INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Harvey Bellomy and Nancy Bellomy,

Defendants and
Counter-Plaintiffs Below, Petitioners,

v.

No. 25-ICA-279

On appeal from Mercer County
Circuit Court no. 23-C-59

Falcon Ridge Homeowners Association, Inc.,

Plaintiff and
Counter-Defendant Below, Respondent.

BRIEF OF PETITIONERS LEE AND NANCY BELLOMY

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I. ASSIGNMENTS OF ERROR

1. The Mercer County Circuit Court omitted substantial findings of fact and conclusions of law from both its *Final Order* and its *Rule 59(e) Order* entering summary declaratory judgment for Respondent, preventing meaningful appellate review.

2. The Circuit Court, in granting summary declaratory judgment to Respondent, failed to apply the *Uniform Common Interest Ownership Act* as the controlling general law of the case.

3. The Circuit Court erred in concluding that Petitioners' lots were conveyed and acquired subject to the Falcon Ridge Declaration when they were not.

4. The Circuit Court erred in concluding that the "deeds in question all expressly state that the Property is part of the Falcon Ridge Subdivision" and "as such, they are governed by the Restrictive Covenants set out for use in the Falcon Ridge planned community"

5. The Circuit Court erred in concluding in the Final Order that Petitioners' lots were conveyed and acquired subject to the Falcon Ridge Declaration, improperly relying on *parol* evidence without first finding that the documents were ambiguous.

6. The Circuit Court erred in concluding that Petitioners' lots are subject to the Falcon Ridge Declaration while Crazy Mountain Cycle LLC's lots are not subject to the Falcon Ridge Declaration even though the declarant's conveyancing of them was effectively the same.

7. The Circuit Court erred in applying W. Va. Code § 36-3-11 to divest Petitioners of their title to Lot 94 except the "western portion of Lot 94" and invalidating Petitioner's Deed of Correction.

8. The Circuit Court erred in applying W. Va. Code § 36-3-11 to divest Petitioners of their title to the streets crossing through Falcon Ridge for pedestrian, vehicular and utility access as shown on Plat 6995 even though Petitioners acquired the streets subject to the nonexclusive rights of Falcon Ridge unit owners to use them.

9. At the same time, the Circuit Court erred in concluding that Respondent owns all of Lot 94 and the Falcon Ridge sign.

10. The Circuit Court committed gross abuse of its discretion when it visited some of the real property in issue, without notice to or the presence of Petitioners and their counsel after the close of evidence; such a property view was *ex parte*, wholly irrelevant and improper.

11. The Circuit Court violated Petitioner's due process rights under both the U.S. and West Virginia constitutions for granting Respondent injunctive relief that Respondent did not seek and the Court had no basis to give.

II. STATEMENT OF CASE

This is a real estate case of multiple, high-grade errors of fact and law committed in the Mercer County Circuit Court. On cross dispositive motions, the Circuit Court wrongly concluded in two orders that Petitioners' real estate is subject to the use restrictions in and the covenant to pay assessments for Falcon Ridge, a planned community for which Respondent serves as the homeowners association. *See Order Granting Plaintiff's Motion for Declaratory Judgment* (the "Final Order") AP 460-464; *Order Granting Plaintiff's Motion for Declaratory Judgment and Denying Defendant's Motion for Rule 59 Relief* (the "Rule 59 Order") AP 559-566.

With scant orders, the Circuit Court nakedly refused to apply the general law the *Uniform Common Interest Ownership Act* (the "Uniform Act" or "*UCIOA*")[1] and black-letter law of contracts and conveyancing. *See* AP 135-140, AP 469-470, AP 527 at ¶ 3, AP 530-533, AP 536-538, and AP 544-545. Had the lower court done so, it would have concluded that Petitioners' property is not a part of Falcon Ridge because there is no contract, deed, plat or instrument that makes Petitioners' property a part of Falcon Ridge. AP 49-62, AP 65, AP 63-64, AP 66-68.

Also, the Circuit Court improperly relied on W. Va. Code § 36-3-11 to wrongly divest Petitioners of their ownership of valuable real estate interests that included their rights of access between Petitioners' property and the public road through Falcon Ridge's streets. *Id.* Respondent first cited W. Va. Code § 36-3-11 in a reply brief on its dispositive motion as a basis for arguing that Petitioners acquired their property by improper means. The Circuit Court not only allowed the procedural ambush but incorrectly applied the statute against Petitioners in the Rule 59(e) Order. Simply, the statute is inapplicable to Petitioners' acquisition of their real estate.

In addition, the Circuit Court *sua sponte* made a site view of Falcon Ridge and its environs

[1] West Virginia Code § 36B-1-101 provides: "This chapter may be cited as the '*Uniform Common Interest Ownership Act*'." Petitioners refer to the act as either the "Uniform Act" or "UCIOA".

after dispositive motions without notice and in the absence of the parties and their lawyers. Petitioners were sandbagged when the Circuit Court enjoined them to conform their property to Falcon Ridge's use restrictions in Falcon Ridge when Respondent did not even ask for this relief.

Procedural History

On April 4, 2023, Respondent began the civil action below against Petitioners by filing its *Complaint for Declaratory Judgment* asking only for declaratory relief:

> a. That Lot 94 is a common element and owned by the Plaintiff;
> b. That the Falcon Ridge entrance sign and the land that the sign rests upon is a common element and owned by the Plaintiff;
> c. That the Declaration of Covenants, Conditions and Restrictions apply to Lots 52, 53, 54, 89, 90 and 91 owned by the Defendants; and
> d. That the street known as Saxon Place (which consists of Circle Drive, Hastings, Street, Saxon Street) and Somerset Lane are common elements and owned by the Plaintiff;

On April 26, 2023, Petitioners answered Respondent's complaint and counterclaimed with their demand for declaratory relief, including that the real estate they had acquired was "not a part of Falcon Ridge" nor subject to any covenant, condition or restriction in the Falcon Ridge Declaration; they are vested with and the sole owners of certain streets within Falcon Ridge providing access to their real property; and they are the owners of a part of Lot 94. AP 19 ¶ 17, AP 20-21 ¶¶ 24-25 and AP 27 ¶¶ 15-29.

On August 22, 2023, the Court granted Crazy Mountain Cycles, LLC's *Motion to Intervene* and its own complaint for declaratory relief was filed with this Court. AP 108. By joint agreement of all parties, reflected in a *Joint Agreed Order of Dismissal* entered on May 10, 2024. AP 114-115. On April 16, 2025, the Court entered an *Amended Order of Dismissal* in which the Association acknowledged and agreed that Crazy Mountain Cycles "acquired all of those certain

lots or parcels of real estate" identified as "Lots pt. 62, 79 thru 88 & 104 thru 120 Falcon Rdg Inc. Pcls 52-7 & 28 30-31.1-44-45-48-49-52 thru 71 inclusive of Tax Map 17B" as shown on "Map Showing Subdivision of Hilltop Manor Bluewell Development Corp Beaver Pond District Mercer County Bluewell, West Virginia Scale 1" – 20' Feb.-Nov 1976 A.M Shields Reg. Prof. Eng.'," recorded in the Mercer County Clerk's office in Microfilm Plat no. 6995" are "not subject to the Falcon Ridge Declaration". AP 477-478.

Despite Petitioners' being in the same posture as Crazy Mountain Cycles, Respondent continued to fight Petitioners, claiming their lots were part of Falcon Ridge while denying that Crazy Mountain Cycles' lots were not.

On April 4, 2025, the lower court entered its *Order Granting Plaintiff's Motion for Declaratory Judgment* in which it granted Respondent's motion for summary judgment (the "Final Order"). AP 460-464. On April 7, 2025, Petitioners filed their *Motion to Alter or Amend Judgment Under W. Va. R. Civ. P. 59(E) and Motion for Stay Under W. Va. R. Civ. P. 62(C).* AP 466-475. On June 30, 2025, the lower court entered its *Order Granting Plaintiff's Motion for Declaratory Judgment and Denying Defendant's Motion for Rule 59 Relief.* AP 559-567

In entering both the Final Order and the Rule 59(e) Order, the Circuit Court enjoined Petitioners from using their real property except in compliance with the use restrictions contained in the Falcon Ridge Declaration. The Circuit Court enjoined Petitioners even though Respondent did not ask for injunctive relief and Petitioners had no earlier notice that the lower court would enjoin them from freely using their real property. Petitioners moved the lower court to stay the Final Order and the Rule 59(e) Order until they pursued and obtained a decision from the ICA. AP 569-573. The lower court granted Petitioners' second motion for stay on September 8, 2025.

Petitioners timely filed their Notice of Appeal to this Court on July 10, 2025.

III. SUMMARY OF ARGUMENT

Petitioners' eleven assignments of error can be divided into four categories. Assignments of Error nos. 1 and 9 seek redress for the Circuit Court's failure to enter final orders on cross-dispositive motions that contain factual findings and legal conclusions sufficient for meaningful appellate review. The Final Order and the Rule 59(e) Order are conclusory and largely devoid of specific findings of fact and statements of rules of law to support the ultimately incoherent, inconsistent and incorrect conclusions that destroy or distort Petitioners' real estate interests.

Assignments of Error nos. 2, 3, 4, 5 and 6 concern the lower court's failure to apply the Uniform Act and the basic law of contracts and conveyancing of real estate, leading to its incorrect declarator judgments for Respondent and against Petitioners.

Assignments of Error nos. 7 and 8 concern the wholly incorrect application of W. Va. Code § 36-3-11 to strip Petitioners of their real estate interests.

Assignments of Error nos. 10 and 11 concern the lower court's abuse of its inherent judicial power. The Circuit Court went bridges too far in advancing Respondent's case.

IV. ORAL ARGUMENT AND DECISION

Petitioners ask for oral argument and decision under W. Va. R. App. P. 19 because this case involves many assignments of error in the application of settled real estate law and the demonstrable insufficiency and the absence of evidence to support the lower court's final orders.

V. ARGUMENT

Standard of Review

The ICA has jurisdiction over this appeal under W. Va. Code § 51-11-4(b)(1) (2024). The facts are undisputed. Therefore, the Circuit Court's entry of summary judgment in favor of Respondents is reviewed *de novo*. "A circuit court's entry of summary judgment is reviewed *de*

novo." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

Statement of Facts

In 1978, Bluewell Development Corporation made a *Declaration*[2] *of Protective Covenants and Reservations of Hilltop Manor* (the "Hilltop Manor Declaration")[3] to encumber undeveloped land in Beaver Pond District, Mercer County. 08[4]. AP 144-148. Bluewell Development simultaneously recorded a plat of subdivision[5] showing the lots within Hilltop Manor in the Mercer County Clerk's office as Plat 6995 depicting numbered lots for residential use, interior streets and the unsubdivided residue of the parcel of land.[6] AP 152. Three larger parcels, A, B and C also were platted. The total number of lots and parcels on Plat 6995 is 125. AP 65.

In 1979, Bluewell Development recorded a supplemental declaration for Hilltop Manor that (1) dedicated but did not convey all streets on Plat 6995 for the lot owners' nonexclusive use and (2) authorized the creation of the Hilltop Manor Maintenance Association with power to collect assessments from all lot owners for the upkeep of the roads *etc.*[7] AP 153-155. In 1992, after developing and conveying some lots in Hilltop Manor, Bluewell Development conveyed the residue of its real estate on Plat 6995 to Shoemaker Construction Co., Inc. ("Shoemaker") AP 156.

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[2] The Uniform Act defines a declaration as "any instruments, however denominated, the create a common interest community, including any amendments to those instruments." W. Va. Code § 36B-1-103(13).
[3] The Hilltop Manor Declaration is recorded in the office of the Clerk of the County Commission of Mercer County, West Virginia, in Deed Book 572, at page 225.
[4] Citations to the record throughout this brief refer to Petitioners' Appendix, or "AP".
[5] A plat is a "map of a town, section, or subdivision showing the location and boundaries of individual parcels of land subdivided into lots, with streets, alleys, easements, *etc.*, usually drawn to a scale." *Black's Law Dictionary* (5th ed. 1979).
[6] Plat 6995 is recorded in Deed Book 831, at page 168 and now no. 14334 in Film Plat Room.
[7] The Hilltop Supplemental Declaration of Protective Covenants and Reservations of Hilltop Manor is dated May 16, 1979. There is no document or instrument in the record that terminated Hilltop Manor as a "common interest community" or as a "planned community".

1994: Falcon Ridge Created as a Planned Community Under the Uniform Act

In 1994, Shoemaker, as the successor declarant, recorded "Declaration of Covenants, Conditions, and Restrictions for Falcon Ridge Subdivision" (the "Falcon Ridge Declaration"). Shoemaker filed the Falcon Ridge Declaration to:

> submit the real property in Beaver Pond District, Mercer County, West Virginia, described in Schedule A-1 to the provisions of the Uniform Common Interest Ownership Act, West Virginia Code Section 36B-1-101, *et seq*. ("Act") for the purpose of creating a Subdivision no longer known as Hilltop Manor and to be henceforth known as Falcon Ridge, and making the roadway and other improvements shown on Plat 6995 as they pertain to the property shown in Schedule A-1, and does hereby declare that the property described in Schedule A-1 shall be held and conveyed subject to the following terms, covenants, restrictions and conditions . . .

AP 161-163.

In addition, Article IV *Maximum Number of Units, Boundaries* of the Declaration provides:

> Section 4.1 - The Common Interest Community upon creation contains forty-nine (49) units. As other portions are added to this Subdivision, it shall declare the number of units shown on the aforesaid Plat or amended plat. The Declarant reserves the right to create a number of units to be determined by the Declarant.
>
> Section 4.2 Boundaries. Boundaries of each unit created by the Declaration are shown on Microfilm Plat 6995.

AP 165.

But, crucially, the Falcon Ridge Declaration omits Schedule A-1. AP 165. The Falcon Ridge Declaration omits a description of any real property on Plat 6995. The Falcon Ridge Declaration fails to identify which of the 49 lots on Plat 6995 are made subject to it. AP 161-174.

Shoemaker conveyed some lots expressly subject to both the Hilltop Manor Declaration

and the Falcon Ridge Declaration. For example, the deed from Shoemaker to Bennie and Mabel Louise Belcher, dated May 16, 1994, conveyed "Lots 57 and 58 of the Falcon Ridge Subdivision shown upon a map entitled *Map Showing Subdivision of Hilltop Manor . . .' etc.* and made the conveyance to the Belchers

> subject to a Declaration of Protective Covenants and Restrictions dated November 19, 1978, recorded in Deed Book 572 at Page 225 and supplemented by instrument dated May 16, 1979, recorded in Deed Book 575 at Page 288 and to be further supplemented and amended by Amended Declaration of Protective Covenants and Restrictions to be filed forthwith.

AP 194.

Later, after Mark and Rhonda Shoemaker acquired the reserved lots, they conveyed to Sheila L. Hall, by a dated August 30, 2010, "Lot 12 of the Falcon Ridge Subdivision" and made the

> conveyance . . . subject to a Declaration of Protective Covenants and Restrictions dated November 19, 1978, recorded in Deed Book 572 at Page 225 and supplemented by instrument dated May 16, 1979, recorded in Deed Book 575 at Page 288, as amended by a Declaration of Covenants, Conditions and Restrictions for Falcon Ridge Subdivision of record in Deed Book 750, at page 110.

AP 197.

Declarant Conveys Certain Property to Respondent as Common Elements

In 1997, Mark and Rhonda Shoemaker formed Respondent to maintain the streets, sidewalks and drains and to impose and enforce assessments on the Falcon Ridge lot owners in accordance with the Falcon Ridge Declaration. AP 178-181. In 2007, Shoemaker conveyed a deed to Respondent that recites that the developer "desires to convey unto the Falcon Ridge Unit Owners' Association certain of the lots and streets shown upon said plat". AP 175. The 2007 deed to Respondent conveyed "the western portion of Lot 94 over which the right-of-way from Circle

Drive presently exists, together with the platted portion of the right-of-way of Hastings Street from its intersection with the western line of Saxton Street to the northwest corner of Lot 25 and to the northeast corner of Lot 90 to the northwest corner of Lot 102, and all of Saxton Street." AP 175-176. The 2007 deed to Respondent recites that the developer "does not convey any of the streets not so mentioned above and . . . further reserves an easement for ingress, egress and utility lines . . . across the streets so conveyed herein." AP 176. These interests, by virtue of the Falcon Ridge Declaration, became "common elements" of Falcon Ridge.[8]

Crazy Mountain Cycles Acquires 22 Lots Free of the Falcon Ridge Declaration

In 2020, Brittany Harvey conveyed 22 lots to Crazy Mountain Cycles, LLC 22 lots, to-wit:

> LOTS 69-78 & 1.5 AC FALCON RIDGE INC PCLS 33-37-38-40-42-43-46-47-50-51 OF TAX MAP 17B: 'all of those certain lots or parcels of real estate designated as Lots 69 through 78, inclusive, and a 1.5 acre parcel labeled "Reserved for Future Development", Beaver Pond District, Mercer County, West Virginia, as shown on "MAP SHOWING SUBDIVISION OF HILLTOP MANOR BLUEWELL DEVELOPMENT CORP BEAVER POND DISTRICT MERCER COUNTY BLUEWELL WEST VIRGINIA . . . , said plat recorded . . . as Microfilm Plat No. 6995.'

AP 185.

Crazy Mountain Cycles did not acquire title to the lots subject to the Falcon Ridge Declaration. AP 477-479.

[8] Section 1.7 of the Falcon Ridge Declaration defines "common elements" as "[e]ach portion of Common Interest Community as set forth above owned by the Association." AP 162. Section 5.1 of the Falcon Ridge Declaration states: "The portions of the Common Elements which are to be owned by the Association *consists [sic] only of the streets shown upon said Plat, and the expanded roadway leading through Lot 94*." AP 165-166 (emphasis supplied). The Falcon Ridge Declaration omits Lot 94 as a part of the Common Elements.

Petitioners Acquired 37 Lots Free of the Falcon Ridge Declaration

In 2020, Mark T. Shoemaker by Mark Timothy Shoemaker, Jr. his attorney-in-fact, conveyed all of the real property described therein, free of the Falcon Ridge Declaration, to Petitioners, Harvey L. Bellomy and Nancy E. Bellomy:

> Lots 26-42, inclusive, Lots 44-54, inclusive, Lots 63-67, including, Lots 89, 90, 91 and Tracts A, B, and C, Falcon Ridge Subdivision, Beaver Pond District, Mercer County, West Virginia, as shown upon a Map entitled "MAP SHOWING SUBDIVISION OF HILLTOP MANOR BLUEWELL DEVELOPMENT CORP BEAVER POND DISTRICT MERCER COUNTY BLUEWELL, WEST VIRGINIA Scall 1" = 20', Feb.-Nov. 1976 A. M. Shields Reg. Prof. Eng.", and known as Plat no. 6995
>
> Hastings Street, situate between Lots 89 and 103 as shown on Plat no. 6995
>
> Un-Named Street situate between Lots 63, 64 and Tracts A and B

AP 188; Deed Book 1094, at page 51.

Lot 94 and the Deed of Correction

Later, Mark Timothy Shoemaker, Jr. and Alisha Shoemaker Sudderth, successors of Mark Timothy Shoemaker, Sr., conveyed a Deed of Correction to Petitioners. In the Deed of Correction, "[t]he parties hereto state that the purpose of this Deed is to clarify that all of the interest previously held by Mark Timothy Shoemaker and Shoemaker Construction Company. Over and near the Falcon Ridge Subdivision were intended to be, and are hereby conveyed in this deed." AP 191. The only relevant difference between the original deed and the Deed of Correction is that the description of the real estate in the Deed of Correction additionally included Lot 94, where the prior deed that it corrected did not, to wit:

> Lots 26-42, inclusive, Lots 44-54, inclusive, Lots 63-67, including, Lots 89, 90, 91, 94 and Tracts A, B, and C, Falcon Ridge Subdivision, Beaver Pond District, Mercer County, West Virginia, as shown upon a Map entitled "MAP SHOWING SUBDIVISION

> OF HILLTOP MANOR BLUEWELL DEVELOPMENT CORP BEAVER POND DISTRICT MERCER COUNTY BLUEWELL, WEST VIRGINIA Scale 1" = 20', Feb.-Nov. 1976 A. M. Shields Reg. Prof. Eng.", and known as Plat No. 6995
>
> Hastings Street, situate between Lots 89 and 103 as shown on Plat no. 6995
>
> Somerset Lane from Saxon Street to its terminus at Lots 66 and 67, and the plat road between Lot 94 and Lot 19 from Circle Drive to Hastings Street between Lots 26 and 52 to its terminus at Lot 43
>
> Interest and rights of Shoemaker Construction, Inc. in and to streets reserved from that certain Deed dated September 18, 207, of record in the Clerk's office in Deed Book 918, at page 286.
>
> The easement for ingress, egress and utility lines for purposes over the streets conveyed to Falcon Ridge Unit Owners Association, Inc.

AP 190-191.

The Shoemakers did not convey the land to Petitioners subject to the Falcon Ridge Declaration. AP 190. Neither of the Shoemaker deeds to Petitioners, the first in 2020 and the second in 2021, contains any text, provision or clause that makes the real property conveyed to Petitioners subject to the Falcon Ridge Declaration. *Id*.

The Shoemakers, as grantors, recited in the deed that they "further convey all of their interest and the interests of Shoemaker Construction Company, Inc. in and to streets reserved from that certain Deed dated September 18, 2007, or record in the said Clerk's Office in Deed Book 918, at page 286" and "further convey[ed] . . . the easement reserved from that Deed for ingress, regress and utility lines for purposes over the streets conveyed by the Deed to" Respondent. AP 191.

In 2010, the Shoemakers conveyed to David L. Harvey "Lots 79 through 88, inclusive, Lots 104 through 120, inclusive, and the eastern portion of Lot 62" shown on Plat 6995, for a total of 27 lots. AP 361-363; Deed Book 956, at page 466. The Shoemakers' deed to Mr. Harvey omitted

any reference to the Falcon Ridge Declaration. AP 361. Later, by a deed dated July 29, 2020, Crazy Mountain Cycles, LLC acquired the same lots. AP 198.

HOA Minutes State Petitioners' Lots Not Part of Falcon Ridge

Minutes of Respondent members' February 25, 2006 meeting, featuring Mark and Rhonda Shoemaker as the declarant, disclose that "Rhonda reviewed the Declaration . . ." and a "lengthy discussion was held concerning how to collect delinquent dues." AP 350. The Minutes state: "Beginning in 2007 dues will be assessed per lot owned, and provided for in the Declaration . . . Rates per lot were discussed and the following figures were discussed. Based on 42 lots in Phase I of Falcon Ridge, and using the following calculations, a projected income from dues was discussed." AP 351. None of the lots that Petitioners acquired from Shoemaker were included in the 42 lots or subject to assessment.

Minutes of Respondent members' meeting for September 7, 2006 state:

> A member asked the UOA to consider paving the road which connects Saxon Street to his existing driveway. He said he was told when his house was built that it would be paved. He indicated that he often has problems getting over the 'ruts' that have washed out during heavy rains. Johnny told him that we have funds for new paving or repair of existing streets at this time. *Steve Spencer told the group that the road in question is a part of Phase III, which is not currently being considered for development. It is therefore private property and in no way a part of Phase I.* Benny asked Johnny to confirm ownership of the road and provide that information to him.

AP 355 (emphasis supplied).

At Respondent's request, Phillip B. Ball, a Princeton lawyer, wrote an April 22, 2020 letter concerning the "Falcon Ridge Restrictions." AP 358. Mr. Ball's letter states in part:

> After you and I spoke last week, I went through our files to see if I could locate the 'Schedule A-1' which was set out in the restrictive covenants of Falcon Ridge. I did not, but I did locate a note where Rhonda Shoemaker had talked with my partner Tom Lilly about the

> Shoemakers authority under the restrictive covenants. Specifically, Article IV, which states that 'The Declarant (*i.e.* Shoemaker Construction Co) reserves the right to create a number of units to be determined by Declarant,' and Article VIII Section 8.1(d). which allows 'the right by amendment to withdraw real estate from the Common Interest Community.
>
> The ability of the Declarant (Shoemaker) to exercise the authority in these Articles was for the period of 15 years, which pursuant to the restrictive covenants, expired on September 27, 2009. Using the above language, *the Shoemakers, by deed dated February 27, 2008, conveyed all of the unsold property unto themselves individually, without the restrictions in the deed. Which effectively eliminated the restrictions from the property. Thereafter, the Shoemakers conveyed portions of the property to various individuals, some with the restrictions attached, which is their right, and some without.*
>
> So it appears that what I told you and Steve Spenser, was not accurate. I was only looking at the restrictions, and not a full examination of all of the deeds that have been put on record. I apologize for not having the full information available when I talked to you previously. I will be sending this same letter to Steve so that he knows as well. Just so you know, I did tell the young lady who owns the adjoining property that the restrictions did apply, as did Bill Winfrey, but if she looks hard at the deeds and restrictions, she may figure out that *they don't apply*.

Id. (emphasis supplied).

Respondent then asked Mr. Ball to review the public records. He sent a September 2, 2020 letter about the real property shown on Plat 6995 that Crazy Mountain Cycles had acquired:

> At your request, I have reviewed the records in the Office of the Clerk of the County Commission of Mercer County, West Virginia, concerning restrictive covenants, and any changes thereto, regarding the Falcon Ridge Subdivision here in Mercer County. As you know, we have spoken several times in regard to this matter, the sale of the property to David Harvey, and thereafter unto his heirs.
>
> The first thing I find in this review, that prior to Falcon Ridge Subdivision being named Falcon Ridge, it was named Hilltop Manor and restrictive covenants dealing with Hilltop Manor are recorded in Deed Book 572, at Page 225. Later when Mr. and Mrs. Shoemaker, doing business as Shoemaker Construction Company, Inc [sic], obtained this subdivision, they renamed it Falcon Ridge

> Subdivision and filed a Declaration . . . . Later, by deed dated February 27, 2008, in Deed Book 922, at Page 679 Shoemaker Construction Company, Inc [sic] conveyed the remaining property unto Mark and Rhonda Shoemaker. Thereafter, Mark and Rhonda Shoemaker conveyed unto David Harvey the property in question, in Deed Book 956, at Page 466.
>
> *As you know the Shoemaker's* [sic] *transferred the property to Mr. Harvey without restrictive covenants*, which is allowed by the restrictive covenants, and pursuant to their ownership interest in Falcon Ridge Subdivision . . .

AP 359-360 (emphasis supplied).

No provision or text in the Shoemakers' deeds, the first in 2020 and the second in 2021, to Petitioners purported to convey the lots to Petitioners to make them subject to the Falcon Ridge Declaration. AP 188-189 and AP 190-192.

Shoemaker published an undated four-page brochure describing Phase I of Falcon Ridge with the notations "44 Homesites Open" and "120 Building Sites". AP 274-275. The brochure is not recorded in the Clerk's office (the "Phase I Marketing Brochure"). There is no evidence that Petitioners had knowledge of the Phase I Marketing Brochure.

Respondent, without reference to any public record or instrument, but only to the Phase I Marketing Brochure, claims that the lots or parcels described in the two Shoemaker deeds are subject to assessment for the upkeep of the roads and drains. AP 248.

In addition to the Minutes disclosing the same, Respondent admits that Respondent never assessed Lots 52, 53, 54, 89, 90, 91 and 94, nor collected assessments from any owner of those lots, as being a part of Falcon Ridge until Petitioners acquired them.[9] Respondent's counsel, Ryan Flanagan responded to Petitioners' repeated written requests for information on this point. AP 364.

[9] These, together with the others that Petitioners acquired by the two deeds, are among Petitioners' lots that Respondent claims are subject to the Falcon Ridge Declaration. AP 161-174. The Circuit Court's orders do explain the reasons that Lots 52, 53, 54, 9, 90 and 94 are subject to the Falcon Ridge Declaration and why the other lots that Petitioners acquired by the same deeds are not.

In an *ex parte* communication, a man named Skip Crane, who does not own property or live in Falcon Ridge, wrote the Circuit Court to ask the judge to enforce the use restrictions in the Falcon Ridge Declaration against Petitioners well after the parties briefed the dispositive motions. The Circuit Court entered the letter in the record but failed to strike it as *ex parte*. While Respondents never asked for injunctive relief to enforce the use restrictions in the Falcon Ridge Declaration against Petitioners, Mr. Crane is the only person who alleged, with specificity, to the Circuit Court that Mr. Bellamy [sic] has broken every rule in Respondent and has erected 'tacky' fencing between properties, erected a 'Magic Mart' storage semi-truck trailer in his front yard made a mockery of the entire HOA . . ." AP 458.

Without any motion of or request by Respondent, the Circuit in the Rule 59(e) Order *sua sponte* enjoined that Petitioners

> shall bring their property into compliance with the Restrictive Covenants, including removal of the storage trailers and barbed wire fencing and immediately allow the Falcon Ridge Unit Owners Association access to their property on the Western Portion of Lot 94 and their Rights of Way on Hasting and Saxon Streets within thirty (30) days from the date of this Order.

AP 566. The Circuit Court enjoined Petitioners to conform their real estate to the Falcon Ridge Declaration, which forced Petitioners to comply under the threat of penalty. *Id.*

Assignment of Error no. 1

The Mercer County Circuit Court omitted substantial findings of fact and conclusions of law from both its *Final Order* and its *Rule 59(e) Order* entering summary declaratory judgment for Respondent, preventing meaningful appellate review.

The lower court's two orders are grossly deficient in findings of fact as drawn from the documents, instruments and plats in this case. Read together, the lower court's two orders will constitute the specific law of the case unless corrected on appeal. *See Noland v. Va. Ins.*

Reciprocal, 224 W. Va. 372 (2009).

Moreover, the lower court, without first analyzing and then finding ambiguity in the record documents, nonetheless in the Final Order relied on *parol* evidence in the form of the unrecorded Phase I Marketing Brochure to depart from documents in the public record to conclude that Petitioners acquired their real property subject to the Falcon Ridge Declaration. Further, there is no evidence that Petitioners had knowledge of the brochure. *See Wilbur v. Locust Hill Unit Owners Association, Inc.* (memorandum decision 24-ICA-270 April 29, 2025)("the record is completely devoid of any analysis or affirmative determination by the circuit court regarding its interpretation of the Declaration, especially with respect to the issue of ambiguity. . . the circuit court's failure to enter a detailed trial order with sufficient findings of fact and conclusions of law addressing this significant question of law impedes this Court's ability to conduct a meaningful appellate review of this case on the merits.) Petitioners discuss the impropriety of relying on *parol* evidence below in the absence of meaningful findings of fact and a conclusion of law that the documents are ambiguous.

In its Rule 59(e) Order, the Circuit Court abandons all rules of construction and makes conclusory statements claims to affirm its judgments in the Final Order, again without citing the record documents: "It is this Court's opinion that all of the property in Falcon Ridge was intended to be part of the Falcon Ridge Planned community. The Deed and the Deed of Correction[10] are clear on their faces that all of the lots purchased by the Defendants are part of the Falcon Ridge Subdivision." If the Shoemakers had intended to remove the plots of land from the planned community, that would have been part of the deed as the Deeds maintained the Falcon Ridge Plot numbers." AP 563-564. The Circuit Court's statement wrongly assumes that Petitioners' "lots of

[10] That is, the two deeds by which Petitioners acquired the real estate in issue.

land" were included in Falcon Ridge in the first instance.

None of the lower court's statements is true. Petitioners' lots, just as Crazy Mountain Cycles' lots, were never made subject to the Falcon Ridge Declaration in the first place. No instrument does so. Two lawyers, Bill Winfrey and Phil Ball, opined on this point. AP 358-360. Rhonda Shoemaker herself was quoted as saying they were excluded from Falcon Ridge. Not a single fact or word in the case record supports the Circuit Court's conclusion, made without factual or legal foundation, that "[t]he Deeds in question all expressly state that the Property is part of the Falcon Ridge Declaration." AP 565, Rule 59(e) Order at p. 7. They are false and gratuitous conclusions.

The lower court failed to analyze the case record or to cite to documents in the Final Order and the Rule 59(e) Order to support the declaratory judgments it made. The lower court's legal conclusions were pulled from thin air. For this reason alone, they must be reversed and vacated.[11]

Assignment of Error no. 2

The Circuit Court, in granting summary declaratory judgment to Respondent, failed to apply the *Uniform Common Interest Ownership Act* as the controlling general law of the case.

The Circuit Court's failure to apply the Uniform Act to the facts in this case is a material error that wholly undercuts its declaratory judgments for Respondent, which, without the power or authority to do so, seeks to enforce the servitudes in the Falcon Ridge Declaration against Petitioners. The Circuit fails to refer to, much less to apply, a single provision in the Uniform Act, and, particularly, in Article 2 of the Uniform Act devoted to the "creation, alteration and termination of common interest communities," to this case. Time and again, Petitioners briefed this abject failure. Had the Circuit Court applied the Uniform Act to this case, it could not possibly

[11] If there is remand, the ICA must include specific instructions to the Circuit Court.

have entered summary judgments against Petitioners or for Respondent.

The Uniform Act applies to all "common interest communities", including "planned communities" in West Virginia. Falcon Ridge, created after the Uniform Law's effective date of July 1, 1986, purports to contain more than 12 lots and does not seek to be a "limited expense liability planned community", making Falcon Ridge subject wholly to the Uniform Law. Moreover, the declarant explicitly made Falcon Ridge wholly subject to the Uniform Act: "Now, therefore, Shoemaker Construction Co., Inc. does hereby submit the real property in Beaver Pond District, Mercer County, West Virginia, described in Schedule A-1 to the provisions of the *Uniform Common Interest Ownership Act* . . ." AP 161. The Uniform Act is applicable to Falcon Ridge because the Falcon Ridge Declaration says so.

It is not debatable that Falcon Ridge from its inception has been fully subject to the Uniform Act. Under the Uniform Act, the "declaration must contain . . . a legally sufficient description of the real estate included in the common interest community." W. Va. Code § 36B-2-105(a)(3). The Uniform Act requires there must be "a description of the boundaries of each unit created by the declaration, including the unit's identifying number . . ." W. Va. Code § 36B-2-105(a)(5).

Cases from Colorado are instructive.[12] Applying Colorado's version of the Uniform Law, the Supreme Court of Colorado held: "Every declaration must, at a minimum, contain the mandatory components listed in section 38-33.3-205(1) of the Act. *See* § 38-33.3-205(1)(a)—(q) . . ." *Ryan Ranch Cmty. Ass'n v. Kelly*, 2016 CO 65, 28 (2016); *see also McMullin v. Hauer*, 2018 CO 57, P21 (2018). "Every declaration must, at a minimum, contain the mandatory components listed in section 38-33.3-205(1) of the Act. § 38-33.3-205(1)(a)—(q) . . ." *Ryan Ranch Cmty. Ass'n*

[12] West Virginia courts are required to apply and construe the Uniform Law "so as to effectuate its general purpose to make uniform the law with respect to the subject matter of the chapter among states enacting it." W. Va. Code § 36B-1-110.

v. Kelly, 2016 CO 65, 28 (2016); *also McMullin v. Hauer*, 2018 CO 57, P21 (2018). "These include a sufficient description of the real estate and the boundaries and identifying numbers of the lots made subject to the declaration." *Id.* [13]

The Falcon Ridge Declaration fails these requirements. Article IV *Maximum Number of Units, Boundaries* of the Falcon Ridge Declaration provides:

> Section 4.1 - The Common Interest Community upon creation contains forty-nine (49) units. As other portions are added to this Subdivision, it shall declare the number of units shown on the aforesaid Plat or amended plat. The Declarant reserves the right to create a number of units to be determined by the Declarant.
>
> Section 4.2 Boundaries. Boundaries of each unit created by the Declaration are shown on Microfilm Plat 6995.

AP 53.

Plat 6995 contains 124 lots, including Tracts A, B, and C, while the Falcon Ridge Declaration declares that Phase I of Falcon Ridge contains only 49 units. The Uniform Act requires that the Falcon Ridge Declaration contain a "statement of the maximum number of units that the declarant reserves the right to create." W. Va. Code § 36B-2-105(a)(3).[14] Given the Falcon Ridge

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[13] In this aspect, the Uniform Law reflects common law: ". . . [T]he description of land in a conveyance must be definite and certain, sufficiently so that the land may be identified; otherwise, it is void for uncertainty." *United Fuel Gas Co. v. Cabot*, 96 W. Va. 387, 395-396 (1924) (citing *Hoard v. Ry. Co.*, 59 W. Va. 91, 53 S.E. 278; *Devlin on Deeds*, sec. 1010).

[14] In *Khan v. Alpine Haven Prop. Owners' Ass'n*, 2016 VT 101, P38 (2016), the Supreme Court of Vermont, a *UCIOA* jurisdiction, wrote: "While preexisting CICs are not required to have a declaration that satisfies the requirements for newly created CICs, it is worth noting that the purported declaration here did not include any of these basic representations, or other very basic requirements such as '[t]he name of each municipality in which any part of the common interest community is located,' '[a] legally sufficient description of the real estate included in the common interest community,' and '[a] statement of the maximum number of units which the declarant reserves the right to create.' 27A V.S.A. § 2-105(a)(2)-(4); *see also Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1281 (Cal. 1994) (explaining that 'the declaration, which is the operative document for the creation of any common interest development, is a collection of covenants, conditions and servitudes that govern the project,' and typically 'describes the real property and any structures on the property, delineates the common areas within the project as well as the individually held lots or units, and sets forth restrictions pertaining to the use of the property')."

Declaration alone, it is impossible for a court to conclude as a matter law which of the 124 lots and tracts on Plat 6995 comprise the 49 lots in Phase I, if, in fact, the declarant decided to subject 49 lots to the Falcon Ridge Declaration.

There is no evidence in the case record that the declarant, in fact, decided or acted to subject 49 lots to the Falcon Ridge Declaration; indeed, the evidence is to the contrary. Minutes of Respondent state: "Beginning in 2007 dues will be assessed per lot owned, and provided for in the Declaration . . . Rates per lot were discussed and the following figures were discussed. Based on 42 lots in Phase I of Falcon Ridge, and using the following calculations, a projected income from dues was discussed." 62. Respondent produced no instruments from the public record to show which lots were actually conveyed subject to the Falcon Ridge Declaration.

The Circuit Court concluded in the Final Order "[t]hat Schedule A-1 was not attached to the Restrictive Covenants . . . is of no moment." AP 565, Final Order at p. 7. This is an absurd and risible conclusion. It alone discredits the Circuit Court's adjudication of this case.

The Circuit Court has no power to ignore the Uniform Act nor to "vary" the provisions of the Uniform Act nor to change its "limitations or prohibitions". The Uniform Act forbids what the Circuit Court has purported to determine. W. Va. Code § 36B-1-104. The Circuit Court had no power to ignore the stark fact that the Falcon Ridge Declaration omits a "legally sufficient description of the real estate included" in Falcon Ridge and that, standing alone, the Falcon Ridge Declaration cannot and does not create a "common interest community." *Sed contra*, *Justice Holdings, LLC v. Glade Springs Vill. Property Owners Ass'n*, 250 W. Va. 563, 569 (2023). Therefore, because the Falcon Ridge Declaration omits a "legally sufficient description" of the real estate and "description of the boundaries of each unit created by the declaration, including the unit's identifying number," the Falcon Ridge Declaration could not have created a valid "common

interest community." Without more, Falcon Ridge cannot be sustained as a valid or lawful "common interest community" under the Uniform Act.

The Final Order and the Rule 59(e) Order do not include sufficient findings of fact to support the Circuit Court's conclusions of law that Falcon Ridge is a "common interest community" and that Petitioners' lots were made subject to the Falcon Ridge Declaration. For these reasons, the Final Order and the Rule 59(e) Order must be reversed and vacated.

Assignments of Error nos. 3 and 4

The Circuit Court erred in concluding that Petitioners' lots were conveyed and acquired subject to the Falcon Ridge Declaration when they were not.

The Circuit Court erred in concluding that the "deeds in question all expressly state that the Property is part of the Falcon Ridge Subdivision" and "as such, they are governed by the Restrictive Covenants set out for use in the Falcon Ridge planned community".

That the Falcon Ridge Declaration, considered alone, fails to create a valid "common interest community" does not end the analysis whether there exists a "common interest community" in this case. It is Petitioners' position—one that the Circuit Court declined to address—that the Falcon Ridge Declaration creates a "common interest community" under the Uniform Act only to the extent that the declarant conveyed a particular lot or lots on Plat 6995 explicitly subject to the Falcon Ridge Declaration.

There is no West Virginia case on the issue. But the courts of Colorado, a UCIOA jurisdiction, have acknowledged the creation of a common interest community in that state where several documents or instruments in the public record, when read together, can satisfy the requirements under UCIOA that the declaration contain a "legally sufficient description of the real

estate included in the common interest community." The Supreme Court of Colorado held:

> [u]nder CCIOA[15], a common-interest community may be created 'only by recording a declaration executed in the same manner as a deed.' § 38-33.3-201(1), C.R.S. (2017). A declaration is 'any recorded instruments however denominated, that create a common interest community, including any amendments to those instruments and also including, but not limited to, plats and maps.' § 38-33.3-103(13). Thus, 'a declaration need not consist of a single document.' *Pulte Home*, ¶ 43, 382 P.3d at 829. That said, for one or more documents to create a common-interest community (and thus amount to a declaration), 'they must, at a minimum, (1) establish an obligation to pay for various expenses associated with common property and (2) *attach that obligation to individually owned property*.' *Id.* at ¶ 44, 382 P.3d at 829 . . .

McMullin v. Hauer, 2018 CO 57, P15 (2018) (emphasis supplied).

This is a two-prong test for West Virginia to adopt: For one or more documents to create a common-interest community (and thus amount to a declaration), they must at a minimum (1) establish an obligation to pay for various expenses associated with common property in a common interest community and (2) attach that obligation to individually owned property.[16] This test should include a third prong that the documents, taken together, must include the contents for a declaration required by W. Va. Code § 36B-3-105.

The requirement that a conveyance must attach that obligation to individually owned property is not novel. It is basic in the law of servitudes that underpins all common interest communities. According to § 2.1 *Restatement Third, Property (Servitudes)*, "[a] servitude is created (1) if the owner of the property to be burdened (a) enters into a contract or makes a

[15] "*CCIOA*" stands for the "*Colorado Common Interest Ownership Act*".

[16] West Virginia Code § 36B-1-13(7) defines a "common interest community" as "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvement of other real estate described in a declaration."

conveyance intended to create a servitude that complies with § 2.7 *Restatement Third, Property (Statute of Frauds)* or § 2.9 *Restatement Third, Property (Exception to the Statue of Frauds)*; or (b) *conveys a lot or unit in a general-plan development or common-interest community subject to a recorded declaration of servitudes for the development or community* . . .” (emphasis supplied). According to § 2.7 *Restatement Third, Property (Servitudes)*, “[t]he formal requirements for creation of a servitude are the same as those required for creation of an estate in land of like duration.”

The West Virginia statute of frauds provides that “[n]o estate of inheritance or freehold, or for a term of more than five years, in lands, or any other interest or term therein of any duration under which the whole or any of the corpus of the estate may be taken, destroyed, or consumed, except for domestic use, shall be created or conveyed *unless by deed* or will.” W. Va. Code § 36-1-1 (emphasis supplied).

In West Virginia, “[a] deed is nothing more than ‘a written, contractual agreement reflecting the parties’ intent.’” *Faith United Methodist Church v. Morgan*, 231 W. Va. 423, 745 S.E.2d 461, 481, 745 S.E.2d 461, 481 (2013); *also Cabot Oil & Gas Corp. v. Huffman*, 227 W. Va. 109, 117, 705 S.E.2d 806, 814 (2010) (a “deed reflects the agreement” of the seller and buyer, and as such, a “deed is a contract”); Syl. pt. 2, *Koen v. Kerns*, 47 W. Va. 575, 35 S.E. 902 (1900) (a “deed represents the final contract of the parties for the sale of property”); *Am. Buttonhole, Overseaming & Sewing Mach. Co. v. Burlack*, 35 W.Va. 647, 652, 14 S.E. 319, 320 (1891) (“A deed is a writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is, to the things contained in the deed.”).

Under the Uniform Act, whether a lot has been subjected to servitudes for inclusion in a common interest community, such as contained in the Falcon Ridge Declaration, cannot be left to

the kind of contemptible, judicial free-wheeling that the Circuit Court engaged in. The lower court violated the principle that courts "should take great care not to make the contract speak where it was intentionally silent; and above all, that they do not make it speak entirely contrary to what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties." *Berry v. Humphreys*, 76 W. Va. 668, 672, 86 S.E. 568, 569 (1915) (citation omitted). The Circuit Court exceeded its power because "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syl. pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 486, 128 S.E.2d 626, 629 (1962).

Petitioners were the only parties to place documents into evidence on this point. After recording the Falcon Ridge Declaration, the declarant thereafter conveyed some lots shown on Plat 6995 by deeds that explicitly made the lots subject to the Falcon Ridge Declaration. Shoemaker conveyed only certain lots subject to both the Hilltop Manor Declaration as purportedly amended by the Falcon Ridge Declaration. The deed from Shoemaker to Bennie and Mabel Louise Belcher, dated May 16, 1994, conveyed "Lots 57 and 58 of the Falcon Ridge Subdivision shown upon a map entitled 'Map Showing Subdivision of Hilltop Manor . . .' *etc*. and made the conveyance to the Belchers subject to a Declaration of Protective Covenants and Restrictions dated November 19, 1978, recorded in Deed Book 572 at Page 225 and supplemented by instrument dated May 16, 1979, recorded in Deed Book 575 at Page 288 and to be further supplemented and amended by Amended Declaration of Protective Covenants and Restrictions[[17]] to be filed forthwith." AP 153.

In another example, a deed from the Shoemakers to Sheila L. Hall, dated August 30, 2010, conveyed "Lot 12 of the Falcon Ridge Subdivision" and made the conveyance . . . subject to a

[17] That is, the Falcon Ridge Declaration.

Declaration of Protective Covenants and Restrictions dated November 19, 1978, recorded in Deed Book 572 at Page 225 and supplemented by instrument dated May 16, 1979, recorded in Deed Book 575 at Page 288, as amended by a Declaration of Covenants, Conditions and Restrictions for Falcon Ridge Subdivision of record in Deed Book 750, at page 110. AP 197.

These are the only two deeds in the case record that show that these three lots, 12, 57 and 58, were made subject to the Falcon Ridge Declaration.

Meanwhile, Petitioners' lots, were not. For these reasons, this Court must reverse and vacate the Circuit Court's conclusion of law that Petitioners' lots were made subject to the Falcon Ridge Declaration.

The Circuit Court's errors do not end there.

Assignment of Error no. 5

As Assignment of Error no. 5 states, the Circuit Court incorrectly concluded in the Final Order that Petitioners' lots were conveyed and acquired subject to the Falcon Ridge Declaration, improperly relying on *parol* evidence without first finding that the documents were ambiguous.

The deeds from Shoemaker to Petitioners are unambiguous that the declarant did not convey them real property subject to the Falcon Ridge Declaration. Yet, the Circuit Court disregarded the clear intent expressed in the deeds from Shoemaker to Petitioners that the lots conveyed by them were free of the Falcon Ridge Declaration. With first finding ambiguity in the documents, the Circuit relied on *parol* evidence contained in the Phase I Marketing Brochure to gin up a phony basis for its conclusion that "it is clear" that "the intention of the Shoemakers . . . was to keep the plots of land within the Falcon Ridge Planned Community, and as such, they remain governed by the Rules of Restrictive Covenants." AP 562-563, Final Order at pp. 4-5.

From the outset, the Circuit Court failed to analyze whether the deeds were ambiguous on

the point. Whether a contract is ambiguous is a question of law for the court alone to answer.. Syl. pt. 1, *Citynet, LLC v. Toney*, 235 W. Va. 79, 80-81, 772 S.E.2d 36, 37-38 (2015). "Where the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl. pt. 2, *Citynet, LLC v. Toney*, 235 W. Va. 79, 81, 772 S.E.2d 36, 38 (2015). "It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." Syl. pt. 3, *Citynet, LLC v. Toney*, 235 W. Va. 79, 81, 772 S.E.2d 36, 38 (2015).

This is the case of the lots that Petitioners acquired from the declarant of Falcon Ridge. In 2020, Mark T. Shoemaker by Mark Timothy Shoemaker, Jr. his attorney-in-fact, conveyed to Petitioners all of the lots and the real property described therein without subjecting them to the Falcon Ridge Declaration:

> Lots 26-42, inclusive, Lots 44-54, inclusive, Lots 63-67, including, Lots 89, 90, 91 and Tracts A, B, and C, Falcon Ridge Subdivision, Beaver Pond District, Mercer County, West Virginia, as shown upon a Map entitled "MAP SHOWING SUBDIVISION OF HILLTOP MANOR BLUEWELL DEVELOPMENT CORP BEAVER POND DISTRICT MERCER COUNTY BLUEWELL, WEST VIRGINIA Scall 1" = 20', Feb.-Nov. 1976 A. M. Shields Reg. Prof. Eng.", and known as Plat no. 6995
>
> Hastings Street, situate between Lots 89 and 103 as shown on Plat no. 6995
>
> Un-Named Street situated between Lots 63, 64 and Tracts A and B

AP 188.

Later, by a Deed of Correction, Mark Timothy Shoemaker, Jr. and Alisha Shoemaker Sudderth, sole heirs of Mark Timothy Shoemaker, Sr., corrected the description of real property

conveyed to Petitioners, essentially for the purpose to also convey to them Lot 94 as shown on Plat 6995:

> Lots 26-42, inclusive, Lots 44-54, inclusive, Lots 63-67, including, Lots 89, 90, 91, 94 and Tracts A, B, and C, Falcon Ridge Subdivision, Beaver Pond District, Mercer County, West Virginia, as shown upon a Map entitled "MAP SHOWING SUBDIVISION OF HILLTOP MANOR BLUEWELL DEVELOPMENT CORP BEAVER POND DISTRICT MERCER COUNTY BLUEWELL, WEST VIRGINIA Scale 1" = 20', Feb.-Nov. 1976 A. M. Shields Reg. Prof. Eng.", and known as Plat no. 6995
>
> Hastings Street, situate between Lots 89 and 103 as shown on Plat no. 6995
>
> Somerset Lane from Saxon Street to its terminus at Lots 66 and 67, and the plat road between Lot 94 and Lot 19 from Circle Drive to Hastings Street between Lots 26 and 52 to its terminus at Lot 43
>
> Interest and rights of Shoemaker Construction, Inc. in and to streets reserved from that certain Deed dated September 18, 207, of record in the Clerk's office in Deed Book 918, at page 286.
>
> The easement for ingress, egress and utility lines for purposes over the streets conveyed to Falcon Ridge Unit Owners Association, Inc.

AP 190-191.

The Shoemakers conveyed the lots and other real estate described in those deeds to Petitioners but did not make them subject to the Falcon Ridge Declaration. The Shoemaker deeds to Petitioners, one in 2020 and the other in 2021, contain no text, provision or clause that makes the real property conveyed to Petitioners subject to the Falcon Ridge Declaration. AP 190.

The Circuit Court relies solely on the opinion in *Jubb v. Letterle*, 185 W. Va. 239, 406 S.E.2d 465 (1991) (*per curiam*):

> Where the owner of land divides it into lots in pursuance of a general plan for the development of an exclusively residential area and conveys the several lots to different grantees by deeds containing identical or substantially similar covenants restricting the use of the lots to residential purposes, an action in the nature of a suit in equity may be maintained by an owner of one of such lots against the owner or owners of any other lot to compel compliance with the restriction. Syl. Pt. 1, Wallace v. St. Clair, 147 W. Va. 377, 127 S.E.2d 742 (1962).
>
> Where the owner of land divides it into lots in pursuance of a general plan for the development of an exclusively residential area and conveys the several lots to different grantees by deeds containing identical or substantially similar covenants restricting the use of the lots to residential purposes, such restriction must be construed, in the light of the surrounding circumstances and the obvious purpose sought to be achieved, so as to ascertain the true intent thereof as expressed in the language employed. Such restriction is valid, not violative of public good, inimical to the public policy or subversive to public interests. The resulting right of the owner of each lot to enforce the restriction against the owner of every other lot is a substantial and valuable right, and the owner of any lot should not be denied the right to enforce such restriction by estoppel, waiver or abandonment unless upon a clear showing and for cogent reasons. Syl. Pt. 3, *Wallace v. St. Clair*, 147 W. Va. 377, 127 S.E.2d 742 (1962).

Syl. pts. 1, 2 and 3, J*ubb v. Letterle*, 185 W. Va. 239, 241 (1991).

First, this Court must directly confront that the Uniform Act has clearly abrogated the holdings in *Jubb v. Letterl*e to the extent that they conflict with the rules stated in the Uniform Law on the creation of common interest communities in West Virginia. Petitioners ask this Court to hold that the Uniform Act is an abrogation of the common law.

Second, the facts in *Jubb v. Letterle* are highly distinguishable from those in this case. In *Jubb*, the declarant, that is, developer, had filed a new, single plat of subdivision for the proposed planned community, that is, common interest community, in the Mineral County Clerk's office. Mountainlaire Village was developed on a greenfield site and some lots divided and conveyed

from it referring to the plat.

In this case, there clearly exists a material question which lots on Plat 6995 comprise up to the 49 lots that the declarant reserved the right to create. Moreover, in this case there is no ambiguity whether Petitioners' lots were made subject to the Falcon Ridge Declaration because they were not. And if there were an ambiguity, the Circuit Court refused to acknowledge the evidence in the record resolving the ambiguity in favor of Petitioners, as discussed *infra.*

During its *de novo* review, if this Court finds there is an ambiguity on the issue whether Petitioners acquired their lots subject to the Falcon Ridge Declaration, this Court must resolve the ambiguity by construing the Falcon Ridge Declaration and the two deeds by which Petitioners acquired their lots against Shoemaker and in favor of Petitioners and concluding that Petitioners acquired their lots free of the Falcon Ridge Declaration.

Assignment of Error no. 6

The Circuit Court erred in concluding that Petitioners' lots are subject to the Falcon Ridge Declaration while Crazy Mountain Cycle LLC's lots are not subject to the Falcon Ridge Declaration even though the declarant's conveyancing of them was effectively the same.

First, Petitioners urge this Court specifically to compare the deeds in the chain of title to the lots conveyed to Crazy Mountain Cycles [AP 185-187] with the deeds from Shoemaker to Petitioners. AP 188-192. Even a casual comparison of the deeds reveals that the conveyances to the parties are indistinguishable on the relevant point of law. It is patent from the deeds themselves that none of the lots, comprising the unsold lots on Plat 6995, acquired by Crazy Mountain Cycles and Petitioners were made subject to the Falcon Ridge Declaration.

Second, Petitioners and Respondent certainly agree with the Circuit Court's order concluding that Crazy Mountain Cycles' lots were conveyed free of the Falcon Ridge Declaration.

AP 479. It is thus puzzling if not suspicious that the Circuit Court will not budge from its conclusion that Petitioners' lots were conveyed subject to the Falcon Ridge Declaration where the texts of the deeds are the same.

Third, the Circuit Court has made wholly incompatible conclusions of law. If it is true that Crazy Mountain Cycles' lots were conveyed free of the Falcon Ridge Declaration, then it must be also true that Petitioners' lots were conveyed free of the Falcon Ridge Declaration.

Fourth, Respondent should be estopped from asserting that Petitioners' lots and other real estate are subject to the Falcon Ridge Declaration when Respondent so clearly has asserted the contrary regarding Crazy Mountain Cycles' lots.

Finally, reversing the Circuit Court's summary declaratory judgment in favor of Respondent and for Petitioners would harmonize with the Joint Agreed Order of Dismissal entered by the Court on May 10, 2024. AP 202-203.

The glaring legal inconsistency between the Circuit Court's orders excluding Crazy Mountain Cycles' lots (AP 202-203 and AP 477-479) and the Final Order and the Rule 59(e) Order must be resolved in favor of Petitioners. For this reason, this Court must reverse and vacate the Final Order and the Rule 59(e) Order.

Assignment of Error no. 7

The Circuit Court erred in applying W. Va. Code § 36-3-11 to divest Petitioners of their title to Lot 94 except the "western portion of Lot 94" and invalidating Petitioner's Deed of Correction.

The Rule 59(e) Order entered *sua sponte*, purports to void the Deed of Correction by which Petitioners acquired the "western portion of Lot 94". AP 560. First, the ruling based on W. Va.

Code § 36-3-11[18] completely sandbagged Petitioners. Respondent first discussed W. Va. Code § 36-3-11 in its brief on the parties' cross motions for summary judgment. Before then, Petitioners had no notice of Respondent's claim seeking not only to invalidate the Deed of Correction by which Petitioners acquired part of the disputed Lot 94 by virtue of W. Va. Code § 36-3-11 but also its request sanctions against Petitioners under W. Va. Code § 36-3-11(k). Respondent plead nor factual allegations nor sought relief against Petitioners in its Complaint under W. Va. Code § 36-3-11. Respondent plead no factual allegations sufficient to give Petitioners general notice as to the nature of its claim.

Second, W. Va. R. Civ. P. 54, indeed, can "support a finding that it is not necessary for [plaintiffs] to set forth the specific legal theory upon which they rely for relief *as long as they set forth sufficient factual allegations to state a claim showing they are entitled to any relief which the court may grant*." *Hawkins v. Ford Motor Co.*, 211 W. Va. 487, 494-495 (2002) (emphasis supplied). Notice to Petitioners is absent here. Respondent made no factual allegations to give Petitioners notice that it claimed that Petitioners' title to a part of Lot 94 would be in issue.

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[18] West Virginia Code § 36-3-11(c) provides:

Prior to recording a corrective affidavit, notice of the intent to record the corrective affidavit, of each party's right to object to the corrective affidavit, and a copy of the corrective affidavit shall be served upon:

(1) All parties to the deed, deed of trust, or mortgage, including the current owner of the property;
(2) The attorney who prepared the deed, deed of trust, or mortgage, if known and if possible;
(3) To the title insurance company, if known;
(4) To the adjoining property owners;
(5) To the property address for the real property conveyed by the deed, deed of trust, or mortgage needing correction;
(6) If a local entity is a party to the deed, deed of trust, or mortgage, the notice and a copy of the corrective affidavit required by this subsection, to the county, city, or town attorney for the local entity, if any, and if there is no such attorney, then to the chief executive for the local entity. For the purposes of this section, the term "party" includes any local entity that is a signatory; and
(7) If the State of West Virginia is a party to the deed, deed of trust, or mortgage, the notice and a copy of the corrective affidavit required by this subsection, to the Attorney General and to the director, chief executive officer, or head of the state agency or chairman of the board of the state entity in possession or that had possession of the property.

Third, even Rule 54(c) is not "without its limits," because "[a] party will not be given relief not specified in its complaint where the 'failure to ask for particular relief so prejudiced the opposing party that it would be unjust to grant such relief.'" *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 716 (quoting *United States v. Marin,* 651 F.2d 24, 31 (1st Cir. 1981)). For example, "a substantial increase in the defendant's potential ultimate liability can constitute specific prejudice barring additional relief under Rule 54(c)." *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 716-717 (citing *Goodman v. Poland*, 395 F. Supp. 660, 685 (D. Md. 1975)). That is both Petitioners' harm and prejudice here. The Circuit Court below quite literally divested Petitioners' title, and thus its, ownership, to part of Lot 94 and while, incredibly, ruling that Petitioners "did not follow the statutory requirements to correct the deed to include any portion of Lot 94" and thus mooting "any question regarding the placement of the sign". AP 565, Rule 59(e) Order at p. 7. The Circuit Court divested Petitioners of "the streets and easements that were added under the Deed of Correction . . . as it was incorrected filed." AP 566, at p. 8.

Petitioners had no notice that their ownership was in issue in this case, or that they were at any risk of losing title to the real estate interests that they had acquired by the two deeds from Shoemaker. A complaint must give the defendant and its counsel "the opportunity to make a 'realistic appraisal of the case, so that [their] settlement and litigation strategy [could be] based on knowledge and not speculation.'" *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 717 (citing Fed. R .Civ. P. 26(b)(2), Advisory Committee Notes to 1970 amendments). Rule 54(c) permits relief based on a particular theory of relief only if that theory was squarely presented and litigated by the parties at some stage or other of the proceedings. *Evans Products Co. v. West American Ins. Co.*, 736 F.2d 920, 923-924 (1984) (emphasis added) (citing *Cioffe v. Morris*, 676 F.2d 539, 541 (11th Cir. 1982)). W. Va. R. Civ. P. 54(c) gives a judge discretion to offer relief not

requested in a complaint *sua sponte*. Yet, a defendant must be given due process to defend the claim. A court may not grant surprise relief if it would be unjust. *Gilbane Bldg. Co. v. FRB*, 80 F.3d 895, 901(1996) (citations omitted); *United States v. Cambridge*, 799 F.2d 137, 140 ("Implementation of Rule 54(c), of course, is improper if it allows unfair surprise of a defendant or allows a plaintiff to obtain relief which the defendant has not been called upon to defend.") (citations omitted).

Fourth, put yet another way, relief may be based on a theory of recovery only if that theory was presented in the pleadings or tried with the express or implied consent of the parties. *Monod v. Futura, Inc.*, 415 F.2d 1170, 1174 (10th Cir. 1969).

Fifth, the Circuit Court rendered these "rulings" not within the Final Order but within the Rule 59(e) Order whose contents by operation of W. Va. R. Civ. P. 59(e) itself are strictly confined to the rulings contained in the Final Order. After all, it was Petitioners, and not Respondent, that moved the Circuit Court to amend the Final Order under W. Va. R. Civ. P. 59(e).

Sixth, substantively, the provisions of W. Va. Code § 36-3-11 are wholly inapplicable to any fact or set of facts in this case. West Virginia Code § 36-3-11 applies only in instances where there exists an "obvious description error". W. Va. Code § 36-3-11(c). Under the statute, an "obvious description error" is defined to mean

> an 'error in a real property description contained in a recorded deed, deed of trust, or mortgage where (A) the parcel is identified and shown as a separate parcel on a recorded subdivision plat; (B) the error is apparent by reference to other information on the face of the deed, deed of trust, or mortgage, or on an attachment to the deed, deed of trust, or mortgage, or by reference to other instruments in the chain of title for the property conveyed thereby; and (C) the deed, the deed of trust, or mortgage recites elsewhere the parcel's

correct address or tax map identification number.'

W. Va. Code § 36-3-11.

These elements are conjunctive. All must be present for W. Va. Code § 36-3-11 to apply. Elements (B) and (C) are not present in this matter. In 2020, Petitioners acquired a number of Lots shown on Plat 6995 excluding any reference to Lot 94 by a deed from Shoemaker. AP 188-189. In 2021, Petitioners acquired "Lot 94" by the Deed of Correction from Shoemaker that "excepted and reserved from Lot 94, the western portion thereof . . ." AP 190-191. Reviewing the Deed of Correction, this Court will realize that the "claimed error" is not apparent by reference to other information on the face of the Deed of Correction and that the Deed of Correction does not recite elsewhere Lot 94's "correct address or tax map identification number."

Seventh, assuming that W. Va. Code § 36-3-11 applies to the Deed of Correction, that statute does not confer power on a circuit court to divest a party of its real estate interest acquired contrary to the statute. The Circuit Court does not have the power to declare that Petitioners did not acquire title to Lot 94 except the western portion by virtue of the Deed of Correction solely based on the predicate that Petitioners somehow violated W. Va. Code § 36-3-11. This is a novel question of law that this Court must decide.

This is another shocking example of the Circuit Court's baseless and unhinged rulings in this case. The Circuit Court has no factual or legal basis to eliminate Petitioners' vehicular and pedestrian access to their real estate behind Falcon Ridge. Without access through Falcon Ridge, Petitioners' real estate interests become worthless.

For these reasons, the Circuit Court's conclusions on this issue must be reversed and vacated. This Court may enter judgment for Petitioners that they have title to Lot 94 except for the

western portion evidenced by the instruments of record.

Assignment of Error no. 8

Similarly, the Circuit Court erred in applying W. Va. Code § 36-3-11 to divest Petitioners of their title to the streets running through Falcon Ridge for pedestrian, vehicular and utility access as shown on Plat 6995 even though Petitioners acquired the streets subject to the nonexclusive rights of Falcon Ridge unit owners to use them.

