IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 22-ICA-46

SCOTT S. SEGAL,

Defendant and Third-Party Plaintiff Below, Petitioner,

v.

PITA, LLC, and **MILAN PUSKAR REVOCABLE TRUST RESTATED 9/28/11**,

Plaintiffs Below, Respondents,

—and—

UNITED BANK,

Third-Party Defendant Below.

REPLY BRIEF OF PETITIONER SCOTT S. SEGAL

Steven R. Ruby (WVSB #10752)
sruby@cdkrlaw.com
Raymond S. Franks II (WVSB #6523)
rfranks@cdkrlaw.com
CAREY DOUGLAS KESSLER & RUBY PLLC
901 Chase Tower, 707 Virginia Street, East
P.O. Box 913
Charleston, WV 25323
Telephone: (304) 345-1234
Facsimile: (304) 342-1105
Counsel for Petitioner Scott S. Segal

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Succinctly, the Trust engaged in an illegal scheme to evade its own guaranty obligations at the expense of Protea's individual guarantors. Disinclined to stop there, the Trust sought to appropriate for itself another undeserved boon by unlawfully attempting to shift the attorney fees that — in a proper contribution action — were its sole responsibility. Then, the Trust boldly and breathtakingly sued its co-guarantors, alleging that ***they*** had committed fraud.

Small wonder, then, that the Trust in its response brief demurs from answering for its own conduct. Instead, the Trust attempts to redirect this Court to discarded arguments (more than thirty, says the Trust, spewing footnotes like confetti) that are not pertinent to this appeal.[1] Complex litigation is akin to a funnel, in that an amorphous amalgam of claims, defenses, and arguments are poured into the top at the beginning. As the claims and defenses proceed down the funnel, the parties and the trial court refine the relevant legal theories and concepts, channeling the most pertinent arguments. At funnel's end, the case is streamlined and more manageable.

Indeed, judging from the theme and tone of the response, one can scarcely believe that the Trust would accuse Segal of neglecting to raise ***any*** conceivable argument before the trial court in his quest to leave no stone unturned. Yet, that is exactly what the Trust does with respect to the argument at the heart of this appeal: that Segal's guaranty must be discharged because the Trust's subterfuge injured him by (1) frustrating his principal purpose in reaffirming his commitment to Protea; and (2) fatally altering his duties and obligations by altering those of Protea. The controlling authority, *Carr v. Sutton*, 70 W. Va. 417, 74 S.E. 239 (1912), was, contrary to what the Trust has intimated, placed squarely before the circuit court.

[1] The Trust and PITA are each nominally a Respondent. However, in light of the circuit court's unassailable finding that the two entities are "one and the same," J.A. 2604, they are referred to collectively herein as simply the "Trust."

The particular ways in which the Trust injured Segal are merely specific applications of the *Carr* general prerequisite of injury inflicted on a guarantor by a creditor. On *de novo* review of the circuit court's award of summary judgment, this Court should consider the balance of equities that militate overwhelmingly in Segal's favor and accord relief in conformance with *Carr* on either of the specific bases, keeping in mind that he need prevail on only one.

I. SEGAL'S *CARR* ARGUMENT IS NOT WAIVED.

The seminal *Carr* decision stands for the simple proposition that a surety (or guarantor) will be discharged "where a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act when required by the surety, which his duty imposes on him, and the omission proves injurious to the surety." 70 W. Va. 417, ____, 74 S.E. 239, 241 (citations omitted). The holding in *Carr* was quoted verbatim to the circuit court in the individual guarantors' Motion for Summary Judgment, beneath a discrete heading specifically arguing that "PITA equitably discharged Defendants' respective obligations under the Note when it absolved the obligations of the Trust and the Estate of Milan Puskar." J.A. 725. Thereafter, in the parties' Joint Pretrial Memorandum, *Carr* was again clearly identified as the threshold legal authority in support of the individual guarantors' defense. *See id.* at 1886 (citing *Carr* as "holding that when a creditor acts to the detriment of a surety, the surety's obligation is discharged").

