

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET No. 13-0926

JERRY N. BLACK, M.D.

Petitioner

v.

**ST. JOSEPH'S HOSPITAL OF
BUCKHANNON, INC.**

Respondent

Appeal from an order
of the Circuit Court of Upshur
County (12-C-52) granting
Respondent's Motion for Summary
Judgment

Respondent's Brief

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STATEMENT OF THE CASE

On June 3, 1982, St. Joseph's Hospital of Buckhannon and Dr. Jerry Black entered into the "Memorandum Agreement" at issue in this case, wherein St. Joseph's agreed to deed real property to Dr. Black to serve as the location for his medical practice. (A.R. 17). In this exchange, Dr. Black granted St. Joseph's "the first option to purchase the land," with the terms of St. Joseph's "Option to Repurchase" contained within Exhibit A to the executed Memorandum Agreement. (A.R. 22). It was clearly designated throughout the Memorandum Agreement and the exhibits to the agreement that St. Joseph's conveyance to Dr. Black was made subject to the Option to Repurchase. (*See, e.g.*, A.R. 28) (including language in Dr. Black's deed specifically referencing the Option to Repurchase).

Prior to filing this lawsuit, Dr. Black mailed St. Joseph's a letter "intended to constitute a formal offer to sell." (A.R. 65). Dr. Black maintained in his correspondence that "[t]his letter will also constitute complete fulfillment of the implied 'first option to purchase' clause of the original Memorandum Agreement . . . , thereby permitting unimpeded sale of these properties and implied rights by Dr. Black to other qualified investors as specified in the recorded Memorandum Agreement herein cited." (*Id.*) Dr. Black's letter demonstrated to St. Joseph's that he incorrectly treated the Option to Repurchase as a right of first refusal instead of the option contract contemplated under the Memorandum Agreement. (*Id.*)

Subsequent correspondence from Dr. Black to St. Joseph's contains further evidence of his mischaracterization of St. Joseph's Option to Repurchase as a right of first refusal instead of an option contract. (A.R. 153) ("The only obligation that was due [to St. Joseph's] . . . is the prior notification of a possible intent to sell the properties, and the concurrent equal offer and right of first refusal by St. Joseph's Hospital.").

On April 20, 2012, St. Joseph's filed its Complaint seeking declaratory relief pursuant to the West Virginia Uniform Declaratory Judgment Act, W.Va. Code § 55-13-1 *et seq.* (A.R. 12). St. Joseph's sought a declaration "that Plaintiff possesses an executed option contract that can be exercised by the optionee, Plaintiff, at any point within the agreed-upon time frame and without the need for any condition precedents to be met[.]" (A.R. 15). St. Joseph's need for a declaratory judgment was due to Dr. Black's continued refusal to recognize the Option to Repurchase as an option contract, and his insistence St. Joseph's held a right of first refusal instead. (A.R. 13).

Upon receipt of St. Joseph's Complaint, Dr. Black filed a Motion to Dismiss, alleging the Complaint failed to state a claim upon which relief can be granted. (A.R. 45). In contravention of his earlier statements that the Option to Repurchase was a right of first refusal and not an option contract, Dr. Black argued in the Motion that "[t]here is simply no language in the Memorandum Agreement or the Option to Repurchase granting such a right to St. Joseph's." (A.R. 47). Instead, Dr. Black contended the Option to Repurchase could only be exercised for a one year period between June 3, 2080 and June 3, 2081. (A.R. 49). Dr. Black based his conclusion on his reading of paragraphs three and five of the Option to Repurchase. (A.R. 51). He included no language in his Motion to Dismiss suggesting that he disagreed with St. Joseph's classification of the Option to Repurchase as an option contract, and not a right of first refusal. (*See* A.R. 46, 47).

St. Joseph's filed a memorandum in opposition to Dr. Black's Motion to Dismiss, duly noting this was the first time he presented such an argument to St. Joseph's. (A.R. 60) ("Obviously, if Physician can act in 'complete fulfillment' of the Option Contract on February 1, 2011, then the Option can certainly be exercised much earlier than June 3, 2080. Physician's contemporaneous statements, e.g., 'in the event St. Joseph's Hospital wishes to exercise its first

option to purchase . . . 'further prove that the Option Contract could be exercised prior to June 3, 2080.'"). In response to Dr. Black's argument as to the enforceability of the option contract, St. Joseph's stated, among other things, it believed paragraphs three and five were ambiguous when taken together, and that fact alone precluded the Circuit Court's granting of the Motion to Dismiss. (A.R. 62).

