INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 25-ICA-280

MICHAEL B. WILBER,

Appellant,

v.

LOCUST HILL UNIT OWNER'S ASSOCIATION, INC.,

Appellee.

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

REPLY BRIEF OF APPELLANT

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COMES NOW the Appellant, MICHAEL B. WILBER ("Mr. Wilber"), and for his Reply to the Response Brief of the Appellee, LOCUST HILL UNIT OWNER'S ASSOCIATION, INC.("HOA"), states as follows:

I. SUMMARY OF THE REPLY

In this unusual case, remanded from this court to the Circuit Court of Jefferson County*, (See Wilber v. Locust Hill Unit Owner's Ass'n*, 2025 W. Va. App. LEXIS 82; 2025 LX 95828), there are no material disputed facts. The primary point of law in this case is that interpretation of a contract, here restrictive covenants, is always a matter of law. Applying the terms of a contract to the undisputed facts is also always a matter of law. Thus, the issues in this case are subject to de novo review.

While the jury should not have been deciding the issue, the sources of the jury instructions was surprising and erroneous. The Trial Court offered instructions on what constitutes a "political campaign" or "political sign" based on an online publication that none of the parties could find on the Internet during the trial. The instructions were also based on a municipal ordinance in a different state that had no applicability to what constitutes a flag in West Virginia. The reliability of internet sources as a basis for jury instructions was error by the Trial Court. Also, it must also be assumed that the Trial Court's "findings of fact and conclusions of law" were based in part on the erroneous legal conclusions articulated in the jury instructions.

Consequently, this Court should reverse the May 31, 2024 Order of the Trial Court and June 13, 2025 Order on Remand of the Circuit Court; enter Judgment in favor of Mr. Wilber; or, in the alternative, remand this case for a new trial.

II. ARGUMENT

A. Interpretation of a restrictive covenant is not an issue of fact, but is a conclusion of law.

It is undisputed that Mr. Wilber was displaying a ***flag*** on his property. The ***flag*** at Mr. Wilber's property was not one providing "directional information with respect to …activities being conducted outside of the property…" The ***flag*** did not violate the plain language of the Covenants. The flag may well constitute political speech, which is not prohibited by the covenants. If directed at President Biden, the flag was erected on the flagpole long before President Biden announced his candidacy in 2024, a mere 19 months into his 4-year term which commenced on January 22, 2021.

Because there is no provision in the Governing Documents of Locust Hill prohibiting Mr. Wilber's flag (even if political speech), the Trial Court's denial of summary judgment in favor of Mr. Wilber, and the Trial Court's post remand expansion of the meaning of the covenants were ***issues of law*** and error subject to de novo review.

The words "Let's Go Brandon" are the only message on Mr. Wilber's flag, which flew directly beneath his American flag. The HOA claims that whether or not the flag was a sign was a disputed issue of material fact and that the interpretation of the covenants by HOA representatives was of some legal moment. This argument spans approximately 7 pages of their response brief See Respondents' Brief Pages 12-19.

According to any dictionary definition, flags and signs are different things. The restrictive covenant at issue, Section 23.2, specifically and expressly treats "flags" differently from "signs." Clearly, the HOA and Mr. Wilber disagree about whether a flag is a sign. However, this was not a disputed fact but rather a disputed question of application of the plain language of the Covenants to undisputed facts. Thus, the disagreement between the parties was about interpretation, a question of law; not facts for a jury; and ultimately on remand questions of law rather than findings of fact by the Trial Court.

West Virginia law is clear that restrictive covenants are to be strictly construed. Instead of strictly construing the Covenants and granting summary judgment in favor of Mr. Wilber, the Trial Court broadly construed the covenants, reading into the Covenants meaning not expressed in the plain language of Section 23.2

In its Findings of Fact and Conclusions of Law, the Trial Court asserted that the following broad interpretation was a "finding of fact".:

> The circuit court finds that the plain and ordinary meaning of "political campaign sign" is a sign promoting or opposing a person running for a political office or a particular vote on a public issue decided by ballot. This plain and ordinary meaning does not rely upon the fabric upon which the promotion or opposition is displayed. The court finds a political campaign sign may take any shape – a flag, a garden flag, a banner, a poster, just to name a few. It is not the fabric of the display that is prohibited, it is whether the message promotes or opposes a candidate or issue subject to ballot. See JA 2088-2093

However, it is clear this was a conclusion of law when the Trial Court **interpreted** and **expanded** what a sign might be, notwithstanding the direct specification about

"prohibited flags" in the covenants. The conclusion of the Trial Court that a political sign can take any shape is **judicial expansion** of the covenants, **not strict construction**.