Pinpointing the injurious act or omission in this instance poses a challenge, because it was a succession of elaborate acts and omissions undertaken by the Trust in rapid-fire fashion that injured Segal. The Trust (1) formed PITA to be its puppet; (2) had PITA assume the role of Protea's nominal creditor — the Trust being the true creditor — by acquiring the loan and Note from United; (3) had PITA instruct United to relinquish the collateral securing the Note; (4) had PITA make demand of the individual guarantors for the entire debt, to the exclusion of the Trust;

then (5) sued only the individual guarantors. In his opening brief, Segal described the wrongdoing holistically as "the Trust's elaborate artifice to evade the contribution action that was its sole legitimate recourse." Pet. Br. 11. It is surely beyond cavil that the natural and inevitable consequence of the Trust's scheme, had the circuit court permitted it to succeed, was to absolve it of its own obligations as surety, which is ***exactly*** what Segal contended below justified his discharge.

It is of no moment that the academic term "discharge by alteration" was not invoked below. *See* Res. Br. 17. Magic words are not required to preserve an argument for appeal. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) ("It is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts. But this principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue."); *accord Murphy v. N. Am. River Runners*, 186 W. Va. 310, 317, 412 S.E.2d 504, 511 (1991) (recognizing in converse situation that written release of liability for negligence need merely be clear from context: "'magic words' are not essential to a clear waiver"). Substance triumphs over form, and it is the argument's substance that controls. The legal rule on which Segal depends is the *Carr* holding, stated broadly: "Creditors that injure guarantors by increasing their risk of obligation equitably discharge those guarantors." The particular facts of this case permit a more discrete framing — but one that is no different from the general rule: "Creditors who alter the duties and obligations of the principal to make the principal more likely to default necessarily injure the guarantors, albeit ***indirectly***." *Carr* itself draws no distinction between direct and indirect injury. The Trust is free to argue (which it does) that *Carr* does not control the result in the instant matter. It cannot, however, genuinely argue that the merits of Segal's *Carr* argument are not properly before this Court.

While discharge by alteration concerns itself with injury inflicted on a guarantor when a creditor has increased his risk of obligation, the doctrine of supervening frustration differs only in that the focus instead is on the injury inflicted by the creditor by depriving the guarantor of an anticipated benefit. In either instance, it is the fact of material ***injury*** caused by the creditor (whether affirmatively or through omission, directly or indirectly, by increasing the obligation or by decreasing the benefit) that, as *Carr* dictates, justifies the guarantor's discharge. *See* 70 W. Va. at ____, 74 S.E. at 241.

The Trust is incorrect that the omission from the proceedings below of the specific phrases "discharge by alteration" or "supervening frustration" means that it should overcome by default the full force and effect of *Carr*. But even if all mention of *Carr* were excised from the record, the Trust's efforts to tie this Court's hands should not be countenanced. In *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005), the Supreme Court of Appeals explained:

> Although the rule requiring all appellate issues be properly raised first in the circuit court is important, it is not immutable. Our cases have made clear that the failure to properly raise issues below is not a jurisdictional prerequisite to an appeal but, rather, is a gatekeeper provision rooted in the concept of judicial economy, fairness, expediency, respect, and practical wisdom. Requiring issues to be properly raised at the trial level is a judicial tool, embodying appellate respect for the circuit court's advantage and capability to adjudicate the rights of our citizens.

Id. at 86, 622 S.E.2d at 793 (quoting *State v. Greene*, 196 W. Va. 500, 505-06, 473 S.E.2d 921, 926-27 (1996) (Cleckley, J., concurring) (alterations omitted)).

Louk, further quoting Justice Cleckley's concurring opinion in *Greene* in adoption thereof, emphasizes that "waiver rules ought not to be applied inflexibly," especially where, as here, the salient issue "is purely legal in nature and lends itself to satisfactory resolution on the existing record without further development of the facts." 218 W. Va. at 86, 622 S.E.2d at 793. The waiver issues in both *Louk* and *Greene* entailed arguments that a particular statute was unconstitutional,

but, given that courts strive to avoid gratuitously deciding constitutional issues, the policy against inflexible application of waiver principles arguably applies with equal or greater force where the overriding concern is simply correcting a miscarriage of justice. *See, e.g.*, *Cogar v. Sommerville*, 180 W. Va. 714, 716-17, 379 S.E.2d 764, 766-67 (1989) (noting "established law that compels us to avoid deciding constitutional issues whenever possible" (citations omitted)).

