

IN THE INTERMEDIATE COURT OF APPEALS FOR WEST VIRGINIA

MICHAEL B. WILBER,

Appellant,

v.

Case No.: 25-ICA-280

LOCUST HILL UNIT OWNER'S
ASSOCIATION, INC.,

Appellee.

ICA EFiled: Oct 15 2025
10:01PM EDT
Transaction ID 77317533

RESPONDENT'S BRIEF

Appeal Arising from Orders Entered in
Civil Action No.: CC-19-2022-C-97 in the
Circuit Court of Jefferson County, West Virginia

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RESPONDENT'S STATEMENT OF THE CASE

The Appellant / Defendant Below, Michael Wilber, owns certain real property in the Locust Hill Subdivision, with an address of 90 Sawgrass Drive, Charles Town, West Virginia, 25414. The Defendant purchased his property in 2014. JA 0006. All Lots within Locust Hill were conveyed subject to certain Governing Documents, including the recorded Declaration, the Bylaws, and varying Amendments and Resolutions. JA 1722. Specifically, and in relevant part herein, the Lots were conveyed with the following restriction as related to signs:

Section 10.2-1:

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 1737.

The Defendant was displaying a flag on his property with the following message: "Let's Go Brandon". This sign was situated on top of a flagpole at an estimated height of at least twenty (20) feet and was easily read from a school bus stop nearby. JA 1986. Prior to displaying this specific sign, the Defendant displayed a sign stating "Biden Sucks" on his property. JA 1603.

Upon learning of these signs, the Appellee / Respondent / Plaintiff Below, the Locust Hill Unit Owner's Association, Inc., acting through its Board of Directors, determined that all signs were prohibited political campaign signs pursuant to Section 10.2-1. When Mr. Wilber refused

to remove the “Let’s Go Brandon” flag, Locust Hill filed the underlying Complaint for Injunctive Relief, seeking an order from the Circuit Court that the sign be removed. JA 0003.

Mr. Wilber filed a Motion to Dismiss, which was denied. JA 0011. Discovery was conducted, and the matter proceeded towards trial. Just two months before the trial date, Mr. Wilber filed a Counterclaim against Locust Hill alleging, in part, that the Association failed to follow its procedures as related to the enforcement of its Governing Documents. JA 0057. Both parties filed Cross Motions for Summary Judgment on the sign covenant violation (JA 0332; 0060), and Locust Hill filed a Motion to Dismiss Mr. Wilber’s Counterclaim on the procedural allegations. JA 0145.

At the first Pretrial Conference held on October 31, 2023, Locust Hill suggested, and the Circuit Court agreed, that the matter be remanded back to the Locust Hill Board of Directors for a hearing on sign covenant violation. Mr. Wilber’s counsel did not object to this remand. JA 1071. The Board of Directors thereafter held a hearing and determined that the “Let’s Go Brandon” flag was a prohibited political campaign sign. JA 1116. By Order dated January 11, 2024, the Circuit Court determined that a Board hearing was not required before litigation was commenced and granted Locust Hill’s Motion to Dismiss the Counterclaim. JA 1120. The case proceeded to trial on Locust Hill’s Complaint for Injunctive Relief.

The Circuit Court empaneled an advisory jury to provide advisory answers on two specific questions of fact: 1) Is the flag at issue a sign pursuant to the covenants?; and 2) Is a “Let’s Go Brandon” flag a political campaign sign prohibited by the covenants? An advisory jury trial was held on April 24 and 25, 2024, where the jury answered “YES” to both questions. JA 1992. The Circuit Court, considering such advisement from the jury, then granted the injunctive relief sought by Locust Hill that the “Let’s Go Brandon” flag violates the sign

covenant and must be removed. JA 1994. The Circuit Court, acting in its clear discretion, denied all post-trial Motions, including a request for attorney fees and costs sought by both parties. JA 2037; 2039; 2048.

Mr. Wilber then appealed this matter to the Intermediate Court of Appeals of West Virginia (Case No.: 24-ICA-270). By Memorandum Decision dated April 29, 2025, this Court remanded the matter back to the Circuit Court with direction to address its interpretation of the Declaration and specifically the sign prohibition set forth in Section 10.2-1. JA 2063. By Order on Remand From Intermediate Court of Appeals dated June 13, 2025, the Circuit Court complied with the directive of this Court and set forth findings of fact and conclusions of law regarding its interpretation of the sign prohibition. JA 2068. The Circuit Court made clear that it had determined the sign prohibition to be unambiguous and that under the facts adduced at trial it indeed prohibited the subject “Let’s Go Brandon” flag. *Id.* The advisory jury empaneled to provide advisory guidance on the noted questions of fact reached the identical conclusion.

Mr. Wilber has now appealed all subject Orders back to this Honorable Court.

SUMMARY OF THE ARGUMENT

The Circuit Court appropriately determined that the sign prohibition (Section 10.2-1) in the Declaration was unambiguous and prohibits the display of a “Let’s Go Brandon” flag. Although restrictive covenants are to be strictly construed, relevant authority dictates that restrictive covenants are to be interpreted considering the obvious intention of the parties – *even though not precisely expressed*. It is nonsensical to conclude that Section 10.2-1 prohibits all signs with messaging, but permits all flags with the same messaging.

The Circuit Court had the clear authority and discretion to empanel an advisory jury to assist it in answering the following factual questions: 1) Is the flag at issue a sign pursuant to the

covenants?; and 2) Is a “Let’s Go Brandon” flag a political campaign sign prohibited by the covenants? Although the Court ultimately agreed with the advisory jury on an affirmative answers to both of these questions, it could have rejected these advisory answers in whole or in part. By empaneling an advisory jury, it was therefore relatedly appropriate for the Court to deny the Cross Motions for Summary Judgment filed by both parties.

The Circuit Court properly dismissed Mr. Wilber’s Counterclaim because the Declaration did not require a hearing, and the conduct of the hearing rendered it moot in any event. The Circuit Court also correctly exercised its discretion in denying Mr. Wilber’s request for attorney fees in connection with the Counterclaim. The Circuit Court evaluated whether the HOA breached any contract, whether Mr. Wilber delayed in bringing his Counterclaim, and whether Mr. Wilber had the opportunity to be heard by the Board and determined that an award of fees was not warranted.

