IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 24-ICA-3

THE ESTATE OF MICHELLE WILLIAMS-BILLINGS

Petitioner, Plaintiff below,

v.

DIAMOND FIELD, LLC d/b/a MAPLE ACRES ESTATES

Respondent, Defendant below.

Lower Court: Circuit Court of Mercer County West Virginia
Case No. CC-28-2023-C-100

RESPONDENT'S RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. West Virginia Cases

II. West Virginia Statutes

III. West Virginia State Rules

IV. Foreign Cases

I. INTRODUCTION

In this Respondent's Brief, the Petitioner/ Plaintiff, the Estate of Michelle Williams-Billings, shall be referred to as "Petitioner." The Respondent/ Defendant, Diamond Field, LLC d/b/a Maple Acres Estates, shall be referred to as "Respondent." References to the Appellate Appendix will be referred to as "Appx.," and followed by the volume number, page number, and paragraph number, if applicable.

II. RESTATEMENT OF ASSIGNMENTS OF ERROR

The Respondent responds to the Assignments of Error provided by the Petitioner, and states an additional issue, as follows:

A.

The Petitioner has waived its ability to seek appellate review regarding the trial court's failure to consider any "facts" contained within the verified complaint in ruling on the parties' competing motions for summary judgment insofar as it did not cite to any facts in the verified complaint as grounds for denial of the Respondent's Motion for Summary Judgment, nor did it argue before the trial court that the verified complaint is admissible under W. Va. R. Evid.804 (b) (5).

B.

The trial court correctly determined that Respondent had not breached the warranties of habitability based upon the law and the summary judgment record.

C.

The trial court correctly determined that W. Va. Code § 37-15-6a does not apply in the absence of a written lease, and therefore summary judgment in favor of the Respondent was appropriate.

RESTATEMENT OF THE CASE

Respondent finds the Statement of the Case submitted by the Petitioner inaccurate, incomplete, and would restate the following procedural history and the undisputed facts before

the trial court in ruling on the parties' competing motions for summary judgments.[1]

I. Factual History.

On March 28, 2023, Respondent purchased Maple Acres Estates (the "Park"), which is a manufactured home community in Mercer County, West Virginia, consisting of 45 lots containing factory-built homes. (Appx. Vol II, p. 507, ¶ 2). When Respondent purchased the Park, none of the then existing tenants had any written leases with the prior owner to the best of Respondent's information and belief. (*Id*., at ¶ 3). Indeed, the record before the trial court did not contain any evidence from the Petitioner disputing that no tenant had any written lease with the Park's prior owner. *Id*. On March 31, 2023, Respondent provided tenants with written notice that as of May 1, 2023, lot rent would increase to $299.00 per month. (*Id*. at ¶ 5). With the exception of Michelle Williams-Billings (who is now deceased and is succeeded in this matter by her Estate), all parties paid the increased lot rent. (Appx. Vol II, p. 508, ¶ 6).

Very soon after acquiring the Park, Respondent applied for an operating permit with the Mercer County Health Department (the "Health Department"). (*Id*., ¶ 7). Following an inspection by the Health Department on June 1, 2023, the Health Department required that Respondent ameliorate certain compliance issues before an operating permit would issue. (*Id*., at ¶ 8). Matt C. Bragg, Lead Sanitarian for the Health Department ("Bragg") conducted the original June 1, 2023, inspection of the Park. (Appx. Vol II, p. 511, ¶ 9). The only compliance issues Matt C. Bragg noted during the first inspection were as follows:

1.) Some homes need lot numbers
2.) Skirting on some homes is in poor repair or is missing.
3.) Some Homes have external storage buildings that are within 3 feet of home
4.) Several homes and vacant lots have trash strewn about.
5.) Externally stored trash receptacles must have lids.

[1] Respondent notes that the Petitioner does not contend that the denial of its motion for summary judgment was in error, and that this Court's review is limited to the trial court's grant of the Respondent's Motion for Summary Judgment.

6.) Taller trees threatening to fall on homes.

(Appx. Vol II, p. 514). Bragg also noted tenant specific compliance issues, and one of these was the dilapidated factory-built home owned by the deceased of the Petitioner. (Appx. Vol. II, p. 511, ¶ 11). It is important to note, as acknowledged by the Petitioner, that the residents of the Park own the homes which sit upon the land owned by the Respondent, and the residents lease the land. (Opening Brief of Petitioner, p. 1).

Accordingly, Respondent implemented a corrective action plan to bring the Park into compliance with W. Va. C.S.R. § 64-40-1, *et seq*. (Appx. Vol II, p. 508, ¶ 9). The Health Department reinspected the Park and issued an operating permit on June 27, 2023. (Appx. Vol II, p. 512 ¶ 14). During that reinspection, Bragg specifically noted that there were "no problems with the sewer system, and specifically there were no noxious odors, sewage back ups, and certainly no standing sewage pools. And, aside from the dilapidated structure which remained present (and which was owned by Michelle Williams-Billings), [Bragg] did not find any dangerous conditions present." (Appx. Vol. II, p. 512, ¶ 13).