Segal reiterates that he has not waived his *Carr* argument on appeal. Assuming, *arguendo*, that Segal's position were refuted by the state of the record below, this Court may, in the interests of fairness, equity, and justice — interests that strongly militate in favor of Segal, in light of the Trust's sharp practice — nonetheless consider waived arguments and accord relief thereon. *See, e.g.*, *Louk*, 218 W. Va. at 94, 622 S.E.2d, 801; *Whitlow v. Bd. of Educ. of Kanawha Cnty.*, 190 W. Va. 223, 226-27, 231, 438 S.E.2d 15, 18-19, 23 (1993).

II. *CARR* CONTROLS THE OUTCOME OF THIS CASE.

The Trust incorrectly asserts that *Carr* has "absolutely no application to this case" because it was a bail bond case. Res. Br. 22. Carr posted an appearance bond for Sutton, who skipped bail. Carr sought recompense from several sureties, but he was ultimately unsuccessful because he had abridged their rights and defeated their reasonable expectations, *i.e.*, he had caused them injury, by carelessly failing to monitor Sutton to ensure his appearance.

The Trust conveniently ignores that the law develops and evolves over time by courts deciding cases whose contextual facts may bear little or no resemblance to each other. The more important focus is the rule of law that is distilled from the courts' opinions. The rule of law may require modification in subsequent cases as those decisions turn on the presence or the absence of ***key*** (not contextual) facts.

The rule of law from *Carr* is that creditors discharge sureties or guarantors by inflicting injury on them. The key fact in *Carr* is that Carr injured his sureties by attempting to shift to them the consequences of his own misconduct. The key fact in Segal's case is that the Trust injured him as guarantor by illegally attempting to shift to him its attorney fees and disproportionate liability. Injury, however inflicted, is the salient fact common to both cases. Therefore, the rule of *Carr* clearly applies here with no need for modification. Segal is entitled to the discharge of his guaranty because he was injured by the Trust's intentional misconduct. The Trust's proffered distinction that, in *Carr*, Sutton "was allowed to escape by the authorities," while here, "Protea[] was not allowed to escape," Res. Br. 22, wildly misses the mark, detracting from the credibility of its myriad of other meritless arguments, *see generally id.* at 19-25, detailed immediately below.

A. The doctrine of impracticability is not applicable.

First: The Trust quotes at length from the discussion of the doctrine of impracticability in *Waddy v. Riggleman*, 216 W. Va. 250, 606 S.E.2d 222 (2004), and declares that "[t]his doctrine has absolutely nothing to do with this case." Res. Br. 20. The Trust correctly states the law set forth in *Waddy*. However, the point is irrelevant because Segal nowhere argued the doctrine of impracticability in his opening brief. Instead, Segal cites *Waddy* for its approval of the doctrine of discharge by supervening frustration, which the opinion in that case makes clear is merely "[a] companion to the rule of impracticability." 216 W. Va. at 257 n.9, 606 S.E.2d at 229 n.9. Segal did explain how considerations common to both doctrines militated in his favor, *i.e.*, that the Trust caused him substantial hardship, that its misconduct was not foreseeable, that the risk of loss had not been allocated to him, and that the Trust could have avoided the entire fiasco. *See* Pet. Br. 14. Thus, the Trust has utterly failed to respond meaningfully to Segal's *Waddy* arguments.

B. Segal's reasonable expectations were frustrated with respect to all three agreements.

Second: The Trust appears not to understand which contract is the source of Segal's frustrated expectations. *See* Res. Br. 20-21. Much as the Trust's series of misdeeds comprising the injurious "act" is best evaluated holistically, *see supra* 2-3, so should be considered the series of agreements pertinent to this dispute. Segal and the Trust were both parties to the 2017 Change in Terms Agreement; they were co-guarantors of the Note and thus both parties to the resultant implied contract of contribution; and they were both parties to the express oral contract made by Puskar for the Trust and memorialized by the Umbrella Guaranty. This Court is free to pick any or all of them as the subject of the Trust's sabotage, inasmuch as Segal's reasonable expectations were frustrated with respect to not one, not two, but all three of the agreements. As such, the Trust's argument on this issue is fatally flawed.

