IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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Docket No. 25-ICA-191

Blake Realty, L.L.C.,

Petitioner,

v.

Sheila K. White,

Respondent.

RESPONDENT'S BRIEF

Appeal from the Circuit Court of Wetzel County, West Virginia
Civil Action No. 24-C-19

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I. RESPONSE TO ASSIGNMENTS OF ERROR

The Assignments of Error set forth by Petitioner misstate the ruling below, appear repetitive, and are sometimes unclear. While Respondent attempts to respond fully to each assignment of error below, out of an abundance of caution and in compliance with the rules, Respondent specifically responds that the circuit court did not err in any way set forth in Assignment of Error A, A1, A2, B, or C. Further:

1. The Circuit Court did not err in granting Respondent's motion to dismiss.

2. The Circuit Court did not err in concluding that petitioner's amended complaint contained no "well pleaded allegations" regarding the intent of the parties when the Blakes' executed the September 10, 1991 deed.

3. The Circuit Court did not require Petitioner to produce evidence at the pleadings stage, and did not err in holding that the Amended Complaint made clear Petitioner was unable to prove any set of facts consistent with the complaint which would entitle it to relief under the ultimate standard of proof.

4. The Circuit Court did not err in concluding that the September 10, 1991 deed was unambiguous, and even if it had such error would have been harmless.

5. The Circuit Court did not err in concluding that petitioner was not entitled to relief under any set of facts which could be proved consistent with the Complaint.

II. COUNTERSTATEMENT OF THE CASE

In September of 1991, Lewis and Opal Blake executed a Deed conveying approximately 18.35 acres of real property to Harold and Sheila White. A decade later, in 2001, Lewis Blake passed away. Two decades after that, in 2021, Opal Blake passed away. In the intervening years,

Harold White—who, as grantee, had not signed the deed—passed away. The 1991 Deed was unambiguous and contained no oil and gas reservation.

Then, in April 2024—over 32 years after the execution of the deed—Petitioner Blake Realty, L.L.C. ("Petitioner") brought this action asking the Circuit Court of Wetzel County to "reform" the unambiguous deed by adding in an oil and gas reservation.

The circuit court granted Respondent's Motion for Judgment on the Pleadings, and, after granting leave to file an amended complaint, granted Respondent's Motion to Dismiss. While Respondent may disagree that her Motions contained "little legal analysis," the fact of the matter is that this case is not complex. Here, a motion which recited the facts alleged in the Complaint and relevant law was sufficient to make plain that the Petitioner faced an insurmountable barrier to proving it was entitled to relief.

Neither the original Complaint nor the Amended Complaint included sufficient well-pleaded allegations which, if proved, would entitle Petitioners to the relief sought, as the circuit court correctly held. Petitioner's case has simply been that because the deed differs from the terms of the prior land contract, the deed must be reformed. The only two people who signed the deed passed away prior to the commencement of this action, putting evidence of the intent of the grantors at the time of the signing of the Deed forever beyond the reach of the Respondent and the trial court. In its amended complaint, Petitioner unsuccessfully attempted to cure that deficiency by including allegations of an opinion from an attorney who stated he has no records of this matter and opined only based on a current review of the Deed. In its briefing below, Petitioner acknowledged that it could not prove the Blakes' intent at the time of the execution of the deed as required by law. J.A. 214. Because Petitioner still had not set forth a claim on which relief could

be granted after amending its complaint, the circuit court properly granted Respondent's motion to dismiss.

III. SUMMARY OF ARGUMENT

The circuit court properly dismissed Petitioner's Amended Complaint for failing to state a claim upon which relief can be granted. Contrary to Petitioner's characterization, the circuit court did not hold that Petitioner was required to produce evidence in order to overcome a motion to dismiss. To the contrary, the court found that Petitioner could not prove any set of facts consistent with the allegations of the Amended Complaint which would entitle it to relief under the ultimate burden of proof required for deed reformation.

The law is well established: dismissal under Rule 12(b)(6) is appropriate when no set of facts consistent with the well-pleaded allegations of the complaint can be proved which would entitle the plaintiff to relief. *Kopelman & Assocs., L.C. v. Collins*, 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996). While West Virginia courts read complaints liberally, "[f]actual allegations must be enough to raise a right to relief above the speculative level." Louis J. Palmer, Jr., Litigation Handbook on West Virginia Rules of Civil Procedure, §12(c)[2] at 422 and §12(b)[8] at 405(5th ed. 2017).

