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**THE FOURTH CIRCUIT’S TREATMENT OF AN
UNCONVENTIONAL OBLIGATION IN
*WEGMANN V. TRAMONTIN***

Nathan W. Friedman*

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Wegmann v. Tramontin,¹ a case involving an oral contract, a prescribed debt, and a divorced couple who has been engaged in on-again, off-again litigation with one another in Louisiana courts for more than thirty years, represents a quality example of a court in a mixed jurisdiction seamlessly applying both civilian principles, namely the obligations articles of the Louisiana Civil Code, and relevant common law authority to solve a legal problem. It shows that the civilian tradition remains strong in Louisiana courts, but not to the exclusion of common law methodology, and that the two need not be thought of as, and indeed cannot practically be, mutually exclusive in a mixed jurisdiction like Louisiana.

* J.D. (May, 2017), Paul M. Hebert Law Center, Louisiana State University. The author would like to thank Professor Olivier Moréteau for his guidance and assistance throughout the writing of this case note.

1. *Wegmann v. Tramontin* 2015-0561 (La. App. 4 Cir. 1/13/16), 186 So. 3d 236, *writ denied*, 2016-0276 (La. 4/4/16), 190 So. 3d 1209.

I. BACKGROUND

Cynthia Wegmann and Gregory Tramontin² were married in 1981 and separated in 1985. During marriage, the couple had founded the USAgencies Insurance Company, and stock in that company was the primary asset of the community of acquets and gains existing between them at the time of their separation. Pursuant to a partition agreement reached in 1988,³ Ms. Wegmann received \$25,000 from Mr. Tramontin in exchange for all rights to her USAgencies stock. However, in 1994, she sued to rescind the partition agreement based on lesion beyond moiety.⁴ She alleged that her shares of USAgencies stock were worth significantly more, and she had transferred her rights to the stock “based on erroneous information that [the company] had little or no value.”⁵ She succeeded on this claim at the trial court level, receiving a \$1,758,571.64 damages award in the 19th Judicial District Court in 2004, but the Louisiana First Circuit Court of Appeal overturned the decision, holding that her original claim had prescribed.⁶

The First Circuit’s 2005 decision in *Tramontin v. Tramontin* seemed to be the final word on the matter as far as Louisiana courts were concerned, but on April 18, 2010, the controversy was resurrected in the form of an alleged oral contract between Ms. Wegmann and Mr. Tramontin purportedly obligating Ms. Wegmann to “willingly support Mr. Tramontin in his pending divorce litigation in East

2. Readers in Louisiana and the Las Vegas area of Nevada may know Gregory Tramontin as “Greg, the GoAuto Guy,” a recurring character in television advertisements for the GoAuto Insurance Company, which Mr. Tramontin founded in 2009. See GoAuto Insurance, YOUTUBE, https://www.youtube.com/watch?v=nftho_3FUpl.

3. *Tramontin v. Tramontin*, 2004-2286 (La. App. 1 Cir. 12/22/05), 928 So. 2d 29, 30.

4. LA. CIV. CODE ANN. art. 2589 (2016).

5. *Id.* at 30-31. In fact, Mr. Tramontin had sold his USAgencies stock in 1988. In return, he had received twenty-five shares of Liberty Underwriters, a successor company, and a contract guaranteeing his employment with Liberty at \$80,000 per year. However, Liberty proceeded soon thereafter to terminate his employment, resulting in litigation whereby Mr. Tramontin was awarded a \$2.2 million judgment and the buyback of his Liberty stock for \$200,000.

6. *Tramontin*, 928 So. 2d at 34.

