

No. 32160 - *Richard F. Frye v. Richard L. Frye, and C. E. Frye Farms, Inc.*

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**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Albright, Chief Justice, dissenting:

In affirming the circuit court's ruling, the majority has overlooked the fact that many of the trial court's rulings centered on issues that were heavily disputed below. For example, the evidence regarding the issuance of stock certificate numbers 11 and 13 and the question of whether there was valid consideration for such stock certificates conflicted greatly. While the circuit court apparently chose to discredit Appellant's testimonial accounts in favor of Appellee, the lower court never expressly indicated that it found Appellant to be lacking in credibility. Upon inquiry, the rationales upon which the circuit court relied to resolve these critical issues concerning the stock issuance are easily dissected and less than convincing. Of further concern is the fact that the trial court appears to have discarded any appreciation for the motivations underlying the acts and testimony of both Appellee and his mother (a disgruntled son and an ex-wife), who appear to have been acting in concert for the purpose of advancing Appellee's interests.

Inexplicably, the trial court accepted the testimony of Appellee and his mother as to the issuance of the disputed stock certificates, numbers 11 and 13. With little explanation, the trial court completely discounted the contradictory evidence offered by both

Appellant and his sister, Dorothy Novak, regarding the origin of these stock certificates. Appellant testified that he recalled signing four stock certificates in blank for the express purpose of replacing stock certificates that had been lost by four shareholders who instigated the buyout proceedings in 1997.¹ When those “lost” certificates were later located, the stock certificates Appellant had signed in blank were no longer needed. Since Appellant had no knowledge of signing certificates for the questioned additional 120 shares of corporate stock in Appellee’s name that are reflected by stock certificate numbers 11 and 13, Appellant suggested that the stock certificates signed in blank were wrongly used to issue the disputed additional shares of stock.

In resolving this issue, the trial court appears to have placed undue weight on the fact that Appellant saw the questioned stock certificates and failed to take timely action to repudiate the issuance of the stock certificates. To turn a consequential issue such as this on a party’s failure to institute formal legal proceedings in light of the trial court’s recognition of how this “closely-held family corporation” had not adhered to “the formalities of law” “since its incorporation in 1961” is certainly puzzling. Rather than implying that Appellant’s inactivity constituted acquiescence that effectively amounted to ratification, the

¹Independent verification for the stock certificates being signed in blank was provided at trial by Appellant’s ex-wife with reference to evidence previously offered by Appellant in 2001 during divorce proceedings involving Appellant and his ex-wife.

trial court should have looked to the historical nature of this corporation's *extremely informal* operation as a more logical explanation for Appellant's inaction.

Similarly questionable is the trial court's conclusion with regard to the consideration offered for the issuance of stock certificate numbers 11 and 13. Essentially, the circuit court decided that the consideration given was for years of services offered to the corporation at little or no pay plus personal moneys Appellant had invested in the corporation. Upon examination, however, these bases fail to withstand scrutiny. After seven years of working on the family farm, the corporation awarded Appellee 60 shares of stock in the subject corporation in 1994. Then only four years later, the corporation (with no knowledge of Appellant – the corporation president) purportedly issued another 120 shares of stock to Appellee upon the same theory – remuneration for unpaid work and contributions to the family farm. Whereas the record reflects that the corporate officers all agreed as to the issuance of the first 60 stock shares to Appellee for this purpose, there was no agreement among the officers as to the second issuance of 120 shares to Appellee.²

In looking for additional consideration offered for these stock certificates, the trial court cited Appellee's investment of certain moneys into the family corporation. In

²The corporation's officers approved the issuance of the initial 60 shares of stock issued to Appellee at a shareholders meeting on November 9, 1994. No such meeting reflects the approval of the issuance of the second 120 shares held by Appellee.

calculating those investments, the circuit court determined that two checks for the cumulative amount of \$100,000 that each bore the memorandum line notation of “Inv.” were outright gifts to Appellee. Incredibly, the trial court concluded that the abbreviation, which certainly suggests that it stands for investment and there was testimony to this effect from Dorothy Novak,³ was not significant, as the trial court found that the amount was an outright gift to Appellee. Even more questionable is the trial court’s decision to place that so-called “gift” on the ledger side of Appellee’s investments in the corporation in considering the amount of money that Appellee had invested in the corporation.⁴

After reviewing the record of this case against the findings of the trial court, Appellant’s testimony does not appear to have been accorded the proper weight that it deserved. While the trial court resolved most of the credibility decisions in a manner unfavorable to Appellant, the record suggests a pattern of collusive behavior on the part of Appellee and his mother that certainly raised the need to carefully weigh the testimony offered by those parties. Upon careful examination of the facts of this case, I simply cannot

³While the check’s signatory, Fred Novak, was not called as a witness at trial, his wife, Dorothy Novak, testified that she and her husband were “investing” in saving the family farm.

⁴Of further note is the fact that none of Appellee’s personal or individual tax records reflect a reporting of the alleged purchase of the stock by capital contribution or gift to the Internal Revenue Service. Similarly, the corporate records do not reflect any change in the corporation’s capitalization or a reporting of such changes to the Internal Revenue Service.

reach the same conclusion as the trial court and the majority with regard to the validity of the questioned stock certificates. Accordingly, I must respectfully dissent.

I am authorized to state that Justice Starcher joins in this dissent.