable persons to have different meanings, we found the language of the statute to be ambiguous. *Id.*

C. Liberal Construction of Statute

Having found West Virginia Code § 46A-5-101(1) ambiguous with regard to applicable statute of limitations periods because it is susceptible of differing interpretations, we may proceed to construe it pursuant to the legislative intent. In *Scott Runyan*, this Court specified that West Virginia Code § 46A-5-101(1) should be construed liberally as a remedial statute. We explained: "Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended." 194 W. Va. at 777, 461 S.E.2d at 523. "The purpose of the CCPA is to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action." *Id*.

Furthermore, this Court explained in *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995), that absent explicatory legislative history for an ambiguous statute, a court construing such a statute must consider the "overarching design of statute." *Id*. at 587, 466 S.E.2d at 438, quoting *Scott Runyon*, 194 W. Va. at 777, 461 S.E.2d at 523. In construing the statute liberally to protect all consumers from unfair, illegal, or deceptive action, and in considering the overarching design of the statute, we are compelled to resolve the issue this ambiguity has created by concluding that the credit sale utilized in this transaction is included within the four-year statute of limitations applicable to "consumer credit sales or consumer loans made pursuant to revolving charge accounts or revolving loan accounts, or from sales. . . ." W. Va. Code § 46A-5-101(1). While such determination admittedly does not effectively answer the myriad of hypotheticals raised by the parties with regard to various types of credit sales utilized by consumers and the issue of into which statutorily-designated category such transactions may fall, the liberal construction to which this statute is entitled compels our conclusion that any doubt about this particular transaction's inclusion within the more liberal four-year statute of limitations period be resolved in favor of such inclusion. Similarly, a consumer who is party to a longer-term, closed-ended transaction is also entitled to maintain an action within one year of the due date of the last payment.

C. Conclusion

After thorough review, this Court concludes that West Virginia Code § 46A-5-101(1) is a remedial statute to be liberally construed to protect consumers from unfair, illegal, or deceptive acts. In face of the ambiguity found in that statute, a consumer who is party to a closed-ended credit transaction,

resulting from a sale as defined in West Virginia Code § 46A-6-102(d), may bring any necessary action within either the four-year period commencing with the date of the transaction or within one year of the due date of the last payment, whichever is later.

Based upon the foregoing, we reverse the decision of the Circuit Court of Kanawha County and remand this matter for further proceedings consistent with this opinion.

Reversed and remanded.