Then, in a letter mailed on July 20, 2023, Respondent advised residents in 42 occupied lots in the Park that West Virginia requires written leases for the rental and occupancy of factory-built home sites, and Respondent provided tenants with Factory-Built Home Site Lease Agreements with rent set at $299.00 per month.[2] (Appx. Vol II, p. 508, ¶ 11)

II. Procedural History.

Petitioner initiated these proceedings on May 25, 2023, upon the filing of the "Class Action Complaint;" however, the record does not contain any order certifying the class. (Appx. Vol I, p. 42). Petitioner claimed that (1) Respondent unlawfully terminated twenty-five or more lease

[2] None of these facts were disputed in the Petitioner's Response to Respondent's Motion for Summary Judgment by any admissible evidence under W. Va. R. Civ. P. 56(e).

agreements under W. Va. Code § 37-15-6a, (2) Respondent illegally raised monthly rental payments owed by tenants notwithstanding that no tenant ever had a written lease as required by W. Va. Code § 37-15-3, (3) Respondent illegally operated the Park without a valid permit from the Mercer County Health Department in violation of W. Va. Code St. R. § 64-40-5.2.a, (4) Respondent committed fraud in raising the rent for the lots in the Park (notwithstanding that none of the tenants had any written lease agreement setting any rent), and (5) Respondent breached the implied warranty of habitability. (Appx. Vol I, pp. 42-115).

Respondent filed an Answer on July 12, 2023, and the Petitioner filed the Amended Class Action Complaint on August 15, 2023 (Appx. Vol I, pp 116-141; Vol II, pp. 315-344). The Amended Class Action Complaint contained the same causes of action stated in the original Class Action Complaint, but added Bonnie Allen in her official capacity as Administrator for the Mercer County Health Department as an additional defendant. (Appx. Vol II, pp. 315-344). After Respondent filed an Answer to the Amended Class Action Complaint on August 25, 2023 (again, there is not any order ever certifying Petitioner as a class), the trial court entered an order directing the parties to submit dispositive Motions on Respondent's ability to obtain an operating permit, whether Respondent's raising tenant rates constitutes constructive evictions so as to trigger W. Va. Code § 37-15-6a, and whether the Mercer County Health Department failed to conduct a proper inspection of the Park under W. Va. C.S.R. § 64-40-1, *et seq*. (Appx. Vol II, pp. 376-379).

Respondent filed a Motion for Summary Judgment on September 29, 2023. (Appx. Vol. II, pp. 476-735). Petitioner also filed a Motion for Partial Summary Judgment; however, the Petitioner's Motion for Partial Summary Judgment is immaterial to the immediate appeal insofar as the Petitioner does not contend that the trial court erred in denying its Motion for Partial Summary Judgment as reflected in the issues presented to this Court's review in its opening brief.

Indeed, it only claims that the trial court erred in granting the *Respondent's* Motion for Summary Judgment. Thus, all remaining procedural history relates solely to the Respondent's Motion for Summary Judgment.

As grounds for the Respondent's Motion for Summary Judgment, it stated that the trial court lacked subject matter jurisdiction to hear this matter because Petitioner failed to exhaust her administrative remedies prior to filing suit. (Appx. Vol II, pp. 480-481). Respondent also argued that Petitioner lacked standing to seek the relief she claimed in this matter, and that because Respondent held a permit at the time of the filing and had held the permit since June 27, 2023, it was entitled to operate the Park as a matter of law. (Appx. Vol. II, p. 481). Finally, Respondent argued that there is no "constructive eviction" under W. Va. Code § 37-15-6(a), given that Michelle Williams Billings never had a valid written lease pursuant to W. Va. Code § 37-15-3(a), and therefore, this case must be dismissed as a matter of law. *Id*.

Respondent relied on the affidavits of Abraham Anderson and Bragg to demonstrate that there was no genuine dispute as to any material fact pursuant to W. Va. R. Civ. P. 56 (a). (Appx. Vol II, pp. 507-516). In response, Petitioner did not submit ***any*** affidavits based upon admissible evidence, as required by W. Va. R. Civ. P. 56 (e), which could create a dispute as to any fact contained in the Respondent's Motion for Summary Judgment. Instead, Petitioner appeared to rely on legal argument alone. Ultimately, Petitioner filed a suggestion of death wherein it suggested that Michelle Williams-Billings had died on August 27, 2023, and her administrator ultimately moved to be substituted as Plaintiff. (Appx. Vol III, pp. 841-847). The record demonstrates that Michelle Williams Billings was deceased before the parties submitted their competing Motions for Summary Judgment. *Id*.

The trial court entered a thorough order denying Petitioner's Motion for Summary Judgment and granting Respondent's Motion for Summary Judgment on December 6, 2023. (Appx. Vol I. pp. 1-41). Based upon the undisputed facts recited in the factual history hereinabove, Section I, *supra*, the trial court found that the Health Department conducted a proper inspection of the Park under W. Va. C.S.R §§ 60-40-1, *et seq*. (Appx. Vol I, p. 5). The trial court specifically found that Petitioner failed to submit any evidence to rebut Matt C. Bragg's account of the Health Department's inspections of the Parks, and indeed that "Plaintiff failed to come forward with ***anything*** in the way of evidence." (Appx. Vol. I, p. 6) (emphasis added). Indeed, the Petitioner raised no argument or provided any admissible material facts to the trial court with respect to its claim for breach of the implied warranty of habitability, much less any argument that it now raises before this court as to any factual dispute contained in the verified complaint. (*See generally*, Appx. Vol 3, pp. 736-800). It likewise did not make any argument as to the admissibility of the verified complaint for purposes of the competing motions for summary judgment. *Id*.

