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Tort Liability--Turnpike Commission

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ABSTRACTS

Agency Relationship—Creditors' Group Life Insurance Policy

P, bank, had a creditors' group life insurance policy with *D*, insurance company, whereby *D* insured the lives of *P*'s debtors who were under 65 years of age. *P* collected and submitted the premiums to *D*. *P* extended a loan to *X*, who was over 65. *X* died before repayment, and as the loan proved uncollectible *P* sued *D*. *P* maintained that even though *X* was over 65 at the time of the loan, *P* acting as *D*'s agent had bound *D* by collecting premiums from *X* and transmitting them to *D*. *Held*, the contract of insurance was between two principals, the bank being the policyholder and the insured, and the insurance company being the insurer. No contractual relationship existed between the debtors and the insurer. The bank did not become an agent of the insurance company by merely collecting and remitting premiums to the insurance company. This was a mere matter of bookkeeping by *P*'s cashier and was a service performed by the bank. Since *P* can in no way be considered an agent, any attempt by *P* to include an ineligible debtor for coverage under the policy with *D* must be chargeable to the bank and not the insurer. *South Branch Valley Nat'l. Bank v. Metropolitan Life Ins. Co.*, 155 S.E.2d 845 (W. Va. 1967).

It is generally held that employees in doing the various acts required to make effective a policy of group insurance act for themselves and their employer, and not as agents of the insurer. This case represents the logical extension of that principle to an employee acting to effect a creditors' group life insurance policy covering his employer's debtors. 29 AM. JUR. *Innkeepers* § 136 (1960).

Constitutional Law—Federal Habeas Corpus for State Prisoners

Two prisoners in the custody of the State of West Virginia filed petitions for writs of habeas corpus in the Supreme Court of Appeals of West Virginia. Both petitions were denied without a hearing by the Court and both petitioners then filed petitions in the district court which were dismissed on the ground that state remedies had not been exhausted. Petitioners then appealed to the Court of Appeals. *Held*, reversed. A person who files habeas corpus proceedings in the West Virginia Supreme Court of Appeals is not required as a prerequisite to obtaining federal habeas corpus

relief to first file a petition in a circuit court of West Virginia seeking an evidentiary hearing. *Sheftic v. Boles*, 377 F.2d 423 (4th Cir. 1967).

The district court's refusal was based on an earlier case in which it held on principles of comity and a desire to give state courts an opportunity to redress invalid state convictions without federal encroachment that state remedies must be exhausted. *Miller v. Boles*, 248 F. Supp. 49 (N.D. W. Va. 1965).

The Court of Appeals in the principal case overrules the district court's dismissal and clearly disapproves the *Miller* decision. The Court of Appeals held that while the Supreme Court had not ruled on this exact question it had held that where there were two alternative methods for filing the writ in state procedures, it was necessary to utilize only one in order to give state courts an opportunity to pass on the matter. The Court of Appeals also cited with approval a Third Circuit case which held it would be unreasonable to expect the circuit court to grant a writ when the Supreme Court of Appeals of that state had already denied the writ. *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3rd Cir. 1952).

Criminal Law—Definition of Capital Offenses

P, fourteen years of age, was indicted for an alleged murder committed at age thirteen. The case was set for trial in the Intermediate Court of Kanawha County under W. VA. CODE ch. 49, art. 5, § 3 (Michie 1966) which provides that a juvenile court shall have jurisdiction over persons under eighteen years of age except for capital offenses. *P* contended that since capital punishment has been abolished in West Virginia, the juvenile court should properly have jurisdiction. *Held*, writ of prohibition denied. Capital offenses include those punishable by life imprisonment. Since murder in West Virginia is punishable by life imprisonment, *P* could be tried by the intermediate court. *State v. Wood*, 155 S.E.2d 893 (W. Va. 1967).

This decision rested on the court's interpretation of the term "capital offenses." W. VA. CODE ch. 49, art. 1, § 4 (Michie 1966) defines delinquency as a crime not punishable by death or life imprisonment, while W. VA. CODE ch. 49, art. 5, § 3 (Michie 1966) just speaks of capital offenses without further definition. In order to resolve the disparity in terminology, the court reasoned that capital offenses, as used in W. VA. CODE ch. 49, art. 5, § 3 (Michie

1966), must include all crimes punishable by death or life imprisonment.

This question has previously arisen in the area of bail. Capital offenses are not bailable, but it has been held that the abolition of capital punishment makes all persons charged with a crime bailable. 8 AM. JUR. 2d *Bail and Recognizance* §§ 30-31 (1963). What this seems to be saying is that by abolishing capital punishment, the difference between capital offenses and other crimes is also abolished. By statutory interpretation the West Virginia court was able to reach an opposite result in the principal case.

Damages—Inadequacy of Verdict

P brought action to recover for property damage to her automobile and for personal injuries sustained in a rear end collision negligently caused by *D* while *P* was waiting to turn at an intersection. *P*'s husband, *H*, sought to recover for medical expenses and loss of consortium occasioned by *P*'s injuries. The jury returned a verdict in favor of *P* but against *H* in disregard of instruction, and judgment was entered thereon. A motion by *P* and *H* to set aside the verdict and judgment on the grounds of inadequacy and as showing, passion, prejudice, bias, or misconception of the law was overruled. *Held*, affirmed as to *P*, reversed and remanded as to *H*. Evidence of liability must be uncontroverted in order to set aside a verdict. Furthermore, the jury having found in favor of *P*, *H* became entitled as a matter of law to recover on his derivative claim. *Coakley v. Marple*, 156 S.E.2d 11 (W. Va. 1967).

One of the issues which arose in this case concerned circumstances under which a jury verdict for plaintiff may be set aside on grounds of inadequacy. The court looked to *Shipley v. Virginian Railway Co.*, 87 W. Va. 139, 104 S.E. 297 (1920), which established the rule that the court may not set aside a verdict because of inadequacy if the evidence is such that had the verdict been for *D* the court could not set it aside. Since *P*'s right to recovery was a jury question in the principal case, the court did not have the right to decide on its adequacy.

Another issue arising was the jury's apparent disregard for an instruction. The trial court instructed that if they found for *P*, they must also find for *H* and consider his damages. The court found that the denial of recovery constituted a reversible error

citing its recent decision in *Richmond v. Campbell*, 148 W. Va. 595, 136 S.E.2d 877 (1964).

Disbarment—Evasion of Federal Income Tax

Defendant was previously convicted of a felony for willful violation of the Internal Revenue Code. He was then brought before the court in a disciplinary proceeding based on the By-laws of the West Virginia State Bar which require that an attorney's license to practice law "shall" be revoked should he be convicted of a crime involving moral turpitude. *Held*, willful evasion of payment of income tax is a crime involving moral turpitude and the by-laws make license revocation mandatory precluding the court from considering extenuating circumstances. *In Re Mann*, 154 S.E.2d 860 (W. Va. 1967).

Refusing to consider extenuating circumstances would appear to place West Virginia in a minority position. *Annot.*, 59 A.L.R.2d 1398 (1958). The court states the weight of authority is that a conviction involving the element of fraud is one involving moral turpitude. However, such conviction does not necessarily dictate disbarment because the majority will give the defendant an opportunity to show himself free of moral turpitude by considering extenuating circumstances. This is true even in situations where the statutory language is similar to West Virginia's. *Baker v. Miller*, 236 Ind. 20, 138 N.E.2d 145 (1956); *Re Hallinan*, 43 Cal. 2d 243, 272 P.2d 768 (1954).

Procedure—Unincorporated Associations

D, a county circuit court, issued a preliminary injunction against *P-relator*, an unincorporated labor union, enjoining *P* from engaging in unlawful picketing. *P* then sought a writ of prohibition to prohibit *D* from perpetuating the preliminary injunction on the grounds that *P*, an unincorporated association, is not subject to suit in its name or as a separate entity. *Held*, an unincorporated association may not sue or be sued in its name or as a separate entity in absence of a statute authorizing such suits. But, an unincorporated association may still protect its rights against third persons by maintaining an action in the name of the State, which acts in a representative capacity. Therefore, *P-relator* has properly maintained this action in the name of the State. Both *P* and the State have a bona fide interest in this proceeding, *P's* interest

being protection from a void injunction issued without jurisdiction, and the State's interest being preventing any of its courts from acting without jurisdiction. Thus the State may properly institute and maintain a prohibition proceeding to protect the rights of an unincorporated association such as *P. State ex rel. Glass Bottle Blowers Ass'n of the United States & Canada v. Silver*, 155 S.E.2d 564 (W. Va. 1967).