Baton Rouge Parish with his then-wife,” in exchange for “\$3,000,000 to \$5,000,000 for her ownership in U.S. Agencies [sic] Insurance Co.”⁷ The contract allegedly promised further that, “The first portion of the \$3,000,000 would be tendered to [Ms. Wegmann] after she sold the house she was living in,” the remainder to be provided on an “as-needed basis.”⁸ Evidently, Ms. Wegmann held up her end of the bargain, selling her house and supporting Mr. Tramontin in his divorce action by attending court hearings and being “available to testify truthfully.”⁹ Mr. Tramontin refused to pay, and Ms. Wegmann sued him in the Civil District Court for the Parish of Orleans for “breach of contract and fraud.”¹⁰ Mr. Tramontin pled exceptions of prescription, *res judicata*, no cause of action, and vagueness in response.¹¹ The trial court granted his exception of no cause of action, dismissing Ms. Wegmann’s claim with prejudice. Ms. Wegmann appealed.

II. DECISION OF THE COURT

On appeal to the Fourth Circuit Court of Appeal, Ms. Wegmann assigned the following errors: that the District Court’s signed judgment and oral reasons for judgment were inconsistent, that the District Court erred by not finding that she and Mr. Tramontin had perfected a valid and enforceable oral contract, and finally that the District Court should have dismissed her case without prejudice had it correctly decided that her petition did not state a cause of action.¹² The Fourth Circuit affirmed the judgment of the District Court in full.¹³

Ms. Wegmann’s first assignment of error was held to be without merit as the court found no conflict between the trial court’s oral

7. Wegmann, 186 So. 3d at 238.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 239.

13. *Id.* at 238.

reasons for judgment and the written judgment.¹⁴ Had there been one, the conflict would have been disposed of by a jurisprudential rule that “where there is a conflict between the judgment and its written reasons, the judgment controls . . . [and] the same reasoning applies where there is a conflict between a written judgment and oral reasons for judgment.”¹⁵

Mr. Tramontin’s exception of no cause of action was found to have been properly granted because an oral contract to pay a prescribed debt and a contract for an undeterminable sum are unenforceable under Louisiana Civil Code articles 1847 and 1973, and a contract to pay a fact witness for testimony is void as against public policy.¹⁶ The court’s treatment of this assignment of error will be discussed in further detail *infra*.

Finally, the Fourth Circuit held that Ms. Wegmann’s petition was properly dismissed with prejudice as amendment would have been futile under Louisiana Code of Civil Procedure article 934, which provides that when, “the grounds of the objection raised through the exception cannot be . . . removed . . . the action, claim, demand, issue, or theory shall be dismissed,” with prejudice.¹⁷

14. *Id.* at 239. The Fourth Circuit’s opinion relates that Ms. Wegmann had argued in the trial court that Mr. Tramontin had “contracted based on a ‘moral obligation to give her the money,’” to which the trial judge had remarked, “Well, if the contract is based upon a moral consideration on the defendant’s part, he’ll have to answer to a higher authority than me if he violates that. But for the purposes of the law of the State of Louisiana I have to grant the Exception. It’s prescribed. It’s *res judicata*.”

15. *Id.* See *Arbourgh v. Sweet Basil Bistro, Inc.*, 98-2218, p. 14 (La. App. 4 Cir. 5/19/99); 740 So. 2d 186, 192, *writ denied*, 99-2942 (La. 12/17/99); 751 So. 2d 883; *Slaughter v. Bd. Of Sup’rs of S. Univ. & Agr. & Mech. Coll.*, 2010-1049 p. 37 (La. App. 1 Cir. 8/2/11); 76 So. 3d 438, 459, *writ denied*, 2011-2110 (La. 1/13/12); 77 So. 3d 970; *see also* *Hebert v. Hebert*; 351 So. 2d 1199, 1200 (La. 1977).

16. *Id.* at 241.

17. *Id.* See *Massiha v. Beahm*, 2007-0137 (La. App. 4 Cir. 8/15/07); 966 So. 2d 87.

III. COMMENTARY

The Fourth Circuit declined to grant legal enforceability to the alleged contract under Louisiana Civil Code articles 1847 and 1973, as well as on public policy grounds.