In any event, the only evidence before the trial court led it to determine that the Health Department had conducted a proper inspection. The Respondent's undisputed evidence also led the trial court to conclude that the issuance of an operating permit is evidence that the Park is in a habitable condition. Accordingly, the trial court granted Respondent summary judgment and dismissed Petitioner's cause of action for breach of implied warranty of habitability.

With respect to the Petitioner's contentions on appeal concerning the requirement that a landlord provide six months' notice of termination of a written lease, the trial court also found that W. Va. Code § 37-15-6a is clear, unambiguous, and does not apply to the case at bar. (Appx. Vol. 1, pp. 8-9). Petitioner argued before the trial court that its predecessor, Michelle Williams-Billings, had a "constructive" or "oral" lease to the end that Respondent's March 31, 2023 letter increasing

the rent violated W. Va. Code § 37-15-6a and "constructively evicte[d]"[3] her. (Appx. Vol. 1, pp. 9-10). The trial court correctly determined that the Respondent could not violate W. Va. Code § 37-15-6a or "constructively evict" Petitioner by raising rent in the absence of a written lease. The trial court held that

> [Petitioner's] argument [is] unpersuasive, as it is contradictory: [Petitioner] argues that [Respondent] operates the Park in violation of W. Va. Code 37-15-3(a) because it did not present tenants with written lot lease agreements until July 20, 2023. (internal citation omitted); but she seeks to enforce unwritten lot lease agreements with the Park's prior owner to prevent [Respondent] from charging her increased lot rent. This contradiction cannot be resolved."

(Appx. Vol. 1, pp. 12-13, ¶ 44). Indeed, the trial court correctly concluded that because W. Va. Code § 37-15-3(a) ***requires*** a written lease between tenants and landlords of manufactured home parks, any "unwritten lease" between Petitioner and the Park's *previous* owner is void. (Appx. Vol 1, pp. 13, ¶ 45; 14, 52). Therefore, "[i]f [Petitioner's unwritten lot lease agreement with the Park's previous owner is void, it was void *ab initio*. As such, [Petitioner] cannot establish that [Respondent] terminated her unwritten agreement with the Park's previous owner." *Id*. Finally, the trial court held that even if W. Va. Code § 37-15-6a applied to the facts of this case, (which the trial court held it does not) Petitioner's entire argument with respect to Respondent's failure to give six month's notice of any termination (or in this case, increase of rent) was moot insofar as the trial court entered the order ruling on the parties summary judgment motions more than six months after Respondent sent the March 31, 2023 letter. (Appx. Vol. 1, p. 13, ¶ 46).

Petitioner filed a notice of appeal on January 5, 2024, and then perfected the immediate appeal on April 8, 2024.

[3] Petitioner does not raise any argument with respect to its constructive eviction theory in this appeal.

SUMMARY OF ARGUMENT

Petitioner only places two matters at issue in this appeal; however, the Respondent raises one additional issue for this Court's review. With respect to Respondent's additional issue, Respondent asks this Court to determine that Petitioner waived its argument with respect to any evidence contained within the verified complaint as creating a genuine dispute of material fact in the Respondent's Motion for Summary Judgment. In the same vein, Respondent asks this Court to determine that Petitioner waived any argument as to the admissibility of any purported facts as evidence which may be asserted in the verified complaint. Before the trial court, Petitioner failed to include any argument or citation to the verified complaint as grounds for denial of the Respondent's Motion for Summary Judgment with respect to its claim for breach of implied warranty of habitability, much less provide any argument as to the admissibility of the verified complaint. This Court is not the proper place to raise those arguments for the first time, and accordingly, they have been waived.

With respect to the Respondent's restatement of issues raised by the Petitioner, Respondent asks the Court to determine that the trial court was correct when it held that Respondent did not breach any warranties of habitability based upon the law and the summary judgment record. As bases for its position, Respondent represents to the Court that the record contains no admissible evidence contradicting the Health Department's testimony, and further does not contain any admissible evidence that the condition of the Park amounted to anything beyond minor housing code violations.

There is no evidence in the record to dispute the affidavit of Bragg that the Park was in compliance with all applicable regulations on June 27, 2023. Petitioner's reliance on any sworn statement in the verified complaint is misplaced insofar as the record demonstrates that Petitioner's

predecessor was deceased at the time the parties filed the summary judgment motions, and courts cannot rely on the testimony at the summary judgment stage which is not admissible at trial.

The facts in the record, including the affidavit of Bragg, likewise cannot demonstrate that any minor housing code violations could amount to any *material* breach of the implied warranty of habitability based upon the applicable law. Indeed, for the same reason, even if this Court concludes that that the record supports a finding that Respondent ever breached the implied warranty of habitability in any way, Respondent is still entitled to summary judgment because Petitioner failed to submit any evidence to the trial court in support of any purported amount of any alleged damages she suffered as a result of any alleged breach.

Respondent also asks that the Court hold that the notice requirements contained in W. Va. Code § 37-15-6a cannot apply in the absence of a written lease because W. Va. Code § 37-15-3(a) requires that all tenants of manufactured homes have written leases with the landlord. W. Va. Code § 37-15-3(a) unambiguously requires a written lease, and the undisputed facts demonstrate that Petitioner's predecessor ***never*** held any written lease with Respondent or the prior owner of the Park. Any "oral" or "constructive" lease urged by the Petitioner is void insofar as it expressly violates W. Va. Code § 37-15-3(a). However, Petitioner's allegations likewise fail as a matter of law because the undisputed facts in the record demonstrate that Respondent never terminated Petitioner's illegal "oral" or "constructive" lease.

STANDARD OF REVIEW

This Court has jurisdiction over this matter pursuant to W. Va. Code § 51-11-4(b)(1). The Supreme Court of Appeals of West Virginia holds that "[a] de novo standard is applied to [appellate] review of summary judgments." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 191, 451 S.E.2d 755 (1994). 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 Casualty and Surety Co. v. Federal Insurance Co. of N.Y.*, 148 W.Va. 160, 162, 133 S.E.2d 770, 772 (1963). Specifically, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), West Virginia Rules of Civil Procedure.

The West Virginia Supreme Court of Appeals has stated, in *Williams v. Precision Coil, Inc.*, 94 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995), that there is no need for a circuit court to wait until after evidence has been received at trial where only a question of law is involved. Summary judgment is simply another method enabling courts to make legal determinations. *Harrison v. Town of Eleanor*, 191 W. Va. 611, 615, 447 S.E.2d 546, 550 (1994). Summary judgment is a device "'designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial', if in essence there is no real dispute as to salient facts or if only a question of law is involved." *Painter,* 192 W. Va. at 192 n.5, 451 S.E.2d at 758 n. 5 (quoting *Oakes v. Monongahela Power Co*., 158 W. Va. 18, 22, 207 S.E.2d 191 (1974)). Indeed, "[w]here the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate[….]" *Payne v. Weston*, 195 W. Va. 502, 506, 466 S.E.2d 161 (1995)(where the only issue before the Court was a legal question, the matter was ripe for summary judgment).

As demonstrated herein, the circuit court properly found that there is no genuine issue of material fact with respect to whether Respondent breached the implied warranty of habitability or violated W. Va. Code § 37-15-6a. The requirements of Rule 56(c) having been met, the trial court correctly held that Respondent was entitled to summary judgment as a matter of law.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent does not oppose any request for oral argument stated by the Petitioner in its Opening Brief, but it does not find that oral argument will assist this Court.

ARGUMENT

I. Petitioner has waived its ability to argue before this Court that the trial court should have considered the verified complaint for genuine issues of disputed fact in ruling on Respondent's Motion for Summary Judgment.

As noted above, Petitioner raised no argument, nor did it provide any citations to the verified complaint, before the trial court as grounds in opposition to Respondent's Motion for Summary Judgment or for denial of Respondent's motion for summary judgment. Likewise, it did not argue that the verified complaint was admissible evidence under the West Virginia Rules of Evidence. For these reasons, these arguments have been waived and should not be considered by this Court on appeal.

"This Court's general rule is that nonjurisdictional questions not raised at the circuit court level will not be considered [for] the first time on appeal." *State v. Jessie*, 225 W. Va. 21, 27, 689 S.E.2d 21, 27 (2009). As the West Virginia Supreme Court of Appeals has consistently explained,

> The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.

Whitlow v. Bd. of Educ. of Kanawha Cnty., 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993). *See also*, *Clint Hurt & Assocs., Inc., v. Rare Earth Energy, Inc.*, 198 W. Va. 320, 329, 480 S.E.2d 529, 538 (1996) ("Generally, we have declined to consider[] nonjurisdictional questions that have not

been considered by the trial court. We have long held that theories raised for the first time on appeal are not considered.").

This rule is perfectly applicable in the present case. Petitioner's Response to Respondent's Motion for Summary Judgment does not even mention the claim for implied warranty of habitability. It does not cite to any portion of the record or provide any supporting affidavits as grounds for denial. To be certain, it never references any statement contained in the verified complaint as grounds for denial of Respondent's Motion for Summary Judgment, and it never argues that the verified complaint is admissible in ruling on the Respondent's Motion for Summary Judgment.

The protections that this Court seeks to provide in the general prohibition against raising new theories for the first time on appeal is demonstrated in Respondent's Reply Brief wherein it does not make any argument with respect the Petitioner's brand-new argument that the trial court should have considered the verified complaint. (Appx. Vol. 3, pp. 826-839). Moreover, the trial court was certainly not given the opportunity to consider this argument insofar as it held that "Plaintiff [Petitioner] failed to come forward with ***anything*** in the way of evidence." (Appx. Vol. I, p. 6) (emphasis added). Petitioner deprived the Respondent of any opportunity to respond to this brand-new theory before the trial court, and similarly deprived the trial court of the opportunity to rule on it. Because this issue has not been developed in such a way so that a disposition can be made on appeal, and in the interests of fairness, this Court should hold that Petitioner has waived all such argument regarding facts which may be alleged within the verified complaint.

II. The trial court correctly concluded that Respondent did not breach the implied warranty of habitability to the end that Respondent was entitled to judgment as a matter of law.

A. The verified complaint would not be admissible at trial, so the trial court could not have considered it as a basis for disputed facts in ruling on the parties' competing motions for summary judgment.