In West Virginia, whether a contract is ambiguous is a threshold question of law. 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 confirmed 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).

Accordingly, it was error to not grant Mr. Wilber summary judgment. Therefore, the judgment must be reversed, and judgment entered in Mr. Wilber's favor because the flag that he raised does not violate the plain language of the Covenants.

B. Political speech is not prohibited by the covenants.

As noted in Mr. Wilber's opening brief on appeal, the issue of whether pure political speech should be considered to be "campaign speech" is an issue of first impression in West Virginia, and appears to be an issue of first impression nationally.

At the time the "Let's Go Brandon" flag first began to fly beneath Mr. Wilber's American flag, President Biden was in the 19th month of his presidency and had not announced his intention to run for reelection in 2024. At that time, when this case began in 2022, Donald Trump had not yet announced his candidacy for the 2024 election.

Assuming without conceding that the words "Let's Go Brandon" constituted political speech, it is important to revisit the evidence presented by the HOA and support of this concept. On April 24, 2024 the first day of trial this is the information presented by Renee Sanders, the representative of the management company seeking to enforce the covenant about how she concluded the flag to be campaign speech

> Renee Sanders: The person that was interviewing Mr. Brown said, "Oh, you know, they're chanting your name 'Let's Go Brandon'." I believe it was something to that effect they're saying "Lets Go Brandon."
>
> So anyway that quickly took off like wild fire and it began being used by Trump supporters **in favor of Trump against Joe Biden even though the campaign was over but Trump had never conceded the election** and it continued even to this day to be used in that way.

See Trial Transcript, April 24, 2024 155:9-13 (emphasis added)

Later, on page 156 of the April 24, 2024, transcript Miss Sanders also indicated she saw "Let's Go Brandon" bumper stickers advertised on an official Trump campaign site, although she did not disclose when she first observed that advertisement. On page 156 of that April 24 transcript Sanders conceded that the website she accessed was clearly not an official website of the Trump campaign.

Mr. Wilber's point is simple and straightforward. Given the Covenants at Locust Hill, a citizen can fly a flag showing dissatisfaction with the current president of the United States. A mere expression of dissatisfaction cannot properly be characterized as a being a "campaign sign".

The conclusion that political speech, whether prior to a campaign for the presidency or during the campaign for the presidency, constitutes a campaign sign is simply not supportable as a matter of fact, or a matter of law, given the clear and plain language of the restrictive covenants. Accordingly, the Circuit Court of Jefferson County must be reversed.

It is undisputed that, at the time the flag at issue was first flown, no presidential election campaign was underway. When applying the covenants and attributing plain meaning to "Let's Go Brandon" the language is virtually meaningless. However, the Trial Court concluded that the members of the HOA board did not "live in a cave", and that they concluded that it was political campaign speech. However, because there was no campaign, the more accurate conclusion that this was "political speech" articulating dissatisfaction with President Biden.

Expanding the meaning of the words to something other than the plain language is inconsistent with strict construction, and consistent with what the trial court did – – improperly expanded the meaning of the language on the flag and the language and the restrictive covenant. To do so will require reversal of well settled mandates of West Virginia law on the application of restrictive covenants to real property. *Miller v. Bolyard*,

186 W.Va. 165, 167 S.E.2d 684 (1991) (citing *Wallace v. St. Clair*, 147 W.Va. 377, 390 127 S.E.2d 742, 751 (1962); *Judd v. Letterle*, 406 S.E.2d 465 (1991)); *Wallace v. St. Clair*, 147 W.Va. 377, 378 S.E.2d 742, 744 (1962) (1962); and *Allred v. City of Huntington*, 331 S.E.2d 861, 862 (1985).

C. Mr. Wilber prevailed on his Counterclaim.

i. The Trial Court found Mr. Wilber had the right to a hearing and that the HOA did not follow the process required by the Bylaws.

The Trial Court also erred by dismissing Mr. Wilber's counterclaim demanding that the HOA comply with its own Covenant, seeking injunctive relief, and monetary damages. The HOA misleads this Court by falsely asserting the "Governing Documents do not require a hearing" as the plain language of the Bylaws and Covenants expressly require otherwise. Consequently, dismissing Mr. Wilber's Counterclaim was reversible error.

There was no standing by the HOA to commence the enforcement proceeding because of its failure to comply with the notice and hearing requirements of Section 23.2 of the Declaration of Covenants of Locust Hill and Article V, Section 5.1 of the Bylaws ("Governing Documents"). Following this argument by Mr. Wilber at the pretrial conference, the Trial Court ordered the parties to participate in a hearing before the HOA Board on November 7, 2023. This relief was consistent with the express relief sought by Mr. Wilber in his Counterclaim and as a result Mr. Wilber should have been able to pursue damages for his breach of contract claim.

The HOA misleads this Court by falsely asserting the "Governing Documents do not require a hearing" as the plain language of the Bylaws and Covenants quoted

hereinbelow expressly require otherwise. The HOA alleges in its response brief that the Governing Documents do not require notice and hearing. This clearly misstates the express language of the Governing Documents. The Bylaws state the Board may act only "***after Notice and Hearing***:"

ARTICLEV
Enforcement

Section 5.1 - Abatement and Enjoinment of Violations by Unit Owners: ***The of the violation of any of the Rules and regulations*** adopted by the Board, or the breach of any provision of the Document ***shall give the 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 Board shall not thereby be deemed liable for any manner of trespass; or

b) ***To enjoin, abate or remedy by appropriate legal proceedings***, either at law or in equity, the continuance of such breach. Emphasis added. (JA 0132)

The Covenants also require written 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 **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 the Trial Court ordered the HOA to convene a hearing before the Board about the alleged violation of the Covenants finding it was a requirement of the Bylaws:

> MR. CAMPBELL: ***Michael Wilber has the right to have this issue heard by the board*** that was elected to manage this community ***because that is what the bylaws say***. He has that protection. So at a minimum, even if you think perhaps come day these other issues night be disputed facts for a trial, he was denied that process. Almost every kind of proceeding that we have in the courts of this state where there is an underlying administrative process, you have the right to that process before there is judicial review. ***That process didn't happen***. ***They admit it didn't happen and that's why we shouldn't be having a trial next week***. Transcript of Pretrial Conference, October 31, 2023 35:1-14 (JA 0529) Emphasis added.
>
> ***
>
> THE COURT: We are continuing it ***to allow for a remedy that the Defendant has asked for***, do you understand what I am saying? Transcript of Pretrial Conference, October 31, 2023 41:18-20 (JA 0535) Emphasis added.
>
> ***
>
> THE COURT: I said a lot. Ordinarily, ***I ask the party that has prevailed*** on the issues ***to do a proposed order*** and then I do a five day hold just to see if there is any objection. So ***I have somewhat granted Mr. Wilber's request in order to allow for this hearing to happen***. So if you would like to take a stab at the pre-trial order.
>
> MR. CAMPBELL: ***Are we free to tell Mr. Wilber you think he won that***?
>
> THE COURT: ***I did think he wanted that***. Transcript of Pretrial Conference, October 31, 2023 45:23-46:8 (JA 0539-0540) Emphasis added.

The Trial Court granted in part the relief sought by Mr. Wilber by expressly concluding that a "hearing" was a requirement precedent to enforcement actions in Court by the HOA. After concluding that the HOA breached the Governing Documents by not conducting a hearing, Mr. Wilber, as the prevailing party, had the right to pursue and recover damages, attorney's fees and costs. It was error by the Trial Court to dismiss Mr. Wilber's Counterclaim as moot because no damages were considered by the Trial Court, nor awarded or denied.

ii. The prevailing party language for the recovery of attorney fees, whether under the Covenants, or the applicable statute, entitles Mr. Wilber to an award of attorney fees.

The HOA breached its contractual obligations to Mr. Wilber by commencing an enforcement proceeding against him without complying with the notice and hearing requirements under the Governing Documents. Mr. Wilber's Counterclaim expressly requested an injunction "enjoining the Plaintiff from enforcing the Covenants without following the procedure outlined in the Covenants." The Trial granted this relief when it ordered that a hearing convene before the HOA Board. As the prevailing party, Mr. Wilber was entitled to pursue damages, attorney's fees and costs pursuant to W. Va. Code § 36B-3-116(f).

The Covenants in this case contain the same operative information as set forth in W. Va. Code § 36B-3-116(f) for attorney's fees. Ordinarily, attorneys' fees, except as fixed by statute, should not be taxed as a part of the costs recovered by the prevailing party; but in a suit in equity where the taxation of such costs is essential to the doing of justice,

they may be allowed. *See Rolax v. Atlantic C. L. R. Co.*, 186 F.2d 473, 481 (4th Cir. 1950); *see also* Syllabus Point 3, *Sally-Mike Prop. v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986).

The prevailing party language for the recovery of attorney's fees, whether it is under the Covenants, the applicable statute, or under principles of equity, entitles Mr. Wilber to that recovery. The HOA's breach damaged Wilber by forcing him to defend an action brought in violation of his contractual rights, and the Trial Court's act of requiring a retroactive hearing does not moot Mr. Wilber's claim for damages incurred through the date of the hearing. Mr. Wilber met the standard for breach of contract and the Trial Court's dismissal of his Counterclaim on a Motion to Dismiss as being "moot," after granting Mr. Wilber partial relief by ordering a hearing, was clear error.