In order to obtain deed reformation, a plaintiff must ultimately be able to produce "strong, clear and convincing" evidence of the intent of the parties at the time of the execution of the deed. Syl. Pt. 5, *Edmiston v. Wilson*, 146 W. Va. 511, 511–12, 120 S.E.2d 491, 492–93 (1961). Here, Petitioner points to a land contract which included a mineral reservation as conclusive evidence that that parties to the deed had intended to also include a mineral reservation in the deed. Of course, West Virginia law explicitly recognizes that deeds may differ from their antecedent land contracts without it being evidence of mistake or error. *See, e.g.* Syl. Pt. 4, *Spitznogle v. Durbin*,

230 W. Va. 398, 738 S.E.2d 562, 563–64 (2013), *quoting* Syl. Pt. 8, *James Sons Co. v. Hutchinson,* 79 W.Va. 389, 90 S.E. 1047 (1916) ("Until consummated by deed, an executory contract of sale is subject to modification by agreement of the parties; and where an act is done which without fraud or mistake is tendered by one of them, and accepted as full performance by the other with knowledge of his legal rights and equities, the acceptor and those claiming under him are not competent to assert that some part of the original agreement remains to be performed.").

Accordingly, in order to state a claim for reformation upon which relief can be granted, Petitioner was required to assert allegations for which facts could be proven which would meet the ultimate standard: "clear and convincing" evidence that the parties did not intend to modify the terms of the Land Contract at the time of the execution of the Deed. Petitioner failed to do so.

The circuit court found that Petitioner would not be able to prove any set of facts consistent with the complaint which would ultimately entitle it to relief under the standard of proof applicable to a deed reformation claim. Petitioner has conflated that finding with the idea that the circuit court was requiring Petitioner to produce evidence at the pleadings stage. This was not the case.

The Amended Complaint made clear that Petitioner relied entirely on the inference that the deed should have matched the land contract and would be unable to prove any facts as to the intent of all parties to the deed at the time of its signing. The circuit court correctly concluded that even if Petitioner proved all of its well-pleaded allegations, it would be unable to establish a right to relief above a speculative level.

The circuit court correctly found that Petitioner failed to state a claim upon which relief could be granted and this court should affirm the judgment below.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Should the Court determine that Oral Argument would aid in its consideration of this appeal, Rule 19 Argument would be appropriate. Respondent believes that this appeal is straightforward and is therefore suitable for disposition by memorandum decision.

V. ARGUMENT

The circuit court properly found that Petitioner failed to state a claim on which relief can be granted and this Court should affirm.

I. Standard of Review

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." 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). "The Supreme Court of Appeals of West Virginia has held that where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review. When reviewing a circuit court's order granting a motion to dismiss, this Court applies a *de novo* standard of review." *Bond v. United Physicians Care, Inc.*, 250 W. Va. 359, 362, 902 S.E.2d 908, 911 (Ct. App. 2024) (internal punctuation and citations omitted).

Dismissal under Rule 12(b)(6) "for failure to state a claim or defense is appropriate only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations contained within the pleadings." *Kopelman & Assocs., L.C. v. Collins*, 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996). While West Virginia courts read complaints liberally and accept as true well-pleaded facts, "legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted." *Id*. Further, "[f]actual allegations must be enough to raise a right to

relief above the speculative level." Louis J. Palmer, Jr., Litigation Handbook on West Virginia Rules of Civil Procedure, §12(c)[2] at 422 and §12(b)[8] at 405(5th ed. 2017).

II. The Circuit Court correctly found that Petitioner failed to state a claim upon which relief could be granted and dismissal under 12(b)(6) should be affirmed.

Petitioner's Assignment of Error "A" mischaracterizes the circuit court's order, overstates the quality of the Complaint, and should be rejected by this Court.

A. The Circuit Court properly concluded that Petitioner had not set forth a case for relief under any set of facts that could be proven consistent with the well-pleaded allegations of the amended complaint.

Even if each well-pleaded factual allegation in the Complaint was proven, it would not raise a right to relief above the speculative level. Specifically, nothing alleged in the Complaint, if proven, would be legally sufficient to strongly, clearly, and convincingly contradict the unambiguous 1991 Deed as the best expression of the parties' intent at the time of the execution of the Deed. *See* Syl. Pt. 5, *Edmiston v. Wilson*, 146 W. Va. 511, 511–12, 120 S.E.2d 491, 492–93 (1961) ("To justify a court of equity in decreeing reformation of a deed, the evidence produced on the part of one seeking such reformation must be strong, clear and convincing.").

