

IN THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

No. 26196

STATE OF WEST VIRGINIA, ex rel.
DARRELL V. McGRAW, JR., Attorney General,

Appellant,

v.

COMBS SERVICES; COMBS SERVICES, INC.;
COMBS FUNERAL SERVICES, INC., d/b/a
GREENLIEF-COMBS FUNERAL HOME;
COMBS FUNERAL SERVICES, d/b/a GREENLIEF-
COMBS FUNERAL HOME; STEVEN W. COMBS,
individually; and STEVEN W. COMBS,
Funeral Director,

Appellees,

and

MOUNTAIN VALLEY BANK, N.A.,
a national banking association,

Appellee/Intervenor.

AMICUS CURIAE BRIEF
ON BEHALF OF THE WEST VIRGINIA BANKERS ASSOCIATION

The West Virginia Banker's Association (hereinafter referred to as "WVBA"), by counsel, submits the following arguments and authorities as its Amicus Curiae Brief to assist this Court in resolving the above-referenced action.

I. INTRODUCTION.

The instant appeal involves issues of first impression for this Court concerning, inter alia, the interpretation and application of West Virginia Code § 47-14-11(d) (the “Statutory Lien Provision”) (Michie Replacement Volume 1998 and Cum. Supp. 1999) of the Preneed Funeral Contracts Act.¹ Generally, § 47-14-11(d) creates a statutory lien (the “Statutory Lien”) in favor of an individual who purchases preneed funeral services, which lien arises at the time of the services contract. Id. The lower court ruled that the Statutory Lien did not and could not have priority over prior perfected liens.

The Appellant (hereinafter referred to as the “State”) contends that the lower court’s ruling should be reversed because the Statutory Lien has priority over all other liens against the funeral services provider and its assets, including liens perfected prior to the creation of the Statutory Lien. However, because the lien priority issue affects every bank and lender doing business in the State of West Virginia, the WVBA is compelled to file this brief in support of the lower court’s decision. To reverse that decision would ignore the plain and unambiguous provisions of West Virginia Code § 47-14-11(d), would violate the due process guarantees and prohibition against the impairment of contractual obligations found in both the United States Constitution and West Virginia Constitution and would create chaos for commercial lenders in the State of West Virginia.

II. FACTUAL BACKGROUND.

The material facts that give rise to the instant appeal are not in dispute. In September, 1996, Mountain Valley Bank, N.A. (the “Bank”) made two (2) loans (the “Loans”) to the Appellees (hereinafter referred to collectively as “Combs”) totaling approximately \$105,000.00, the repayment of which was secured by a valid and perfected lien on certain property of Combs. Thereafter, the State, while acting as administrator of the Preneed Funeral Act, audited Combs’ sales of preneed

¹ West Virginia Code §§ 47-14-1, et seq. (the “Preneed Funeral Act”).

funeral contracts. During the audit and through subsequent investigation, the State discovered that Combs had embezzled nearly \$55,000.00 from fourteen (14) customers who had purchased preneed funeral services.

Pursuant to § 47-14-8(f) of the Preneed Funeral Act, twelve (12) of the defrauded customers applied for and were awarded guarantee funds in an amount sufficient to reimburse the cost of the preneed funeral services contracts. Of the twelve (12) customers defrauded by Combs, two (2) entered into contracts for preneed funeral services prior to the effective date of the Statutory Lien Provision. Each of the remaining ten (10) customers' burial funds were taken by Combs after the Bank perfected its lien against Combs and after the effective date of the lien provision.

The State argued that each of the twelve (12) customers defrauded by Combs was entitled to a Statutory Lien with priority over the Bank's properly perfected security lien. In response, the Bank argued that the Statutory Lien is effective from and after the date of the preneed funeral services contract. The lower court agreed with the Bank and ruled that the Statutory Lien does not have priority over the Bank's earlier and properly perfected lien. The WVBA respectfully suggests that the lower court's ruling is correct. To hold otherwise would misapply the Preneed Funeral Act and violate the due process and impairment of contracts clauses of the federal and state constitutions.

III. DISCUSSION.

A. The Statutory Lien Created By West Virginia Code § 47-14-11(d) Does Not Take Priority Over Prior, Properly Perfected Liens.