Petitioner argues that the trial court erred in granting Respondent summary judgment as to the issue of whether Respondent breached the implied warranty of habitability because Petitioner's verified complaint "contained a litany of sworn statements of fact concerning the conditions of Maple Acres Estates on March 31, 2023, when Respondent assumed the role of landlord to the tenants of the community." Petitioner's Opening Brief, p. 14. Indeed, the statements contained in the verified complaint are the ***only*** evidence in the record upon which Petitioner contends there was a genuine issue of disputed material facts before this Court. However, Petitioner's reliance upon the verified complaint is misplaced.

First, in order to present or oppose a motion for summary judgment, W. Va. R. Civ. P. 56 (c) (1) provides as follows: "[a] party asserting that a material fact cannot be disputed, or is genuinely in issue, shall support the assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine issue, or that an adverse party cannot produce admissible evidence to support the fact.

W. Va. R. Civ. P. 56 (e) provides in pertinent part as follows: "Supporting and opposing affidavits shall be made on personal knowledge, ***shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein***." (emphasis added). Thus, the statements contained in the verified complaint must be admissible at trial and made by a person competent to testify to create a genuine issue of fact in order to preclude a properly supported motion for summary judgment. As described herein below,

the verified complaint would not have been admissible at trial because Petitioner's predecessor, Michelle Billings Thompson, was deceased at the time of the filing of the competing motions for summary judgment.

The United States Fourth Circuit Court of Appeals has considered this issue in construing Fed. R. Civ. P. 56 (e), which is identical to W. Va. R. Civ. P. 56 (e).[4] In *Loney v. Miles*, No. 98-2826, 2000 U.S. App. LEXIS 8673 (4th Cir. May 3, 2000), a party opposing a motion for summary judgment presented the affidavits of two witnesses who could not be found to appear for depositions. *Id*., at * 3. The Fourth Circuit Court of Appeals affirmed the trial court's award of summary judgment because it could not consider those affidavits. The Court explained that "[a]ffidavits submitted at summary judgment must 'set forth such facts as would be admissible in evidence.'" *Id*. at * 8 (quoting Fed. R. Civ. P. 56(e)); *see also Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996). Accordingly, the Fourth Circuit held that because the affiants could not be found, it must conclude that they would not be available to testify at trial concerning the factual statements made in their affidavits. *Id*., at * 9. The Fourth Circuit further held that there was no hearsay exception under which those affidavits could be introduced at trial, and therefore, the trial court correctly did not consider them for purposes of the underlying summary judgment. *Id*; *see also Maryland Highways Contractors Ass'n, Inc. v. State of Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991) (noting that "hearsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment").

West Virginia jurisprudence likewise requires that evidence submitted for summary judgment must also be admissible at trial. *Aluise v. Nationwide Mut. Fire Ins. Co*., 625 S.E.2d 260,

[4] "Because the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, we give substantial weight to federal cases, especially those of the United States Supreme Court, in determining the meaning and scope of our rules." *Painter*, 192 W. Va. at 192 n.6, 451 S.E.2d at 758 n. 6 (1994) (internal citation omitted).

266 (2005)(holding that "Rule 56(c) of the West Virginia Rules of Civil Procedure does not contain an exhaustive list of materials that may be submitted in support of summary judgment. In addition to the material listed by that rule, a trial court may consider any material that would be admissible or usable at trial."). "Hearsay evidence is not admissible . . . for summary judgment purposes, unless it falls within one of the exceptions specified in the . . . Rules of Evidence." *Aluise*, 625 S.E.2d at 266 (internal citation omitted).

Here, Petitioner relies on Michelle Williams-Billings' out of court statement, *i.e.*, her verification of her pleadings, as opposing evidence for Respondent's properly supported Motion for Summary Judgment. It is important to note that as of the time of that the trial court entered the order granting Respondent's motion for summary judgment and denying petitioner's motion for summary judgment, Michelle Willliams-Billings was deceased and her estate would eventually be substituted as the Petitioner in the immediate appeal.

W. Va. R. Evid. 802, like its federal counter-part, prohibits admission of any hearsay evidence, including the verified complaint filed in this matter. Rule 804(b)(5) covers those situations where a declarant is unavailable — say, "unable to be present or to testify at the hearing because of death" — and where the evidence sought to be admitted is hearsay, but not one of four specific exceptions: former testimony, a statement made under belief of impending death, a statement against interest, or a statement of personal or family history. Rule 804(b)(5) provides an alternative exception and states:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . .

> (5) . . . A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other

> evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Even had Petitioner properly preserved the issue, those circumstances are not present here. Michelle Williams-Billings' statement as to the condition of the Park may have been material, but it is not more probative than any other evidence that the Petitioner could have procured through reasonable efforts. The Petitioner could have obtained affidavits from any of the other 41 tenants as to the condition of the Park when Respondent assumed the role of landlord in March 2023. If Michelle Williams-Billings' statements were true, and it was not the product of self-interest, then the same evidence would have been easily available to Petitioner. It failed to offer any such evidence. Further, interests of justice could not be served if the trial court had considered the verified complaint insofar as there is no circumstantial guarantee of trustworthiness required under W. Va. R. Evid. 804 (b) (5). *See also State v. Boyd*, 167 W. Va. 385, 397, 280 S.E.2d 669, 679 (1981) ("The underlying rationale of the hearsay rule is to prevent the admission into evidence of unreliable or untrustworthy evidence. The major vehicle through which trustworthiness of evidence is guaranteed is cross-examination.") (internal citation omitted). None of the statements made by Michelle Williams-Billings could be reliable and trustworthy because it could not be subject to cross examination following her death.