A. Article 1847

Article 1847 reads in full, “Parol evidence is inadmissible to establish either a promise to pay the debt of a third person or a promise to pay a debt extinguished by prescription.”¹⁸ A brief and seemingly straightforward article, the Fourth Circuit explains that it stands for the proposition that, “an oral contract to pay a prescribed debt is unenforceable.”¹⁹ Thus, because Ms. Wegmann asserted in her initial pleading that the amount of money she bargained for under the purported contract represented what she believed she was owed by Mr. Tramontin for her shares of USAgencies stock under the 1988 partition agreement, and that debt was held prescribed by the First Circuit in *Tramontin v. Tramontin*,²⁰ the article thus rendered the contract unenforceable and Ms. Wegmann with no cause of action.

As Revision Comment (e) explains, article 1847 was originally article 2278 when the Code was promulgated in 1870. Because it has no analog in the *Code Napoléon*, the article is “no doubt [reflective] of the influence of the common law Statute of Frauds” on post-bellum Louisiana.²¹ Here we have a Code article that reflects the creeping influence of the common law of Louisiana’s neighbors not only on its jurisprudence, but also on its positive law. Like the common law Statute of Frauds, the article creates not necessarily a rule of law, but instead an evidentiary rule; namely, that a court may not

18. LA. CIV. CODE ANN. art. 1847 (2016).

19. Wegmann, 186 So. 3d at 240.

20. Tramontin, 928 So. 2d at 33.

21. LA. CIV. CODE ANN. art. 1847, Revision Comment (e) (2016).

admit parol evidence to prove the existence of certain classes of contracts, and therefore courts may not imbue such contracts with legal enforceability when not evidenced by a writing.

There is an element of friction between the common law and the Civil Code at play in this controversy: the civilian concept of the natural or moral obligation to pay a prescribed debt, enumerated in Louisiana Civil Code articles 1760 and 1761,²² is significantly weakened by the incorporation of the Statute of Frauds into the Code. A natural obligation is typically understood as an obligation that is created by a moral duty to act,²³ but one that nevertheless is not legally enforceable in the manner of a conventional or general obligation with civil effects (known as a “civil obligation”). The Code and Louisiana jurisprudence nevertheless grant enforceability to some promises to pay a debt, which represents a natural obligation, thus turning the natural obligation into a civil one.²⁴ This process, created by the provision of article 1761 that states, “A contract made for the performance of a natural obligation is onerous,” takes place when a debtor’s promise to perform a natural obligation “binds him to the creditor by a civil obligation of which the natural one is the cause.”²⁵ Even if Mr. Tramontin’s oral promise to pay a prescribed debt to Ms. Wegmann had been sufficient to convert a previously existing natural obligation into a judicially enforceable civil one, Louisiana’s incorporation of the Statute of Frauds into article 1847 would still operate to make such a civil obligation impossible

22. “A natural obligation is not enforceable by judicial action. Nevertheless, whatever has been freely performed in compliance with a natural obligation may not be reclaimed. A contract made for the performance of a natural obligation is onerous.” LA. CIV. CODE ANN. art. 1761 (2016).

23. *Id.* at art. 1762. A debt extinguished by prescription is expressly defined as a natural obligation in Civil Code article 1762: “Examples of circumstances giving rise to a natural obligation are: (1) When a civil obligation has been extinguished by prescription”

24. “If the obligor makes a promise to perform his natural obligation, that promise, though informally made, gives the creditor an action to enforce it, but . . . in such a case the obligor through his promise turns the natural obligation into a civil one.” SAÚL LITVINOFF & RONALD J. SCALISE, JR., 5 LA. CIV. L. TREATISE, LAW OF OBLIGATIONS § 2.1 (2d. ed., West 2016).

25. *Id.* at § 2.23.

to enforce. Such a civil obligation would have been created by oral contract, and parol evidence would continue to be inadmissible to prove its existence in court.