In West Virginia the only unincorporated associations presently subject to suit under a common name are a cooperative agricultural marketing or credit association, W. VA. CODE ch. 19, art. 4, § 4 (Michie 1966), and a common carrier, W. VA. CODE ch. 56, art. 3, § 15 (Michie 1966). All other unincorporated associations fall within the common law rule, that since they have no legal entity distinct from that of their members they may not sue or be sued in the organization's own name.

Sales—Warranties Under the Uniform Commercial Code

D, for the purpose of making coke, bought coal from one of two piles exhibited near the mouth of *P*'s newly opened mine. *P* had shown *D* a sample with a low percentage of ash, suited for coke-making, taken from another part of the mine. At *D*'s request *P* had the coal cleaned and shipped. After the delivery *D* told *P* to stop loading coal until an analysis could be made to determine ash content, but after looking at the same coal pile, allowed three more truckloads to be delivered. An analysis of the coal later showed that the ash content was too high for coke making, and *D* refused to pay for the coal. In an action to recover the value, the jury returned a verdict for *P*, and judgment was entered thereon. *Held*, affirmed. There was no express or implied warranty of merchantability, an issue properly determined by the jury. *D*'s inspection of the coal before delivery excluded any warranties under W. VA. CODE ch. 46, art. 2, § 316 (Michie 1966). *Sylvia Coal Co. v. Mercury Coal and Coke Co.*, 156 S.E.2d 1 (W. Va. 1967).

As the court points out in its opinion, this is one of the first cases in West Virginia involving provisions of the Uniform Commercial Code as embodied in W. VA. CODE ch. 46 (Michie 1966). In this same area of warranties under the Uniform Commercial Code, see *Shreve v. Casto Trailer Sales, Inc.*, 150 W. Va. 669, 149 S.E.2d 238 (1966).

The decision in the principal case rested on two fact determinations made by the jury: that even though *P* exhibited the sample, he *did not represent* it as coming from the coal piles near the mine, and that *D* *relied on his own examination* of the coal rather than on any statements or representations made by *P* who had no experience in the sale of coal for any purpose. With these facts determined, the Uniform Commercial Code, W. VA. CODE ch. 46, art. 2, § 316 (Michie 1966), clearly excludes any possibility of express or implied warranties.

Tort Liability—Turnpike Commission

P's decedents were killed in an accident involving two vehicles on a state turnpike. Conflicting evidence was introduced at the trial concerning the icy condition of the highway at the time of the accident. On appeal, the issue arose as to the turnpike's liability for failure to keep the highway free of ice and snow. *Held*, W. VA. CODE ch. 17, art. 10, § 17 (Michie 1966), and W. VA. CODE ch. 17, art. 10, § 18 (Michie 1966) changed the common law and created a basis of liability which did not exist at common law. Section 18 reads in part, "Any person injured by reason of a turnpike, road or bridge . . . being out of repair may recover all damages . . ." from those responsible for its maintenance. While the liability of municipal corporations and turnpike commissions under the statutes is absolute, that does not refer to the cause of action. The cause of action itself must be established within the terms of the statutes. The general rule as to municipal corporations and turnpikes is that normal amounts of ice and snow do not constitute a defect and do not render the road out of repair. Although ice and snow may render a street out of repair, there must be an accumulation amounting to an obstruction before it can be within the purview of the statute creating a cause of action. *Christo v. Dotson*, 155 S.E.2d 571 (W. Va. 1967).

This case supports the well-established principle that reasonable care does not require a municipality or other public authority to free its streets and sidewalks from ice and snow which have naturally accumulated. Generally, liability is rarely imposed and then ordinarily upon the theory that the ice and snow has created dangerous formations or obstacles and notice of their existence

has been received by the public authority. 25 AM. JUR. *Highways*
§ 519 (1940); *Annot.*, 39 A.L.R.2d 782 (1955).

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