The language of the Statutory Lien Provision, contrary to the State's assertions, does not give rise to a super-priority lien. To read this statute in any other fashion goes beyond the plain language of the statute, the clear mandate of the Legislature and violates long-standing norms of commercial law.

Section 47-14-11(d) of the West Virginia Code provides that:

[a]ll preneed funeral contract buyers have a priority in claims against the provider, to the extent that their interest is set forth in this article. Such priority constitutes a statutory lien at the time the contract was executed to the extent payments on the contract were made and interest has accrued. [Emphasis added.]

Id. This statutory provision must be construed by giving effect to its plain, obvious and rational meaning, which should be rejected only if there is substantial, unambiguous evidence supporting a contrary interpretation. Matala v. Consolidation Coal Co., 647 F.2d 427 (4th Cir. 1981), rev'g 483 F. Supp. 1332 (N.D.W.Va. 1980), Thompson v. Chesapeake & O.R. Co., 76 F. Supp. 304 (S.D.W.Va. 1948).²

The clear language of § 47-14-11(d) intends to give the preneed funeral services customer a priority over claims against the funeral services provider, not liens, by creating a statutory lien in favor of the customer at the time of the contract. There is nothing in § 47-14-11(d) which elevates the Statutory Lien above all other prior, properly perfected liens and security interests. Rather, the Statutory Lien simply takes its place in line and its priority is ascertained by the date of its creation/perfection as with all other liens.

The lower court correctly concluded that, based upon the language of the Preneed Funeral Act, the Statutory Lien does not take priority over prior, properly perfected security interests. Accordingly, the WVBA respectfully requests that this Honorable Court affirm the decision of the lower court.

² Where a statute is clear and unambiguous, the oral advice of a public official cannot be used to contravene the plain meaning of such statute. In re Vandelinde, 179 W.Va. 183, 366 S.E.2d 631 (1988). Courts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed. State v. Boatright, 184 W.Va. 27, 399 S.E.2d 57 (1990).

B. Prioritization Of The Statutory Lien Is An Unconstitutional Taking And A Violation Of Due Process.

Prioritization of the Statutory Lien created by West Virginia Code § 47-14-11(d) over existing perfected liens is inappropriate because it is an unconstitutional taking of property without just compensation and a violation of due process, and thereby violates Section 1 of the Fourteenth Amendment of the United States Constitution and/or Article III, Sections 9 and 10 of the West Virginia Constitution.

Section 1 of the Fourteenth Amendment of the United States Constitution provides, in relevant part, that “. . . nor shall any State deprive any person of life, liberty or property without due process of law” Similarly, Article III, Section 9 of the West Virginia Constitution provides, in relevant part, that:

[p]rivate property shall not be taken or damaged for public use, without just compensation, nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner . . .

Likewise, Article III, Section 10 of the West Virginia Constitution provides that “[n]o person shall be deprived of life, liberty or property without due process of law”

This Court has long held that “property” is comprised of a wide array of tangible and intangible interests. For purposes of the property protected by the federal and state constitutions, this Court has defined “property interest” as including:

. . . not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings.

State ex rel. Blankenship v. Richardson, 196 W.Va. 726, 474 S.E.2d 906 (1996); Barron v. Board of Trustees, 176 W.Va. 480, 345 S.E.2d 779 (1985); Evans v. West Virginia Bd. of Regents, 165 W.Va. 780, 271 S.E.2d 778 (1980); Kisner v. Public Serv. Comm'n, 163 W.Va. 565, 258 S.E.2d 586 (1979); State ex rel. McLendon v. Morton, 162 W.Va. 431, 249 S.E.2d 919 (1978); Waite v. Civil Serv. Comm'n, 161 W.Va. 154, 241 S.E.2d 164 (1977);.