Because the verified complaint is hearsay made by a deceased individual, the trial court could not consider it to find any dispute of any material fact in response to the Respondent's Motion for Summary Judgment. There is likewise no applicable exception for the verified complaint in W. Va. R. Evid. 804 (b) (5). Accordingly, the trial court correctly determined that

there was no dispute of any material fact as to the condition of the Park based upon the affidavit of Bragg[5], and that the Park complied with all applicable housing codes. Therefore, summary judgment was appropriate as to Petitioner's claim against Respondent for breach of implied warranty of habitability.

B. There is no evidence contained in the record to support Plaintiff's claim that any dwelling was rendered completely unfit or uninhabitable prior to June 27, 2023.

Notwithstanding the inadmissibility of the verified complaint for purposes of opposing Respondent's Motion for Summary Judgment, Petitioner argues that the trial court committed reversible error in failing to consider Matt C. Bragg's inspection report from June 1, 2023. Petitioner argues that it is entitled to recover damages based upon the condition of the Park from June 1, 2023 to June 27, 2023 based upon Respondent's alleged breach of the implied warranty of habitability. However, Petitioner's position is not tenable based upon the common law requiring material and substantial breaches of the implied warranty of habitability to allow Petitioner to recover damages. Moreover, Respondents' obligation only extends to common areas rather than the homes themselves.[6]

As the Supreme Court of Appeals of West Virginia has acknowledged, "the finder of fact in an action where the warranty of habitability is in issue must determine two things: (1) whether the implied warranty of habitability or fitness has been ***materially*** breached, and (2) how much of the tenant's rental obligation was abated or offset by virtue of the breach." *Teller v. McCoy*, 162 W. Va. 367, 391, 253 S.E.2d 114, 128 (1978) (emphasis added). The *Teller* Court further explained that

[5] Bragg's affidavit is admissible, as the record does not reflect his unavailability.
[6] As Petitioner correctly notes in its Opening Brief, the Park is a mobile home community wherein the tenants own their homes, but they lease the lot upon which the home is placed from Respondent. (Opening Brief of Petitioner, p. 1).

> [u]nder (1) the determination of whether a landlord breached the warranty is a question of fact to be determined by the circumstances of each case. The breach must be of a substantial nature rendering the premises uninhabitable and unfit. ***Thus minor housing code violations or other [de]ficiencies which individually or collectively do not adversely affect the dwelling's habitability or fitness would not entitle the tenant to a reduction in rent***. In making the determination of whether the premises were uninhabitable and unfit, housing code violations and deficiencies should be scrutinized in light of such things as their nature, the length of time they persisted, their effect on safety and sanitation, the age of the structure, and the amount of rent charged.

Id., 162 W. Va at 391-392, 253 S.E.2d at 128-129 (emphasis added). Therefore, this Court must consider these factors by reviewing the only admissible evidence submitted by the parties in their competing motions for summary judgment with respect to Petitioner's claim for the breach of the implied warranty of habitability: the affidavit of Bragg. The June 1, 2023 inspection report incorporated in Bragg's affidavit noted the following compliance issues:

1.) Some homes need lot numbers
2.) Skirting on some homes is in poor repair or is missing.
3.) Some Homes have external storage buildings that are within 3 feet of home
4.) Several homes and vacant lots have trash strewn about.
5.) Externally stored trash receptacles must have lids.
6.) Taller trees threatening to fall on homes.

(Appx. Vol II, p. 514). Bragg also noted tenant specific compliance issues, and one of these was the dilapidated factory-built home owned by the deceased of the Petitioner. (Appx. Vol. II, p. 511, ¶ 11). Notably, Bragg did not find that any portion of the Park was completely uninhabitable or unfit. Bragg merely noted a few minor housing violations, and each such violation was remedied less than a month later. Moreover, **the record indicates that Michelle Williams-Billings never paid rent to Respondent.** (Appx. Vol II, p. 508, ¶ 6).

Therefore, the nature of these violations, the majority of which relate to lot numbering, location of external storage buildings, placing lids of trash cans, and replacing skirting, are incredibly minor, and cannot, as a matter of law rise to the level of a material breach. The only

evidence before the Court with respect to the length of time these violations persisted is a period of 27 days from June 1, 2023 to June 27, 2023. The record is also devoid of any evidence demonstrating any adverse effect of these minor violations on any safety and sanitation. Finally, the record demonstrates that Michelle Williams Billings never paid any rent in any amount to Respondent. Each of these considerations must weigh in favor of finding that Respondent could not have materially breached the implied warranty of habitability. These minor violations cannot support any finding that any portion of the Park was rendered ***completely*** uninhabitable or unfit to the end that summary judgment on this claim was proper.