On October 1, 2012, the Circuit Court held oral argument on Dr. Black's Motion to Dismiss. (A.R. 7). Based on this argument and the briefs before the court, the Circuit Court denied the Motion to Dismiss, and held that the Option to Repurchase was an option contract, not a right of first refusal. (A.R. 8). The Circuit Court agreed with St. Joseph's that paragraphs three and five of the Option to Repurchase were ambiguous as drafted. (A.R. 7). An Order was entered on October 9, 2012, finding "[t]he language of Paragraph 3 of the Option Contract allows St. Joseph's to exercise the Option at any time prior to June 3, 2080. Therefore, Paragraph 5 of the Option Contract is ambiguous as a matter of law and fact." (A.R. 8).

Dr. Black filed his Answer on October 22, 2012. (A.R. 74). Within his Answer, Dr. Black denied he had ever considered the Option to Repurchase to be a right of first refusal. (A.R. 72). This was consistent with Dr. Black's failure to deny the existence of an option contract both within his Motion to Dismiss, and when he was properly before the Court during the hearing of that motion. (*See* A.R. 47). Furthermore, Dr. Black did not object to the Order denying his Motion to Dismiss at the time of its entry.¹ (Pet'r's Br. 13, A.R. 361).

Due to Dr. Black's apparent agreement with St. Joseph's that it did possess an option contract instead of a right of first refusal, St. Joseph's filed its Motion for Summary Judgment and memorandum in support on April 25, 2013. (A.R. 423). Subsequent to the filing of St.

¹ Dr. Black waited until July 2, 2013, nine months after the motion was decided, to note any objections to the Circuit Court's findings of fact and law within the Order denying his Motion to Dismiss. (Pet'r's Br. 13, A.R. 361).

Joseph's Motion, an order closing discovery was entered on May 7, 2013. (A.R. 216). Prior to the close of discovery, Dr. Black had well over a year to conduct discovery and ample time to produce admissible evidence to the Circuit Court for its consideration.²

On June 21, 2013, the Circuit Court heard oral argument on St. Joseph's Motion for Summary Judgment. (A.R. 1). Dr. Black, during oral argument on the Motion for Summary Judgment, agreed with St. Joseph's that the Option to Repurchase was an option contract, and not a right of first refusal. (A.R. 378-79). There being nothing else to resolve, the Circuit Court granted St. Joseph's Motion for Summary Judgment, and reiterated its earlier finding that the Option to Repurchase was an option contract, and not a right of first refusal as Dr. Black initially contended. (A.R. 2). Dr. Black objected to entry of St. Joseph's proposed order granting summary judgment and St. Joseph's motion requesting Dr. Black's memoranda in opposition be sealed. (A.R. 361).

Notably, Dr. Black did not object to the classification of the Option to Repurchase as an option contract within his several pages of objections to St. Joseph's proposed orders. (A.R. 355-60). Instead, Dr. Black used his list of objections to introduce matters irrelevant to the resolution of the very narrow question before the Circuit Court as to whether the Option to Repurchase was an option contract or a right of first refusal. (A.R. 355). Dr. Black argued about the terms, enforceability, and timing of the option contract – all issues that were not properly before the Circuit Court, and are not properly before this Court on appeal. (*Id.*) The Circuit Court, after

² Dr. Black and St. Joseph's undertook mediation of this matter on September 17, 2012 (A.R. 57), and continued settlement discussions throughout January and February 2013. (A.R. 316). Dr. Black included confidential settlement discussions within his memoranda in opposition to St. Joseph's Motion for Summary Judgment, and included such information in the Dr. Black's Brief submitted to this Court. (*See, e.g.* A.R. 5, 363) (containing the Circuit Court Order granting St. Joseph's request to seal Dr. Black's memoranda in opposition and motion). Additionally, Dr. Black, well over a month after discovery had closed, disclosed an expert witness not previously known to the Circuit Court or St. Joseph's, along with an opinion letter authored by the expert for consideration by the Circuit Court. (A.R. 312) (disclosing expert witness on June 13, 2013 despite court order closing discovery on May 7, 2013).

consideration of Dr. Black's objections to the proposed orders granting summary judgment and sealing portions of the record, adopted St. Joseph's proposed orders in their entirety and entered the same on August 8, 2013. (A.R. 3, 5).

St. Joseph's disagrees with Dr. Black's statement of the case to the extent it is inconsistent with the information above. Dr. Black has introduced facts and legal conclusions not relevant to the resolution of this matter in his Brief. Moreover, many of these facts and legal conclusions are unsupported by the Appendix Record on file with this Court. St. Joseph's requests the Court disregard Dr. Black's Statement of the Case, and other matters within his Brief, when the information presented is otherwise unsupported by the trial record, or is inadmissible evidence of settlement negotiations undertaken between it and Dr. Black.