C. PITA and the Trust are "one and the same."

Third: The Trust persists in the discredited notion that it sued Segal solely for contribution with no attendant disclaimer of liability for contribution, claim for breach of contract, or demand for attorney fees. *See* Res. Br. 21-22. Of course, it was PITA on whose nominal behalf the contract claim was brought, whereby it asserted entitlement to attorney fees. And, it was to PITA that the Trust might have theoretically been liable on the Umbrella Guaranty. But the circuit court, on incontrovertible evidence, found as a ***fact*** that PITA and the Trust are "one and the same." J.A. 2604. The Trust is therefore demonstrably incorrect in asserting that its superficially separate identity "renders irrelevant" the decision in *In re Basil Street Partners, LLC*, No. 9:11-bk-19510, 2012 WL 6101914 (Bankr. M.D. Fla. Dec. 7, 2012). Res. Br. 21 n.122. Far from irrelevant, *Basil Street*, on all fours factually with the case at bar, straightforwardly illustrates the illegality of the

Trust's scheme. *See* Pet. Br. 13-14. Again, the Trust cannot prevail on its position based on the circuit court's finding of "one and the same," together with the crystal clear law set out in *Basil Street*.

D. The Trust's alteration of Protea's duties and obligations were detrimental to Segal's personal guaranty.

Fourth: The Trust again professes to misunderstand with specific respect to discharge by material alteration "how a rule applicable only to Segal's contractual obligations to PITA is relevant to Segal's equitable contribution obligations to the Trust." Res. Br. 25. As before, the immutable fact is that PITA and the Trust are ***interchangeable***. So when the Trust speaks of Segal's guaranty of the loan and Note transferred to PITA, his "contractual obligations to PITA" are wholly subsumed within "Segal's equitable contribution obligations to the Trust." And for the sake of exactitude, the "rule" applies at the threshold to alterations of ***Protea's*** duties and obligations under the Loan Agreement upon transfer from United, which the Trust accomplished through its creation of and wholesale control over PITA. Segal was not a party to the Loan Agreement, but the Trust's alteration of Protea's duties and obligations to the latter's detriment were likewise deleterious to Segal's duties and obligations under his personal guaranty, causing the requisite "injury" for which *Carr* prescribes remedy by discharge.

Segal could not disagree more with the Trust's blanket assertion that "there was never any alteration of Protea's debt obligations to either United or PITA." Res. Br. 24. As Segal previously explained, the Trust resorted to illegal means to render the collateral unavailable to satisfy all or part of the loan, which otherwise put Protea at its mercy. *See* Pet. Br. 16-17. Protea's Chapter 11 petition followed just nine days later, after which the Trust (through PITA) made demand of Segal on his guaranty, followed by this lawsuit. The Trust's alteration of Protea's duties and obligations

under the Loan Agreement were indisputably material. It is certainly conceivable that they ultimately proved catastrophic. The derivative alteration of Segal's guaranty constitutes more than sufficient injury to justify his discharge under *Carr*. Adoption of the Trust's argument would require this Court to wholly disregard and completely rewrite long-standing West Virginia case law. If the Trust is permitted to prevail, future co-guarantors inclined toward shady dealing need not fear any consequences from bypassing, through legal legerdemain, the well-established law of contribution. Rather than be rewarded for its misdirected ingenuity, the Trust should be punished for its deceit.

III. NOTWITHSTANDING THAT DISCHARGE WOULD MOOT THE ISSUE, THE CIRCUIT COURT MISCONSTRUED THE LAW OF CONTRIBUTION WHERE SEGAL'S GUARANTY WAS FOR ONLY *ONE-SIXTH* OF THE TOTAL GUARANTIES ON THE NOTE.

The Trust spends much of Section V-D of its response not actually responding to any argument in the opening brief. Instead, the Trust raises a new argument that the circuit court erred when it properly declined to impose on Segal the risk assumed by the Trust when it accepted an initial down payment of $175,000 on its $537,500 settlement with Hostler's estate, leaving a current balance of $362,500. This is the same argument that the Trust presented in its opening brief in the parallel proceeding, No. 22-ICA-4. To avoid any accusation from the Trust that he accedes to its position by simply ignoring its improper response, Segal adopts by reference herein all of the arguments set forth in Section III of his response brief filed in No. 22-ICA-4.

Section V-D simply does not effectively respond to Segal's argument in his opening brief: because his $1 million guaranty was only one-sixth of the total guaranties, his liability for contribution to the Trust, which guaranteed the full $3 million, cannot exceed one-sixth of the $3,026,904.16 paid to acquire the Note, *i.e.*, $504,484.03. With the Trust having already settled with the other co-guarantors' estates for $1,075,000, it would be responsible for the remaining

$1,447,420.13, a sum in line with — yet $66,000 short of — its one-half proportionate liability of $1,513,452.08. The net benefit to the Trust is accounted for by it having favorably settled with each estate for $33,000 ***more than it actually owed!***

The Trust, *see* Res. Br. 29 & n.142, trots out the same out-of-jurisdiction authorities that Segal debunked in his opening brief. *See* Pet. Br. 19-20. Those authorities are not "wrong" per se for stating that co-guarantors are generally presumed equally liable, but none of them addressed the situation here: multiple guaranties in different amounts. Much more importantly, the Trust does not deal meaningfully with the ***West Virginia*** case on point, *State ex rel. Connellsville By-Product Coal Co. v. Continental Coal Co.*, 117 W. Va. 447, 186 S.E. 119 (1936), *overruled on other grounds*, *State ex rel. Shenandoah Nat'l Bank v. Hiett*, 123 W. Va. 739, 17 S.E.2d 878 (1941). The Court in *Connellsville* squarely held that each of the multiple sureties involved was liable, but only "*in proportion*, however, to the *penalties on their respective bonds*." 117 W. Va. at ____, 186 S.E. at 121 (emphasis added).

The Trust cavalierly asserts that *Connellsville* was "never cited to the Circuit Court." Res. Br. 29 n.142. That assertion is baseless and flat-out wrong. The case was referenced and discussed at length in Segal's Opposition to Plaintiffs' Verified Motion for Entry of Judgment, filed March 30, 2022. *See* J.A. 2329-30; *see also* J.A. 2332 (arguing for one-sixth contribution in accordance with "binding West Virginia precedent"). Flailing away, the Trust intimates that *Connellsville* is no longer good law, having been "disapproved" in *Hiett*, *supra*, which it was — but solely on the entirely different, procedural ground of permitting misjoinder of different parties liable on different instruments, in derogation of statute. *See Hiett*, 123 W. Va. at _____, 17 S.E.2d at 880. Finally, the Trust says that the propriety of joinder "was the issue in *Connellsville*," Res. Br. 30 n.142, suggesting that the Court's pronouncement on proportionate liability was dictum. However, the

Connellsville litigation involved separate bonds in different amounts, thus triggering the well-considered discussion. Significantly, the two dissenters signaled no disagreement with the majority's statement of the law fixing surety liability ***in proportion*** to the penalty amount.

Lastly, Segal leaves to this Court to determine whether he "completely misstates" Illustration 5 to Section 57 of the Restatement (Third) of Suretyship and Guaranty, as accused by the Trust. Res. Br. 27 n.138. Illustration 5 appears to be a perfect example of the rule in *Connellsville*, but the Trust contends that it "has nothing to do with any loan guaranties, but secondary loan obligors." Primary loan obligors are generally understood to be the borrowers, as was Protea here. *See, e.g.*, 12 C.F.R. Pt. 1026, Supp. I, Part 3 (2023) (illustrating applicability of § 1026.41(e)(5)(i) to situations where "two spouses jointly own a home and are primary obligors on the mortgage loan"). It logically follows that a guarantor is a secondary obligor. Indeed, the Restatement (Third) itself instructs that "[i]n order to induce C to lend D $10,000, S agrees to repay the loan if D defaults. S is a secondary obligor with suretyship status." RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 1 cmt. c, illus. 2 (1996). The Trust cites some additional authorities for the proposition that liability may be proportioned unequally among co-guarantors in recognition that one has received a disproportionate benefit from the underlying transaction, *see* Res. Br. 27 n.138. Importantly, those cases simply document circumstances ***in addition to*** variances in bond penalties, as here, that will justify proportionate liability.

