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.

APPEAL FROM THE CIRCUIT COURT OF MERCER COUNTY

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

West Virginia Cases:

Foreign Cases

West Virginia Statutes:

West Virginia State Rules

West Virginia Rules of Civil Procedure

West Virginia Rules of Evidence

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I. Introduction

To the Honorable Judges of the Intermediate Court of Appeals of West Virginia:

Petitioner, the Estate of Michelle Williams-Billings, respectfully files **PETITIONER'S REPLY BRIEF** in response to the brief filed by Respondent Diamond Field LLC.

II. Reply to Restatement of the Case

Because this appeal involves a final order granting summary judgment, the parties necessarily included a comprehensive recitation of the facts established in the record below. Although Respondent argues that Petitioner's statement of the case is "inaccurate [and] incomplete,"[1] it is Respondent Diamond Field's Restatement of the Case that requires correction. Indeed, Respondent does not accurately reflect the Mercer County Health

[1] Resp't's Resp. Br. at 1.

Department's inspection.[2] Respondent focuses on the Health Department's concerns of the tenants' homes and conditions, excluding the sanitarian's mark-ups on broader community issues. In fact, the report notably highlights a sewer leak and nine other areas that are out of compliance that affect the *entire* community. These include:

- A need to grade the community's surfaces to allow drainage;
- Demand to create visible identification markers in the community;
- A need to maintain the streets, roads, and/or walkways in good repair;
- A need to cap water risers;
- A requirement that the sewage system be in good repair;
- A requirement to eliminate odors, rodents, insects and/or nuisances; and
- An acknowledgement that the community was not free of insect breeding, rodent harborage, and infestation.[3]

These are conditions which are largely or solely in Respondent's purview to maintain or correct as landlord/owner of the community.

Moreover, and notably, Respondent glosses over much of the procedural history of this action. The trial court, on August 25, 2023, entered an order directing the parties to submit dispositive motions on three discrete issues: (1) Respondent's ability to obtain an operating permit, (2) whether the Mercer County Health Department conducted a proper inspection of the community, and (3) whether Respondent's unilateral increase of monthly lot rent amounts constituted "constructive eviction" so as to trigger W. Va. Code § 37-15-6a.[4] The Court further ordered simultaneous briefing schedules. Thereafter, Petitioner, in response to what

[2] Resp't's Resp. Br. at 2-3.
[3] Appx. Vol II.p.000514-515.
[4] Resp't's Resp. Br. at 4; Appx. Vol II.p.000377-379.

the court ordered, submitted her brief, contending that the issues the trial court ordered to be heard were misplaced and not dispositive of Petitioner's claims. The Respondent, in contravention to and beyond the court's order, submitted a motion for summary judgment on all claims.[5] Given the trial court's limited order, Respondent never explains why, in the middle of the discovery process, it was appropriate for it to move for summary judgment on all claims or why it was appropriate for the trial court to consider and grant its motion as to all claims.

III. Reply to arguments

Respondent now inappropriately generates a third assignment of error concerning the verified facts contained in Petitioner's Verified Complaint stating that Petitioner waived any such argument by not raising it below.[6] This argument is misplaced as the verified complaint is simply a document in the record with, as explained in detail below, the same force and effect as if it were an affidavit; a verified complaint can be considered as summary judgment evidence.[7] Respondent, as "movant must demonstrate that there is no evidence to support the non-movant's case."[8] The existence of a factual record contrary to Respondent's assertions is not a "non-jurisdictional question not raised at the circuit level" as Respondent argues.[9] Indeed, the full record of the proceedings below is required to be examined in response to Petitioner's first assignment of error—that clear issues of material fact exist which support Petitioner's position that the trial court erred in granting summary judgment. Rather, it is the trial court that must assure "the pleadings,

[5] Appx. Vol III.p.000476-735.
[6] Resp't's Resp. Br. at 1.
[7] *Dunn v Watson*, 211 W. Va. 418, 566 S.E.2d 305 (2002).
[8] *Cobb v E.I. DuPont DeNemours & Co.*, 209 W. Va. 463, 466, 549 S.E.2d 657, 660 (1999).
[9] Resp't's Resp. Br. at 11.

depositions, answers to interrogatories, and admissions on file, together with the affidavit, if any, show that there is no genuine issue as to any material fact."[10]

Petitioner followed the trial court's order, and in responding to the trial court's limited questions, presented answers and support for those answers. Had the trial court ordered summary judgment motions on Petitioner's claim for the breach of the warranty of habitability, the Petitioner would have advised the factual record needed to be further developed and that Respondent's motion was premature.

