

NO. 31683

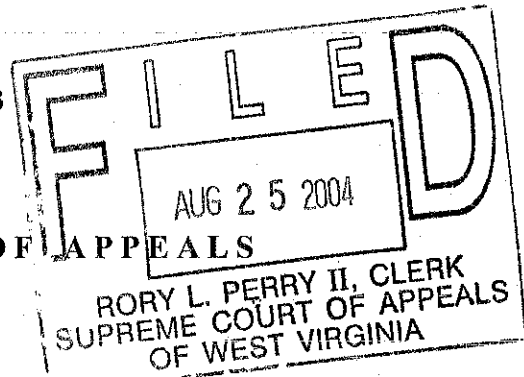
IN THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON



CARA HANNA KOERNER,

Appellant,

v.

**WEST VIRGINIA DEPARTMENT OF
MILITARY AFFAIRS AND PUBLIC
SAFETY, and OTIS G. COX, JR., in
his official capacity,**

Appellees.

REPLY BRIEF OF APPELLANT

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I. PRELIMINARY STATEMENT

This is Appellant's brief in: (1) reply to Appellees' brief; and (2) response to Appellees' cross assignment of error. Since Appellant anticipated, and thoroughly refuted, most of Appellees' arguments, this brief is limited to a few minor, but necessary, observations and comments.

II. LEGAL ARGUMENT

A. Standard of Review

Appellees argue that the proper standard of review is "abuse of discretion." Appellees' view is based on the mistaken belief that this appeal is akin to the appellate review of a circuit court's order enforcing a settlement agreement. (Appellees' Br. at 5.) Here, however, the circuit court interpreted West Virginia law to determine whether: (1) the West Virginia Human Rights Commission's ("Commission's") waiver regulations apply to the settlement agreement underlying this case; and (2) the "tender back" doctrine bars Appellant from proceeding with her West Virginia Human Rights Act ("WVHRA") claims. Thus, the issues presented here are clearly questions of law for which a *de novo* standard of review is proper. See Syl. Pt. 1, *Chrystal R. M. v. Charlie A. L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

B. Appellees Ignore The Remedial Nature Of The West Virginia Human Rights Act.

Relying on *dicta* from a footnote in *Spradling*¹ and the Fourth Circuit's results-oriented misapplication of West Virginia law in *Adams*,² Appellees urge this Court to

¹ *Spradling v. Blackburn*, 919 F.Supp. 969 (S.D.W.Va. 1996).

² *Adams v. Moore Business Forms, Inc.*, 224 F.3d 324 (4th Cir. 2000).

ignore the logic of the United States Supreme Court's holding in *Oubre*³ and adopt an exceedingly harsh and restrictive interpretation of the WVHRA.⁴ As such, Appellees completely ignore the Legislature's direction that the WVHRA "shall be liberally construed to accomplish its objectives and purposes." *W. Va. Code* 5-11-15. Likewise, Appellees pay no heed to this Court's admonition that "every act of unlawful discrimination in employment . . . is akin to an act of treason undermining the very foundations of our society." *Allen v. West Virginia Human Rights Commission*, 174 W. Va. 139, 148, 324 S.E.2d 99, 108 (1984); *see also Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 64, 479 S.E.2d 561, 574 (1996) (liberal construction and application of WVHRA).

C. Appellees Misinterpret and Then Misapply The West Virginia Human Rights Act's Regulatory Framework

Appellees maintain here, as they did before the circuit court, that the West Virginia Human Rights Act's regulations do not apply to Appellant's claims. The reason: Appellant did not file her claims with the Commission. Again, the basis for this contention is a federal district court's *dicta* in *Spradling*. But as the Commission points out in its *amicus curiae* brief, "The waiver regulations, read as a whole, are designed to apply to all claims under the Human Rights Act." (WVHRC Br. at 7.) The Commission then explains in painstaking detail precisely why the *Spradling dicta* is dead wrong. (*Id.* at 7-8.) In fact, the Commission revised its regulations in 2002 to clarify this point. (*Id.*

³ *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).

⁴ Appellees also request that this Court disregard Appellant's recitation of the facts because they "are wholly unsupported by any factual record before the trial court or any record provided to this Court, and should be completely disregarded." (Appellees' Br. at 2.) There was, of course, no trial testimony regarding the underlying facts since the circuit court bifurcated the proceeding. Therefore, Appellant never had an opportunity to make a trial record. Nevertheless, all of the factual representations were part of the

Oddly, Appellees suggest that this change indicates that the Commission “became aware that the regulations, as previously worded, did not, by their own terms, apply to claims filed in the first instance in circuit court.” (Appellees’ Br. at 8 n.2) However, the Commission makes clear that this was not the motivation; rather, the regulations were revised to clarify what was always the case – i.e., that “the rules apply to all Human Rights Act claims, regardless of where or whether those claims are adjudicated.” (WVHRC Br. at 8.) In essence, the regulations were amended to avoid any lingering notion that the *Spradling dicta* was a correct interpretation of the regulations.