Because of the unusual nature of the alleged debt in this case—an alleged lesionary conveyance in a partition agreement evidenced by an actually fairly unrelated damages award in an amount far exceeding the original value of the stock in controversy—it is hard to know exactly how it should have been treated. Indeed, whether the amount prayed for by Ms. Wegmann can even properly be called a “debt” at all. The First Circuit held in *Tramontin v. Tramontin* that Ms. Wegmann’s lesion claim had prescribed because she had not brought it within five years of the execution of the agreement under Civil Code article 1413, and refused to find an interruption of prescription for reason of *contra non valentem agere nulla currit praescriptio* (no prescription runs against a person unable to act).²⁶ The court here disposed of this alleged debt easily by characterizing it as a prescribed debt which no debtor can create an enforceable oral contract to pay; but if Ms. Wegmann had been allowed to amend her pleading to state that the money bargained for under the purported oral contract was not in fact representative of the amount she alleged she was owed for her share of USAgencies stock, this would have been perhaps a much more difficult question. Surely one that could not have been disposed of by Mr. Tramontin’s exception of no cause of action in the trial court.²⁷

Had Ms. Wegmann been allowed to amend her petition to remove the prescription problem, there would have simply existed an alleged oral contract for payment in exchange for certain acts. In such a case, the admissibility of parol evidence to prove the contract’s validity would be controlled not by article 1847, but instead by its sister article, article 1846—formerly article 2277 of the Code

26. *Tramontin*, 928 So. 2d at 32.

27. *Wegmann*, 186 So. 3d at 240.

of 1870, and transferred into the current code keeping its spot directly before article 2278, now 1847—which states that a contract the object of which has a value over \$500, “must be proved by at least one witness and other corroborating circumstances.”²⁸ Indeed, the court tells us that Ms. Wegmann claimed that “witnesses could corroborate the details of the contract,” but, “such evidence would not be admissible.”²⁹ However, if the alleged oral contract were not representative of a promise to pay a prescribed debt, it would necessarily fall under article 1846, and that article would expressly admit witness testimony related to the details of the alleged contract. The trial court disposed of this issue by granting Mr. Tramontin’s exception of no cause of action and dismissing Ms. Wegmann’s petition with prejudice, reasoning that because Ms. Wegmann had memorialized her understanding that the \$3 to \$5 million bargained for in the alleged contract represented her purported share of USAgencies, that fact was judicially admitted and could not be contradicted by an amended petition.³⁰ Therefore, the trial court reasoned, and the Fourth Circuit affirmed, amendment of the petition to cure the defect that allowed Mr. Tramontin’s exception of no cause of action to be granted would be impossible and as such dismissal with prejudice was required under Louisiana Code of Civil Procedure article 934.

B. Article 1973

The court held that the purported oral contract is also without effect under Louisiana Civil Code article 1973, which states, in pertinent part, “The quantity of a contractual object may be undetermined, provided it is determinable.”³¹ The court writes that, “Where an obligation is ‘too indeterminate’ to meet the requirements of article 1973, the ‘obligation [is] unenforceable because it is without

28. LA. CIV. CODE. ANN. art. 1846 (2016).

29. Wegmann, 186 So. 3d at 240.

30. *Id.* at 241.

31. LA. CIV. CODE. ANN. art. 1973 (2016).

cause.”³² The court concluded that because the purported contract was for an amount of money between \$3 and \$5 million to be tendered on the sale of Ms. Wegmann’s house, and the remainder to be paid on an “as-needed basis,”³³ the purported contract failed as to cause due to an indeterminable object.

Cause is defined in the first paragraph of article 1967 as “the reason why a party obligates himself,” and is one of the crucial ingredients of an enforceable contract without which a valid contract cannot exist. Quite notable is that the second paragraph of that article is the Code’s definition of and express authorization for courts to apply the doctrine of detrimental reliance.³⁴ Detrimental reliance is yet another common law principle that has been absorbed into the law of Louisiana and memorialized in the Code. Louisiana courts have held that “Louisiana law allows a party to recover under the doctrine of detrimental reliance even if no formal, valid, or enforceable contract existed.”³⁵ Here, the court makes no mention of the doctrine of detrimental reliance, as it appears Ms. Wegmann did not raise the issue.³⁶ This may have been a missed opportunity as it is undisputed that Ms. Wegmann did indeed sell her home in reliance upon the purported contract between her and Mr. Tramontin.