The Circuit Court’s mention of evidence not clearly in the record, and the alleged trial errors, even if deemed errors, were harmless, immaterial, and did not violate applicable law. The Circuit Court had clear discretion to rule on these matters during the trial as determined, although trial errors before an advisory jury are largely inconsequential.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Appellee respectfully suggests that oral argument is not necessary as the issues raised on appeal can be adequately decided on the briefs.

ARGUMENT IN RESPONSE

A. The Circuit Court Did Not Err in Empaneling an Advisory Jury.

The Circuit Court did not err and had clearly authority when it empaneled an advisory

jury to assist the Court in answering two specific questions of fact: 1) Is the flag at issue a sign pursuant to the covenants?; and 2) Is a “Let’s Go Brandon” flag a political campaign sign prohibited by the covenants?

As set forth in Rule 39(c) of the West Virginia Rules of Civil Procedure, “[i]n all actions not triable by right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, with the consent of the parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.” W.Va.R.Civ.P. 39(c).

The function of an advisory jury is to advise. As discussed in Heydinger v. Adkins, 178 W.Va. 463, 469, 360 S.E.2d 240, 246 (1987):

By its nature, the function of the advisory jury is to enlighten the conscience of the trial court and the jury’s verdict has no binding effect upon that court. The trial court, may, of course, believe that the advisory verdict represents a correct result and make findings in accordance therewith.

The Heydinger court further relied on 5 Moore’s Federal Practice, § 39-40 (2d ed. 1985) in adopting the following analysis for advisory juries:

As its name suggests, an advisory jury merely advises. Its findings of fact are not binding on the trial court. Indeed, the court is free to adopt its findings in whole or in part or to disregard them altogether. The ultimate responsibility for finding the facts remains with the court. Accordingly, review on appeal is from the judgment of the court as though no jury had been present.

Indeed, in other matters that ultimately required a determination by the court, advisory juries have been permitted. In Lambert v. Peters, 143 W.Va. 588, 103 S.E.2d 788 (1958), an advisory jury was used to assist the court in determining an issue out of chancery, holding in part, that “[t]he verdict of a jury on an issue out of chancery is simply advisory, its only object being to ‘enlighten the conscience of the court’; and, when such verdict is not supported by or is

against the plain preponderance of the evidence it should be disregarded and the trial court should determine the matter in accordance with the evidence. Id., at Syl. Pt. 1.

Similarly, in E. Shepherdstown Developers v. J. Russell Fritts, Inc., 183 W.Va. 691, 398 S.E.2d 517, Syl. Pt. 1 (1990), the Court concluded that “[s]ince equitable issues are generally determined by a court without a jury, one is not entitled, as a matter of right under the law, to a jury trial of such issues; however, there is no constitutional right to a trial without a jury and the submission of equitable issues to a[n advisory] jury does not constitute reversible error.” In that case, an advisory jury was empaneled to assist the court in determining what the term ‘reasonable time’ meant in a land development contract. The circuit court ultimately dismissed the advisory jury before the verdict, but the empaneling of the same was not reversible error as the circuit court had all the discretion to either listen to or ignore the advisory jury.

Finally, in Just. Highwall Mining, Inc. v. Varney, 249 W.Va. 1, 890 S.E.2d 685, the Court reversed a decision of the circuit court when it failed to provide any independent analysis of an advisory jury’s conclusion to award reasonable attorney fees. The Court made clear that it was not prohibiting the use of advisory juries, but reminded that “on matters ultimately in the discretion of the court, a judge must exercise independent judgment when reaching a ruling.” Id., at HN14.

The Circuit Court in this Case recognized such discretion at the first Pretrial Conference held on October 31, 2023. Indeed, Mr. Wilber’s counsel conceded that issues of fact existed. The following discussion was held:

THE COURT: Do the parties agree that the flag is a sign?

MR. CAMPBELL: No.

THE COURT: There’s a disputed fact. Do the parties agree the statement is related to a political campaign?

MR. CAMPBELL: That would be a disputed fact.

THE COURT: So I think we do have disputed facts.

JA 1041.

When the matter was not resolved at the remanded hearing before the HOA Board of Directors, the Circuit Court empaneled an advisory jury to assist in answering these two factual questions. The Court made clear its intentions when the jury trial began, stating: “We have this matter set on the Court’s docket today to impanel a jury. This is an advisory jury in a case for injunctive relief.” JA 1370. Indeed, the Trial Order confirmed the same, providing that an “advisory jury” was empaneled. JA 1994. Upon the jury’s affirmative answers to both factual questions, the Circuit Court concluded as follows:

Based upon these factual findings of the jury, the Court adopts the same and rules in favor of the Plaintiff granting injunctive relief sought, and it is hereby ORDERED that the Defendant remove the “Let’s Go Brandon” flag as it is in violation of the restrictive covenants for the Locust Hill Unit Owners.

JA 1995.

Following remand, the Circuit Court reasserted its reasoning to empanel an advisory jury. The Circuit Court stated that the jury found in favor of Plaintiff, and the Circuit Court agreed and entered an Order granting the injunctive relief sought by the Plaintiff. JA 2070. The Circuit Court further stated that it had good cause to allow the parties the benefit of an advisory jury, as opposed to simply ending the matter with the court granting the same injunctive relief in favor of the Plaintiff, finally noting that neither party objected to the empaneling of an advisory jury. JA 2072. All considered, it is now clear that the Circuit Court exercised its independent judgment in reaching its final ruling herein.

B. The Consideration by the Circuit Court of Evidence Not in the Record is Not Reversible Error.

The Circuit Court mistakenly noted in its Order on Remand from Intermediate Court of Appeals that “[t]estimony at trial established that he (Michael Wilber) initially had a sign that blatantly stated “F_ck Joe Biden.” JA 2072. The Appellee concedes that there was no such testimony at trial; however, there was a discussion at a pretrial conference that suggested Mr. Wilber had indeed initially had such a sign. JA 1330.¹ Plaintiff ultimately advised that it did not intend to introduce (and did not introduce) evidence of such a sign. Thus, the advisory jury did not hear any evidence of a “F_ck Joe Biden” sign.