As the Commission stressed:

The interpretation proposed by the federal district court in *Spradling* and the interpretation of the Circuit Court below, if adopted by this Court, would create a complex matrix of standards, using radically different criteria depending on whether the issue arises under federal law, under state law in state court or under state law within the Human Rights Commission. It does not make sense to have the substantive legal question of whether claims have been waived turn on the choice of forum.

(*Id.* at 7.)

Based on the foregoing, the WVHRC’s waiver regulations are, and should be, applicable to Appellant’s legal claims filed pursuant to the WVHRA.

D. Application Of The Discredited “Tender Back” Doctrine Would Thwart Public Policy And Defeat The Commission’s Regulations

Appellees cavalierly maintain that this Court should uphold the circuit court’s application of the “tender back” doctrine because to do otherwise would allow Appellant “to have her cake and eat it too.” (Appellees’ Br. at 11.) This is patently wrong.

record below and Appellants properly designated and referenced same. Therefore, this Court should not disregard the factual background underlying Appellant’s case.

Appellant clearly stated that a double recovery should not be permitted. (Appellant's Br. at 21.) ("[T]he best way to address this issue is not via a harsh and unfair application of the "tender back" doctrine, but rather by a potential setoff following the trial of the remaining claims.")

Importantly, application of the "tender back" doctrine would allow employers to completely nullify the Commission's waiver regulations. In essence, there would be no need to draft a complying release since most employees would never be able to tender back the settlement moneys. As the United States Supreme Court noted in *Oubre*:

The rule proposed by the employer would frustrate the statute's practical operation as well as its formal command. In many instances a discharged employee [such as Ms. Koerner] will have spent the monies received and will lack the means to tender their return. These realities might tempt employers to risk noncompliance with the OWBPA's [or the Commission's] waiver provisions, knowing it will be difficult to repay the monies and relying on ratification. We ought not to open the door to an evasion of the statute by this device.

522 U.S. at 427.⁵

Additionally, application of the "tender back" doctrine in the context of employment discrimination claims creates significant potential hardship on the victims of such discrimination. As the West Virginia Employment Lawyers Association ("WVELA") emphasized in its *amicus curiae* brief: "This Court should also acknowledge the hardships that claimants who have been discharged and induced to sign invalid waivers of their rights would face if they were required to tender back the

⁵ Curiously, Appellees suggest that failure to apply the "tender back" doctrine will "clearly encourage plaintiffs to draft defective releases[.]" (Appellees' Br. at 11.) In light of the likelihood of setoff (and given that defendants draft 99.9% of all releases), this suggestion fails to pass muster (even at a cursory level).

consideration received for those waivers as a prerequisite to filing a discrimination claim.” (WVELA Br. at 7.)

Based on the foregoing, and for the reasons set forth in more detail in Appellants’ Brief, the “tender back” doctrine should be rejected in the context of employment discrimination claims.

E. Appellees’ Estoppel Argument Is Without Merit

Appellees baldly proclaim that if Appellant prevails on her appeal: (1) “it would make all parties, and especially defendants, think twice about ever again negotiating a settlement;” and (2) “the words ‘good faith’ in settlement negotiations would never have the same meaning they do today[.]” (Appellees’ Br. at 15.) This “sky is falling” argument is completely misplaced. In truth, the only consequence of this Court’s reversal of the circuit court’s order is a fair, equitable and legally sound result that is consistent with West Virginia jurisprudence. In terms of future settlements, nothing will change (except that parties will need to ensure compliance with – as, for the most part, they do already – the Commission’s waiver regulations).

F. Appellees’ Cross Assignment Of Error Is Superfluous

Appellees maintain that the circuit court erred in not granting their motion for summary judgment and/or motion for directed verdict. (Appellees’ Br. at 16-18.) With apologies to Shakespeare, Appellees’ argument is “full of sound and fury, signifying nothing.” The fact is that Appellees prevailed at trial. What possible difference could it now make if this Court somehow determines that they should have prevailed by way of dispositive motion? Indeed, it would not change the posture of this appeal one iota – i.e., even if the settlement agreement was found to be unambiguous as a matter of law, the

current issue on appeal (regarding the application of the Commission's waiver regulations) would still need to be resolved.