SUMMARY OF ARGUMENT

Dr. Black incorrectly maintains the Circuit Court erred when granting St. Joseph's Motion for Summary Judgment as to the narrow issue of whether the "Option to Repurchase," as contained within the Memorandum Agreement constituted an option contract or a right of first refusal. (Pet'r's Br. 8). Dr. Black conceded that the Option to Repurchase is an option contract, and not a right of first refusal, in his Motion to Dismiss, his Answer, and even in oral argument on St. Joseph's Motion for Summary Judgment. (A.R. 47, 72, & 378-79). Dr. Black's agreement and the findings of the Circuit Court at the hearings for his Motion to Dismiss and St. Joseph's Motion for Summary Judgment led to the Circuit Court's determination that St. Joseph's possesses an option contract, and not a right of first refusal. Further, Dr. Black, in his attempts to manufacture a genuine issue of material fact to survive summary judgment, has presented matters before this Court irrelevant and immaterial to the resolution of this case. (*See, e.g.*, Pet'r's Br. 20-21) (introducing issues such as the rule against perpetuities). These extraneous issues

should be ignored, as they have no applicability on Dr. Black's challenges to St. Joseph's Motion for Summary Judgment. It was proper for the Circuit Court to grant St. Joseph's Motion for Summary Judgment, and there is no reason to reverse this grant on appeal.

Further, it was proper for the Court to enter its Order granting St. Joseph's Motion for Summary Judgment. A Circuit Court's adoption of a proposed order prepared by a party to the case becomes that Court's findings of fact and conclusions of law for all intents and purposes. All written Orders supersede any oral rulings of the Circuit Court, and to the extent the written Order is perceived as inconsistent with the Court's oral ruling, the written Order should govern. Dr. Black's claims in this regard are meritless, and any challenges to the wording of the written Court Order granting St. Joseph's Motion for Summary Judgment should be disregarded.

Dr. Black contends that it was error for the Circuit Court to deny his Motion to Dismiss, and he challenges the entry of the Order accompanying that denial as an incorrect statement of the Court's oral ruling as well. (Pet'r's Br. 8). Motions to dismiss under West Virginia Rule of Civil Procedure 12(b)(6) are disfavored, and a trial court should not grant a party's motion unless there appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Here, St. Joseph's Complaint stated a claim sufficient to defeat Dr. Black's Motion to Dismiss – it is clear from the facts presented that Dr. Black, prior to the filing of St. Joseph's Complaint, maintained the Option to Repurchase was a right of first refusal, and not an option contract. (A.R. 13). St. Joseph's would be accorded relief through the Court's finding it possessed an option contract, and not a right of first refusal.

Additionally, there is no inconsistency between the Circuit Court's oral ruling and the information included in its written Order denying Dr. Black's Motion to Dismiss, and its finding

paragraph five of the Option to Repurchase ambiguous. Even to the degree there is any inconsistency, the inconsistency is resolved in favor of the written, and not oral, Order.

Finally, St. Joseph's argues Dr. Black has waived his assignments of error through his failure to provide any argument in support of the alleged errors. Dr. Black has merely copied and pasted a significant amount of text from his various motions and memoranda previously on file with the Circuit Court into his Brief, and much of the included information is inapplicable to any of his errors contended on appeal. Per West Virginia law, Dr. Black's baseless errors should be deemed waived.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

St. Joseph's believes oral argument is unnecessary in this matter, as this case does not implicate any matters of first impression and does not contain an issue of fundamental public importance. However, if the Court believes oral argument is necessary for the resolution of this case, St. Joseph's requests oral argument under Rule 19 of the Rules of Appellate Procedure, as this is a simple matter involving an assignment of error in the application of settled law.

ARGUMENT

I. SINCE DR. BLACK CONCEDED THAT THE AGREEMENT WAS AN OPTION CONTRACT, THE CIRCUIT COURT PROPERLY GRANTED ST. JOSEPH'S MOTION FOR SUMMARY JUDGMENT.³

Upon appeal, a circuit court's entry of summary judgment is reviewed *de novo*. *Fayette Cnty Nat'l Bank v. Lilly*, 199 W.Va. 349, 352, 484 S.E.2d 232, 235 (1997) (citing Syl. pt. 1, *Davis v. Foley*, 193 W.Va. 595, 596, 457 S.E.2d 532, 533 (1995)). A circuit court's grant of "[s]ummary judgment is appropriate where the record as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. pt. 3, *Davis*, 193 W.Va. at 596, 457 S.E.2d at 533 (quoting Syl. pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 755 (1994)).