Notwithstanding, this is harmless error. Mr. Wilber testified that he previously flew a “Joe Biden Sucks” flag that was later replaced with the “Let’s Go Brandon” flag. JA 1603. The Circuit Court did not find Mr. Wilber to be credible when he offered varying other meanings for the term “Let’s Go Brandon.” JA 2073. The simple admitted fact that Mr. Wilber previously flew a “Joe Biden Sucks” flag confirmed his true intention of expressing his displeasure with a political candidate for office. The Court understood his intention, and any mention of an alleged “F_ck Joe Biden” sign is extraneous to the Court’s understanding.

C. The Circuit Court Did Not Err in Denying Summary Judgment in Favor of Mr. Wilber.

i. Standard of Review.

“Under W.Va. Code § 55-13-9, and W.Va.R.Civ.P. 38, 39 and 57, when a declaratory judgment proceeding involves the determination of an issue of fact, that issue may be tried and determined by a judge or a jury, just as issues of fact are tried and determined in other civil actions, and any determinations of fact made by the circuit court or jury in reaching its ultimate

¹ It should be noted that Peter Zimmerman, HOA board member and community resident, signed an Affidavit claiming that Mr. Wilber had previously flown a “F_ck Joe Biden” flag. However, Mr. Zimmerman did not testify at trial. JA 0347.

judgment are reviewed under a clearly erroneous standard.” Joslin v. Mitchell, 213 W.Va. 771, 584 S.E.2d 913 (2003).

ii. The Circuit Court Did Not Otherwise Err in Denying Summary Judgment to Mr. Wilber.

Both parties filed Motions for Summary Judgment prior to the advisory jury trial and the Circuit Court’s decision to empanel the advisory jury. The Circuit Court denied both Motions for the reasons set forth in its Order on Remand From Intermediate Court of Appeals. Notwithstanding its clear authority to empanel an advisory jury, the Circuit Court did not err in otherwise denying summary judgment to Mr. Wilber.

“The general rule is that, the unrestricted use of property by the owner being favored in law, restrictive covenants are strictly construed.” Ballard v. Kitchen, 128 W.Va. 276, 282, 36 S.E.2d 390, 393 (1945); Neekamp v. Huntington Chamber of Commerce, 99 W.Va. 388, pt. 2, syl., 129 S.E. 314 (1925); Deutsch v. Mortgage Securities Co., 96 W.Va. 676, pt. 2 syl., 123 S.E. 793 (1924). If “there be doubt”, or “if the language of a restrictive covenant, when read in the light which the context and surrounding circumstances throw upon it, remains of doubtful meaning, it will be construed against rather than in favor of the covenant.” Deutsch v. Mortgage Securities Co., 96 W.Va. 676, 681, 123 S.E. 793, 795 (1924). The rule of strict construction against the grantor in a deed and the rule that restrictive covenants are strictly construed may be resorted to only in case of ambiguity. United Fuel Gas Co. v. Morley Oil Gas Co., 102 W.Va. 374, 376, 135 S.E. 399 (1926). The rule “which declares that restrictive covenants are not favored simply means that all doubts are to be resolved in favor of the free alienation of real estate. Neither rule can operate when there is no room for doubt as to the intention of the parties.” Avis v. Virginian Railway Co., 124 Va. 711, 718, 98 S.E. 638, 640 (1919). Covenants in deeds as a part of the general scheme of development though to be construed strictly, “cover

things forbidden by necessary implication, just as they cover things named with unmistakable exactness.” Deitrick v. Leadbetter, 175 Va. 170, 175, 8 S.E.2d 276, 278 (1940).

“While the courts have manifested some disfavor of covenants restricting the use of property, they have generally sustained them where reasonable, not contrary to public policy, not in restraint of trade, and not for the purpose of creating a monopoly.” Wallace v. St. Clair, 147 W.Va. 377, 387, 127 S.E.2d 742, 750 (1962).

“This rule of strict construction, however, obtains only where the parties have failed to express their meaning with sufficient clarity to enable the court to say that the construction of the deed is plain and admits of no doubt; the rule will not be applied to defeat the obvious purpose of the restriction, or the obvious intention of the parties, even though not precisely expressed, nor does it require an unnatural and strained construction of the words used; and before giving effect to the rule the court will have recourse to every aid, rule, or canon of construction to ascertain the intention of the parties, since it is the duty of courts to enforce, not to make, contracts. So, although restrictive covenants must be strictly construed, they cover things forbidden by necessary implication, just as they cover things named with unmistakable exactness.” Id.

“The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That 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. The rule that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of the free use of property should not be applied in such a way as to defeat the plain and obvious purpose of the contractual instrument or restrictions.” Id.

“With respect to the construction of restrictive covenants, words should be given their ordinary and popular meaning, unless they have acquired some peculiar significance.” United Fuel Gas Co. v. Morley Oil Gas Co., 102 W.Va. 374, 376, 135 S.E. 399, 399 (1926).

The words contained within the subject restrictive covenant should be given their ordinary and popular meaning. Section 10.2-1 again states:

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).

It is evident the Section 10.2-1 was intended to limit messaging in the community. This is a common restriction within a common interest community, as varying unrestricted messaging can impact the neighborhood in varying ways, including but not limited to *inciting disputes between residents* and cluttering an otherwise neat and consistent viewshed. These impacts can adversely impact property values. It does and should not matter what vehicle the messaging is conveyed by – a sign, poster, banner, bedsheet, spray-paint on a fence...or flag. It is nonsensical to conclude that Section 10.2-1 prohibits all signs with certain messaging, but permits all flags with the same messaging. Although restrictive covenants are to be strictly construed, relevant authority dictates that restrictive covenants are to be interpreted considering the obvious intention of the parties – *even though not precisely expressed*.

The Board of Directors for Locust Hill defined a “campaign sign” to mean “any sign for, against or relating to a political campaign.” JA 0336; 0350. With this guidance, the Board determined that the “Let’s Go Brandon” flag was a prohibited political campaign sign. JA 1547.

It is important to note that the Board heavily weighed its options in making this decision. Varying signs are displayed throughout the Locust Hill subdivision, including but not limited to American Flags, American Flags with color variations, sports team signs, seasonal signs, armed services signs, etc. The Board chose to narrowly interpret the subject restrictive covenant so as to not land in a position where all signs would have to be regulated. The Board remained hopeful for the community that most signs could continue to be displayed without issue.