1. The Circuit Court did not require Petitioner to produce evidence in order to withstand a Motion to Dismiss, it merely held that Petitioner could prove no set of facts consistent with the Complaint which would entitle it to relief under the relevant standard of proof.

Petitioner was not required to produce evidence at the pleadings stage, merely to include allegations for which facts could be proven to entitle it to relief under the ultimate evidentiary standard. Here, the existence of a mutual mistake by virtue of a scrivener's error depends upon the intent of the parties at the time of the signing of the Deed in 1991 and must ultimately be proved by strong, clear and convincing evidence. During the 32 years between the execution of the deed and commencement of this action, the Lewis and Opal Blake—the only two signers of the Deed and both grantors—passed away. J.A. 152-153. Their testimony regarding their intent is forever

beyond the reach of the court. The Amended Complaint made clear, by appending correspondence from the Blakes' attorney at the time the deed was executed, that there were no records of the transaction. Petitioner acknowledged in briefing below that it could not prove the intent of the Blakes at the time of the execution of the deed as required by law. J.A. 214 (Petitioner argued that "if…the Court were to find that Plaintiff is obligated to prove that the Blakes did not agree to such modification then…if anyone is prejudiced by the death of the Blakes, it is Plaintiff.").

But the intent of all parties at the time of the execution of the deed is the essence of a claim of mutual mistake. *See* Syl. Pt. 4, *Smith v. Smith*, 219 W. Va. 619, 620, 639 S.E.2d 711, 712 (2006) ("A mutual mistake is one which is common to all parties, wherein each labors under the same misconception respecting a material fact or provision within the agreement."); Syl. Pt. 3, *Johnston v. Terry*, 128 W. Va. 94, 94, 36 S.E.2d 489, 490 (1945) ("In a suit to reform a deed, parol testimony may be introduced to show a mutual mistake of the parties to such deed, or a mistake of the scrivener in failing to make the written instrument prepared by him conform to the **intention of the parties thereto**.") (emphasis added); Syl. Pt. 1-3, *Edmiston v. Wilson*, 146 W. Va. 511, 511–12, 120 S.E.2d 491, 492–93 (1961) (Holding that to warrant the reformation of a deed for mistake, the mistake must be mutual. Scrivener's errors are regarded as mutual mistakes when the alleged error is proven to have failed to express the mutual intent of the parties with regard to the deed.).

Petitioner includes a discussion of caselaw related to West Virginia's liberal pleading standards, including extensive quotes from *Mountaineer Fire & Rescue*. West Virginia's notice pleading standard and liberal reading of complaints is an asset to the state. But even the *Mountaineer Fire & Rescue* Court explained that a liberal standard is not the same as no standard at all. Indeed, the Court there included as a syllabus point the established rule that "[t]he 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 can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 2, *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Virginia*, 244 W. Va. 508, 854 S.E.2d 870, 876 (2020) *quoting Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977).

Here, the Amended Complaint itself serves as the basis for its dismissal. From the face of the Complaint and the exhibits attached to it, the circuit court properly determined that it appeared beyond doubt that Petitioner could prove no set of facts in support of its claim which would entitle it to relief.

The circuit court did not require Petitioner to produce evidence to survive a 12(b)(6) motion, but the law does require Petitioner to include well-pleaded allegations for which facts could be proven to entitle it to relief under the ultimate evidentiary standard. That Petitioner acknowledged it could not prove whether or not the grantors intended for the deed to differ from the land contract at the time they signed the deed should be sufficient to affirm the decision below.

2. The Circuit Court correctly held that the no set of facts consistent with the well-pleaded allegations in the Amended Complaint could be proven which would entitle Petitioner to relief.