Indeed, the question of habitability is most often a question for experts. To put a finer point on this, the Petitioner is not raising a new theory at the appellate stage. The Petitioner is simply arguing that the record that was before the trial court judge contains admissible statements of fact. These statements of fact are sufficient to create material issues of disputed fact. Although beyond the scope of the trial court's order, these sworn facts should have been considered before the trial court granted summary judgment on Petitioner's claims. The burden is on the movant—Diamond Field—not the Petitioner to demonstrate that the record contains no genuine disputes of material facts.

Respondent argues that the trial court could not now, since Ms. Williams-Billings' passing, rely on the sworn statements contained in the verified complaint because now that she is unavailable, Ms. Williams-Billings's sworn statements are inadmissible hearsay. This is an incorrect application of the West Virginia Rules of Evidence. There are arguably two hearsay exceptions that the verified complaint satisfies for the threshold level of admissibility. First, the verified complaint fits the Rule 804(b)(5) exception for statement of a deceased person.[11] It is

[10] W. Va. R. Civ. P. 56(c).
[11] W. Va. R. Evid. 804(b)(5).

unclear what case Respondent purports to quote when it discusses "Rule 804(b)(5)."[12] West Virginia Rule 804(b)(5) was added in accordance with a Supreme Court of Appeals of West Virginia holding that specifically overruled the state Dead Man's Statute and stated, "In actions, suits or proceedings by. . .representatives of deceased persons. . . evidence pertaining to any statement of the deceased either written or oral, shall not be excluded solely on the basis of competency."[13] Under the West Virginia Rule, the verified complaint should be ruled admissible because Ms. Williams-Billings's estate is continuing to prosecute the case against Petitioner, the sworn statements in the verified complaint were made by her, in good faith and on her personal knowledge and under circumstances, under the penalty of perjury, which indicate trustworthiness. The verified complaint also satisfies the former testimony exception.[14] Ms. Williams-Billings made the sworn statements contained in the verified complaint as part of this proceeding, Respondent had over three months from the filing of the lawsuit to conduct discovery, including a deposition of Ms. Williams-Billings, but choose to engage in no discovery, either written or by deposition. Respondent, however, had a motive to develop the testimony as Ms. Williams-Billings was the sole named Plaintiff in the suit and the claims and putative class claims derived from her sworn statements. Accordingly, Respondent's argument that the trial court could not consider the verified complaint under a hearsay theory is misplaced. Had the trial court engaged in the analysis Respondent now claims necessary to consider the verified complaint after Ms. Williams-Billings passing, it would have been admissible under at least one hearsay exception.

Nonetheless, Respondent is wrong when it claims the statements in Petitioner's complaint are the only evidence in the record on which Petitioner contends a genuine issue of disputed facts

[12] Resp't's Resp. Br. at 15.
[13] Syl. Pt. 7, *State Farm Fire & Cas. Co. v. Printz,* 231 W. Va. 96, 743 S.E. 2d 907 (2013).
[14] W. Va. R. Evid. 804(b)(1).

is created. As discussed at length in Petitioner's opening brief, the inspection report of the lead sanitarian provides further support for the allegations contained in the complaint and provide an independent basis to find genuine issues of material fact exist sufficient to preclude the grant of summary judgment on Petitioner's habitability claim.[15]

Rather than address these arguments, the Respondent moves the goalposts, stating that there is no evidence in the record that "any dwelling was rendered completely unfit or uninhabitable" prior to it receiving the permit from the Mercer County Health Department. Likewise, Respondent misconstrues the time period in which Petitioner claims damages as from "June 1, 2023, to June 27, 2023."[16] This incorrect conclusion is not supported by any claim of Petitioner and seems to be pulled from thin air by Respondent. Rather, Petitioner claims to be entitled to damages from the date Respondent took ownership of the community, March 30, 2023, until the habitability issues were resolved. In mischaracterizing Petitioner's claim and the period in which damages are claimed, Respondent intentionally ignores the unique circumstances of a manufactured home community such as Maple Acres Estates. Rather, Respondent seeks only to analyze the claim in purely landlord/tenant language, focusing on *Teller*'s[17] premises analysis. Here, Petitioner and other residents in her community own their homes and rent only the land upon which the home sits. The focus must be on the community, including, but not limited to 1) the condition of the land itself, 2) the community's infrastructure, and 3) the community's common areas. This is consistent with the law. West Virginia Code § 37-6-30 provides that a landlord must deliver "surrounding premises in a fit and habitable condition and shall thereafter maintain the leased property in such condition **and** maintain the leased property in a condition that meets