The “Let’s Go Brandon” message originated at a NASCAR race on October 2, 2021, where the crowd was mistakenly charged with chanting “Let’s Go Brandon” for the winner of that race – Brandon Brown – when, in fact, it was chanting “Fuck Joe Biden.” JA 0352. This slogan quickly became utilized to criticize President Biden. The Courts can take judicial notice of the fact that Donald Trump never conceded the 2020 presidential race and continued to campaign by challenging the results of that election. Both Donald Trump and Joe Biden ran for president again in 2024. The “Let’s Go Brandon” slogan was adopted by Donald Trump’s supporters and was used on t-shirts, hats, and other merchandise in support of Donald Trump. JA 0367; 0375.

Certain depositions were taken prior to the filing of the Cross Motions for Summary Judgment, to include HOA President Steve Ruble, Community Manager Renee Sanders, Board Member Sheila Davis, and the purported expert witness for Mr. Wilber, Stephen Stolipher.

President Ruble, in relevant part, testified as follows:

- Q. Okay. So, tell me why you think that Mr. Wilber’s flag violates the covenants.
- A. After hearing all sides of everything at the Board Meeting, the main reason I felt it was that is basically was as overscore of a political statement which was the FU Biden. The key factor here to me that really made it a political flag is it sort of named even by nickname a political person, whereas other sayings such as gay pride and such flags like that

don't name a person. It named an individual. And that's kind of why I started saying, okay, fine, my goal was to try, just trying to understand what all was transpiring. Because at the time when some of this was going down, like I say, I wasn't here. I was taking Zoom meetings and stuff. And but that's my main concern is that Let's Go Brandon became the FU Biden.

Q. And how is that a political campaign flag?

A. Because it's specifically naming a political person, even though it's by nickname.

Q. Even if there's no campaign?

A. No, sir, to me it's a, the big issue for me is a political, a campaign political flag is anything that could influence a candidate by name.

JA 0412-0413.

President Ruble continued:

Q. Let me ask you a question, so you're telling me that the Let's Go Brandon flag you've decided is a political campaign sign / flag?

A. Yes sir, upon my, just by going on Google and researching political campaign sign, and then later after getting the receipts that your client gave me, I then went to Amazon as well, and just put in political campaign signs, and that's where it came.

Q. Okay.

A. With the description about the sign and what is basically meant.

...

Q. What's the campaign that this flag refers to?

A. The campaign to me refers to the fact, basically that the sitting president who as this time is Joe Biden, and the flag refers to a statement that was made originally was he, that Mr. Wilber had a, of FU Biden, and from that the campaign is, of course, Trump, Biden because basically Trump really has never conceded in my opinion, but that's still the election situation so I'm not sure.

JA 0453-0454.

Renee Sanders, community manager for Locust Hill, in relevant part, testified as follows:

Q. What did they say that they saw?

A. The[y] saw the, I'm going to call it a sign flag because they, it was, one is in a window and ones on a pole. And so definitely visible as a flag versus in the window, looking more as a sign.

Q. Can I stop you there for a second?

A. Sure.

Q. Is this at Mr. Wilber's property?

A. At Mr. Wilber's property.

Q. Okay. And what was the nature of the sign they saw and when?

A. Was "Joe Biden Sucks" or "Biden Sucks".

Q. Okay.

A. And Let's Go Brandon.

Q. And which directors told you they saw that?

A. Sheila Davis.

Q. Okay.

A. And Peter Zimmerman.

Q. Any what else did any of the board members share with you?

A. Peter Zimmerman said that he saw, along with others at the bus stop and bus stop drivers, "F Biden", "Fuck Biden".

Q. And when was that?

A. Around the same time, in August of 2021.

JA 0512-0513.

Q. Okay. In September of 2021, what campaign or race for political office did the "Let's Go Brandon" sign address in your view?

A. The Trump versus Biden...

Q. Okay.

A. ...election.

Q. Which one?

A. What do you mean?

Q. Well presidential elections in our country happen every four years, do you agree?

A. Correct but there was ongoing propaganda related to the outcome of that election.

...

A. Because it related to that which took place the year prior and the beginning of that started with the derogatory language message that was previous to that which was the "F Biden" or the "Biden Sucks" signs which is what came to my attention the first place. And so, regardless, so both political and derogatory.

JA 0534-0535.

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.

JA 0545.

Ms. Sanders continued:

A. That there's no provision about flags, because there is. And then we're referring to signage, and all signage is specific, you know, it has specific guidelines and to which that did not. So I was, I was saying that a sign is a flag and a flag is a sign, anything that conveys a message is a, is a sign, and if it's not a, as the documents state, a real estate sign, then it's not permitted unless it's a seasonal type of message.

JA 0690.

A. That yeah, yeah, the closed executive session, that's where it was officially documented, but through the email communication of when it was brought to our attention, my attention, that this flag, which had also, also been in the window was noticed that it was a sign, a flag is a sign and a sign is a flag. That was the interpretation.

JA 0691.

Board Member Sheila Davis, in relevant part, testified as follows:

Q. Okay and you sent an email about an inappropriate flag, what was the flag that you complained about?

A. It was a flag that said Biden Sucks, and it was at the bus stop.

Q. Okay, and did that flag eventually come down?

A. He, he took it off of the pole and put it in his window, which faced the bus stop.

Q. Okay, and is that the only flag you complained about?

A. Well I, I think I also raised concern that he replaced one political campaign flag with another one, which is the one that's up there now, and that's the Let's Go Brandon.

Q. Okay, and you think that's a political campaign flag?

A. Absolutely.

Q. Why do you think that's a campaign flag?

A. Well, Trump is still using it to campaign for himself.

Q. Trump is using what?

A. The flag.

Q. Okay.

JA 0750-0751.

Q. Okay, when did you first learn of the Let's Go Brandon flag?

A. Driving by and seeing one flag be replaced with the other.

Q. Okay, and what did you understand Let's Go Brandon to expressly say?

A. Fuck Joe Biden...

Q. No, it would...

A. ...that's the, that's the meaning of it.

Q. Okay tell me how you drew that conclusion.

A. Everyone knows that.

JA 0771.