The function of the Supreme Court of Appeals, "as a reviewing court is to determine whether the stated reasons for the granting of summary judgment by the lower court are supported by the record." *Thompson v. Hatfield*, 225 W.Va. 405, 408, 693 S.E.2d 479, 482 (2010) (quoting *Lilly*, 199 W.Va. at 353, 484 S.E.2d at 236). The circuit court's order must contain the factual and legal basis for its decision. *Id.* (citing *Nestor v. Bruce Hardwood Flooring, L.P.*, 206 W.Va. 453, 456, 525 S.E.2d 334, 337 (1999)). "Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." *Ayersman v. W. Va. Div. of Env't'l Prot.*, 208 W.Va. 544, 547, 542 S.E.2d 58, 61 (2000).

³ Due to the structure of Dr. Black's Brief, and his clear noncompliance with the Rules of Appellate Procedure, St. Joseph's' Brief does not adopt the structure of the "argument" contained therein. St. Joseph's argues in opposition to each of Dr. Black's alleged assignments of error, and has tried to respond to each of his arguments in kind. However, St. Joseph's requests that pursuant to Rule 10(d) of the Rules of Appellate Procedure, it not be deemed to have conceded any of Dr. Black's arguments through the restructuring of its Brief to conform with the Rules of Appellate Procedure.

“A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” *Painter*, 192 W.Va. at 192, 451 S.E.2d at 758 (1994) (quoting Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W.Va. 160, 133 S.E.2d 770 (1963)). When deciding whether to grant a party’s motion for summary judgment, the circuit court must only determine whether there is a genuine issue for trial; its purpose is not to weigh the evidence to determine the truth of the matter asserted. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

'Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed 'material' facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.'

Syl. pt. 2, *Lilly*, 199 W.Va. at 350, 484 S.E.2d at 233. (quoting Syl. pt. 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995)). “The movant’s burden is ‘only [to] point to the absence of evidence supporting the nonmoving party’s case.’” *Powderidge Unit Owners Ass’n v. Highland Props. Ltd.*, 196 W.Va. 692, 699, 474 S.E.2d 872, 879 (1996) (quoting *Latimer v. SmithKline & French Labs.*, 919 F.2d 301, 303 (5th Cir. 1990)) (alterations in original).

It is clear that once Dr. Black conceded that the Option to Repurchase was not an option contract, but was a right of first refusal, the Circuit Court was free to grant St. Joseph's Motion for Summary Judgment. (A.R. 1). The Circuit Court’s Order on the motion complies with this Court’s mandate, as it adequately identifies the legal and factual basis for its decision to grant St. Joseph’s Motion for Summary Judgment. (A.R. 1-3). The Order states the facts the Circuit Court found relevant and determinative as to whether the Option to Repurchase was an option contract

or a right of first refusal, including Dr. Black's agreement with St. Joseph's that it did possess an option contract, and not a right of first refusal. (A.R. 2) ("Defendant answered the Complaint for Declaratory Judgment on October 22, 2012. Therein, Defendant denied taking the position that Plaintiff does not possess an Option Contract and confirmed that a legal conclusion is necessary to determine whether Plaintiff possesses an Option Contract.").

Dr. Black reaffirmed his agreement with St. Joseph's that it possessed an option contract, and not a right of first refusal, at the Circuit Court's hearing on St. Joseph's Motion for Summary Judgment. With Dr. Black's acknowledgement that St. Joseph's possessed an option contract there was simply nothing left for the Circuit Court to resolve. (*See* A.R. 378-79) ("By the Court: So you are saying you agree with them [St. Joseph's' counsel] that it's an option contract? [Dr. Black's Counsel]: Always have."). Whether St. Joseph's could currently exercise the option contract was never at issue; the narrow question of law presented to the Circuit Court for its ruling was whether St. Joseph's possessed an option contract or a right of first refusal through the Option to Repurchase. (A.R. 379).

The distinction between an option contract and a right of first refusal is an important one, and was the only genuine issue in dispute in this case. "In a typical option the optionee has the absolute right to purchase something for definite consideration." *John D. Stump & Assocs., Inc. v. Cunningham Mem'l Park, Inc.*, 187 W.Va. 438, 443, 419 S.E.2d 699, 704 (1992). A preemptive right, or a right of first refusal, "involves the creation of the privilege to purchase only on the formation of a desire on the part of the owner to sell, and the holder of the right must purchase for the price at which the owner is willing to sell to a third person." *Id.* (quoting Syl. pt. 1, *Smith v. VanVoorhis*, 170 W.Va. 729, 730, 296 S.E.2d 851, 852 (1982)). A right of first refusal does not give a party the right to force an owner to sell, but only requires the owner, if he

decides to sell, to offer the property first to the party with the right of first refusal prior to selling the property to a third party. *Id.* The person with the right of first refusal must then purchase the property on the terms set by a bona fide third party offer. *See id.* (citing Syl. pt. 3, *Hartman v. Windsor Hotel Co.*, 132 W.Va. 307, 308, 52 S.E.2d 48, 48 (1949)).

