In The

Supreme Court of Virginia

RECORD NO. 140112

NANCY C. JIMENEZ,

Appellant,

v.

LEWIS S. CORR, JR., Individually, LEWIS S. CORR, JR., as Executor of the ESTATE OF NORMA F. CORR, and as Trustee under the NORMA F. CORR REVOCABLE TRUST, THOMAS M. WILLIAMS, as Executor of the ESTATE OF NORMA F. CORR, and as Trustee under the NORMA F. CORR REVOCABLE TRUST, and CAPITOL FOUNDRY OF VIRGINIA, INC.,

Appellees.

BRIEF OF APPELLANT

Mark R. Baumgartner (VSB No. 45171)
Kristen R. Jurjevich (VSB No. 80532)
PENDER & COWARD, P.C.
222 Central Park Avenue, Suite 400
Virginia Beach, Virginia 23462
(757) 490-3000 (Telephone)
(757) 497-1914 (Facsimile)
mbaumgartner@pendercoward.com
kjurjevich@pendercoward.com

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT 1

STATEMENT OF FACTS 2

ASSIGNMENTS OF ERROR 11

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES 12

A. THE TRIAL COURT ERRED IN ADDING A "TRUST" TO THE PERMITTED TRANSFEREES ENUMERATED IN THE SHAREHOLDERS' AGREEMENT 12

B. THE TRIAL COURT ERRED IN DECLINING TO DETERMINE THAT THE COMPANY AND REMAINING SHAREHOLDERS HAD A JOINT RIGHT TO ACQUIRE THE ESTATE'S SHARES 17

C. THE TRIAL COURT ERRED IN GRANTING RELIEF ON FACTS AND A CLAIM NOT PLED 25

D. THE TRIAL COURT ERRED IN DETERMINING AND CONSIDERING MRS. CORR'S INTENT 30

CONCLUSION 37

CERTIFICATE 38

TABLE OF AUTHORITIES

Page(s)

CASES

Austin v. City of Alexandria,
265 Va. 89, 574 S.E.2d 289 (2003) 14

Barter Found., Inc. v. Widener,
267 Va. 80, 592 S.E.2d 56 (2004) 31

Berry v. Klinger,
225 Va. 201, 300 S.E. 2d 792 (1983) 32

Bott v. N. Snellenburg & Co.,
177 Va. 331, 14 S.E.2d 372 (1941) 19

Bridgestone/Firestone, Inc. v. Prince William Square Assocs.,
250 Va. 402, 463 S.E.2d 661 (1995) 32, 33, 34, 35

Camp v. Camp,
220 Va. 595, 260 S.E.2d 243 (1979) 33

Cobbs v. Fountaine,
24 Va. 484, 3 Rand. 484 (1825)..... 18

Cohan v. Thurston,
223 Va. 523, 292 S.E.2d 45 (1982) 33

Harrity v. Continental-Equitable Title & Trust Co.,
124 A. 493 (Pa. 1924)..... 19

Houston v. Bain,
170 Va. 378, 196 S.E. 657 (1938) 20, 25

In re Estate of Halas,
568 N.E.2d 170 (Ill. App. Ct. 1991)..... 15

Jones v. Harrison,
250 Va. 64, 458 S.E.2d 766 (1995) 13

Kiser v. Amalgamated Clothing Workers,
169 Va. 574, 194 S.E. 727 (1938) 18

Lacos Land Company v. Arden Group, Inc.,
517 A.2d 271 (De. 1986) 15

Link v. Weizenbaum,
229 Va. 201, 326 S.E.2d 667 (1985) 20, 21

Lipps v. First Am. Serv. Corp.,
223 Va. 131, 286 S.E. 2d 215 (1982) 13

McDaniel v. Daves,
139 Va. 178, 123 S.E. 663 (1924) 19

Phillips Petroleum Company v. Buster,
241 F.2d 178 (10th Cir. 1957), *cert. denied*,
355 U.S. 816, 78 S. Ct. 18, 2 L. Ed. 2d 33 (1957) 19