Petitioner's argument from the outset has boiled down to an insistence that the existence of the land contract with a different term should be considered sufficient to prove the intent of the parties at the time of the execution of the deed. However, while courts may consider parol evidence in order to determine whether "an unambiguous deed fails to express the obvious intention of the parties," Syl. Pt. 3, *Smith v. Smith*, 219 W. Va. 619, 620, 639 S.E.2d 711, 712 (2006), courts do not consider land contracts themselves as evidence that the parties did not intend to modify the agreement at the time it was consummated by deed. Syl. Pt. 4, *Spitznogle v.*

Durbin, 230 W. Va. 398, 738 S.E.2d 562, 563–64 (2013). As the Supreme Cout of Appeals has explained, the

> presumption of law is that the acceptance of a deed, made in pursuance of an antecedent written agreement for the sale of land, is satisfaction of all previous covenants, and, although such acceptance may in some circumstances be but partial execution of the contract, to rebut the legal presumption the intention to the contrary must be clear and convincing.

Syl. Pt. 3, *Spitznogle*, 230 W. Va. 398, 738 S.E.2d at 563–64, *quoting* Syl. Pt. 7, *James Sons Co. v. Hutchinson,* 79 W.Va. 389, 90 S.E. 1047 (1916). This is because "[u]ntil consummated by deed, an executory contract of sale is subject to modification by agreement of the parties…" Syl. Pt. 4, *Spitznogle*, 230 W. Va. 398, 738 S.E.2d at 563–64, *quoting* Syl. Pt. 8, *James Sons Co.,* 79 W.Va. 389, 90 S.E. 1047.

Thus, as argued below and as found by the circuit court, logically and legally the land contract itself cannot serve as evidence that the parties did not subsequently intend to modify their agreement at the time it was consummated by the Deed. The circuit court made this clear in granting Respondent's 12(c) motion, and Petitioner sought to address the defect by amending its complaint to include the conclusory allegation that the parties "did not, either expressly or by implication, modify the terms of the January 1, 1984 land contract." J.A. 154. This allegation failed to solve the defects in the original complaint for at least three reasons: (1) it is a naked conclusion which does not supply any operative underlying facts; (2) the remainder of the Complaint makes plain that Petitioner could not prove facts consistent with that allegation in any event; and, (3) technically, even if true that the parties did not modify the land contract, it does not mean they did not nonetheless intend for the deed to differ from the land contract.

Under West Virginia law, the allegation that the parties "did not" modify the agreement is not a well-pleaded factual allegation which must be taken as true. *See Brown v. City of*

Montgomery, 233 W. Va. 119, 127, 755 S.E.2d 653, 661 (2014) ("a trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted references and sweeping legal conclusions cast in the form of factual allegations."); *Fass v. Nowsco Well Serv., Ltd.*, 177 W. Va. 50, 53, 350 S.E.2d 562, 564 (1986) (requiring that a complaint include more than "mere sketchy generalizations of a conclusive nature unsupported by operative facts."). Indeed, "despite the allowance in Rule 8(a) that the plaintiff's statement of the claim be 'short and plain,' a plaintiff may not "fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995). Petitioner does not include any allegations of factual matter which would support this conclusory allegation.

Further, the relevant standard requires the dismissal of the complaint when "it is clear that no relief could be granted under any set of **facts that could be proven** consistent with the allegations contained within the pleadings." *Kopelman & Assocs., L.C. v. Collins*, 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996). West Virginia's pleading rules do not require a plaintiff to plead all of the evidence to prove its claims. However, when—as here—the Complaint itself clearly establishes that "no set of facts can be proven" sufficient to entitle the plaintiff to relief, the Complaint has failed to state a claim upon which relief can be granted.

Even if the allegation that the parties did not modify the land contract was not merely conclusory, the remainder of the Amended Complaint makes clear that no facts consistent with that allegation can be proven. Both grantors have passed away. J.A. 152-153. The attorney who handled the matter over three decades ago asserted that no files exist. J.A. 167. Petitioner attached an email from Attorney Hassig which demonstrates that he has no memory of the matter and believes that no relevant files exist. *Id*. Importantly, the conclusory allegation and the email from

Attorney Hassig are all that Petitioner added to the Amended Complaint in an attempt to address the finding of the circuit court that the original complaint insufficiently set forth allegations regarding the intention of the parties. One presumes that if Petitioner had any better factual support for its allegations than this email, it would have included them in the Amended Complaint. Instead, Petitioner asserted below that it would be prejudiced if it was required to actually prove facts related to the intent of the grantors to the deed. J.A. 214. The Amended Complaint itself makes clear that Petitioner can prove no set of facts consistent with its allegations which would entitle it to relief.