It was clear from Dr. Black's initial correspondence to St. Joseph's that Dr. Black thought of the Option to Repurchase as a right of first refusal. (A.R. 65-67). Dr. Black then recanted his earlier position, and asserted there was no right of first refusal contemplated within the Option to Repurchase. (A.R. 47). From that point forward, Dr. Black was in agreement with St. Joseph's that it had an option contract, and not a right of first refusal. (See A.R. 378-79). Dr. Black's agreement, along with the Court's findings of fact in its previous hearing on his Motion to Dismiss and the findings of fact determined at the hearing on St. Joseph's Motion for Summary Judgment, effectively resolved this issue, as "the record as a whole could not lead a rational trier of fact to find for the nonmoving party." Syl. pt. 3, *Davis*, 193 W.Va. at 596, 457 S.E.2d at 533 (quoting Syl. pt. 4, *Painter*, 192 W.Va. at 189, 451 S.E.2d at 755). With Dr. Black's concession, there is simply no disputed material fact remaining in the case.

Dr. Black, despite the narrow scope of St. Joseph's' requested relief, insisted upon introducing material to the Circuit Court, and this Court upon review, unrelated to the resolution of this matter. (A.R. 315, 332). None of these collateral issues constitute disputed material facts that would preclude granting the Motion for Summary Judgment. Syl. pt. 2, *Lilly*, 199 W.Va. at 350, 484 S.E.2d at 233. (quoting Syl. pt. 5, *Jividen*, 194 W.Va. at 705, 461 S.E.2d at 451). Here, Dr. Black has pointed to no disputed material facts that impact the issue of whether the Option to Repurchase is a right of first refusal. Instead, the information Dr. Black submits applies to the

entirely different issue of the exercise of St. Joseph's' option contract, an issue not in dispute in this current litigation.⁴

The Circuit Court, correctly recognizing the scope of St. Joseph's Complaint as only asking whether the Option to Repurchase contemplated an option contract or a right of first refusal, admonished Dr. Black's counsel at its hearing on St. Joseph's Motion for Summary Judgment, explaining to Dr. Black's counsel that the issue of whether the option was exercisable was not part of the case. (A.R. 379). This is further evidence of Dr. Black's continued attempts to introduce ancillary matters not relevant to the disposition of this case. (*Id.*) (“[Dr. Black's Counsel]: And if they [St. Joseph's' Counsel] are seeking a ruling on whether they can exercise that option now [the option contract], go on record saying that if they try, we'll resist it. The Court: That's not part of the case. That's not part of the case.”).

It is clear from the parties' pleadings, motions, supporting memoranda and the hearing transcripts that the issue has always been whether St. Joseph's held an option contract or a right of first refusal. Dr. Black's efforts to state otherwise are part of his desperate efforts to circumvent the valid judgment of the Circuit Court, and his arguments to the contrary are inapplicable and insufficient to merit reversal of that judgment.

⁴ Dr. Black alleges a myriad of arguments as to the exercise of the Option to Repurchase, including that it is barred by the rule against perpetuities. (Pet'r's Br. 27). However, all of Dr. Black's contentions as to the execution of the Option to Repurchase do not apply to the issue properly resolved through summary judgment whether the Option to Repurchase is a right of first refusal or an option contract. These extraneous matters are improperly before the Court, and St. Joseph's respectfully requests they be disregarded.

II. THE CIRCUIT COURT DID NOT ERR IN ENTERING ITS ORDER GRANTING ST. JOSEPH'S MOTION FOR SUMMARY JUDGMENT AND RECOGNIZING THE "OPTION TO REPURCHASE" AS A VALID OPTION CONTRACT.⁵

Reversible error does not occur simply because a circuit court adopts the language and findings of fact contained within a party's proposed order, even though doing so may not be considered the preferred practice. *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 214, 470 S.E.2d 162, 168 (1996) (internal citations omitted). "Rather, 'even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.'" *Id.* (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985)). When analyzing the sufficiency of an order, an appellate court is not concerned with who prepared the order, but whether the findings of fact and conclusions of law accurately reflect the trial record and existing law. *See id.*

Dr. Black assigns as error the Circuit Court's entry of an Order granting St. Joseph's Motion for Summary Judgment. The thrust of Dr. Black's argument is that the Circuit Court erred when it entered the order because it accepted St. Joseph's proposed order granting summary judgment verbatim, and did not modify the proposed order in any way. (*See generally*, Pet'r's Br. 14-17, A.R. 355-60) (containing Dr. Black's complaints regarding the language used within the Court's Order granting St. Joseph's Motion for Summary Judgment). Dr. Black claims the Order granting summary judgment does not reflect the Circuit Court's oral ruling as issued from the bench. (Pet'r's Br. 16, 20) ("The Court did not state that the contract is 'valid' which, of course, it is not.").