[15] Resp't's Resp. Br. at 4; Appx. Vol II. pp.000377-379.
[16] Resp't's Resp. Br. At 17.
[17] *Teller v. McCoy*, 162 W. Va. 367, 253 S.E.2d 114 (1978)

requirements of applicable health, safety, fire and housing codes."[18] Here, there is evidence that the community property did not meet applicable health codes upon first inspection based on both the Health Department's affidavit and report.[19] There is additional evidence in the record that creates an issue of fact on whether the premises and common areas were maintained in a fit and habitable condition.

Rule 56(c) of the West Virginia Rules of Civil Procedure sets forth what may be examined by a judge in deciding a summary judgment motion. The Rule provides that judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits show that there is no genuine issue as to any material fact, if the moving party is otherwise entitled to judgment as a matter of law.[20] Petitioner agrees that a motion for summary judgment cannot be "mere allegations" but must set forth specific facts showing that there is a genuine issue for trial.[21] But, the verified complaint *and* the evidence in the record are not a mere allegations. Rather it is a statement sworn to before a notary, and, in this instance, admissible even though the original named plaintiff is deceased. The verified complaint is a sworn factual recitation that should be relied upon by a trial court judge in determining summary judgment.[22]

The full record (including both the verified complaint and the health department's initial inspection report) shows that Petitioner operated Maple Acres Estates while the community's sewage system was not properly operating. This resulted in the surface collection of raw sewage in the community, sewage back-ups into tenants' homes, and noxious odors.[23] Additionally, the record shows that Maple Acres Estates suffered from poor drainage resulting in standing water in

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[18] *Id.* (emphasis added).
[19] Appx. Vol II.p.000510-515.
[20] W. Va. R. Civ. P. 56(c).
[21] *Id.*
[22] *Foster v. Good Shepherd Interfaith Volunteer Caregivers*, 202 W. Va. 81, 502 S.E.2d 178 (1998).
[23] Billings-Appx.Vol.1.p.000056, 000064–65.

yards and around homes.[24] These waterlogged conditions not only exposed tenants of Maple Acres Estates to mold and other damage to their homes, but also limited their full enjoyment of the leased premises and created breeding grounds for the infestation of flies and mosquitos.[25]

The Petitioner sets forth a prima facie case for the breach of the warranty of habitability against her landlord. The conditions described above affected the rented lots of tenants and the common areas of the community. Petitioner suffered from these conditions as did the rest of the residents in Maple Acres Estates. The areas which suffered from these conditions were not individually owned homes, but leased premises and common that are required by law to be maintained in a fit and habitable condition. Once a prima facie case has been presented by Petitioner, summary judgment is not appropriate.[26] Not only did the trial court err in not considering these facts in the record, but also it would seem the trial court took *no* steps to analyze the condition of the community. The trial court summarily concluded "the [Mercer County] Health Department conducted a proper inspection of the Park under W. Va. C.S.R. §§ 64-40-1, *et seq.*," and, "[Respondent] is entitled to summary judgment on Count V of the Amended Complaint."[27] The court undertook no analysis of the condition of the community or the time frame in which the community suffered from the unfit and unhabitable condition. The trial court erred when it concluded that once an inhabitable condition is remedied, a tenant is not entitled to any damages and cannot support a claim for breach of the warranty of habitability. Rather, the trial court concluded that if, at the time of the summary judgment motion, Maple Acres Estates was in

[24] *Id.*
[25] *Id.*
[26] *Adams v. Gaylock*, 180 W. Va. 576, 378 S.E. 2d 297 (1989) (reversing a directed verdict after finding a prima facie case for breach of the warranty of habitability had been presented.)
[27] Billings-Appx.Vol.1.p.000008.

compliance with the legislative rule, Respondent was entitled to judgment on Petitioner's breach of warranty of habitability claim. This conclusion is clear and reversible error.