C. There is no evidence before the Court as to the amount of Petitioner's damages, if any.

As noted above, in the event that the Court determines that the minor housing violations amounts to a material breach of the implied warranty of habitability, the second inquiry before the Court is the determination of "how much of the tenant's rental obligation was abated or offset by virtue of the breach." *Teller*, 162 W. Va at 391, 253 S.E.2d at 128. *Teller* further provided that "when the warranty of habitability is breached, the tenant's damages are measured by the difference between the fair market value of the premises if they had been as warranted and the fair rental value of the premises as they were during the occupancy by the tenant in the unsafe and unsanitary condition." *Id*. Therefore, even if this Court determines that those minor housing code violations amounted to a material breach, Petitioner must have submitted evidence related to its damages based upon the formula provided above. **Petitioner failed to do so.**

Indeed, even if the Court considers the inadmissible hearsay statements contained with the verified complaint, the verified complaint does not provide any evidence as to the fair market value of the premises if they had been as warranted and the fair rental value of the premises as they were during the occupancy by the Petitioner in the unsafe and unsanitary condition. The verified

complaint does not state the amount of damages Petitioner may have suffered on the basis of any "annoyance" or "harassment." The verified complaint merely provides that Petitioner "suffered damages." (Appx. Vol 1, p. 65, ¶ 98). This is insufficient.

It is well settled that a plaintiff has the duty of proving his damages. *See* Syl. Pt. 4, in part, *Sammons Bros. Const. Co. v. Elk Creek Coal Co*., 135 W.Va. 656, 65 S.E.2d 94 (1951) ("In this jurisdiction[,] the burden of proving damages by a preponderance of the evidence rests upon the claimant."). Thus, summary judgment in favor of Respondent was proper. *See* Syl. Pt. 4, *Painter*, 192 W.Va. at 190, 451 S.E.2d at 756 (summary judgment may be granted where the non-moving party fails to make a sufficient showing on a required element he had the burden to prove). Because Petitioner held the burden to submit evidence to the trial court on the amount damages, summary judgment in favor of Respondent was proper on this basis as well. *See* W. Va. R. Civ. P. 56(c) (1) ("[a] party asserting that a material fact cannot be disputed, or is genuinely in issue, shall support the assertion by: [….] (B) showing that the materials cited do not establish the absence or presence of a genuine issue, or that an adverse party cannot produce admissible evidence to support the fact.").

III. The trial court correctly concluded that W. Va. Code § 37-15-6a cannot apply to unwritten leases.

A. W. Va. Code § 37-15-3(a) renders unwritten leases void as a matter of law.

Petitioner next contends that the trial court erred when it determined that Respondent could not violate the notice requirement of W. Va. Code § 37-15-6a if Petitioner did not hold a valid lease. Before the trial court, Petitioner alleged that in sending notice that rent would be set at $299.00, Respondent had effectively terminated its lease in violation of W. Va. Code § 37-15-6a. This statute provides as follows in its entirety:

> (a) A landlord of a factory-built home rental community may not terminate a rental agreement nor otherwise evict more than twenty-five tenants of any factory-built home rental community within a single eighteen-month period unless:
>
> (1) The landlord obtains written agreement to voluntarily vacate the premises by every tenant prior to the expiration of the eighteen-month period;
>
> (2) The landlord provides not less than six months' notice to terminate the rental agreement to each tenant; or
>
> (3) The tenant has breached a provision of the rental agreement and the termination complies with the requirements of this article.
>
> (b) If a landlord violates the provisions of this section, the tenant has a cause of action to recover actual damages, the costs required to relocate the aggrieved tenant and, in addition, a right to recover treble damages or the equivalent of the aggrieved tenant's rent for one year, whichever is greater, and reasonable attorney fees.

Contrary to Petitioner's contentions, the Legislature has codified a special form of the common law statute of frauds with respect to leases governing tenancy of a manufactured home. W. Va. Code § 37-15-3(a) provides as follows: "[t]he rental and occupancy of a factory-built home site ***shall*** be governed by a written agreement which ***shall*** be dated and signed by all parties thereto prior to commencement of tenancy." (emphasis added). As Respondent argued, and the trial court correctly determined, the statute provided above ***requires*** that a landlord and tenant have a ***written*** lease in order to form a valid tenancy, and any oral or constructive lease would be void *ab intio* as violative of the W. Va. 37-15-3(a). (Appx. Vol 1, p. 13, ¶ 45).

"[A] contract made in violation of a statute is void," even when "the statute fails to provide expressly that contracts made in violation of its provisions shall not be valid." *County Court v. Barnett*, 100 W. Va. 405, 407, 130 S.E. 471, 471 (1925); *see also Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 39, 614 S.E.2d 680, 686 (2006) ("[N]o action can be predicated upon a contract of any kind or in any form which is expressly forbidden by law or otherwise void." (citing *State ex rel. Boone Nat'l Bank v. Manns*, 126 W. Va. 643, 637, 29 S.E.2d 621, 623 (1944)).

Petitioner's contention that she holds a valid "oral" or "constructive" lease is contrary to the clear mandate of W. Va. Code § 37-15-3(a). The law requires that all leases in manufactured home communities "shall" be written. Therefore, Petitioner's lease (if any) would have been *void ab initio,* and unenforceable, all to the end that Petitioner has never held any lease to which the notice of termination requirements contained in W. Va. Code § 37-15-6a could apply. Rather, as the Respondent correctly contended before the trial court, it tried to ameliorate the illegality of the tenants' agreements with the prior landlord of the Park by obtaining written leases from the tenants in order to provide those protections stated in W. Va. Code § 37-15-1, *et seq*. However, absent a valid, written lease, Respondent could not have terminated it.