PMA Capital Ins. Co. v. US Airways, Inc.,
271 Va. 352, 626 S.E.2d 369 (2006) 30

Potts v. Mathieson Alkali Works,
165 Va. 196, 181 S.E. 521 (1935) 26, 29

Reid v. Boyle,
259 Va. 356, 527 S.E.2d 137 (2000) 19

Schuiling v. Harris,
286 Va. 187, 747 S.E.2d 833 (2013) 12, 30

Spicely v. Jones,
199 Va. 703, 101 S.E.2d 567 (1958) 13, 34

Ted Lansing Supply Co. v. Royal Aluminum and Constr. Corp.,
221 Va. 1139, 277 S.E.2d 228 (1981) 25, 26

Tuttle v. Webb,
284 Va. 319, 731 S.E.2d 909 (2012). 25

Va. Hardwood Lumber Co. v. Hughes,
140 Va. 249, 124 S.E. 283 (1924) 29

Van Winckel v. Carter,
198 Va. 550, 95 S.E.2d 148, 152 (1956) 25

Westbury Coal Mining P'ship v. J.S. & K. Coal Corp.,
233 Va. 226, 355 S.E. 2d 571 (1987) 13, 32

Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co.,
270 Va. 566, 621 S.E.2d 114 (2005) 30

Wilson v. Holyfield,
227 Va. 184, 313 S.E.2d 396 (1984) 17, 31, 32-33

STATUTES

26 U.S.C. § 303..... 1, 10

Va. Code § 8.01-30 22

Va. Code § 13.1-649 20

Va. Code § 64.2-778 14

TREATISES

9-52 Corbin on Contracts § 52.3. ..... 22, 23

Restatement (Second) Contracts § 45 (1981) 28-29

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

This case concerns the application of the terms of a Shareholders' Agreement following the death of Mrs. Norma F. Corr, the majority Shareholder of Capitol Foundry of Virginia, Inc. (the "Company"). The case raises significant issues, not previously addressed by this Court, pertaining to the enforceability of restrictions placed upon the transfer of stock by a shareholders' agreement. The issue is whether stock, the transfer of which is restricted to certain specified natural persons, can instead be transferred to a trust.

If the Shareholders' Agreement in this case is enforceable, there will be a balance of control among the heirs to a family business and equal financial benefit to the heirs; if not, one heir will have a significant disproportionate benefit. Further, if the shares had been transferred to the Trust A, the Estate and all beneficiaries would have lost significant tax benefits provided by Internal Revenue Code § 303. 26 U.S.C. § 303.

Nancy Jimenez, Mrs. Corr's daughter and a shareholder, officer, and director of the Company, filed a complaint on October 23, 2012, to enforce the terms of the Shareholders' Agreement, which prohibited transfers to anyone (or anything) other than, "children, spouses, parents and siblings". An Amended Complaint was filed on March 28, 2013. A trial on the merits

was conducted on October 1st and 2nd, 2013. The trial court ruled that the disposition of Mrs. Corr's shares through the residuary clause of her Will into a Trust was "tantamount to the stock being bequeathed" to Mrs. Corr's children. J.A., vol. II, p. 537. The Court further ruled that Lewis S. Corr, Jr., Mrs. Corr's son, had properly exercised an option granted in the Trust to acquire a two-thirds controlling interest in the Company. J.A., vol. II, pp. 552-53.

Mrs. Jimenez appealed the trial court's decisions because the terms of the Shareholders' Agreement do not permit a transfer to a trust, Mrs. Corr did not intend to transfer the shares to the Trust, and the effective exercise of the option granted by the Trust was not properly before the Court.

This Court granted an appeal on April 8, 2014.

STATEMENT OF FACTS

This matter involves the Corr family[1] and a privately held company, Capitol Foundry of Virginia Inc. (the "Company"). The Company sells castings for municipal infrastructure, such as manholes, drains, etc. The dispute concerns the ownership and control of the Company following the death of its majority shareholder, Norma F. Corr, in May 2012.

[1] The family pronounces its name as in "Car."