Next, Respondent asserts that there is no evidence before the Court as to the amount of Petitioner's damages. In so doing, Respondent, selectively quoting *Teller*, incorrectly states that in a case of breach of the warranty of habitability the measure of damages[28] is the difference between the fair market value of the premises if they had been as warranted and the value of the premises in the unsafe or unsanitary condition.[29] A full reading of *Teller* further instructs, "money damages so assessed, while appropriate in the commercial cases, are inadequate in most residential landlord-tenant tenant cases, since the residential tenant who endures a breach of the warranty of habitability normally does not actually lose only money."[30] Accordingly, "annoyance and inconvenience can be considered as elements of proof in measuring damages for loss of use of real property."[31] Taking the factual record as a whole and drawing inferences therefrom in the light most favorable to Petitioner, it is obvious a jury could find substantial annoyance and inconvenience damages for a manufactured home tenant residing in a community with raw sewage, noxious odors, standing water, and insect breeding grounds throughout the premises. Accordingly, Respondent's argument on damages is without merit.

Moving to the next issue, the Respondent incredulously admits its position is that it cannot be subject to the notice requirements and damages contained in W. Va. Code § 37-15-6a because it was in violation of W. Va. Code §37-15-3. Here, although Respondent seeks the best of both

[28] Again, the claim regarding the breach of the warranty of habitability was not a claim the trial court ordered briefing on. Had the trial court not erred in granting judgment on all counts in favor of Respondent, Petitioner would have developed damages through discovery and expert testimony pursuant to a future scheduling order and/or the rules of civil procedure.
[29] Resp't's Resp. Br. at 19.
[30] *Teller*, 162 W. Va. at 389-90, 253 S.E.2d at 128.
[31] *Brooks v. City of Huntington*, 234 W. Va. 607, 609, 768 S.E.2d 97, 99 (2014).

worlds, such a position is also fatal to its argument. And accordingly, Petitioner's case must proceed. Respondent agrees it was in violation of W. Va. Code S 37-15-3, at the time of Petitioner's lawsuit. Respondent admits its tenants were without the required written lease agreement, from March 30, 2023, when it purchased Maple Acres Estates until sometime after July 20, 2023, when it admits it first advised residents they would need to sign written leases. But, it argues, this violation of the law is without consequence—that the trial court was correct when it ruled that Respondent can collect rents and otherwise conduct itself as landlord to Maple Acres Estates' residents, but it cannot violate any notice requirements for terminating the terms upon which residents occupied their lots. That is, Respondent argues it can terminate rental agreements and increase tenants' lot rents without complying with any statutory notice requirement whatsoever so long as it terminates those agreements before providing written lease agreements to its residents.

Again, the landlord faces no consequence for the lack of written lease agreements, but Respondent argues that violation of the statute prevents Petitioner from seeking to enforce any other provision of the statutory scheme, including W. Va. § 37-15-6a and its enumerated damages. This position is extremely troubling and subject to gamesmanship that would eviscerate all statutory protections afforded tenants in rented land communities. Indeed, if the issues were before the Court, Respondent would likely defend the trial court's rulings that Respondent was entitled to collect rent and evict for non-payment of rent despite the non-existence of a written lease agreement; the Respondent did not engage in fraud by representing itself to be entitled to all rights and privileges of a landlord despite the non-existence of a written lease; and the trial court's conclusion that West Virginia Code § 37-15-3 does not provide a remedy for any violations of that section of the statute insinuating there is no private right of action to enforce those requirements.

The Respondent's position defies the basic protections the legislature provided tenants in the precarious position of owning their home but having it placed on land not owned but leased. The statutes at issue in this appeal are remedial in nature.

A "remedial statute is a statute that is designed to correct an existing oversight in the law, redress an existing grievance, introduce regulations conducive to the public good, or. . . reform or extend existing rights."[32] W. Va. Code § 37-15-6a is clearly such a statute as it provides an expanded or new right (the notice requirement) for the public good. It further explicitly states the redress to be provided upon a violation. It has been well settled in West Virginia nearly since statehood that a remedial statute "must be construed liberally in order to advance the remedy intended to be given by it and to suppress the evil intended to be avoided by it."[33] Put in a more contemporary manner, remedial statutes must be liberally construed to effect their objects and suppress the mischief at which they are directed.[34] The Respondent believes that it can collect rents, evict, change the community rules and rental rates without a written lease agreement, and at the same time, a tenant, without a written lease agreement, is neither a tenant nor subject to the statute's notice requirements. This view is most definitely a narrow construction of the law. This view likewise denies the statutory goal of providing certain protections to tenants in rented land communities. In the face of a statute, clear in its language and with a clear remedial intention, Respondent urges this Court to keep Petitioner trapped in a Catch-22, required to pay rent and abide by Respondent's rules to remain in Maple Acres Estates with no recourse for any of Petitioner's violation of law. This Court should not endorse such a restrictive reading of a remedial statute.