⁵ It is unclear what Dr. Black is actually arguing in his Brief. As evidenced in the Appendix Record, Dr. Black himself acknowledges the Option to Repurchase is an option contract, and not a right of first refusal in his Motion to Dismiss, his Answer, and even during the oral argument for the Motion for Summary Judgment (A.R. 47, 72, & 378-79). Dr. Black instead devotes a significant portion of his argument as to the exercise of St. Joseph's option, which has never been at issue in this case.

Under West Virginia law, it is not reversible error for a circuit court to adopt the wording of a party's proposed order. *See State ex rel. Cooper*, 196 W.Va. at 214, 470 S.E.2d at 168. Further, once the circuit court adopts a party's proposed order, the findings of fact and law contained therein become those of the circuit court. *Id.* Any perceived discrepancies between the circuit court's oral ruling and a subsequent written order should be examined within the parameters of the written order, which this Court has determined supersedes any earlier ruling issued by the circuit court. *Tennant v. Marion Health Care Found., Inc.*, 194 W.Va. 97, 106 n.5, 459 S.E.2d 374, 383 n.5 (1995). "That a court of record speaks only through its records or orders has generally been affirmed by this Court." *Harvey v. Harvey*, 171 W.Va. 237, 241, 298 S.E.2d 467, 471 (1982). A petitioner's concerns with the differences between a circuit court's oral ruling and a later written order generally have no merit and alone are not sufficient to engender reversal of the circuit court's order. *See Tennant*, 194 W.Va. at 106 n.5, 459 S.E.2d at 383 n.5.

If it is determined that there is any difference in the contents of the Circuit Court's oral rulings from the bench regarding St. Joseph's Motion for Summary Judgment and its subsequent written Order, the differences should be resolved in favor of the written Order. Therefore, Dr. Black's contention the written Order's language "[t]he June 3, 1982 Option Contract is a valid Option Contract under West Virginia law" does not align with the Circuit Court's statement to "[p]lease prepare an Order which says that the matter was determined by the Court to be an option contract" should be disregarded by this Court, and any alleged variation between the two resolved in favor of the written Order granting St. Joseph's Motion for Summary Judgment. (Pet'r's Br. 16, A.R. 1, 379).

III. THE CIRCUIT COURT PROPERLY DENIED DR. BLACK'S MOTION TO DISMISS.

“When a party, as part of an appeal from a final judgment, assigns as error a circuit court’s denial of a motion to dismiss, the circuit court’s disposition of the motion to dismiss will be reviewed *de novo*.” Syl. pt. 4, *Ewing v. Bd. of Educ. of Cnty of Summers*, 202 W.Va. 228, 230, 503 S.E.2d 541, 543 (1998).⁶ Ordinarily, denial of a motion to dismiss is considered an interlocutory order, and is not immediately appealable. *Id.* (citing Syl. pt. 2, *State ex rel. Arrow Concrete Co. v. Hill*, 194 W.Va. 239, 460 S.E.2d 54 (1994)).

Motions to dismiss for failure to state a claim are viewed with disfavor and should rarely be granted. *Kessel v. Leavitt*, 204 W.Va. 95, 119, 511 S.E.2d 720, 744 (1998) (citing *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W.Va. 603, 606, 245 S.E.2d 157, 159 (1978)). The primary purpose of a motion to dismiss under Rule 12(b)(6) is to test the formal sufficiency of the complaint. *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W.Va. 48, 52, 717 S.E.2d 235, 239 (2011) (citing *Collia v. McJunkin*, 178 W.Va. 158, 159, 358 S.E.2d 242, 243 (1987)). ““The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief.”” Syl. pt. 2, *Roth v. DeFeliceCare, Inc.*, 226 W.Va. 214, 217, 700 S.E.2d 183, 186 (2010). When entertaining a motion to dismiss, the trial court construes the complaint in the light most favorable to plaintiff, and all of plaintiff’s allegations are taken as true. *Id.* at 219, 700 S.E.2d at 188 (citing *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008)).

⁶ Dr. Black incorrectly quotes Syl. pt. 2, *State ex rel McGraw v. Scott Runyan Pontiac-Buick Inc.*, 194 W.Va. 770, 773, 461 S.E.2d 516, 519 (1995) as “The standard of review applicable to dismissal orders entered pursuant to West Virginia Rule of Civil Procedure 12(b)(6) is *de novo*.” (Pet’r’s Br. 22). The proper statement of the law is “[a]ppellate review of a circuit court’s order granting a motion to dismiss a complaint is *de novo*.” Syl. pt. 2, *Scott Runyan Pontiac-Buick Inc.*, 194 W.Va. at 773, 461 S.E.2d at 519.