Similarly, in Cottrell v. Public Fin. Corp., 163 W.Va. 310, 256 S.E.2d 575 (1979), this Court determined that “[t]he right of a creditor to collect a garnishment is a significant property interest protected by the due process clause of the Fourteenth Amendment of the United States Constitution and under W.Va. Const., art. III, § 10.” Courts in other jurisdictions follow this rule and, on that basis, have concluded that lien priority is a property right protected by the takings and due process clauses of the federal and state constitutions. See, e.g., PDS Engineering & Constr., Inc. v. Double RS, 1991 Conn.Super. LEXIS 3092, *31 (The court concluded that the mechanic’s lien law, to the extent that it operates to give priority to a mechanic’s lien over Lender’s mortgage would violate the due process clause of the Fourteenth Amendment of the United States Constitution and Article First § 10 of the Connecticut constitution. Accordingly, the mechanic’s lien is determined to be secondary in priority to the Lender’s mortgage.); Fisher v. Wineman, 84 N.W. 1111 (Mich. 1901) (Altering the priority of liens without due process of law is unconstitutional.); 51 AmJur2d, Liens, § 52 (The general rule as to the priority of liens – first in time, first in right – cannot, as to vested liens, be modified without depriving the prior lienholder of his property without due process, or without impairing the obligation of a contract.).

When considering the instant case in light of the foregoing rules and authorities, it is clear that the position advanced by the State – that the Statutory Lien takes priority over the Bank’s earlier, properly perfected liens - results in a construction of the statute that violates the takings prohibition and due process guarantees of both the federal and state constitutions. The Statutory Lien arises automatically and would prime the recorded liens of pre-existing creditors, all without notice, an opportunity to be heard or any due process whatsoever.

Because courts should strain to interpret statutes in a constitutional manner³, the lower court's decision must be affirmed. To hold otherwise violates Section 1 of the Fourteenth Amendment of the United States Constitution and/or Article III, Sections 9 and 10 of the West Virginia Constitution. Accordingly, the State's position must be rejected by this Court.

C. Prioritization Of The Statutory Lien Is An Unconstitutional Impairment of Contractual Obligations.

The lower court's decision must be affirmed because prioritization of the Statutory Lien created by West Virginia Code § 47-14-11(d) would result in an unconstitutional impairment of contractual relations that violates Article I, Section 10, cl. 1 of the United States Constitution and/or Article III, Section 4 of the West Virginia Constitution.

Article I, Section 10, cl. 1 of the United States Constitution provides, in relevant part, that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts" Likewise, Article III, Section 4 of the West Virginia Constitution provides, in relevant part, that "[n]o . . . law impairing the obligation of a contract, shall be passed."

³ See, e.g., Syllabus Point 1 of West Virginia Trust Fund v. Bailey, 199 W.Va. 463, 485 S.E.2d 407 (1997), in which this Court held that:

[i]n considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question.

To determine whether a statute impairs a constitutionally protected contractual obligation, this Court has adopted a test similar to the impairment analysis employed by the United States Supreme Court.⁴ In describing the test, this Court has stated that:

[t]he initial inquiry is whether the statute has substantially impaired the contractual rights of the parties. If a substantial impairment is shown, the second step of the test is to determine whether there is a significant and legitimate public purpose behind the legislation. Finally, if a legitimate public purpose is demonstrated, the court must determine whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.

Syl. Pt. 4, Shell v. Metropolitan Life Insurance Co., 181 W.Va. 16, 380 S.E.2d 183 (1989).

In applying the first prong of the Metropolitan Life test to the instant case, there is no doubt that, by adopting the State's interpretation, the super-priority of the Statutory Lien would substantially impair the contractual rights of the Bank established pursuant to its Loans and security agreement with Combs. Instead of having a first lien in and to the collateral securing the Loans, the Bank's lien position would be automatically subordinated to the Statutory Lien of Combs' customers, none of whom had a recorded lien at the time of the Loans. Moreover, two of Combs' aggrieved customers contracted with Combs prior to the enactment of the Statutory Lien Provision and ten of the customers contracted with Combs after the Bank perfected its lien.

Because the State's interpretation of § 47-14-11(d) would clearly and substantially impair the existing contractual relationship between Bank and Combs, this Court must also address the second prong of the Metropolitan Life test to determine if the improper contractual impairment serves a legitimate public purpose and is reasonable in light of such public purpose. Clearly it does

⁴ In determining whether a law impairs an obligation of contract, this Court has construed Article III, Section 4 of the West Virginia Constitution as the United States Supreme Court has interpreted Article I, Section 10, cl. 1 of the United States Constitution. Syl. Pt. 1, Shell v. Metropolitan Life Insurance Co., 181 W.Va. 16, 380 S.E.2d 183 (1989).

not. Although the State's interpretation of the Statutory Lien Provision may serve a few persons who purchase preneed funeral contracts, it would create chaos for lenders in this State and violate long-standing norms of commercial law. Such consequences cannot and do not serve any public purpose. Notably, similar statutes which alter the priority of liens to favor one group over another have been consistently struck down because they do not serve a legitimate public purpose and thereby, impermissibly impair contracts. See, e.g., First Nat. Bank of Marysville v. Bahan, 198 N.E.2d 272 (Ohio Com.Pl. 1964) (Artisan liens created by UCC could not take priority over prior chattel mortgages without violation impairment of contracts clause.); Central Savings Bank in City of New York v. City of New York, 18 N.E.2d 151 (N.Y. 1938), cert. denied, 306 U.S. 661, 59 S.Ct. 790, 83 L.Ed. 1058 (1939) (New York law allowing for repairs to tenements and for assessment of costs of repair against property as a lien prior to existing mortgages was unconstitutional as impairment of obligation of mortgagee's contract with mortgagor.); Link v. Receivers of Seaboard Air Line Ry. Co., 73 F.2d 149 (4th Cir. 1934) (An 1882 statute giving personal injury judgments against railroads priority over railroad mortgages violated impairment of contracts clause.); Giles v. Stanton, 26 S.W. 615 (Tex. 1894) (Statute establishing preference to railroad's earnings ahead of mortgage made before law was enacted violated impairment of contracts clause.); Yeatman v. Foster County, 51 N.W. 721 (N.D. 1892) (North Dakota statutes that purported to make a statutory lien for seed grain furnished thereunder superior to the preexisting lien of a mortgage violated the impairment of contracts clause).

Based on the undisputed facts and circumstances of this case and long-held notions of constitutional law, the State's interpretation of the Statutory Lien Provision cannot withstand this Court's scrutiny inasmuch as it violates Article I, Section 10, cl. 1 of the United States Constitution and/or Article III, Section 4 of the West Virginia Constitution. Accordingly, the WVBA respectfully requests that this Court affirm the lower court's decision.

IV. CONCLUSION.

Based upon the foregoing arguments and authorities, the WVBA respectfully requests that the lower court's ruling be affirmed.

WEST VIRGINIA BANKERS ASSOCIATION

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Appellees,

and

MOUNTAIN VALLEY BANK, N.A.,
a national banking association,

Appellee/Intervenor.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
ON BEHALF OF THE WEST VIRGINIA BANKERS ASSOCIATION

The West Virginia Bankers Association, by counsel, moves this Court for leave to file the attached Amicus Curiae Brief on its behalf and in support of the Mountain Valley Bank, N.A., Appellee/Intervenor in the above-referenced Appeal. The West Virginia Bankers Association represents the interests of approximately one hundred one (101) FDIC insured lending institutions in West Virginia. The movant is an association whose members have an interest in the

Appellee/Intervenor's issue concerning the priority of the statutory lien created by West Virginia Code § 47-14-11(d). This issue also affects all other West Virginia lending institutions and the movant believes its perspective will be of assistance to this Court in the resolution of the above-referenced Appeal.

For these reasons, the West Virginia Bankers Association respectfully requests this Court's leave to file the attached Amicus Curiae Brief, pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, and such other relief as this Court deems just and proper.

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CERTIFICATE OF SERVICE

I, Kenneth E. Webb, Jr., do hereby certify that I have caused copies of the hereto attached Motion for Leave to File Amicus Curiae Brief on Behalf of West Virginia Bankers Association and Amicus Curiae Brief on Behalf of West Virginia Bankers Association to be served upon:

Jill L. Miles, Esq.
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Post Office Box 1789
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by placing the same in the regular United States Mail, postage prepaid, on this _____ day of August, 1999.

Kenneth E. Webb, Jr.