But even if Petitioner could somehow prove that the parties did not modify the land contract, that is of no help to Petitioner's case. Indeed, whether or not the parties modified the land contract is not at issue, only whether the parties intended for the Deed to match or differ from the land contract.

3. Petitioner's Assignment of Error "A," including its subparts, is without merit.

As the circuit court properly held, no set of facts consistent with well-pleaded allegations in the Amended Complaint could be proved which would entitle the Petitioner to relief. The circuit court did not require Petitioner to produce evidence at the pleadings stage, instead merely set forth the standard which would ultimately have to be met to support the conclusion that no facts which could be proved consistent with the Complaint would possibly meet that standard. Petitioner's conclusory allegation that the parties did not modify the land contract is insufficient to survive dismissal, particularly when placed alongside those parts of the Amended Complaint which make clear that Petitioner could not prove that allegation, in any event.[1]

[1] Petitioner includes a footnote referencing the fact that Respondent sought to delay any deposition until after resolution of what she correctly believed to be her meritorious Motion for Judgment on the Pleadings. Leaving aside the dangers of presuming what information anyone may recall after 33 years, the Respondent could not be presumed

This Court should reject Petitioner's Assignment of Error A 1 and 2 and affirm the judgment of the circuit court.

III. The Circuit Court did not err in finding that the 1991 Deed was unambiguous, but such error would have been harmless, in any event.

The 1991 Deed is unambiguous and the circuit court was correct to find it so. However, even if it was an error to find the 1991 Deed to be unambiguous it was a harmless error. Petitioner does not allege in its Amended Complaint that the 1991 Deed is ambiguous, and did not assert a cause of action asking the circuit court to resolve any ambiguity in the deed. In its argument regarding this assignment of error in its appellate brief, Petitioner does not set forth any injury which resulted from the determination that the 1991 Deed was unambiguous. Petitioner also does not effectively argue here that the 1991 Deed is ambiguous, all that it actually argues is that the reference to the prior land contract may lead a reader to wonder if the omission of a mineral reservation was a mistake. Pet. Brief at 17-18.

There is no ambiguity in the 1991 Deed. Petitioner asserts that the deed is ambiguous because it states that it is made in consummation of a prior land contract. Petitioner asserts that because comparing the deed to the land contract shows that land contract contained a "surface only" term which was omitted from the deed, it may "cause a reader of those documents to question whether the 1991 deed erroneously conveyed the entirety of the Blakes' interest in the property to the Whites." Pet. Brief at 18. This is merely a repetition of the argument that the 1991 Deed contains a scrivener's error omitting the severance term.

Even under Petitioner's analysis, the only way to find any "ambiguity" in the 1991 Deed is to compare it to the Land Contract and then wonder whether they were actually intended to

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to have information—particularly not admissible information—regarding the intent of the Grantors, and proving mutual mistake requires establishing the intent of **all** parties.

match. That is, there is no argument to be made that the 1991 Deed is not clear and definite on its face. Petitioner cites to *Paxton v. Benedum* to suggest that a document is susceptible to two meanings, it is ambiguous. 80 W. Va. 187, 94 S.E. 472 (1917). It is perhaps noteworthy that *Paxton* also stands for the proposition that "[w]here there is ambiguity in a deed, or where it admits of two constructions, that one will be adopted which is most favorable to the grantee." *Id*.

But the 1991 Deed is not susceptible to two interpretations. The language of the deed is clear and definite. The law is clear that "[w]here the intent of the parties is clearly expressed in definite and unambiguous language on the face of the deed itself, the court is required to give effect to such language and, ordinarily, will not resort to parole or extrinsic evidence." *Pocahontas Land Corp. v. Evans*, 175 W. Va. 304, 308, 332 S.E.2d 604, 609 (1985). Further, the statement that the 1991 Deed was made in consummation of the prior land contract does not create a latent ambiguity. The "presumption of law is that the acceptance of a deed, made in pursuance of an antecedent written agreement for the sale of land, is satisfaction of all previous covenants, and, although such acceptance may in some circumstances be but partial execution of the contract, to rebut the legal presumption the intention to the contrary must be clear and convincing." Syl. Pt. 3, *Spitznogle v. Durbin*, 230 W. Va. 398, 738 S.E.2d 562, 563–64 (2013) *quoting* Syl. Pt. 7, *James Sons Co. v. Hutchinson,* 79 W.Va. 389, 90 S.E. 1047 (1916). Further,

> Until consummated by deed, an executory contract of sale is subject to modification by agreement of the parties; and where an act is done which without fraud or mistake is tendered by one of them, and accepted as full performance by the other with knowledge of his legal rights and equities, the acceptor and those claiming under him are not competent to assert that some part of the original agreement remains to be performed.