The Circuit Court was correct to deny Dr. Black's Motion to Dismiss. It is clear from the face of St. Joseph's Complaint that, taken in the light most favorable to St. Joseph's, there was sufficient information to support the contention that it possessed an option contract, and that Dr. Black refused to acknowledge this option contract prior to the filing of its Complaint. (A.R. 65-66) (including initial correspondence from Dr. Black to St. Joseph's mischaracterizing St. Joseph's' option contract as a right of first refusal).

Despite contending St. Joseph's Complaint failed to state a claim, Dr. Black then argued against the existence of an option contract within his Motion to Dismiss, and included his own reading of the Memorandum Agreement and Option to Repurchase in support of that assertion. (A.R. 49-50). Dr. Black, clashing with his earlier assertions that St. Joseph's possessed a right of first refusal and not an option contract, stated there was "simply no language in the Memorandum Agreement or the Option to Repurchase granting such a right to St. Joseph's." (A.R. 47). This disagreement demonstrated the need for the Circuit Court's ruling as to whether the Option to Repurchase was an option contract or right of first refusal, and St. Joseph's Complaint sufficiently articulated the need for the Circuit Court's intervention in resolving this issue.

The Circuit Court's decision to deny Dr. Black's Motion to Dismiss is consistent with this Court's instructions that motions to dismiss are disfavored and infrequently granted. *Kessel* 204 W.Va. at 119, 511 S.E.2d at 744 (citing *John W. Lodge Distrib. Co.*, 161 W.Va. at 606, 245 S.E.2d at 159). Judgment on the merits is preferred in West Virginia, and when the Complaint was taken in the light most favorable to St. Joseph's, it was clear that St. Joseph's could prove a set of facts in support of its claim entitling it to relief. Syl. pt. 2, *Roth*, 226 W.Va. at 217, 700 S.E.2d at 183.

IV. THE CIRCUIT COURT DID NOT ERR IN ENTERING ITS ORDER DENYING DR. BLACK'S MOTION TO DISMISS.

As stated in Part II, *supra*, it is not reversible error for a circuit court to adopt the language and findings of fact and law contained within a proposed order submitted to the court, although this may not be considered the best practice. *State ex rel. Cooper*, 196 W.Va. at 214, 470 S.E.2d at 168. These findings of fact and law, even if adopted verbatim, are considered the findings of the court and may be reversed only if clearly erroneous. *Id.* Further, to the extent a written order conflicts with an earlier oral holding, the written order is deemed to control. *See Tennant*, 194 W.Va. at 106 n.5, 459 S.E.2d at 383 n.5.

The Circuit Court's Order found dismissal of St. Joseph's Complaint inappropriate, and denied Dr. Black's Motion to Dismiss, stating that paragraph five of the Option to Repurchase was ambiguous as a matter of law. (A.R. 8). The Circuit Court's Order also concluded, based on the evidence before it, "Dr. Black entered in an option contract with St. Joseph's dated June 3, 1982." (*Id.*)

Dr. Black contends the language featured in the Circuit Court's written Order denying his Motion to Dismiss is inconsistent with its oral holding from the bench. (Pet'r's Br. 12). However, it is difficult to discern what Dr. Black considers inconsistent as between the Circuit Court's oral ruling denying his Motion to Dismiss, and its written order. In the transcript of the hearing on Dr. Black's Motion to Dismiss, the Circuit Court states specifically that "I think paragraph five is ambiguous." (A.R. 117). This is echoed in the Court's later statement that

Well, as I read paragraph three and five, five is saying that three can be – paragraph three says it has to be exercised at least a year prior to the expiration date. Paragraph five turns around and says they can do it within that one year. So I think it's ambiguous. And I so find and deny your Motion to Dismiss.

(A.R. 118). The written Order issued by the Circuit Court reiterates its oral holding – that paragraph five is ambiguous as a matter of law and fact. (A.R. 8). There is no support for Dr. Black’s baseless assertion that “[t]he antecedent to pronoun ‘it,’ quite clearly, is the option contract, not paragraph 3 and not paragraph 5,” and the Order as entered does not reflect the Court’s oral holding. (Pet’r’s Br. 12). To the extent there would be a perceived inconsistency; however, under West Virginia law, the language of the written Order will govern, and Dr. Black’s argument as to its consistency with the oral findings of the Circuit Court meritless.