Segal is entitled to the discharge of his guaranty under *Carr*. However, if this Court disagrees and reaches his alternative ground for relief, it must, in accordance with *Connellsville*, vacate the judgment of contribution and remand with instructions for the circuit court to follow that well-settled West Virginia case law.

IV. SEGAL'S COUNTERCLAIM FOR BREACH OF CONTRACT IS PROPERLY PRESERVED.

The circuit court's final order confirms that Segal's counterclaims "were dismissed in the Order Granting Plaintiffs' Motion for Partial Summary Judgment and Third-Party Defendant's Moton for Summary Judgment, entered on August 13, 2021." J.A. 2624. The title of the Order led the undersigned to mistakenly indicate in the heading to Section III of the opening brief that the circuit court had entered summary judgment for the Trust on Segal's counterclaim for breach of contract. *See* Pet. Br. 20. Instead, the disposition was a dismissal pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, which the undersigned had previously correctly related in reciting the procedural history below. *See id.* at 7.

The Trust filed its Motion to Dismiss Defendants' Counterclaims, including the one for breach of contract, on January 13, 2020. *See* J.A. 194-95. Segal and the other individual guarantors responded in opposition on January 31, 2021. *See id.* at 202-05. Given the collective response from the individual guarantors, it is at best misleading and disingenuous for the Trust to insist that "Segal never raised, briefed, or argued this counterclaim." Res. Br. 35.

The only hearing between the parties' January 2021 briefing and the dispositive order on August 13, 2021, was conducted by the circuit court on June 9, 2021. *See* J.A. 474-513. The transcript of that hearing bears no mention of the dismissal motion. It stands to reason, then, that the court necessarily decided the motion on the parties' written submissions and entered judgment for the Trust pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. That ended the matter. There was no need for Segal to again assert the issue in connection with any subsequent motion for summary judgment, at any subsequent hearing, or in any motion for reconsideration, contrary to the Trust's protestations. *See* Res. Br. 35-37. Segal explained in his opening brief why the circuit court's dismissal of his contract counterclaim was erroneous. The record indicates the

presence of all the essential elements thereof. *See* Pet. Br. 20-21. The Trust emphasizes conflicting evidence to the contrary. Nevertheless, the comparative merits of Segal's claim and the Trust's defense is a matter to be resolved on remand at summary judgment or at trial.

CONCLUSION

For all the reasons set forth above, the judgment entered in favor of the Trust should be reversed and remanded to the circuit court with instructions to enter a defense judgment for Segal. Alternatively, remand is proper with instructions for the circuit court to reduce the amount of the judgment from $975,952.08 to no more than $504,484.03, based on the *Connellsville* opinion. Finally, the circuit court's dismissal of Segal's counterclaim for breach of contract should be reversed and the cause remanded to the circuit court for further proceedings, as appropriate.

/s/ Raymond S. Franks II
Steven R. Ruby (WVSB #10752)
sruby@cdkrlaw.com
Raymond S. Franks II (WVSB #6523)
rfranks@cdkrlaw.com
CAREY DOUGLAS KESSLER & RUBY PLLC
901 Chase Tower, 707 Virginia Street, East
P.O. Box 913
Charleston, WV 25323
Telephone: (304) 345-1234
Facsimile: (304) 342-1105
Counsel for Petitioner Scott S. Segal

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Third-Party Defendant Below.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of January, 2023, the foregoing "Reply Brief of Petitioner Scott S. Segal" was served using the electronic File & ServeXpress system, which will send notification of such filing to all counsel of record.

/s/ Raymond S. Franks II
Raymond S. Franks II (WVSB #6523)