Ms. Davis continued:

Q. Okay. And what do you understand a campaign to be?

A. Just a, well in this case a politician constantly selling himself for a seat.

Q. A politician doing what?

A. Selling himself for a seat.

Q. Okay.

A. Campaign to sell himself for a seat.

Q. And who were the candidates for president in 2021?

A. I'm trying to think if I voted. Was it 2021 or 2020?

Q. Well in your email, this email message and the display of Let's Go Brandon happened in 2021, do you agree?

A. Yes. But Mr. Trump still hasn't to this day conceded the election so...

Q. So you think Let's Go...

A. he's still campaigning...

Q. ...so you think Let's Go Brandon is a 2020 election campaign?

A. No it came after, but that's what he's been capitalizing on and, and pushing his, his campaign for.

JA 0773-0774.

Even Mr. Stolipher, purported expert witness for Mr. Wilber, testified as follows:

Q. Has the “Let’s Go Brandon” slogan been used by Donald Trump supporters?

A. Yes.

Q. Okay.

A. That’s a better question.

Q. Thank you. Sometimes I have good questions, sometimes I don’t have good questions. Has the “Let’s Go Brandon” slogan been used against Joe Biden?

A. I believe so, yes.

Q. Okay. And has the Let’s Go Brandon slogan been used on merchandise that’s sold in support of Donald Trump?

...

A. Yeah. I mean, I – I – Are you saying it was like – like T-shirts, hats?

Q. Yeah. Shirts? Hats?

A. Oh, yeah, yeah, yeah, yeah.

JA 0851-0852.

Mr. Stolipher continued:

Q. Okay. Did Trump ever concede the 2020 race?

...

Q. He’s still challenging the results of the 2020 election, isn’t he?

A. I don’t – I don’t – I don’t believe so, but I don’t know.

Q. In his speeches, he’s not still challenging the results of the 2020 election?

A. He could still be campaigning on that. Who knows.

...

Q. And as we sit here today Donald Trump is running for President in the election, 2024 election cycle, correct?

A. Yes, sir.

Q. As is Joe Biden, correct?

A. Yes, sir.

JA 0852-0853.

Based upon this testimony and a reasonable interpretation of the subject restrictive covenant, the Board of Directors determined the Defendant's "Let's Go Brandon" flag was a prohibited political campaign sign. Although the subject applicable covenant might be strictly construed, it "*covers things forbidden by necessary implication.*" The rule of strict construction "*will not be applied to defeat the obvious purpose of the restriction.*" Most importantly is that the intention of the parties governs. "That 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.*" Syl. Pts., Wallace v. St. Clair, 147 W.Va. 377, 387, 127 S.E.2d 742, 750 (1962).

The Circuit Court, upon reviewing the respective positions of the parties, did not err in denying both Motions for Summary Judgment and empaneling an advisory jury on the noted questions of fact to assist in ruling as a matter of law.

D. The Circuit Court Correctly Dismissed Mr. Wilber's Counterclaim.

In his opening brief, Mr. Wilbur argues that the Circuit Court erred in dismissing his Counterclaim as moot after granting him the injunctive relief he sought in his Counterclaim. *See* Appellant's Opening Brief at 19. He argues that as the "prevailing party" with regard his breach of contract claim, the Circuit Court's failure to grant partial summary judgment in his favor

denied him the right to seek and recover damages. Id. This Court should reject Appellant's arguments and affirm the Circuit Court's granting of the HOA's Motion to Dismiss the Counterclaim.

Appellee agrees that this Court's review of the Circuit Court's granting of the Motion to Dismiss the Counterclaim is *de novo*. Syl. Pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 461 S.E.2d 516 (1995). However, as discussed below, it is clear from the record in this case that the Circuit Court's granting of the Motion to Dismiss was proper because it was beyond doubt that Mr. Wilbur could not prove any set of facts in support of his breach of contract claim which would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)." Syl. Pt. 3, Chapman v. Kane Transfer Co., 160 W. Va. 530, 236 S.E.2d 207 (1977).

The timeline of the filing of the pleadings and motions in the Circuit Court is significant here. The HOA's Complaint was filed on August 9, 2022. JA 0001-0010. Mr. Wilber filed a Motion to Dismiss the Complaint on August 26, 2022. JA 0011-0029. By Order dated September 30, 2022, the Circuit Court denied Mr. Wilber's Motion to Dismiss. JA 0047-0048. On October 7, 2022, Mr. Wilber filed his answer to the Complaint. JA 0048-0053. Despite the fact that the HOA's Declaration and Bylaws were readily available to him, Mr. Wilbur waited nearly a year from the date he filed responsive pleadings (and two months before the scheduled trial) before he filed his Counterclaim.

Mr. Wilbur's Counterclaim alleged a single cause of action—breach of contract. JA 0054-0059. The sole basis for the breach of contract claim was the Board's failure to conduct a hearing with regard to enforcement of the HOA's Covenants. Id. The relief sought in the Counterclaim was an Order (1) dismissing HOA's Complaint; (2) enjoining the HOA from

enforcing the Covenants without following the procedure outlined in the Covenants; (3) awarding Mr. Wilbur his attorney's fees and costs expended pursuant to W.V. 36B-3-116(f); and (4) such other relief as the Circuit Court deemed appropriate. Id. Importantly, Mr. Wilber failed to demand the very hearing he claimed to be entitled to.

The HOA moved to dismiss the Counterclaim arguing that the Declarations and Bylaws did not require that it conduct a hearing. JA 0145-0331. At a pretrial hearing before the Circuit Court on October 31, 2023, the parties presented argument on the HOA's Motion to Dismiss Mr. Wilbur's Counterclaim. JA 1036-1082. The Circuit Court did not rule on the HOA's Motion to Dismiss or the issues raised therein. Instead, after reviewing the length of time the case had been pending and the procedural status of the case, the Circuit Court merely directed that the Board conduct a hearing so that Mr. Wilbur could present his case in hopes that the hearing might provide a means to resolve the case. JA 1077. The Court continued the trial date so that the parties had time to conduct the hearing before the Board. JA 1078.

The Circuit Court properly exercised its discretion in abstaining from ruling on the motions pending before it when it directed the parties to conduct a hearing before the Board. Although a trial judge must be neutral in the area of trial management, the judge does not have to be a passive spectator. A trial judge has broad discretion in managing his or her docket, including trial procedure and the conduct of trial. Barlow v. Hester Industries, Inc., 198 W.Va. 118, 479 S.E.2d 628 (1996). The Circuit Court's November 6, 2023, Order did not address the HOA's Motion to Dismiss or Mr. Wilber's Motion for Partial Summary Judgment. JA 1093-1094.