The Company was founded by Lewis Corr, Sr., who was married to Norma Corr. J.A., vol. I, p. 136, ¶ 1. They had three children: Lewis Corr, Jr. (a/k/a 'Jim') ("Mr. Corr, Jr."), Patricia Williams ("Mrs. Williams"), and Nancy Jimenez ("Mrs. Jimenez" or "Plaintiff"). *Id.* at ¶ 2. Mr. Corr, Jr. and Mrs. Jimenez have been involved in, and employed by, the business for 30+ years.

Mr. Corr, Jr. acquired 5 shares of the company in the early 1980s. J.A., vol. I, p. 408.

In the early 1990s, Mr. Corr, Sr. and Mrs. Corr executed reciprocal wills and trusts. J.A., vol. I, p. 137, ¶¶ 3, 5; J.A., vol. I, pp. 143-74, 184-218. The wills poured assets into the trusts, and each trust contemplated the further division of assets into a "family trust", referred to as "Trust A", to maximize the estate tax exemption.

Each trust provides that Mr. Corr, Jr. was to have an option (the "Option") to purchase any shares of the Company "which Trust A *may* own". *See, e.g.*, J.A., vol. I, p. 153, Art. IV(B)(6) (emphasis added). The trusts further provided that the Option must be exercised within 90 days of the death of the latter of Mr. Corr, Sr. or Mrs. Corr. *Id.*

Mr. Corr, Sr. passed away in late 1999. J.A., vol. I, p. 137, ¶ 8. After Mr. Corr, Sr. passed away, his Trust A could have been funded with his

shares of Company stock. J.A., vol. I, pp. 397-98. The Company shares held by Mr. Corr, Sr. were, however, not placed in trust, but instead, were conveyed to Mrs. Corr outright and free of trust. J.A., vol. I, pp. 398, 438-39. After the administration of Mr. Corr, Sr.'s estate, and as of 2002, Mrs. Corr owned 100 and Mr. Corr, Jr. owned 5 shares of the Company's 105 outstanding shares. J.A., vol. I, p. 419.

In December 2002, Mrs. Corr conveyed 5 of her shares to Mrs. Jimenez. J.A., vol. I, pp. 273, 395. Simultaneous with the transfer of shares to Mrs. Jimenez, Mrs. Corr, Mr. Corr, Jr., and Mrs. Jimenez executed a shareholders' agreement. J.A., vol. I, p. 137, ¶ 4; J.A., vol. I, pp. 175-83. The Shareholders' Agreement was drafted at Mrs. Corr's request by Lawrence Seigel, Esq., the Company's counsel. J.A., vol. I, p. 329. After the transfer, Mrs. Corr held 95 shares, and Mr. Corr, Jr. and Mrs. Jimenez held 5 shares each J.A., vol. I, p. 137, ¶ 11.

The Shareholders' Agreement contained provisions for the mandatory purchase and sale of stock. J.A., vol. I, p. 176, § 3. Section 3(a) states:

> Subject to subparagraph (d) hereof, on the death of an Agreeing Shareholder, all of the Shares of Stock owned by such Agreeing Shareholder shall be sold by his personal representative and shall be purchased by the Company or the remaining Shareholders for the purchase price and under the terms set forth in Section 4.
> Section 3(d) states:

> An Agreeing Shareholder shall have the right to convey or bequeath his/her shares to a member of such Agreeing Shareholder's immediate family. Such right shall apply during such Agreeing Shareholder's lifetime and shall also apply subsequent to the demise of such Agreeing Shareholder, and then be applicable to such Agreeing Shareholder's executor or administrator. The term "immediate family" shall be defined as children, spouses, parents and siblings of such Agreeing Shareholder.

There was disputed testimony concerning events subsequent to the execution of the Shareholders' Agreement. Plaintiff presented evidence that Mrs. Corr understood that the Shareholders' Agreement would govern the disposition of her shares at her death. J.A., vol. I, p. 276.

It was not disputed that that there were discussions among the family regarding possible changes to the ownership of the Company, though the substance of those discussions were in dispute. It is undisputed that Mrs. Corr made no further changes to her estate planning documents following the execution of the Shareholders' Agreement. J.A., vol. I, pp. 136-38.

The evidence also established that Mrs. Corr made an effort to retitle substantially all of her assets, other than real estate and her shares in the Company, to provide for a "transfer on death" designation. J.A., vol. I, pp. 279-80, 396. It is undisputed that Mrs. Corr made *no effort to retitle her Company shares to provide for them to be transferred to her Trust A at her death*. J.A., vol. I, pp. 279-80, 397, 438-39.