32. *Id.* (citing TAC Amusement Co. v. Henry, 238 So. 2d 393,400 (La. App. 4th Cir. 1970)).

33. *Id.*

34. LA. CIV. CODE. ANN. art. 1967, para. 2 (2016):

A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee’s reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.

35. Babkow v. Morris Bart, P.L.C., 98-0256 (La. App. 4 Cir. 12/16/98), 726 So. 2d 423, 429; State v. Murphy Cormier Gen. Contractors, Inc., 2015-111 (La. App. 3 Cir. 6/3/15), 170 So. 3d 370, 380, *writ denied*, 2015-1297 (La. 9/25/15), 178 So. 3d 573 (“A formal, written, underlying contract is not necessary to prove the existence of a binding contractual agreement where the plaintiff can show a promise was made, he relied on the promise, the promise was broken, and as a result he suffered loss.”).

36. Original brief of Defendant-Appellee, 2015 WL 4727336 (La.App. 4 Cir.); Reply brief of Cynthia Wegmann, Plaintiff-Appellant, 2015 WL 4880096 (La.App. 4 Cir.).

C. Void as Against Public Policy

Finally, the court upheld the trial court's determination that the alleged oral contract was a contract to secure live testimony through remuneration in excess of an amount fixed by law,³⁷ and therefore void as against public policy. This finding is notable, as it is *sui generis* in Louisiana jurisprudence, being the first recorded opinion to apply this particular public policy consideration, although it has been known to the common law for many years.³⁸ The court's ruling seems to have the effect of invalidating all contracts to secure live testimony in exchange for an amount of money greater than that set by law as against public policy within the jurisdiction of the Fourth Circuit. It is an open question, then, whether the remaining Louisiana Courts of Appeal will adopt the rule.³⁹

37. Compensation of witnesses in Louisiana is set by LA. REV. STAT. ANN. § 13:3661 (2016).

38. The court relies on three of the iconic volumes of common law doctrine to reach its determination: *Williston on Contracts*: "A bargain to pay one who is amenable to process a further sum for attending as a witness is generally invalid," RICHARD A. LORD, 7 WILLISTON ON CONTRACTS § 15:6 (4th ed., Lawyers Cooperative Publ'g), *The Restatement (First) of Contracts*: "A bargain to pay one who is subject to legal process, a sum for his attendance as a witness in addition to that fixed by law is illegal." RESTATEMENT (FIRST) OF CONTRACTS § 552 (1932), and the *Corpus Juris Secundum*: "When a witness 'is to be paid more than his or her legal fees, or other elements occur which tend to show that his or her evidence may be improperly influenced, the contract is against public policy.'" 17A C.J.S. CONTRACTS § 304).

39. In fact, the Fourth Circuit's decision seems to go beyond what had previously been the law regarding payment to witnesses. See Dane S. Ciolino, *Can I make Any Payments to a Fact Witness?*, LOUISIANA LEGAL ETHICS Blog (Aug. 8, 2013) <https://perma.cc/382K-SNSX>; Dane S. Ciolino, a distinguished scholar of Louisiana Legal Ethics, has written that, at least regarding attorney discipline, "the Louisiana Rules of Professional Conduct, relevant statutory law, case law, and persuasive authority all indicate that a lawyer should not be subjected to discipline for paying a fact witness if: 1. the payment is not motivated by an improper purpose, such as to obtain "inside information," to obtain false testimony or to influence the content of the witness's testimony; 2. the amount paid merely compensates the witness for the reasonable value of the time and expenses actually incurred by the witness; and, 3. the amount of the payment is not contingent on the witness's testimony." After *Wegmann v. Tramontin*, however, agreements to remit such formerly permissible payments to witnesses in exchange for their availability to testify may be unenforceable within the jurisdiction of the Fourth Circuit.