Dr. Black’s argument as to the validity of the language of the written Order denying his Motion to Dismiss is just as deficient as his similar argument against the validity of the Circuit Court Order granting St. Joseph’s Motion for Summary Judgment. As stated *supra*, Part II, the information within the Circuit Court’s written Order governs, and no error mandating entry of a contrary order has occurred.

V. DR. BLACK’S OTHER ASSIGNMENTS OF ERROR ARE UNSUPPORTED BY HIS BRIEF, AND AS SUCH, SHOULD BE DEEMED TO HAVE BEEN WAIVED.

“First and foremost, a lawyer has a duty to plead and prove his case in accordance with the established court rules.” *State Dept. of Health v. Robert Morris N.*, 195 W.Va. 759, 765, 466 S.E.2d 827, 833 (1995). “A skeletal ‘argument,’ really nothing more than an assertion, does not preserve a claim Judges are not like pigs, hunting for truffles buried in briefs.” *Id.*

Although the Supreme Court of Appeals liberally construes briefs in determining the issues presented for review, issues not raised, or only mentioned in passing and unsupported with pertinent authority, will not be considered on appeal. *State v. LaRock*, 196 W.Va. 294, 302, 470 S.E.2d 613, 621 (1996) (citing *State v. Lilly*, 194 W.Va. 595, 605 n.16, 461 S.E.2d 101, 111 n.16 (1995)). Furthermore, “[a]ssignments of error that are not argued in briefs on appeal may be deemed by the Supreme Court of Appeals to be waived.” Syl. pt. 9, *State v. Green*, 187 W.Va.

43, 46, 415 S.E.2d 449, 452 (1992) (quoting Syl. pt. 6, *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981)).

St. Joseph's contends Dr. Black, although he alleges five assignments of error, has failed to submit any argument in support of these alleged errors within his Brief. Instead, as is evident through a comparison of Dr. Black's Brief with the Appendix Record submitted to this Court, he has merely copied and pasted from the various memoranda previously submitted to the Circuit Court. (*See, e.g.*, Pet'r's Br. 24-26, A.R. 269-71) (featuring examples of Dr. Black's copying and pasting from earlier submissions to the Circuit Court).

For example, Dr. Black submits no argument in support of his fifth assignment of error, the very general sentiment that the Circuit Court erred by denying him his day in court. (Pet'r's Br. 37). Instead, Dr. Black merely cites the Fifth and Fourteenth amendments to the United States Constitution. (*Id.*). He does not craft any sort of argument as to what sort of "deprivation" has occurred, and does not offer any analysis as to how the two provisions inure to his benefit. (*Id.*). St. Joseph's contends that Dr. Black has waived this assignment of error through his inability to produce any argument in support, and urges the Court to find the same.

Therefore, St. Joseph's requests that this Court find Dr. Black's other assignments of error, which are unsupported by any argument, to be waived for the purposes of this appeal.

CONCLUSION

St. Joseph's respectfully requests this Court affirm the Circuit Court's entry of summary judgment in this matter.

ST. JOSEPH'S HOSPITAL OF BUCKHANNON, INC.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET No. 13-0926

JERRY N. BLACK, M.D.

Petitioner

v.

**ST. JOSEPH'S HOSPITAL OF
BUCKHANNON, INC.**

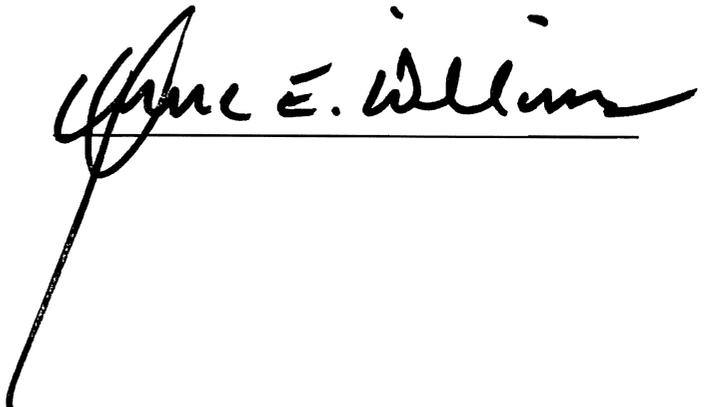
Respondent

Appeal from an order
of the Circuit Court of Upshur
County (12-C-52) granting
Respondent's Motion for Summary
Judgment

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing "*Respondent's Brief*" was served upon the following individuals by mailing true copies thereof by regular manner in the United States mail, postage prepaid, at Huntington, West Virginia, on the 17th day of January, 2014 to:

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A handwritten signature in black ink, reading "Anne E. Williams", is written over a horizontal line. The signature is cursive and includes a long, thin vertical stroke extending downwards from the end of the signature.