Syl. Pt. 4, *Spitznogle v. Durbin*, 230 W. Va. 398, 738 S.E.2d 562, 563–64 (2013), *quoting* Syl. Pt. 8, *James Sons Co. v. Hutchinson,* 79 W.Va. 389, 90 S.E. 1047 (1916).

"The term 'ambiguity' is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning." *Hansen-Gier Fam. Tr. of Apr. 22, 2016 by Hansen v. Haywood*, 250 W. Va. 42, 48, 902 S.E.2d 174, 180 (2024). There is no language in the 1991 Deed which is of doubtful meaning. The deed is definitionally unambiguous.

The fact that the 1991 Deed was made in consummation of a prior land contract but that it did not match that contract term for term is not sufficient to create an ambiguity under West Virginia law. Which is probably why Petitioner has not alleged in its Complaint that the Deed is ambiguous. And that fact is why even if the circuit court erred in finding that the 1991 Deed was unambiguous, it is a harmless error. By rule, "[a]t every stage of the proceeding, the court shall disregard all errors and defects that do not affect any party's substantial rights." W. Va. R. Civ. P. 61. Here, Petitioner brought claims asserting mutual mistake and alleged that the 1991 Deed was supposed to include language which was inadvertently omitted. Whether the deed as-written is unambiguous has no bearing on that claim.

Further, whether the deed is or is not ambiguous has no bearing on the circuit court's determination that Petitioner failed to set forth a claim for deed reformation on which relief could be granted. The circuit court found that the Amended Complaint established that Petitioner could not prove facts consistent with the complaint which would meet the ultimate burden of proof related to the intent of all parties to the deed. The circuit court's determination regarding the deed being unambiguous had no impact on the substantive rights of Petitioner, and not even Petitioner sets forth an argument to the contrary.

Because the circuit court did not err in finding that the 1991 Deed is unambiguous and because it would be harmless error even if it had, Petitioner's Assignment of Error "B" should be rejected by this Court and the judgment below affirmed.

IV. The Circuit Court did not err in concluding that Petitioner was not entitled to relief under any set of facts.

To the extent Petitioner's Assignment of Error "C" is distinct from "A" and its subparts, Respondent responds that the circuit court did not err by granting her motion to dismiss. As set forth above, the circuit court properly held that, based upon the Amended Complaint, Petitioner was unable to prove any set of facts consistent with the complaint which would entitle it to relief. Respondent expressly incorporates her arguments above into her response to Assignment of Error "C."

While Petitioner may criticize Respondent for simply listing facts and the law in her motions below, and again here, this case is so straightforward that the facts and law need little in the way of fluff or flourish from counsel in order to make plain why Respondent should prevail, and can be summarized as follows:

- West Virginia law recognizes that it is perfectly acceptable for a deed in consummation of a land contract to differ from the terms of the land contract.
- The Deed here did differ from the terms of the land contract.
- The Deed may only be reformed to match the land contract if the plaintiff is ultimately able to prove by clear and convincing evidence that the parties to the deed did not intend for it to differ from the land contract.
- The Amended Complaint makes clear that three of the four parties to the deed, including both grantors and the only two signers, have passed away and that no records were kept at the time of the deed signing as to the grantors' intent.

- Petitioner admitted below that having to actually prove that the grantors' intended for the deed to match the land contract would "prejudice" Petitioner because doing so would be impossible.

Thus, and in accordance with West Virginia law, the circuit court dismissed Petitioner's Amended Complaint for failing to state a claim upon which relief could be granted.