On January 10, 2024, the HOA filed a reply in further support of its Motion to Dismiss advising the Court of the Board's 3-0 decision affirming that the "Let's Go Brandon" flag was a prohibited campaign sign and reiterating its request to dismiss the Counterclaim. JA 1113-1119.

By Order dated January 11, 2024, the Circuit Court granted the HOA's Motion to Dismiss. JA 1120-1122. In the Order the Court found that the Board had held the hearing on November 7, 2023 and that the Board had made the decision 3-0 that the "Let's Go Brandon" flag was a prohibited political campaign sign in accordance with Section 10.2.1 of the Declaration. Id. The Court further found that "any procedural issue is now cured, and the Defendant's Counterclaim is now moot." Id.

The January 11, 2024 Order also addressed Mr. Wilber's claim for attorney's fees. The Circuit Court rejected Mr. Wilber's position that he was entitled to attorney's fees under W.Va. Code § 36B-3-116(f). JA 1120-1122. The Circuit Court observed that Mr. Wilber might be able to recover fees pursuant to W.Va. Code § 36B-4-117; and noted that "this Section states that '[t]he court, in an appropriate case, may award reasonable attorney's fees.'" Id. Thus, the Circuit Court properly determined that it "had the discretion to award fees." Id.

In its examination of whether to exercise its discretion to award attorney's fees, the Circuit Court held "based upon the rationale that a Board hearing was not required before litigation was commenced, the fact that the Counterclaim was filed over one (1) year after the Complaint was filed, and most notably that the any procedural issues are now cured, the Court finds attorney fees on the Counterclaim are not appropriate." JA 1120-1122.

The Circuit Court had the discretion to order attorney's fees, or not. Here, the Circuit Court appropriately weighed the issues of whether the HOA breached any contract, whether Mr. Wilber delayed in bringing his motion and whether Mr. Wilber had the opportunity to be heard by the Board and found that an award of attorney's fees were not warranted. This Court should affirm the Circuit Court's dismissal of the Counterclaim.

- i. The Circuit Court Properly Determined that the Board was not Required to Have a Hearing before Litigation was Commenced.**

Mr. Wilber baldly asserts without citing to any part of the record that “the Circuit Court expressly concluded that ‘hearings’ are required conditions precedent for enforcement actions by Locust Hill.” *See* Appellant’s Opening Brief at 20. As referenced above, the Circuit Court did not so hold. Indeed, the Circuit Court’s January 11, 2024 Order specifically stated that the Court’s finding that “a Board hearing was not required before litigation was commenced” JA 1120-1122.

Mr. Wilbur also asserts without any supporting cite to the record that “[t]he Circuit Court concluded that Locust Hill breached the Covenants by not conducting a hearing. *See* Appellant’s Opening Brief at 21. Again, the Court made no such finding or determination, and, in fact, held the opposite. JA 1120-1122.

It is clear that the Governing Documents do not require that a hearing be held by the Board of Directors before litigation is commenced. As related to any such process, the Governing Documents provide as follows:

DECLARATION

Article I
Definitions

Section 1.19 – Notice and Hearing. The right of a Unit Owner to receive notice of an action proposed to be taken by or on behalf of the Association and the right to be heard thereon. *The procedures for Notice and Hearing shall be adopted by bylaw or by rule by the association.*

JA 1726 (emphasis added).

Article XIII
Additions, Alterations and Improvements

Section 13.7 – Appeal to the Executive Board. *If the Committee disapproves or imposes conditions on the approval of a proposed improvement to Property, the applicant may appeal to the Executive Board by giving written notice of such appeal to the Executive Board and the Committee within ten days after notice of such disapproval or conditional approval is given to the Applicant. The Executive Board shall hear the appeal with reasonable promptness after reasonable notice of such hearing to the Applicant and the Committee shall decide, with*

reasonable promptness, whether or not the proposed Improvement to Property or the conditions imposed by the Committee shall be approved, disapproved or modified.

JA 1741 (emphasis added).

Section 13.11 – Appeal to the Executive Board of Finding of Noncompliance. *If the Committee gives any Notice of Noncompliance, the Applicant may appeal to the Executive Board by giving written notice of such appeal to the Board and the Committee within ten days after receipt by the Applicant of the Notice of Noncompliance. If, after a Notice of Noncompliance, the Applicant fails to commence diligently to remedy such noncompliance, the committee shall request a finding of noncompliance by the Board of Directors by giving written notice of such request to the Executive Board and the Applicant within thirty days after delivery to the Applicant of a Notice of Noncompliance.* In either event, the Board of Directors after Notice and Hearing shall decide, with reasonable promptness, whether or not there has been such noncompliance and, if so, the nature thereof.

JA 1742 (emphasis added).

Article XXIII
Rights to Notice and Comment; Notice and Hearing

Section 23.2 – 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 note 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.

Section 23.3 – Appeals. *Any person having a right to Notice and Hearing shall have the right to appeal to the Executive Board from a decision of persons other than the Executive Board by filing a written notice of appeal with the Executive Board within ten (10) days after being notified of the decision.* The Executive Board shall conduct a hearing with thirty (30) days given the same notice and observing the same procedures as were required for the original meeting.

JA 1750 (emphasis added).

Article XXIV
Executive Board

Section 24.2 – Powers and Duties. The Executive Board may act in all instances on behalf of the Association, except as provided in this Declaration, the Bylaws or the Act. The Executive Board shall have, subject to the limitations contained in this Declaration and the Act, the powers and duties necessary for the administration of the affairs of the Association and of the Common Interest Community which shall include, but not be limited to, the following:

(f) *Institute, defend or intervene in litigation or administrative proceedings or seek injunctive relief for violation of the Association’s Declaration, Bylaws or Rules in the Association’s name on behalf of the Association or two or more Unit Owners on matters affecting the Common Interest Community;*

(m) *Impose a reasonable charge for late payment of assessments after Notice and Hearing, levy reasonable fines for violations of this Declaration, Bylaws, Rules and regulations of the Association.*

JA 1751-1752(emphasis added).

