

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

**Dean Miner, Plaintiff Below,
Petitioner**

vs) No. 11-0185 (Ohio County 08-C-320)

**Ricardo Pacheco, Defendant Below,
Respondent**

FILED

February 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Ohio County, wherein the circuit court granted respondent's motion for summary judgment. The appeal was timely perfected by counsel, with petitioner's appendix from the circuit court accompanying the petition. Respondent Ricardo Pacheco has filed a summary response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On April 18, 2007, the parties herein entered into a written contract entitled "Greyhound Agreement Between Ricardo Pacheco and Dean Miner." Per the terms of this contract, petitioner agreed to fund the construction of "dog runs" on respondent's farm, and also agreed "to pay for all vet costs and shot programs." Respondent agreed to raise twenty greyhound pups for petitioner from whelp to twelve months of age for \$100.00 per month, per dog. Both parties agreed that, of the \$100.00 per month, per dog that respondent was to receive, \$40.00 per month, per dog would be applied to the money respondent owed petitioner for the construction of the dog runs. The contract also provided that, if complications arose prohibiting respondent from raising the full twenty pups, that the \$9,100.00 petitioner provided respondent for construction of the dog runs would become a loan payable within ninety days, and would be prorated depending on how many pups were raised and for how long. Petitioner agreed to provide the broods for the female greyhounds, but the contract said nothing about the number of broods or the specific female greyhound dogs to be used for breeding.

In total, respondent raised six pups of the twenty specified in the contract from the single brood petitioner provided. Following delivery of the six dogs, petitioner filed suit against respondent alleging breach of contract and seeking either the remaining fourteen pups or the fair market value of the same. The circuit court eventually granted summary judgment for respondent, finding that petitioner was not entitled to damages for the failure to deliver the remaining fourteen pups because petitioner's damages were established as a matter of law. Petitioner now appeals the circuit court's memorandum order, arguing that the circuit court erred in finding that the written contract between the parties was unambiguous. Petitioner further argues that the circuit court erred in finding that the damages in question were speculative in nature and therefore not recoverable, as the value of greyhound pups is ascertainable with reasonable certainty by evidence of industry standards and customs, as well as information available from the National Greyhound Association. A review of the record, however, shows that the contract in question was unambiguous, and further that the circuit court simply found that petitioner's damages were established as a matter of law.

“‘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.’ Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N. Y.*, 148 W.Va. 160, 133 S.E.2d 770 (1963).” Syl. Pt. 2, *W.Va. Human Rights Com’n. v. The Esquire Group, Inc.*, 217 W.Va. 454, 618 S.E.2d 463 (2005). Petitioner first argues that it was error to find that the written contract between the parties was unambiguous. Citing *Williams v. Precision Coil, Inc.*, petitioner argues that a contract is ambiguous when it is reasonably susceptible to more than one meaning in light of the surrounding circumstances and after applying the established rules of construction. 194 W.Va. 52, 459 S.E.2d 329 (1995). The contract was drafted by the parties, two non-lawyers, and is rife with language that constitutes ambiguities, according to petitioner. However, a review of the contract in question shows that the circuit court's finding on this issue was accurate. The agreement was unambiguous in that it provided for the raising of pups by respondent from broods provided by petitioner. This Court has recently held that “[t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court.” Syllabus Point 1, *Berkeley County Public Service Dist. v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968)” Syl. Pt. 2, *Lee v. Lee*, 2011 WL 5902237 (W.Va., Nov. 21, 2011). Simply put, petitioner provided respondent with \$9,100.00 in return for respondent raising twenty puppies, and if respondent failed to raise the puppies in the agreed time, respondent had to repay petitioner a prorated share of the advanced funds. Based upon the circuit court's analysis of the contract at issue, it is clear that the circuit court was correct in its findings as to the unambiguous nature of the contract.

Petitioner next argues that the circuit court erred in finding that the damages in question were speculative in nature and therefore not recoverable, as the value of greyhound pups is ascertainable with reasonable certainty by evidence of industry standards and customs, as well as information available from the National Greyhound Association. According to petitioner, the circuit court found he was not entitled to damages for loss of profits from unborn or future dogs and declared that such damages were not recoverable under state law without citing any case law from this jurisdiction. Citing *State ex rel. Shatzer v. Freeport Coal Co.*, petitioner argues that where a loss of profit is a result of a breach of contract and the profit can be ascertained with reasonable certainty and those profits were part of the contemplations between the parties when making the contract, damages are available. 144 W.Va. 178, 107 S.E.2d 503 (1959). Recovery may be had for such losses where they are reasonably certain in character and are the proximate result of tort or breach of contract. *Id.* Petitioner's argument, however, misstates the circuit court's order, which found that petitioner's damages were instead established as a matter of law.

Specifically, the circuit court found that "[t]he damages suffered by the [petitioner] are the same whether a jury would find a breach of contract or not, and based upon the undisputed facts in this case, the damages are established as a matter of law." The unambiguous terms of the contract at issue clearly state that if complications arose prohibiting respondent from raising the full twenty pups, that the \$9,100.00 petitioner provided respondent for construction of the dog runs would become a loan payable within ninety days, and would be prorated depending on how many pups were raised and for how long. As such, the circuit court simply calculated the total credit that respondent earned and subtracted the same from the total loan amount in order to determine the specific amount that petitioner was still owed. This Court has held that "[t]his State's public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public." Syl. Pt. 3, *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W.Va. 33, 614 S.E.2d 680 (2005). We decline to find that enforcement of this contract would violate a principle of greater importance to the general public than the freedom of contract. Because the contract plainly stated how petitioner was to be repaid in the event that less than the full twenty pups were delivered, the circuit court was correct in its finding that the petitioner's damages were established as a matter of law.

For the foregoing reasons, we find no error in the decision of the circuit court and the circuit court's memorandum order is hereby affirmed.

Affirmed.

ISSUED: February 14, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh