

**INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA**

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No. 25-ICA-280

MICHAEL B. WILBER,

Appellant,

v.

**LOCUST HILL UNIT OWNER'S
ASSOCIATION, INC.,**

**Appeal from an Order
of the Circuit Court of
Jefferson County,
Case No. CC-19-2022-C-97**

Appellee.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Following Remand the Circuit Court found the Covenants to be unambiguous and thus the interpretation of the Covenants was an issue of law for the Court to decide, not the jury.

B. Following Remand, the Circuit Court relied upon information that was not in evidence and reached beyond the record to draw the conclusions contained in the Order entered on June 13, 2025, and did not correct or address the requirements of the Remand Order from this Court.

C. Summary judgment with regard to the claim against Michael B. Wilber (“Appellant” or “Mr. Wilber”) was sought by virtue of the fact that the Restrictive Covenants (“Covenants”) prohibit only certain kinds of flags and the plain language of the Covenants regarding flags does not prohibit the flag displayed at Mr. Wilber’s residence. Denying Summary Judgment in Mr. Wilber's favor, and the broad interpretation made by the Circuit Court in the June 13, 2025 Order, was reversible error because there is no provision in the Covenants prohibiting Mr. Wilber’s “Let’s Go Brandon” flag.

D. Following Remand, the Circuit Court erred in failing to strictly construe the Covenants in denying Summary Judgment in Mr. Wilber's favor because Covenants cannot be enlarged by implication or extended by construction beyond their original plain language, and reference to the North Carolina Planned Community Act is simply not applicable as a basis for interpreting a restrictive covenant under West Virginia law.

E. The Circuit Court erred in dismissing Mr. Wilber's Counterclaim as moot after granting Mr. Wilber the injunctive relief sought in his Counterclaim making Mr. Wilber the prevailing party with regard to the breach of contract and denied him the right to seek and recover damages by failing to grant Partial Summary Judgment in his favor.

F. If impaneling a jury was not reversible error, the Circuit Court still committed reversible error at Trial.

II. STATEMENT OF THE CASE

On August 9, 2022, Locust Hill Unit Owner's Association (“Locust Hill” or “HOA”) filed a Complaint for Injunctive Relief and Damages against Michael B. Wilber (“Appellant” or “Mr. Wilber”). Mr. Wilber owns real property at 90 Sawgrass Drive, Charles Town, West Virginia located in the Locust Hill Subdivision. The HOA sought to

enforce the Covenants by alleging that Mr. Wilber wrongly displayed a “political campaign sign” on his real property when he displayed a “Let’s Go Brandon” flag. The HOA alleged that Mr. Wilber was “displaying a prohibited political campaign sign at [his] property in clear violation of the applicable restrictive covenants.” (JA 0004) However, the Covenants simply did not prohibit Mr. Wilber from displaying this flag at his property. A plain reading of Section 10.2-1 of the Covenants confirms that the display of flags on community property is permitted. Further, 30(b)(7) representatives of the HOA admitted that “[t]here is no provision at all in your [Covenant] about flags,” Deposition of Renee Sanders, July 25, 2023 70:17-22 (JA 0552)¹ and that a flag interpreted as carrying a political or social message is not in violation of the Covenant.” The dispute arises from the Covenant in Section 10.2-1 of the Owner’s Association Governing Documents (“Covenants”) which regulates signs and flags:

Signs. No sign of any kind shall be erected within the Property without the written consent of the Board of Directors except those signs used in any subsequent sale of the property providing that they do not exceed two square feet. The Board of Directors or Declarant shall have the right to erect signs as they, in their discretion, deem appropriate. Notwithstanding the above, **no signs, flags[,] banners or similar items advertising or providing directional information** with respect to [t]he **activities being conducted outside the Property** shall be permitted within the Property and no political campaign signs shall be permitted. Emphasis added. (JA 0096)

The Covenants only limit **flags** that may be displayed in Locust Hill that are commercial advertisements providing directional information about activities being conducted outside the development. *See* Section 10.2.1. The “Let’s Go Brandon” flag

¹ This admission should be dispositive.

may be considered to be political speech but was not a commercial advertisement providing “directional information with respect to activities...outside the Property...” Not a single sentence in Section 10.2.1 prohibits flags with messages unrelated to commercial activities outside of the Locust Hill community. Therefore, Mr. Wilber's alleged activity was not prohibited by the Covenants or governing documents.

Mr. Wilber filed a Counterclaim asserting that the HOA did not comply with Section 23.2 of the Covenants which entitled him to a hearing before the HOA Board, prior to the commencement of an enforcement action in the Circuit Court of Jefferson County. The Counterclaim sought the dismissal of the Complaint and injunctive relief prohibiting the HOA from seeking enforcement without following the procedure mandated by Section 23.2 of the Covenants, and recovery of damages, attorney’s fees and costs pursuant to West Virginia Code Section 36B-3-116(f). Section 23.2 of the Covenants states:

Right to Notice and Hearing. Whenever the Documents require that an action be taken after "Notice and Hearing", **the following procedure shall be observed: The party proposing to take the action** e.g. the Executive Board, a committee, an officer, the Manager, etc., **shall give written notice of the proposed action to all Unit Owners** or occupants of Units whose interest would be significantly affected by the proposed action. The **notice shall include a general statement of the proposed action and the date, time and place of the hearing.** At the hearing, the affected person shall have the right personally or by a representative, to give testimony orally, in writing or both as specified in the notice, subject to reasonable rules of procedure established by the party conducting the meeting to assure a prompt and orderly resolution of the issues. Such evidence shall be considered in making the decision but shall not bind the decision makers. The affected person shall be notified of the decision in the same manner in which notice of the meeting was given. Emphasis added. (JA 0109)

At the pretrial conference Mr. Wilber argued that there was no standing by the HOA to commence the enforcement proceeding because of the failure to comply with the notice

and hearing requirements of Section 23.2. Following this argument, the Circuit Court ordered the parties to participate in a hearing conducted by the HOA Board on November 7, 2023, the previously scheduled trial date, consistent with the express relief sought by Mr. Wilber in his Counterclaim.

On January 10, 2024, the HOA filed a supplement to its Motion to Dismiss the Counterclaim advising the Circuit Court that the HOA had essentially complied with the notice and hearing requirement of the Covenants, as ordered by the Circuit Court rendering the Counterclaim moot. (JA 1113-119) Without providing an opportunity for Mr. Wilber to respond, by Order entered January 11, 2024, the Circuit Court granted the Motion to Dismiss (JA 1120-1122).

A two-day trial before an advisory jury commenced on April 24, 2024. At the conclusion of the evidence the jury returned a verdict in favor of the HOA. The Circuit Court adopted the advisory jury verdict and entered a Trial Order on May 6, 2024. (JA 2046-2048) On May 17, 2024, Mr. Wilber filed a Motion to Set Aside Verdict and Enter Judgment in favor of Defendant or, in the alternative, Award a New Trial. (JA 1996-2011) The Trial Court entered an Order on May 31, 2024 denying this Motion (JA 2038-2039) and Mr. Wilber filed his first appeal.

Following the first appeal, by Memorandum Decision dated April 29, 2025, this Court remanded this case to the Circuit Court because the May 6, 2024 Trial Order failed to conform with the relevant portions of Rule 52(a) of the West Virginia Rules of Civil Procedure, and *failed to have any “analysis or affirmative determination by the Circuit Court regarding its interpretation of the Declaration, especially with respect to the issue*

of ambiguity.” (JA 2065) Following Remand, on June 13, 2025, the Circuit Court entered an Order (JA 2067-2073) purportedly complying with this Court’s Remand Instructions of April 29, 2025.

Mr. Wilber notes his timely appeal to the Orders entered by the Circuit Court on January 11, 2024, April 18, 2024, May 6, 2024, May 31, 2024 and June 13, 2025.

III. SUMMARY OF THE ARGUMENT

The dispute in this case centers on the plain and ordinary meaning of the Covenants of Locust Hill. The application of the plain and unambiguous language of the Covenants to the undisputed facts is a question of law for the Circuit Court, not a question of fact for a jury. Accordingly, Partial Summary Judgment should have been awarded in favor of Mr. Wilber with regard to this question of law and it was error for the Circuit Court to deny Mr. Wilber this relief. Prior to trial, the Circuit Court erred by dismissing Mr. Wilber's breach of contract Counterclaim as "moot" when the Circuit Court effectively granted the relief requested; and denying Mr. Wilber's Motion to Amend his Answer, relief he was entitled to pursuant to W.Va. R. Civ. P. 15.

The Circuit Court improperly impaneled an advisory jury based on its original conclusion that the Covenants and Declarations were ambiguous. This is where the legal error lies. Under established law, such documents are strictly construed, and if found to be ambiguous, the case should have ended immediately in Mr. Wilber's favor. By handing a question of law to a jury under the guise of concern over public sentiment, the Circuit Court denied Mr. Wilber an unbiased arbiter of his rights and disregarded a clear principle of law. The case was never about public opinion, or the political leanings of the six jurors;

it was about the application of a legal doctrine that protects property owners.

In its Order following Remand, the Circuit Court issued a contradictory ruling by back tracking on its initial position and finding the language of the Covenants to be unambiguous. By impaneling an advisory jury to interpret unambiguous contract language, the Circuit Court improperly abdicated its legal duty to apply the plain language of the Covenants.

While Mr. Wilber contends that Assignments of Error A, B, C, D and E are dispositive based on pure issues of law. In the unlikely event this Court should determine that a jury trial was appropriate, the Circuit Court still committed several reversible errors including (a) permitting witnesses for the Plaintiff to testify regarding their opinions - testimony not permitted of a layperson; (b) permitting witnesses for the Plaintiff to testify regarding Google research they performed without verification or authentication; (c) improperly instructing the jury by including in the instructions to the jury definitions based on a municipal ordinance in a different state that had no applicability to what constitutes a flag in West Virginia; and (d) denying Mr. Wilber's Motion for Directed Verdict at the conclusion of the Plaintiff's case.

The Circuit Court further compounded the error when it relied upon alleged facts not in evidence or in the record from trial in an attempt to satisfy the Remand Instructions of this Court in its April 29, 2025 Memorandum Decision.² Mr. Wilber notes his timely

² In fact, the Plaintiff specifically indicated that the allegations relied upon by the Court were not true.

appeal to the Orders entered by the Circuit Court on January 11, 2024, April 18, 2024, May 6, 2024, May 31, 2024 and June 13, 2025.

Mr. Wilber sought a fair and unbiased determination of his rights under the Covenants, requesting a process untainted by political considerations. Instead, the Circuit Court chose to improperly impanel a jury out of political concerns. The Circuit Court then committed numerous reversible errors during the trial. Upon Remand, the Circuit Court persisted in making reversible errors by considering items not in evidence, which the Plaintiff itself conceded are untrue. In committing those errors, the Circuit Court has denied Mr. Wilber his right to due process. This Court now has the chance to rectify these wrongs by reversing the Circuit Court and entering judgment in favor of Mr. Wilber.

IV. STATEMENT REGARDING ORAL ARGUMENT

This case is appropriate for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure because the issue of Mr. Wilber's right to raise a flag containing alleged political speech is an issue a first impression because no West Virginia court has enforced a restrictive covenant prohibiting political speech on the basis that the actual words on a flag mean something different than the plain language of the words. The Circuit Court of Jefferson County, West Virginia enforced a restrictive covenant that prohibits “political campaign signs”, but does not address whatsoever flags containing alleged political messages. The Circuit Court concluded that the words “Let’s Go Brandon” actually were profane criticism of President Joseph R. Biden, and thus constituted a political campaign sign in favor of former President Donald J. Trump.

Accordingly, the Appellant requests this Court schedule this case for oral argument pursuant to Rule 20.

V. ARGUMENT

A. Following Remand the Circuit Court found the Covenants to be unambiguous and thus the interpretation of the Covenants was an issue of law for the Court to decide, not the jury. (Assignment of Error A)

In its Order following Remand from this Court, the Circuit Court crafted a new justification —citing an upcoming election as the reason to impanel a jury—a political argument, not a legal one. This political calculus is a smokescreen for a fundamental legal error. (JA 2070) In the first appeal, this Court agreed with Mr. Wilber that "*the Circuit Court failed to address whether the Declaration was ambiguous, which was required by law and is the threshold issue in this case.*" (JA 2064) This Court remanded this case because "*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.*" (JA 2065)

The Circuit Court's Order of June 13, 2025 following Remand found the Declaration to be unambiguous **five separate times**:

The circuit court disagreed with the Defendant's contentions and believed that **the language in the covenants was clear and unambiguous**. Emphasis added. (JA 2070).

The circuit court specifically finds that express and **unambiguous language** in Section 10.2-1 of the Declaration states ...no political campaign signs shall be permitted. Emphasis added. (JA 2070)

The circuit court finds the absence of ambiguity in the express language

and applies the plain and ordinary meaning of the language in the Declaration covenant. Emphasis added. (JA 2070)

the circuit court finds **the Declaration is unambiguous** and clearly prohibits the Defendant from displaying the Let's Go Brandon phrase. Emphasis added. (JA 2072)

the circuit court found no basis to go against the findings of the jury and indeed the jury confirmed **the court's singular opinion that the language in the Declaration was unambiguous**. Emphasis added. (JA 2073)

In West Virginia, whether a contract is ambiguous is a threshold question of law for the court to decide. If the language is plain and unambiguous, it must be applied and not construed, with no need for a jury to determine the intent of the parties. The West Virginia Supreme Court of Appeals established this principle in *Berkeley County Pub. Serv. Dist. v. Vitro Corp. of Am.*, 152 W. Va. 252, 162 S.E.2d 189, 1968 W. Va. LEXIS 149, which has been repeatedly reaffirmed. Only if the court makes the determination that the contract cannot be given a certain and definite legal meaning, and is therefore ambiguous, can a question of *fact* be submitted to the jury as to the meaning of the contract." *Cent. W. Va. Reg. Airport Auth., Inc. v. Triad Engr'r, Inc. (In re Yeager Airport Litig.)*, 2018 W.V. Cir. LEXIS 20 (Hutchison, J., Lead Presiding Judge, Kanawha Cir. Court) citing *Payne v. Weston*, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995).

The terms of the Declaration are unambiguous and do not prohibit Mr. Wilber's flag. Therefore, Mr. Wilber contends there was no need for the Circuit Court to impanel an advisory jury. A jury's role is to interpret a contract only when the court has first determined that the contract's language is ambiguous and that the parties' intent is a disputed factual question. In such a case, the jury would hear extrinsic evidence (such as

the parties' course of dealings) to determine the intended meaning of the ambiguous terms. Consequently, it was error for the Circuit Court to abdicate its legal duty to apply the plain language of the contract and impanel an advisory jury to interpret the Covenants.

i. Mr. Wilber raised objections to impaneling a jury at the October 31, 2023 pretrial hearing.

In its Order following Remand, the Circuit Court erroneously stated that "the parties did not object to the circuit court empaneling an advisory jury..." (JA 2072) This is inaccurate. At the October 31, 2023, pretrial hearing Mr. Wilber raised issues with the Circuit Court's decision to impanel a jury:

MR. CAMPBELL: in my 37 years of practicing we rarely ask a jury to interpret a contract. Juries would be dealing with disputed issues of material fact. So the attorneys, Plaintiffs and Defendants, agreed that we would file cross motions for summary judgment under the belief that I think we both had that this is the application of undisputed facts to the covenants and declaration of the law is a job for the judge not a job for the jury. We were discussing earlier today as we were coming to court, what would the disputed issues of material fact be in this case where the issues are this, they claim a flag that has certain -- what the flag says is undisputed. That it's a flag is undisputed. That they did not conduct a hearing is undisputed. What disputed fact would we be asking the jury to decide?

Transcript of October 31, 2023 Pre-trial Hearing, 4:17-5:9 (JA 1039)

Mr. Wilber further argued:

MR. CAMPBELL: The interpretation of a contract, the application of that contract to the facts is ordinarily a judicial responsibility not a jury responsibility.

Transcript of October 31, 2023 Pre-trial Hearing, 5:15-17 (JA 1040)

The Plaintiff agreed with Mr. Wilber:

MR. STROECH: Yes, ma'am. I agree with Mr. Campbell that I think the law is relatively clear that the interpretation of the restrictive covenants is the Court's decision.

Transcript of October 31, 2023 Pre-trial Hearing, 10:22-11:1 (JA 1045-46)

It is evident from the record that the position of both parties at pretrial was that interpretation of the Covenants is a judicial responsibility. Impaneling a jury was unnecessary, unlawful and clear error.

B. The consideration by the Circuit Court of evidence not in the record is reversible error. (Assignment of Error B)

In its Order on Remand from this Court, the Circuit Court found “there was substantial evidence that Mr. Wilber was intentionally bucking the covenants. Testimony at trial established that he initially had a sign that blatantly stated "F-ck Joe Biden." (JA 2072)

To the contrary, the HOA admitted it had no “evidence” that Mr. Wilber displayed a "F-ck Joe Biden" sign.:

MR. STROECH: And this is why we develop this stuff and we talk to witnesses and their recollection did change. Quite frankly, **we are not going to put forth any testimony that would suggest that Mr. Wilber previously flew a "Fuck Joe Biden" sign.** We will present evidence that he did fly a "Biden Sucks" flag. That has been admitted to. Emphasis added.

Transcript of April 12, 2024 Pre-trial Hearing, 19:23-20:5. (JA 1329-30)

In West Virginia, a court's decision must be based on evidence presented at trial and the court cannot rely on evidence outside of the record. This is a core principle of due process, designed to ensure fairness by requiring both sides to have an opportunity to challenge and respond to all evidence considered by the court.

Courts at all levels are required to base their decisions solely on evidence properly included in the record, ensuring fairness and adherence to procedural rules and any reliance on extrinsic evidence constitutes a reversible error or abuse of discretion in most jurisdictions.

Findings of fact by a trial court without a jury will not be set aside unless they are clearly wrong. *McDaniel v. Romano*, 155 W. Va. 875, 190 S.E.2d 8, 1972 W. Va. LEXIS 234 (1972); *Adkins v. Stacy*, 214 W. Va. 371, 589 S.E.2d 513, 2003 W. Va. LEXIS 121 (2003). Where there is sufficient information in the record with regard to the facts controlling the disposition of a case, it will be disposed of without remanding it to the trial court. *Commonwealth Tire Co. v. Tri-State Tire Co.*, 156 W. Va. 351, 193 S.E.2d 544, 1972 W. Va. LEXIS 199; *City of Morgantown v. Town of Star City*, 156 W. Va. 529, 195 S.E.2d 166, 1973 W. Va. LEXIS 244 (1973); *Prete v. Merchants Property Ins. Co.*, 159 W. Va. 508, 223 S.E.2d 441, 1976 W. Va. LEXIS 168 (1976); Syllabus Point 1, *McDaniel v. Romano*, 155 W. Va. 875, 190 S.E.2d 8 (1972).

The Circuit Court's reliance on evidence that Mr. Wilber possessed a sign that blatantly stated "F-ck Joe Biden" when considering his credibility, evidence the Plaintiff stated it would not present as it was false, is reversible error.

C. It was error for the Circuit Court to deny Summary Judgment in favor of Mr. Wilber. (Assignment of Error C and D)

i. There is no provision in the Covenants prohibiting Mr. Wilber's "Let's Go Brandon" flag.

The Complaint alleges that display of Mr. Wilber's flag constitutes a prohibited "political campaign sign" in violation of the Covenant. However, Section 10.2-1 of the

Covenants regulates signs and flags distinctly by permitting them to be displayed in different ways. See Exhibit 1, Covenant at Section 10.2-1 (JA 0096). No rule of construction, particularly for restrictive covenants in this state, allows the words “signs” and “flags” to be interpreted synonymously.

The plain language of the Covenants do not prohibit flags on any lot in Locust Hill except as relating to the last full sentence under the heading “Signs” which holds that, “no signs, **flags**[,] banners or similar items **advertising or providing directional information** with respect to [t]he **activities being conducted outside the Property . . .**” This narrow provision restricts flags from being used for business advertising purposes for goods or services occurring outside the Locust Hill community. In contrast with political campaign "signs," the Covenant expressly does not prohibit nor mention “flags” having any other message other than flags with “directional information with respect to activities...outside the Property....” See Covenants, Section 10.2-1 (JA 0096). The independent clause that **"no political campaign signs shall be permitted,"** creates no restriction on *flags* displaying political speech. Importantly, this clause concertedly omits the term "flag" from the prohibition.

In West Virginia, it is the *"fundamental rule in construing covenants and restrictive agreements that the intention of the parties govern. The intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish."* (emphasis added) *Miller v. Bolyard*, 186 W.Va. 165, 167 (1991) (citing *Wallace v. St. Claire*, 147 W.Va. 377, 390 (1962) and *Judd v. Letterle*, 406 S.E.2d 465 (1991)). Critically, the Court in *Miller*

confirmed the long-standing rule that restrictive covenants are strictly construed "*because the unrestricted use of property by the owner is favored.*" (emphasis added) *Miller* 186 W. Va. at 167 (citing *Wallace v. St. Claire*, 147 W.Va. 377, 378 (1962); *Allred v. City of Huntington*, 331 S.E.2d 861, 862 (1985); and *Ballard v. Kitchen*, 120 W.Va. 276, 282 (1945)).

In this case, the term "sign" is not defined within the Covenant. The term "flag" is also not defined. Under West Virginia law, in the absence of ambiguity, terms of contracts and deeds are applied according to their plain and ordinary meaning. *Bass v. Coltelli-Rose*, 207 W. Va. 730, 733 (2000) (quoting Syl. pt. 3, *Bennett v. Dove*, 166 W. Va. 772, 774 (1981) (quoting syl. pt. 4, *Williams v. South Penn Oil Co.*, 52 W. Va. 181, 43 S.E. 214 (1902); *Nisbet v. Watson*, 162 W. Va. 522, 530 (1979)).

To determine the plain and ordinary meaning of terms, courts frequently consult dictionaries. See *National Union Fire Ins. Co. of Pittsburgh v. Miller*, 228 W. Va. 739, 748 (2012) (citing *Merriam-Webster Online Dictionary* for the meaning of the term "fence" in an insurance policy)). Under the Covenants, the terms "sign" and "flag" are unambiguous. The plain and ordinary meaning of the term "sign" is a "signboard; a display (such as a lettered board or a configuration of neon tubing) used to identify or advertise a place of business or product; a posted command, warning, or direction." *Merriam-Webster Online Dictionary*, "sign" available at <https://www.merriamwebster.com/dictionary/sign#> (last accessed Aug, 22, 2022). The term "flag" means "a usually rectangular piece of fabric of distinctive design that is used as a symbol (as of a nation), as a signaling device, or as a decoration; something used like a flag to signal or attract attention." *Merriam-Webster*

Online Dictionary, "structure", available at <https://www.merriamwebster.com/dictionary/flag> (last accessed Aug, 22, 2022). Clearly, "flags" and "signs" are distinct communication modalities that are accorded different meanings within the scope of the Covenant.

The Covenant regulates "signs" on the lots within the Locust Hill subdivision. The Covenant does not regulate or limit the uses of flags on or within those lots in the same manner, except for flags "advertising or providing directional information with respect to [t]he activities being conducted outside the Property." Mr. Wilber's flag does not fall into this regulated category. The term "flag" is not incorporated into a definition of "political campaign signs" and is limited only as distinctly stated in Section 10.2-1. Fundamentally, save for a narrow exception that does not apply to the "Let's Go Brandon" flag, under the plain and ordinary meaning of the Covenant, displaying a "Let's Go Brandon" flag within the Locust Hill community is an activity that is not addressed generally nor prohibited by the Covenants.

Mr. Wilber's "Let's Go Brandon" flag may be political speech but is not a "political campaign sign." Both in pleadings and at trial, Locust Hill and its counsel asserted repeatedly that the phrase "Let's Go Brandon" was a substitute for a profane criticism of the President of the United States and must be political campaign material favoring former President Donald J. Trump. Curiously, given the clear mandate from the West Virginia Supreme Court of Appeals, over decades, that restrictive covenants be narrowly construed, Locust Hill sought to broadly construe the restrictive covenant regarding flags (as admitted by agents of Locust Hill Deposition of Renee Sanders, July 25, 2023 63:1-5 (JA 1347), and

convinced the Trial Court to accept the advisory jury's conclusion that “Let's Go Brandon” actually meant something different than the plain language of the words.

Mr. Wilber has not located a single reported case from any court in the United States enforcing a restrictive covenant because words on a flag allegedly meant something different than the plain language of the flag. Consequently, this is an issue of first impression not only in the state of West Virginia, but in the United States where political commentary and speech is ordinarily not simply favored, but protected. Even in the context of enforcing restrictive covenants, this Court should not condone allowing a Circuit Court to ignore the plain language of a restrictive covenant in order to prohibit political speech.

Agents of the HOA have admitted "t]here is no provision at all in your [Covenant] about flags" and that a flag that could be interpreted as carrying a political or social message is not in violation of the Covenant. See Email dated February 28, 2022 (LH 420) (JA 0141); See Transcript of Deposition of 30(b)(7) designee, Renee Sanders, July 25, 2023, 33:16-17 (JA 1887); 67:22-25 (JA 1896); 68:1-18 (JA 1896); 104:1-6 (JA 1905). Because Mr. Wilber's Flag was not prohibited by the Covenants, the HOA's theory of recovery presented a pure question of law that should have been resolved by entry of Summary Judgment or directed verdict in favor of Mr. Wilber.

ii. The Circuit Court failed to strictly construe the Covenants when the Plaintiff admitted they were broadly interpreted.

Renee Sanders, a community manager with Clagett Management, testified at the 30(b)(7) deposition of Locust Hill on July 25, 2023, that the HOA Board broadly interpreted the terms of the Covenants as follows:

Q. And your Board has decided to broadly interpret the terms “no political campaign signs” to prohibit political speech.

A. Correct.

Q. Okay. Does anywhere in the covenant ban political flags?

A. I think the way you're stating it, I think they're the same thing. Anything that conveys a political message, no matter what it's written on, is a message. It's the same thing. It doesn't matter if it's written on wood, glass, plastic, paper, metal, flag, banner, corrugated plastic.

Q. And that's the broad interpretation you and your Board are adding to this covenant?

A. I don't think they're adding it. I think it's the way they're interpreting it.

Q. Broadly.

A. Broadly.

See Transcript of Deposition of 30(b)(7) designee, Renee Sanders, July 25, 2023, 53:2-5; 53:17-25; (JA 1892) 72:4-10 (JA 1897). Excerpts of Ms. Sanders’ deposition were read to the jury at trial, and the Court admitted her entire transcript as evidence at trial.

Restrictions cannot be enlarged by implication or extended by construction beyond their original intent in order that the general purpose of the parties may be effectuated under new conditions not to be anticipated. In the event of ambiguity, restrictive covenants are to be strictly construed against the person seeking to enforce them, and all doubt must be resolved in favor of natural rights and a free use of property, and against restrictions.

Neekamp v. Huntington Chamber of Commerce, 99 W.Va. 388, pt. 2, syl., 129 S.E. 314.

Under strict construction of the Covenants, no interpretation or construction prohibited the “Let's Go Brandon” flag. Put simply, the law does not permit the HOA to broadly interpret the Covenants. Consequently, summary judgment in favor of Mr. Wilber was mandated.

D. The Circuit Court erred in dismissing Mr. Wilber's Counterclaim as moot after granting Mr. Wilber the injunctive relief sought in his Counterclaim making Mr. Wilber the prevailing party with regard to the breach of contract and denied him the right to seek and recover damages by failing to grant Partial Summary Judgment in his favor. (Assignment of Error E)

The Board did not conduct a hearing regarding Mr. Wilber’s flag before commencing this action required by the Covenants. See Transcript of Deposition of 30(b)(7) designee, Renee Sanders, July 25, 2023, 18:13-17 (JA 1884).

Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995). "The 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. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)." Syllabus Point 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977).

"In West Virginia, the **elements of breach of contract** are (1) a contract exists between the parties; (2) a defendant failed to comply with a term in the contract; and (3) damage arose from the breach." *Wittenberg v. Wells Fargo Bank, N.A.*, 852 F. Supp. 2d

731, 749 (N.D.W.Va. 2012) (cited favorably in *Nance v. Huntington W. Va. Hous. Auth.*, No. 16-0855, 2017 W. Va. LEXIS 345 (May 19, 2017)).

Mr. Wilber pled a claim for a breach of contract by alleging that a contract existed, that the HOA breach the contract by failing to comply with its terms, and that damages arose from the HOA's breach.

Instead, the Circuit Court incorrectly and prematurely dismissed Mr. Wilber's Counterclaim under a Motion to Dismiss as being moot. The Circuit erred in failing to assess the sufficiency of Mr. Wilber's Counterclaim and pass *de novo* judgment on whether the Counterclaim should have been dismissed. Mr. Wilber's Counterclaim clearly supported a claim for breach of contract which entitled him to seek full relief, which necessarily includes monetary damages.

The Circuit Court agreed that the HOA breached Mr. Wilber's rights by hauling him into court without following the contractual prerequisites. These well-pled facts meet the standard for a breach of contract and the Court's dismissal of the claim on a Motion to Dismiss as being "moot," after granting Wilber partial relief by ordering a hearing, was clearly improper. The HOA's breach damaged Wilber by forcing him to defend an action brought in violation of his contractual rights, and the court's act of requiring a retroactive hearing does not moot Wilber's claim for damages incurred through the date of the hearing.

Mr. Wilber filed an Amended Answer and Counterclaim on August 25, 2023, alleging breach of contract and seeking to enjoin the Plaintiff from enforcing the Covenants without following the procedures an affirmative condition precedent that Locust Hill

conduct a hearing in relation to the alleged Covenant breach before filing suit to enforce the Covenants. *See* Counterclaim, p. 5. (JA 0058) On September 22, 2023, the Plaintiff filed a Motion to Dismiss the Counterclaim, asserting principally that the Covenants “do not require a hearing to [be] scheduled.” (JA 0150) During a pretrial conference on November 5, 2023, the Circuit Court ordered the Plaintiff to convene the required hearing before the Board of Directors on November 7, 2023, consistent with the breaches claimed by Mr. Wilber in his Counterclaim. *See* Order entered on November 6, 2023. (JA 0551-553) The Order granted in part the relief sought by Mr. Wilber, because the Circuit Court expressly concluded that "hearings" are required conditions precedent for enforcement actions by Locust Hill.

On January 10, 2024 (after 10pm) the Plaintiff filed a Reply to Defendant’s response to Plaintiff’s Motion to Dismiss Counterclaim advising the Circuit Court that the hearing before the Board of Directors was held on November 7, 2023 and the Board affirmed its decision that the “Let’s Go Brandon” flag is a prohibited political campaign sign. The Plaintiff asserted that as a result, any procedural issue was cured, and the Defendant’s Counterclaim was then moot. Before Mr. Wilber had an opportunity to respond, the Circuit Court entered an Order (the next day) dismissing the Counterclaim as moot. (JA 0572-574)

Because the Circuit Court essentially granted Mr. Wilber the relief sought in his Counterclaim, he was the prevailing party. Partial Summary Judgment in relation to breach of contract (Count I of his Counterclaim) rather than Dismissal was the proper course.

The Counterclaim sought "damages" for "breach of contract" together with attorney fees and costs pursuant to W.V. Code Section 36(B)-3-116(f). *See* Counterclaim, p. 5 (JA 0058) After the Circuit Court concluded that Locust Hill breached the Covenants by not conducting a hearing, Mr. Wilber had the right to pursue and recover damages and attorney fees and costs. Mr. Wilber pled a breach of contract claim which he should have been permitted to pursue to verdict on the issue of damages. Consequently, the Circuit Court erred when it dismissed Mr. Wilber's Counterclaim as moot because no damages were considered by the Circuit Court, nor awarded or denied.

E. The Circuit Court committed multiple reversible errors at Trial. (Assignment of Error F).

In the event this Court disagrees that Assignments of Error A, B, C and D are dispositive based on pure issues of law, the Circuit Court still committed several reversible errors during the Trial. These errors are discussed hereinbelow.

i. The Circuit Court erred in permitting lay witnesses to offer opinion testimony not based upon their perception and offer opinion testimony regarding Google research they performed regarding the meaning of "Let's Go Brandon" without verification or authentication.

During trial the Circuit Court permitted witnesses for the Plaintiff to testify and opine about the research they performed via Google and other internet searches regarding the meaning of "Let's Go Brandon." *See* Trial Transcript, April 24, 2024 160:13-161:16 (JA 0979-80) The Plaintiff did not provide proper authentication or citation necessary to verify the information.

As a general rule, a lay witness must confine their testimony to a report of the facts. A lay witness may testify in the form of inferences or opinions only when from the nature of the subject matter no better or more specific evidence can be obtained. Normally, opinion testimony by a lay witness is limited to opinions rationally based on the witness' perception which are helpful for a clear understanding of the witness' testimony or a determination of a fact in issue. W. Va. R. Evid. 701 states that if the witness is not testifying as an expert, his or her testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. *State v. Nichols*, 208 W.Va. 432, 541 S.Ed.2d 310 (1999).

A witness must have personal knowledge or perception of the facts from which the opinion is to be derived. The opinion of a witness who is not an expert may be given in evidence if he has some peculiar knowledge concerning the subject of the opinion. ***Speculative opinion testimony by lay witnesses, testimony not based upon the witness's perception, is generally considered inadmissible.*** Lay opinion testimony founded on personal knowledge may include the motivation or intent of another person, if the witness has an adequate basis for his or her opinion, such as personal knowledge or an opportunity to observe the surrounding circumstances. Where a lay witness's testimony is based upon perceptions which are insufficient to allow the formation of an opinion but, instead, ***merely expresses the witness' beliefs***, then the opinion testimony should be excluded. *Id* at 4.

Testimony from lay witnesses based on their perception of the slogan was

inadmissible and should not have been allowed by the Circuit Court. Permitting witnesses to testify about an internet search regarding the slogan “Let’s Go Brandon” was error by the Circuit Court.

- ii. **The Circuit Court erred in failing to properly instruct the jury based on certain definitions, not found in a generally accepted or published, dictionary or encyclopedia but rather instructed the jury based upon internet-based publications of questionable foundation not based on the law, alleged facts and/or reliable sources.**

The Court instructed the jury regarding the definition of a campaign as follows:

A "campaign" is defined as a series of operations designed to bring about a particular result, election, campaign, and advertising campaign. (JA 1494)

This is a misstatement of the definition found Merriam-Webster Dictionary. The Merriam-Webster definition of campaign is:

a connected series of operations designed to bring about a particular result

The words "election campaign" and "an advertising campaign" are listed under the definition as examples of the use of the word "campaign."

In addition, the Court proffered an instruction with the definition of a "campaign sign" obtained from Lawinsider.com as follows:

Campaign sign. means any sign, *as defined in section 17.58.20*, that contains the name of, image of, or any message regarding a candidate in any election that contains a message or identification of an issue in any election. *Lawinsider.com/dictionary*. Emphasis added. (JA 1494)

The regulation originally cited by Law Insider pertains to a campaign sign ordinance in the City of Belen, New Mexico, not a general accepted dictionary definition and

certainly not a definition from any West Virginia court. An ordinance from a town in New Mexico had no bearing on the Covenants.

Where, in a trial by jury, there is competent evidence tending to support a pertinent theory in the case, it is the duty of the trial court to give an instruction presenting such theory when requested to do so. *McAllister v. Weirton Hospital Co.*, 173 W. Va. 75, 312 S.E.2d 738, 744 (1983).

In general, the question on review of the sufficiency of jury instructions is whether the instructions as a whole were sufficient to inform the jury correctly of the particular law and the theory of defense. An appellate court asks whether: (1) the instructions adequately stated the law and provided the jury with an ample understanding of the law, (2) the instructions as a whole fairly and adequately treated the evidentiary issues and defenses raised by the parties, (3) the instructions were a correct statement of the law regarding the elements of the offense, and (4) the instructions meaningfully conveyed to the jury the correct burdens of proof. *State v. Campbell*, 246 W. Va. 230, 868 S.E.2d 444 (2022).

The Circuit Court proffered erroneous instructions to the jury or definitions derived from unreliable and irrelevant sources, out of context. If impaneling the jury was proper then these are reversible errors.

VI. CONCLUSION

WHEREFORE MICHAEL B. WILBER, by counsel, respectfully requests entry of an Order vacating the June 13, 2025, Order of the Circuit Court and entering Judgment in

his favor, or, in the alternative, remanding this case for a New Trial; and granting such further relief this Court deems appropriate.

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By Counsel

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