In their Counterclaim against Respondent, Petitioners asked for a declaratory judgment that they owned a right of way through Falcon Ridge's streets for utility, vehicular and pedestrian access to their property outside of Falcon Ridge. AP 43-45. The Circuit Court again pulled from thin air its ruling that "the streets and easements that were added under the Deed of Correction" to Petitioners "would be invalid, as that entire Deed of Correction is not valid, as it was incorrectly filed." Rule 59(e) Order.

The Circuit Court omitted the niceties of fact-finding that would actually support its ludicrous conclusion that they have no ownership of and possessory rights to the streets running through Falcon Ridge, including nonexclusive possession. A core defect of the Rule 59(e) Order is that facts simply do not exist to empower the Circuit Court to rule that W. Va. Code § 36-3-11 operated to divest Petitioners of these rights.

Respondent has no claim to exclusive ownership or use of the Falcon Ridge streets. These rights in the streets and roads shown on Plat 6995 Shoemaker Construction Co., Inc. reserved in its deed to Respondent, dated September 18, 2007:

> The said party of the first part does hereby grant, sell and QUIT-CLAIM, with the exception mentioned below, all of its right, title and interest in and to the western portion of Lot 94 over which the right-of-way from Circle Drive presently exists, together with the

> platted portion of the right of way of Hastings Street from its intersection with the western line of Saxton Street to the northwest corner of Lot 25 and to the northeast corner of Lot 90 to the northwest corner of Lot 102, and all of Saxton Street.
>
> *The party of the first part does not sell or convey any of the streets not so mentioned above and the part of the first part further reserves an easement for ingress, egress and utility lines for itself, its assigns and successors across the streets so conveyed herein.*

AP 175-176 (emphasis supplied).

By the Deed dated October 27, 2020, Shoemaker Construction Co., Inc.'s successor in interest, Mark T. Shoemaker, quitclaimed to Petitioners "all of his right, title and interest in Hastings Street, situate between Lots 89 and 103 as shown on said plat, and an un-named street situate between Lots 63, 64, 65 and Tracts A and B and Hastings Street between Lots 26 and 52 to its terminus at Lot 43". AP 188. Petitioners acquired these described streets and roads subject to Respondents' interests in the streets within Falcon Ridge.

Further, by the Deed of Correction dated September 27, 2021, Mark T. Shoemaker's sole heirs, Mark Timothy Shoemaker, Jr. and Alisha Shoemaker Sudderth not only quitclaimed and conveyed their remaining interest in Lot 94 but also "all of their interest and the interests of Shoemaker Construction Company, Inc. in and to streets reserved" and, further, "the easement reserved from that Deed for ingress, egress and utility lines for purposes over the streets conveyed by that Deed to" Respondents. Shoemaker stated that "the purpose of [the Deed of Correction] is to clarify that all of the interest previously held by Mark Timothy Shoemaker and Shoemaker Construction Company, Inc. over and near the Falcon Ridge Subdivision were intended to be, and are hereby conveyed in this Deed." AP 190-191.

The Circuit Court's assertions of fact are plainly false. Petitioners acquired all of their interests by either or both the 2020 deed and the 2021 deed.

West Virginia Code § 36-3-11 has no applicability whatsoever to Petitioners' acquisition of their interests in the streets and roads shown on Plat 6995. Petitioners refer this Court to its discussion *supra* on the narrow circumstances under which W. Va. Code § 36-3-11 applies where there exists an "obvious description error". W. Va. Code § 36-3-11(c). Petitioners acquisition of their ownership and possessory rights to the streets and roads of Falcon Ridge do not fall within the circumstances stated in the statute.

Again, assuming that W. Va. Code § 36-3-11 applies to the Deed of Correction, that statute does not confer power on a circuit court to divest Petitioners of their real estate interest in the streets and roads in Falcon Ridge. The Circuit Court does not have the power to declare that Petitioners did not acquire ownership of and possessory rights in the streets and roads in Falcon Ridge by virtue of the Deed of Correction solely based on the predicate that Petitioners somehow violated W. Va. Code § 36-3-11.

This too is a novel question of law that this Court must decide.

Assignment of Error no. 9

At the same time, the Circuit Court erred in concluding that Respondent owns all of Lot 94 and the Falcon Ridge sign.

First, the Circuit Court failed to hold Respondents to their burden of proof to prove its ownership of all of Lot 94. Respondent acquired only the "western portion" of Lot 94 by virtue of its acquisition of a deed in 2007. Petitioners acquired Lot 94 except for the "western portion". "[B]efore a court of equity will entertain a suit to remove a cloud on title, the plaintiff must be the owner of 'a clear, legal and equitable title to the land'". *Tate v. United Fuel Gas Co.*, 137 W. Va. 272, 278, 71 S.E.2d 65, 69 (1952). A "[p]laintiff in ejectment can recover only on the strength of his own title." Syl. 8, *King v. Mullins*, 171 U.S. 404, 405, 18 S. Ct. 925 (1898). A "plaintiff must

establish by a preponderance of evidence and to the satisfaction of the jury the boundaries of the land claimed by him, his exterior lines, before he can recover under his declaration. The burden is on plaintiff to establish his case set up in the declaration.“ *Boggs v. Morrison*, 102 W. Va. 240, 248, 135 S.E. 230, 234 (1926)(citations omitted).

Respondent failed to meet its burden of proof that it owns the residue of Lot 94 that is, in fact, titled in Petitioners' names. There is no chain of title recited in its pleadings. As important, Petitioners placed no evidence in the case record to establish the corners of whatever portion of Lot 94 it might owner.

Second, Respondent's same failure to meet its burden applies to the location of the Falcon Ridge sign. The record is silent on this key issue constituting Respondent's burden. The Circuit Court ignored Respondent's burden of proof and pulled its determination that Respondent owns the sign out of thin air.

Third, there is no instrument or document in the record that establishes or proves Respondent's title or interest in the sign.

Respondents failed to satisfy its burdens of proof to show an unbroken chain of title to the "western portion" of Lot 94 and the sign. This Court must reverse and vacate the Final Order and the Rule 59(e) on this point.

Assignment of Error no. 10

The Circuit Court committed gross abuse of its discretion when it visited some of the real property in issue, without notice to or the presence of Petitioners and their counsel after the close of evidence; such a property view was *ex parte*, wholly irrelevant and improper.

After discovery had closed and the parties had submitted their respective W. Va. R. Civ. P. 56(c) dispositive motions, the Circuit Court visited Falcon Ridge on its own motion without

notice of its decision and in the absence of the parties or their counsel. There is no West Virginia case on this point, of course. In a case in Nebraska, in which the judge was the trier of fact, he, "in the exercise of his discretion, may view the premises, or a part thereof, without the consent of the parties. In doing so it is better practice to inform the parties and their counsel that he intends to do so and, in so far as it is practical, make such inspection in their presence or with an opportunity for them to be present. However, a failure to do so will not necessarily constitute an abuse of discretion. *Lippincott v. Lippincott*, 144 Neb. 486, 488 (1944) (citations omitted).

The judge below was not the trier of fact. The case was submitted on dispositive motions where material facts were not in dispute. It was highly improper for the judge below to visit Falcon Ridge and Petitioner's real estate surrounding it without notice to or the presence of counsel for the parties. This Court must give Petitioners relief from the Circuit Court's abuse of Petitioners' right to know about and to be present for the site view.

Assignment of Error no. 11

The Circuit Court violated Petitioner's due process rights under both the U.S. and West Virginia constitutions for granting Respondent injunctive relief that Respondent did not seek and the Court had no basis to give. The Circuit Court *sua sponte* enjoined Petitioners to conform their real estate outside of Falcon Ridge with the restrictions on use in the Falcon Ridge Declaration. Petitioners ask this Court to refer to their discussion of Rule 54(c) under Assignment of Error no. 6 for its applicability to this Assignment of Error no. 11. Respondent did not ask for injunctive relief and Petitioners had no notice in advance of having to bear economic and physical hardship to conform their real estate to the use restrictions particularly while pending appellate review.

The Circuit Court denied Petitioners their due process rights. For these reasons, this Court, in addition to the legal remedies sought, must dissolve the Circuit Court's injunction, whether

temporary or permanent, and award Petitioners their lawyers' fees, costs and expenses.

VI. CONCLUSION AND PRAYER FOR RELIEF

Petitioners, Lee and Nancy Bellomy, pray that this Court reverse and vacate both the Final Order and the Rule 59(e) Order and enter declaratory judgments for them in accordance with the points in this Petition; dissolve the Circuit Court's injunction against Petitioners; award Petitioners their lawyers' fees, costs and expenses, and give other relief just and reasonable.

HARVEY LEE BELLOMY
and NANCY BELLOMY

By their counsel,

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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Harvey Bellomy and Nancy Bellomy,

Defendants and
Counter-Plaintiffs Below, Petitioners,

v.

No. 25-ICA-279

On appeal from Mercer County
Circuit Court no. 23-C-59

Falcon Ridge Homeowners Association, Inc.,

Plaintiff and
Counter-Defendant Below, Respondent.

CERTIFICATE OF SERVICE

I, Mark A. Sadd, counsel for Petitioners, do hereby affirm that on September 30, 2025 counsel for Respondent was served with a copy of *Brief of Petitioners Lee and Nancy Bellomy,* via electronic mail and through File and Serve Xpress to the following record of counsel:

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