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[32] *Perlin v. Time Inc.,* 237 F. Supp. 3d 623, 633-34 (E.D. Mich. 2017) (internal quotations omitted).
[33] *Steenrod's Adm'r v. W.P. & B. R. R. Co.*, 25 W. Va. 133 (1884).
[34] *Reed v. Hall,* 235 W. Va. 322, 773 S.E. 2d 666 (2015).

The Respondent's argument that it would be inconsistent to enforce W. Va. Code § 37-15-6a when there is no written lease is likewise without merit. Respondent's argument relies on this Court reading "written" into both § 37-15-6a's prohibition of terminating a "rental agreement" as well as reading written into § 37-15-2's definition of a tenant being a person entitled to occupy a factory-built home site "pursuant to a rental agreement."[35] Of course, the word "written" appears in neither section. Petitioner is a tenant in accordance of the definition, and Respondent cannot avoid liability for its termination of existing agreements without proper notice. Petitioner's proffered reading creates no inconsistencies in a statute that creates a number of protections for residents of manufactured housing communities. Indeed, it is the restrictive reading that Respondent proposes that would create inconsistencies permitting a landlord's violation of one of a resident's statutory protections to open the door to the violation of all of a resident's statutory protections with impunity. This is not what the legislature intended, and it is not how the remedial statute should be read. Petitioner urges this Court to reject Respondent's argument and give effect to the statutory protections enacted by the legislature.

Finally, Respondent again argues that it did not "terminate a rental agreement." Petitioner addressed this issue at length in her opening brief, but a brief reply is necessary. Petitioner's position has nothing to do with evictions or constructive evictions—these are red herrings. All parties agree the statutory language is clear and unambiguous: "[a] landlord of a factory-built home rental community may not terminate a rental agreement. . . "[36] Respondent, however, takes the position that Petitioner never had any written agreement, again reading a requirement into the statute that does not exist in the text. Respondent further argues that it did not terminate a rental

[35] "Tenant" means 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). *Compare* Resp't's Resp. Br. at 22

[36] W. Va. Code § 37-15-6a(a).

agreement because it offered new leases (with different terms). The Respondents urge this Court to endorse this absurdity. Respondent's argument is it did not terminate any rental agreements because the tenants at Maple Acres Estates did not have any written agreements. Further, Respondent argues, by now offering a written lease with the new terms, no agreement has been terminated because it is now offering a written agreement, no mind the terms are less advantageous for the tenant. Respondent is not providing the benefit of the original bargain, it is memorializing its desired terms into a new writing. It may permit tenants to continue to reside in its community if they sign a new lease with new terms and conditions, but such a continuation of tenancy is under a new agreement, with less beneficial terms for the tenants. If the statutory language is clear and unambiguous, so is Respondent's actions: its demand of a written lease agreement with changed terms and increased rental rates is an end, conclusion, discontinuation, stoppage, finish, or any other synonym for termination of the agreed terms on which Petitioner was theretofore occupying her lot. Accordingly, the trial court erred in deciding there had been no termination of any rental agreement.

IV. Conclusion

For the foregoing reasons, Petitioner respectfully asks the Court to grant oral argument, to reverse in part the summary judgment order entered by the Circuit Court of Mercer County, and to remand this case for a jury to resolve the remaining issues raised in this case.

THE ESTATE OF MICHELLE WILLIAMS-BILLINGS,
Petitioner,

--By Counsel--

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CERTIFICATE OF SERVICE

I, Colten L. Fleu, do hereby certify that on June 12, 2024, copies of the foregoing **PETITIONER'S REPLY BRIEF** were electronically served on all counsel of record using the File and Xpress system.

/s/ Colten L. Fleu
Colten L. Fleu (WVSB #12079)