There was also undisputed evidence that in the years preceding Mrs. Corr's death, the Company accumulated significant amounts of cash and marketable securities. J.A., vol. II, pp. 558-63. As of May 2012, the Company had accumulated nearly $6,000,000 in cash reserves, equal to roughly half of its net book value. J.A., vol. I, p. 399; J.A., vol. II, pp. 558-63.

Mrs. Corr passed away in May 2012. J.A., vol. I, p. 137, ¶ 8. Mr. Corr, Jr. and Mrs. Williams' husband, Tom Williams ("Mr. Williams"), are the co-executors of her estate (the "Estate") and co-trustees of her trust (the "Trust"). *Id.* at ¶¶ 9, 10.

The Shareholders' Agreement established the purchase of Mrs. Corr's Shares as their proportional share of the Company's book value as stated in the most recent tax return preceding her death. J.A., vol. I, p. 177, § 4(a). The evidence established that the purchase price of Mrs. Corr's shares so calculated would be approximately $10,000,000.[2] J.A., vol. II, pp. 558-63. The purchase price is payable over five years. J.A., vol. I, pp. 177-78, § 4(b).

[2] The purchase price was therefore approximately $108,000 per share. The Company has already purchased 64.4 shares (at a discounted price, which is subject to adjustment upon the conclusion of this appeal), leaving 30.6 shares for an approximate purchase price of $3,300,000 for the remaining shares.

The Shareholders' Agreement further provides that "Such offer [to purchase a decedent's shares] shall be deemed made and accepted on the ninetieth (90th) calendar day following the date of death, whether actually made and accepted or not." J.A., vol. I, p. 176, § 3(a). If the Company purchased all of Mrs. Corr's shares, then Mr. Corr, Jr. and Mrs. Jimenez would retain an equal interest in, and equal control over, the Company.

Mr. Corr, Jr., a co-executor and co-trustee, did not tender Mrs. Corr's Estate's shares to the Company or the remaining Shareholders. Instead, Mr. Corr, Jr. asserted that the Trust provided him an option to purchase the shares held by the Trust, and wanted to transfer the shares from the Estate to the Trust so that he could exercise his option. J.A., vol. I, p. 278.

On November 29, 2012, the Company purchased 64.4 shares of Mrs. Corr's 95 shares. J.A., vol. I, p. 138, ¶ 13; J.A., vol. I, pp. 226-30. The purchase was conducted pursuant to a Redemption Agreement that allowed the Estate to obtain the benefits provided by Internal Revenue Code Section 303, which, under certain circumstances, allows an Estate to obtain significant tax benefits by selling shares to a closely held corporation. This benefit *would not have been available* if the shares had been transferred to the Trust. J.A., vol. I, pp. 399-400, 401.

Following the Company's redemption of 64.4 shares, the Estate owned 30.6 shares, which were the subject of the Amended Complaint. J.A., vol. I, p. 138, ¶ 14. Mrs. Jimenez sought an order directing the Co-Executors of Mrs. Corr's Estate to tender the 30.6 shares to the Company and the remaining Shareholders, including specifically, Mrs. Jimenez.

The Co-Executors denied that the Shareholders' Agreement applied to the shares held by Mrs. Corr's Estate, and sought a declaratory judgment that the Option contained within the Trust constituted a conveyance or bequest of Mrs. Corr's shares and, thus, was exempt from the mandatory provisions in Section 3(a) of the Shareholders' Agreement. J.A., vol. I, p. 3-4.

Mr. Ankney, a corporate attorney specializing in closely held businesses, testified as an expert. J.A., vol. I, p. 316. Mr. Ankney explained the important distinction between specific natural persons and trusts as the categories pertain to shareholder agreements. Mr. Ankney explained that because trustees hold legal title and are generally permitted to vote shares owned by trusts, it is not customary to treat trust beneficiaries as the equivalent of a share owner. J.A., vol. I, pp. 319-20. As a matter of custom and practice, trusts are treated as a separate class of owner from natural persons that may be shareholders. J.A., vol. I, p. 318.