D. Witnesses gave opinion testimony based on hearsay which is not permitted by the Rules of Evidence.

The Trial 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 0979-980). The HOA relies on W.Va.R.E. 701 to support its assertion that the testimony of their "perception and understanding of the 'Let's Go Brandon' message" was proper and admissible. It is fundamental that a lay witness may only testify about what he ***personally perceived with his own senses***. West Virginia Rule of Evidence 602 provides: "*A **witness may not testify** to a matter **unless** evidence is introduced sufficient to support*

a finding that he has ***personal knowledge of the matter***." West Virginia R. Evid. 602. Emphasis added.

A witness who is competent is properly allowed to testify as to any evidentiary fact of which he has personal knowledge. *C.J.S. Witnesses* § 52. However, a witness cannot be allowed to testify as to a fact of which he has no personal knowledge, *Browning v. Hoffman*, 90 W. Va. 568, 111 S.E. 492 (1922), or a matter with respect to which his knowledge is so slight that his testimony would not be reliable. West Virginia Rule of Evidence 602 states that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. *Brennan v. Insul Co. (In re Asbestos Pers. Injury Litig.*), 2009 W.V. Cir. LEXIS 2029

In the present case, witnesses for the HOA testified based on internet searches they performed and within their personal knowledge. Therefore, these witnesses are not competent to testify on their perception and understanding of the message "Let's Go Brandon" as it is not a matter within their personal knowledge.

To the extent that these witnesses were expressing their opinions that "Let's Go Brandon" means F--- Joe Biden, such witnesses should not have been permitted to offer opinion testimony. A witness, in testifying, is to be restricted to facts within his personal knowledge, observation or recollection; his opinion, conclusion or inference with respect to matters in issue or relevant to the issue may not be received in evidence. C.J.S. Evidence § 438. The normal function of a witness is to state facts within his general knowledge, and ***his opinions are irrelevant***. See, *Clay v. Walkup*, 144 W.Va. 249, 107 S.E.2d 498 (1959).

Only an expert witness is permitted to give his individual opinion or conclusion. A witness is required to have some peculiar knowledge or more knowledge concerning the subject of his opinion than the jurors are ordinarily expected to have. *Cochran v. Appalachian Power Co.*, 162 W.Va. 86, 246 S.E.2d 624 (1978). Permitting witnesses to testify about an internet search regarding the slogan "Let's Go Brandon" was error by the Trial Court.

E. The Trial Court failed to properly instruct the jury.

Mr. Wilber filed Proposed Jury Instructions with his Amended Pretrial Memorandum (JA 0612-0622) and filed objections to the Plaintiff's Proposed Jury Instructions (JA 0808). 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)

Instructions which are confusing, misleading, or which incorrectly state the law should not be given. 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 regulation proffered by the Trial Court which was originally cited by Law Insider is not sourced from a reliable learned treatise, encyclopedia, or dictionary, and is not a definition from any West Virginia court. An ordinance from a town in New Mexico has no bearing on the Covenants at issue. The instruction by the Trial Court regarding the definition of a campaign sign was not a correct statement of the law and is reversible error.

III. CONCLUSION

This unique case provides an opportunity to reconcile long-standing principles of strict construction of real estate restrictive covenants with the public policy considerations of honoring and protecting political speech. While the First Amendment of the United States Constitution does not apply to private contracts between private parties, in this state, and in this country the importance of protected political speech cannot be understated nor undervalued.

The governing documents for Locust Hill do not attempt to prohibit political speech such as criticism of any elected official. However, the governing documents prohibit or limit political campaign signs, which are a small element of political speech in a democracy. This court should enforce the covenants for Locust Hill by limiting the enforcement to the plain language of that Covenants, and not the expansion and overreach of the Locust Hill Homeowners Association, and the Circuit Court of Jefferson County.

The remaining issues addressed in the opposition brief are adequately addressed, in Mr. Wilbur's opening brief.

WHEREFORE MICHAEL B. WILBER, by counsel, respectfully requests entry of an Order reversing the May 31, 2024 Order of the Trial Court denying Mr. Wilber's Motion to Set Aside Verdict and entering Judgment in his favor, or, in the alternative, remanding this case for a New Trial; and such further relief this Court deems appropriate.

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CERTIFICATE OF SERVICE

I hereby certify that service of a true copy of the foregoing has been made as follows:

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Item Served: Reply Brief of Appellant

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