V. The Circuit Court did not err in concluding that Petitioner was not entitled to declaratory relief.

Argument Section "D" of Petitioner's Brief argues that the circuit court erred by concluding that Petitioner was not entitled to declaratory relief. This issue was not raised in the Assignments of Error presented at the outset of Petitioner's Brief nor was it raised as an assignment of error in the Notice of Appeal. Ordinarily, then, this issue would be deemed waived and not considered by the Court. *See, e.g. Canterbury v. Laird*, 221 W. Va. 453, 458, 655 S.E.2d 199, 204 (2007) ("Our cases have made clear that this Court ordinarily will not address an assignment of error that was not raised in a petition for appeal."); *Holmes v. Basham*, 130 W. Va. 743, 754, 45 S.E.2d 252, 258 (1947) ("The plaintiffs also argue in their brief the actions of the trial court in decreeing the costs below against them, but they fail to assign such as error in their petition for an appeal to this Court. Therefore, we do not consider plaintiffs' argument with respect thereto.").

Nonetheless, should this Court consider Petitioner's argument on this issue, the Court should affirm the judgment below.

First, Respondent moved to dismiss Count II of the Amended Complaint on the basis that it was duplicative of Count I. In her Motion to Dismiss, Respondent stated the following as reasons for the dismissal of Count II:

62. Plaintiff has not alleged any ambiguity in the Deed for the Court to resolve.

63. Plaintiff has not alleged any conflicting claims of title to the Property other than

that raised by Plaintiff in Count I.

64. Accordingly, there is no dispute regarding title sufficient to give the Court jurisdiction to enter declaratory judgment on the same.

J.A. 197.

In its response in opposition to the motion to dismiss, Petitioner did not dispute respondent's argument that Count II was duplicative. *See* J.A. 201-217, J.A. 222. Petitioner did not argue that it had, in fact, alleged an ambiguity in the deed. **Petitioner did not address the Motion to Dismiss Count II at all**. Because Petitioner did not argue that Count II should not be dismissed as duplicative (or for any other reason) below, it has waived the right to raise the issue on appeal. *See* Syl. Pt. 6, *Page v. Columbia Nat. Res., Inc.*, 198 W. Va. 378, 382, 480 S.E.2d 817, 821 (1996) ("A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal."); Syl. Pt. 2, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 210–11, 470 S.E.2d 162, 164–65 (1996) ("To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect.").

Further, Petitioner argues here for the first time that the second count of its Amended Complaint, seeking Declaratory Relief, was actually based on a contention that the Petitioner's should be awarded the mineral rights they seek not based on mutual mistake but instead based on an apparent deed ambiguity. Pet. Brief at 19-20. Again, Petitioner failed to respond to the argument that it had not raised any ambiguity during briefing on the Motion to Dismiss below. The only instance of the word "ambiguous" in the Amended Complaint comes at paragraph 15, in which Petitioner is alleging the terms of the land contract were "unambiguous." There is no reference to any alleged ambiguity in the Deed in the Amended Complaint. In its brief in opposition to the

motion to dismiss below, Petitioner did not assert that the 1991 Deed was ambiguous, let alone that such ambiguity was the basis of its claim for declaratory relief. Not only did Petitioner abandon Count II during the motion to dismiss briefing below, it is now attempting to revive it on appeal by inventing a basis which was wholly absent from the Amended Complaint and which it declined to assert below when Respondent expressly argued otherwise.

This Court should affirm the judgment of the circuit court regarding Count II because Petitioner waived all of the arguments it now seeks to make. But, importantly, while Respondent contends that Count II was properly dismissed as duplicative based on the actual language of the Amended Complaint, even had Petitioner asserted that the basis of its claim for Declaratory relief was an alleged ambiguity, the count should still have been dismissed because the 1991 Deed is plainly unambiguous, as discussed above, and the law presumes that unambiguous deeds mean what they say. *See* Syl. Pt. 1, *Maddy v. Maddy*, 87 W.Va. 581, 105 S.E. 803 (1921). The judgment below should be affirmed.

VI. CONCLUSION

The circuit court properly granted Respondent's motion to dismiss because the Amended Complaint makes clear that Petitioner could not prove any set of facts consistent with the allegations of the complaint which would entitle it to deed reformation. Further, Petitioner's claim for declaratory relief was properly dismissed as duplicative and Petitioner has repeatedly waived any argument to the contrary. Accordingly, and as set forth above, this Court should affirm the judgment below.

Respectfully submitted,
Respondent Sheila White, by counsel

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CERTIFICATE OF SERVICE

I, Matthew R. Miller, counsel for Respondent Sheila K. White, hereby certify that I have served a true and correct copy of the foregoing Respondent's Brief upon all counsel of record by placing said copies in the United States mail, with first-class postage prepaid, on this day, August 11, 2025, addressed separately as follows:

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