That said, and to ensure that the record is complete, Appellant posits that there was obvious ambiguity in the language of the settlement agreement, especially when the facts and allegations are viewed in a light most favorable to Appellant. Indeed, Appellees' "interpretation" of the settlement agreement permitted them to offer an entry level clerical position requiring evening and weekend hours. By contrast, Appellant's "interpretation" of the agreement caused her to reject such position. As a result, there was significant ambiguity regarding the term "job."⁶

Appellant believes that the "intent" of the parties was that the job would be "comparable" in the terms and conditions of employment. In this context, extrinsic evidence is admissible to explain the meaning of the written Agreement.⁷ For example, in *Roberts v. Lykins*, 145 S.E. 440 (1928) the Lykin brothers conveyed their "interest" in a certain partnership. The Court held that evidence of conversations between plaintiffs and defendant was admissible to show what was included in the "interest" of the Lykin

⁶ Otis Cox conceded that the term "job" did not mean just "any" job within his Department (such as a correctional officer, trooper or cook). (Cox Tr. at 158, 162, Appendix to Appellant's Response in Opposition to Defendants' Motion for Summary Judgment ("App.") at Exhibit 1.) Instead, it had a specific meaning that was understood by the parties. In fact, Defendants did not even debate this point in their discovery responses – e.g., they stated that the job that was offered to Cara was comparable and equivalent. (Appellees' Answer to Int. No. 7, App. Exhibit 11; Cox Tr. at 157, App. Exhibit 1.)

⁷ A written contract merges all negotiations and representations which occurred before its execution, and in the absence of fraud, mistake, or material misrepresentations extrinsic evidence cannot be used to alter language in a written contract which is otherwise plain and unambiguous on its face. *Jolynne Corp. v. Michels*, 191 W.Va. 406, 412, 446 S.E.2d 494, 500 (1994); Syl. pt. 1, *Warner v. Haught, Inc.*, 174 W.Va. 722, 329 S.E.2d 88 (1985); Syl. pt. 1 *Buckhannon Sales Co., Inc. v. Appalantic Corp.*, 175 W.Va. 742, 338 S.E.2d 222 (1985) ("where the meaning [of a contract] is uncertain and ambiguous, parole evidence is admissible ..."). In the case below, extrinsic evidence was essential to determine the meaning of the Agreement. *See also* L. Simpson, 8 CONTRACTS § 98 (parole evidence "is admissible for the purpose of interpreting the written contract in resolving ambiguous expressions").

brothers. Since the term was uncertain in the contract, oral testimony was permissible to show what it meant.

Here was a latent ambiguity, and, for the purpose of arriving at the correct intention of the parties, parole evidence is admissible, not for the purpose of adding to, contradicting, or varying the plain terms of the writing but for the purpose of explaining that which is ambiguous; and where, as here, a latent ambiguity appears, even the parole declarations made, at the time of and prior to the execution, are admissible to show what was intended to be included in the "interest" of the Lykins brothers in the partnership.

Id. at 442; citing *Belcher v. Coal Co.*, 68 W. Va. 716, 70 S.E. 712. In this case, like in *Roberts*, there was ambiguity regarding the meaning of the term "job." Therefore, this was a proper matter to submit to the jury any remaining factual dispute.⁸ Since there were clearly genuine issues of material fact regarding the meaning of the settlement agreement, the circuit court properly denied both Appellees' motion for summary judgment and motion for directed verdict.

Again, however, all of this is of absolutely no significance in the present context.

IV. CONCLUSION

Based upon the record, in accordance with persuasive authority and to do fundamental justice, Appellant respectfully requests that the Court reject Appellees' constricted view the West Virginia Human Rights Act, GRANT her appeal, DENY

⁸ Of course, if Mr. Cox testifies that his intention was never to provide a "comparable" job, then there was obviously no meeting of the minds and, by logical extension, no valid settlement agreement. "A meeting of the minds is a *sine qua non* of all contracts." Syl. pt. 1, *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.*, 157 W. Va. 93, 199 S.E.2d 308 (1973)(quoting Syl. pt. 1, *Martin v. Ewing*, 112 W. Va. 332, 164 S.E. 859 (1932). In *O'Connor v. GCC Beverages, Inc.*, 182 W. Va. 689, 391 S.E.2d 379 (1990), the West Virginia Supreme Court of Appeals reiterated its strong position in this regard: "It is well-understood that '[s]ince a compromise and settlement is contractual in nature, a definite meeting of the minds of the parties is essential to a valid compromise, since a settlement cannot be predicated on equivocal actions of the parties.' 15A C.J.S. *Compromise and Settlement* § 7(1) (1967)." 182 W. Va. at 691, 391 S.E.2d at 381.

Appellees' superfluous cross appeal, and correct the patent injustice wrought by the circuit court's distinctly erroneous application of law.

Respectfully submitted,

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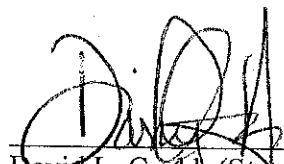
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CERTIFICATE OF SERVICE

I, David L. Grubb, counsel for Appellant, do hereby certify that I have this 25th
day of August, 2004, served a true and accurate copy of the foregoing *Appellant's Reply*
Brief upon counsel of record, via United States Mail, as follows:

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