Moreover, as noted above, W. Va. Code § 37-15-6a makes it illegal to "terminate a rental agreement [or] otherwise evict more than twenty-five ***tenants*** of any factory-built home rental community within a single eighteen-month period unless [….] [t]he landlord provides not less than six months' notice to terminate the rental agreement to each tenant[.]" (emphasis added). The statute is plain, unambiguous, and only applies to termination of rental agreements with "tenants." A "tenant" is a person "entitled pursuant to a rental agreement to occupy a factory-built home site to the exclusion of others." W. Va. Code § 37-15-2(n). As provided hereinabove, and acknowledged by Petitioner, Michelle Williams-Billings never had any written rental agreement to occupy a factory-built home in the Park pursuant to W. Va. Code § 37-15-3(a). Therefore, Michelle Williams-Billings could not have been a "tenant" for purposes of the notice requirements contained within W. Va. Code. § 37-15-6a.

Petitioner appears to argue that this Court should apply the notice of termination requirements to individuals who do not have any legal lease. Petitioner argues that W. Va. Code § 37-15-1, *et seq*. specifically contemplates the existence of a tenancy absent a written lease.

(Opening Brief of Petitioner, p. 11). As basis for this argument, Petitioner cites to W. Va. Code § 37-15-2 (e) (3) which provides in pertinent part as follows: "'Good cause' means [….] [w]here there is no written agreement[.]" This argument is somewhat baffling insofar as the term "good cause" is only used throughout the section as grounds for termination of a tenancy, not as an interest subject to the protections afforded therein. *See generally* W. Va. Code § 37-15-6. The definition of "good cause" merely indicates that there are circumstances under which a party's tenancy may be wrongful and subject to termination. Simply stated, there is no support for Petitioner's contention that Petitioner is nevertheless still afforded the same protections with respect to notice as parties with valid, written leases even though Petitioner's "oral" agreement is void *ab initio* under the law.

Petitioner further argues that the trial court's conclusion that Petitioner must have a written agreement to assert the protection under the notice requirements of W. Va. Code § 37-15-6(a) impermissibly inserts the word "written" to modify "agreement". (Opening Brief of Petitioner, p. 23). This argument is inapposite to the remaining provisions in the statutory scheme. As the West Virginia Supreme Court of Appeals has noted,

> Consistency in statutes is of prime importance, and, in the absence of a showing to the contrary, all laws are presumed to be consistent with each other. Where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions.

Messer v. Huntington Anesthesia Grp., Inc., 218 W. Va. 4, 19, 620 S.E.2d 144, 159 (2005) (internal citation omitted). Petitioner urges the Court to review W. Va. Code § 37-15-6(a) in a vacuum without regard to any other provision of the act; however, such a statutory construction would render the mandate concerning **written** leases in W. Va. Code § 37-15-3(a) meaningless.

Therefore, any notice requirements can only apply to tenants with valid, written leases. The trial court properly granted Respondent summary judgment on this issue.

B. Even if this Court determines that W. Va. Code § 37-15-6a applies to illegal "oral" leases, the record clearly demonstrates that Respondent never "terminated" the leases of more than twenty-five (25) tenants.

Even if this Court construes W. Va. Code § 37-15-6a to apply to people who do not hold any valid lease, the undisputed material facts before the trial court demonstrated that no termination of any such "oral" lease ever occurred. Respondent offered written rental agreements to Petitioner and the other tenants of the Park where none previously existed. Thus, Respondent worked to establish legal tenancies, not to terminate them.

Likewise, the record provides that no evictions of any kind have occurred. In the context of a tenant-owned factory-built home, an "eviction" is the removal of a tenant and factory-built home from a factory-built home site. *See* W. Va. Code §§ 55-3B-4 and 55-3B-6. To establish an eviction, Petitioner must have come forward with evidence showing that Respondent sought to remove Michelle Williams-Billings and her home from the Park. Petitioner could not succeed in this endeavor, and indeed no proof on the subject is contained in the record, because Respondent never made any effort to remove Michelle Williams-Billings or any other person from the Park. Based on the foregoing, the trial court properly applied the law with respect to Petitioner's claim for statutory violations when it determined that Petitioner's predecessor held no valid lease subject to six months' notice prior to termination, and even if it did, Respondent never terminated Petitioner's lease for purposes of W. Va. Code § 37-15-6a. Summary disposition of this matter was appropriate based upon the applicable law discussed herein and undisputed admissible matters.

CONCLUSION

Respondent respectfully prays that following such proceedings as the Court deems appropriate, that this Court affirm the decision of the trial court in all respects.

Respectfully submitted this the 23rd day of May, 2024.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 24-ICA-3

THE ESTATE OF MICHELLE WILLIAMS-BILLINGS

Petitioner, Plaintiff below,

v.

DIAMOND FIELD, LLC d/b/a MAPLE ACRES ESTATES

Respondent, Defendant below.

Lower Court: Circuit Court of Mercer County West Virginia
Case No. CC-28-2023-C-100

CERTIFICATE OF SERVICE

I, Webster J. Arceneaux, III, do hereby certify that the foregoing Respondent's Brief was served this the 23rd day of May 2024 on counsel of record for all parties using the File and Xpress system.

/s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III, Esq. (WVSB No. 155)