BYLAWS

Article II Board Members

Section 2.2 – Powers and Duties. The Board Members may act in all instances on behalf of the Association, except as provided in the Declaration, these Bylaws or the Act. The Board of Directors shall have, subject to the limitations contained in the Declaration and the Act, the powers and duties necessary for the administration of the affairs of the Association and of the Common Interest Community which shall include, but not be limited to, the following:

a) Adopt and amend Bylaws and Rules and regulations;

f) Institute, defend or intervene in litigation or administrative proceedings or seek injunctive relief for violations of the Association’s Declaration, Bylaws or rules in the Association’s name on behalf of the Association or two or more Unit Owners on matters affecting the Common Interest Community;

m) Impose a reasonable charge for late payment of assessments and, after Notice and hearing, levy a reasonable fine for a violation of the Declaration, Bylaws, Rules and regulations of the Association;

JA 0296-0297(emphasis added).

Article V Enforcement

Section 5.1 – Abatement and Enjoinment of Violations by Unit Owners. *The violation of any of the Rules and regulations adopted by the Executive Board, or the breach of any provision*

of the Document shall give the Executive Board the right, after Notice and Hearing, except in case of an emergency, in addition to any other rights set forth in these Bylaws:

(a) to enter, except the enclosed area, of any residential structure, the Unit in which, or as to which, such violation or breach exists and to summarily abate and remove, at the expense of the defaulting Unit Owner, any structure, thing or condition (except for additions or alterations of a permanent nature that may exist therein) that is existing and creating a danger to the Common Elements contrary to the intent and meaning of the provisions of the Documents, and the Executive Board shall not thereby be deemed liable for any manner of trespass; or

(b) *to enjoy, abate or remedy by appropriate legal proceedings, either at law or in equity, the continuance of any such breach.*

Section 5.2 – Fine for Violation. By resolution, following Notice and Hearing, the Executive Board may levy a fine of up to \$25 per day for each day that a violation of the Documents or Rules persists after such Notice and Hearing, but such amount shall not exceed that amount necessary to insure compliance with the rule or order of the Executive Board.

JA 0305 (emphasis added).

ARCHITECTURAL GUIDELINES

Appeal Procedures

Any Unit Owner whose application has been denied and/or been found to be noncompliant after the fact by the ACC has the right to contest the finding to the BOD, pursuant to Article XIII of the Declaration. The Unit Owner must submit the written request for appeal to the Managing Agent within 10 days of the receipt of the denial. A decision will be provided in a timely manner, not to exceed 30 days for a decision, and 30 days for an appeal to be scheduled.

JA 0317 (emphasis added).

RESOLUTION POLICY NO P04 – 001

NOTICE OF NON-COMPLIANCE GUIDELINES AND PROCEDURES

D. CONTESTING NOTICE OF NON-COMPLIANCE: Unit Owner can contest a Notice of Non-Compliance if the Unit Owner formally takes action to request a Board hearing within ten (10) days of receipt of a Notice of Non-Compliance. If a Unit Owner elects not to contest a Notice of Non-Compliance within ten (10) days it will be assumed by the Board that the Unit Owner is acknowledging the compliance violation and is taking the necessary steps to correct the violation.

E. BOARD HEARING: The Board has thirty-days (30) after receiving a Unit Owner's request to contest a Notice of Non-Compliance to schedule a closed hearing...

F. ENFORCEMENT: In accordance with Locust Hill Unit Owner Association documents and applicable West Virginia law, enforcement actions that the Board may take if there is no satisfactory resolution during a closed hearing or if a Unit Owner elects not to take exception to the Notice within ten (10) days of said Notification include one or more of the following:

1. Issuance of fines: not to exceed twenty-five (\$25.00) per day from the date that the compliance violation was officially recognized by the ARC and/or Board. Fines shall be treated as an assessment against the Unit Owner's Lot and, as such, are subject to the delinquency penalties as determined by the Board and subject to WV laws and statutes and will reflect an annual compounded interest[] rate of 10%.
2. Place of property Lot lien: If fines levied and penalties by the Board have not been satisfied after being in place for six (6) months, the Board may at its discretion order a lien to be placed against a Unit Owners Lot. All fees and costs associated with placing the lien are to be deferred to the Unit Owner as an additional assessment against Unit Owner's Lot.
3. Forward the issue to the Locust Hill Unit Owner Association counsel for appropriate action.

JA 0329-0331.

As the Governing Documents establish in the various sections referenced above, if a Unit is found to be in noncompliance, then the owner of that Unit may request a hearing before the Board of Directors. However, the Board is not required to schedule a hearing. Although Section 23.2 of the Declaration does indeed state that certain procedural requirements must be taken “[w]henver the Documents require that an action be taken after “Notice and Hearing,” there is no such requirement under the circumstances of this case. *See* JA 1750. Importantly, since the Complaint only sought injunctive relief and a possible award of attorney fees and costs in the event the HOA prevailed, the “Notice and Hearing” requirements set forth in Section 23.2 of the Declaration did not have to be followed. Pursuant to Section 24.2(f) of the Declaration, the Association may institute litigation and seek injunctive relief without following the “Notice and Hearing” requirements, as “Notice and Hearing” is not *expressly* required. *See* JA 1750-1751.

Thus, the Governing Documents permitted the HOA to initiate litigation when it became clear that Mr. Wilber was not going to remove his prohibited political campaign sign.

In granting the HOA's Motion to Dismiss, the Circuit Court also properly rejected Mr. Wilber's argument that Article V of the Bylaws require that "Notice and Hearing" requirements must be followed before litigation is initiated. Significantly, to the extent that this Bylaw Article is inconsistent with the Declaration, the Declaration prevails. As set forth in W.Va. Code § 36B-2-103:

Construction and validity of declaration and bylaws:

(c) In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with the chapter.

Since the Complaint only sought injunctive relief and a possible award of attorney fees and costs in the event the HOA prevailed, the "Notice and Hearing" requirements set forth in Section 23.2 of the Declaration did not have to be followed. Accordingly, the HOA did not breach any contract and Mr. Wilber was not entitled to any damages for breach of contract. He was not entitled to summary judgment on his breach of contract claim. The Circuit Court did not err in granting the HOA's Motion to Dismiss and failing to grant Mr. Wilber's Motion for Partial Summary Judgment.

Even if Mr. Wilber could prevail under his Counterclaim, he would not be entitled to his attorney fees and costs pursuant to W.Va. Code § 36B-3-116(f), as this particular provision relates only to an award of attorney fees in the collection of assessments.

ii. The Circuit Court Did not Abuse its Discretion in Refusing to Award Mr. Wilbur his Attorney's Fees and Costs Related to the Counterclaim.

Mr. Wilber argues that since the Circuit Court essentially granted Mr. Wilber the relief he sought in his Counterclaim he was the prevailing party and that he was entitled to recover

attorney's fees and costs. *See* Appellant's Opening Brief at 20. As an initial matter, the Counterclaim *did not* include a request that the HOA be required to conduct a hearing. Nevertheless, the Circuit Court considered and rejected Mr. Wilber's request for attorney's fees and costs. In the January 11, 2024 Order, the Circuit Court correctly rejected Mr. Wilber's argument that W.Va. Code § 36B-3-116(f) applied to mandate a fee award. JA 1120-1122. This particular provision applies only to an award of attorney fees in the collection of assessments.

The Circuit Court observed that if Mr. Wilber was able to recover fees, it would be pursuant to W.Va. Code § 36B-4-117. This Section states that "[t]he court, in an appropriate case, may award reasonable attorney's fees." JA 1120-1122. Thus, the Circuit Court determined that it had the discretion to award fees or not. *Id.* The Circuit Court then determined that an award of attorney's fees and costs was not appropriate. The Circuit Court reasoned that "[b]ased upon the rationale that a Board hearing was not required before litigation was commenced, the fact that the Counterclaim was filed over one (1) year after the Complaint was filed, and most notably that the any procedural issues are now cured, the Court finds attorney fees on the Counterclaim are not appropriate." JA 1120-1122.

"The decision to award or not to award attorneys' fees rests in the sound discretion of the circuit court, and the exercise of that discretion will not be disturbed on appeal except in cases of abuse." Beto v. Stewart, 213 W. Va. 355, 359, 582 S.E.2d 802, 806 (2003); *see also* Fairmont Tool, Inc. v. Davis, 246 W.Va. 258, 868 S.E.2d 737 (2021); Sanson v. Brandywine Homes, Inc., 215 W. Va. 307, 310, 599 S.E.2d 730, 733 (2004) ("We ... apply the abuse of discretion standard of review to an award of attorneys' fees."). Likewise, "[t]he trial [court] ... is vested with a wide discretion in determining the amount of ... court costs and counsel fees; and the trial [court's] ... determination of such matters will not be disturbed upon appeal to this Court unless it clearly

appears that [it] has abused [its] discretion.” Bond v. Bond, 144 W.Va. 478, 109 S.E.2d 16 (1959).

The January 11, 2024 Order demonstrates that the Court considered the appropriate factors in and correctly determined that Mr. Wilber was not entitled to an award of attorney’s fees related to his Counterclaim. The Circuit Court determined that Mr. Wilber was not entitled to a hearing; that he had significantly delayed in raising the issue and that even if Mr. Wilber was entitled to a hearing that the issue had been corrected. Thus, it cannot be said that the Circuit Court abused its discretion in failing to award Mr. Wilber his attorney’s fees. Accordingly, the Circuit Court’s determination should not be disturbed on appeal.

E. The Circuit Court Did Not Err in Permitting the Testimony Offered by the Witnesses for Locust Hill.

i. Standard of Review.

The determination of whether a witness has sufficient knowledge of the material in question so as to be qualified to give his opinion is largely within the discretion of the trial court, and will not ordinarily be disturbed on appeal unless clearly erroneous.” State v. Jameson, 194 W.Va. 561, 461 S.E.2d 67 (1995).

ii. The Witnesses for Locust Hill Did Not Offer Improper Testimony.

The witnesses for Locust Hill testified as to their perceptions of the “Let’s Go Brandon” message and related research. As set forth in Rule 701 of the West Virginia Rules of Evidence:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness’s perception;
- (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. W.Va.R.E. 701 (2024).

Locust Hill first contends that most, if not all, of the members of the jury pool had some

pretrial understanding regarding the “Let’s Go Brandon” message. JA 1396. Several of these members ultimately became jurors on the Case. JA 1466.

Notwithstanding, the testimony offered by the witnesses for Locust Hill was based upon their personal perceptions and research and did not violate Rule 701 or otherwise. The witnesses for Locust Hill testified regarding their perception and understanding of the “Let’s Go Brandon” message. These witnesses were HOA President Steve Ruble and Community Manager Renee Sanders. Their testimony was helpful in understanding how and why the HOA came to its decision regarding the sign at issue. JA 1522; 1547.

F. The Circuit Court Did Not Improperly Instruct the Jury.

The Appellee first and importantly points out that trial errors before an advisory jury are largely inconsequential. It is established that “[a]lleged errors in instructions to a jury are not grounds for reversal where the verdict is purely advisory and the trial court makes its own independent findings on evidence sufficient to sustain a verdict, unless it is obvious from the instructions that the trial court was operating under a basic misconception of the governing law.” Syl. Pt. 1, Wolfe v. Kalmus, 186 W.Va. 622, 413 S.E.2d 679.

i. Standard of Review.

“The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court’s giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.”

ii. The Circuit Court Provided Reasonable Common Sense Definitions of the Subject Words.

The Jury Instructions in this Case were indeed accurate and fair to both parties. JA 1677. The portion of the Jury Instructions that provided definitions of “campaign,” “campaign sign,”

and “political sign” were accurate definitions of these terms, and the Appellant has not demonstrated that these definitions were somehow inaccurate. JA 1685. The Appellant simply did not prefer the definitions that were given. Indeed, these definitions are reasonable and common sense definitions of these specific words. More to the point herein, the HOA defined “campaign sign” as “any sign for, against or relating to a political campaign.” This definition is similar to the definitions provided in the Jury Instructions, and the provided definitions did not mislead the jury in any manner.

CONCLUSION

For the reasons set forth herein, Locust Hill respectfully requests that the appeal filed by Mr. Wilber be denied in its entirety, and that this Honorable Court affirm the judgment of the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christopher P. Stroech, Esq., do hereby certify that I have served a true copy of the foregoing RESPONDENT'S BRIEF upon the following counsel of record by email through the File & ServeXpress System this October 15, 2025:

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