At the conclusion of the trial, the trial court ruled:

> Under these circumstances and under this factual scenario that the Will and Trust in this case need to be read as documents which are dependent upon each other, and as a consequence thereof, the Court is of the opinion that the requirement that the stock owned by Mrs. Corr be placed in the Trust under the terms of her Will and Trust document is tantamount to the stock being bequeathed as set forth in Paragraph 3(D) to the children of Mrs. Corr. The documents in the Court's mind speak for themselves. The Beneficiaries both under the Will and under the Trust are in fact the children of Mrs. Corr, and the Court under this factual scenario determines that the Trust in this case simply holds that stock for the benefit of the three children of Mrs. Corr.

J.A., vol. II, pp. 537-38.

The trial court went on to determine that Mr. Corr, Jr. had properly exercised his Option, even though that issue was not set out in the pleadings and, therefore, not properly before the trial court. J.A., vol. II, pp. 552-53. Finally, the trial court declined to determine whether the Shareholders' Agreement granted the Company and the remaining Shareholders joint rights to acquire the decedent's shares. *See, generally*, J.A., vol. II, pp. 536-37.

The trial court erred because the plain language of the Shareholders' Agreement prohibits transfers to a trust, particularly a trust that has trustees and potential beneficiaries that are not within the defined permitted transferees, and because the intent of Mrs. Corr, as demonstrated through

the documents as well as her actions subsequent to the execution of the documents, was to treat her children equally and not to grant one a disproportionate benefit of her estate.

The trial court's ruling provides one child—Mr. Corr, Jr.—a disproportionate benefit from Mrs. Corr's Estate because it allows him to obtain control of the family Company and to purchase shares at a price lower than that provided in the Shareholders' Agreement. It further forces both Mrs. Jimenez and Mrs. Williams into involuntary minority ownership.

In addition, the purchase of shares by the Company from the Estate, as contemplated by the Shareholders' Agreement, provided the Estate a significant tax benefit under IRC § 303 (26 U.S.C. § 303); benefits that would have been lost if the shares had been transferred to Trust A and subjected to the Option. One wonders what language would have been necessary to effect the clear intent set forth in the Shareholders' Agreement, that the Company or the remaining Shareholders purchase the shares of a deceased shareholder, unless they were bequeathed or conveyed to certain specified natural persons.

This Court should reverse the trial court, hold that the Shareholders' Agreement is enforceable, and direct that the Estate sell the Shares to the

Company or Mrs. Jimenez under the terms set forth in the Shareholders' Agreement.

ASSIGNMENTS OF ERROR

I. The trial court erred in holding that shares of stock not specifically conveyed or bequeathed by Mrs. Corr could be transferred to a Trust through the residuary clause of her Will, because the Shareholders' Agreement only permitted transfers to "immediate family", specifically defined as "children, spouses, parents and siblings", which are all natural persons. J.A., vol. II, pp. 457-58, 462.

II. The trial court erred in holding that shares of stock not specifically conveyed or bequeathed by Mrs. Corr could be transferred to a Trust through the residuary clause of her Will, because the Shareholders' Agreement expressly prohibited transfers to anyone other than specific natural persons and the trustees and contingent beneficiaries of the Trust included persons who were not immediate family of the decedent as defined in the Shareholders' Agreement. J.A., vol. II, pp. 457-58, 462.

III. The trial court erred in holding that Mr. Corr, Jr. could exercise an option to purchase shares "which Trust A may own", because Trust A did not, and pursuant to the Shareholders' Agreement, could not, own any shares of the Company. J.A., vol. II, pp. 528-29.

IV. The trial court erred in failing to enforce the mandatory purchase provisions of the Shareholders' Agreement, because the plain language of the provision required the Estate to sell the shares to the Company or the remaining Shareholders. J.A., vol. II, pp. 462-63, 465.

V. The trial court erred in ruling on the effectiveness of Mr. Corr, Jr.'s Option exercise because the exercise of the Option was not presented to the trial court by the pleadings. J.A., vol. II, pp. 543-46, 554.

VI. The trial court erred in holding that Mrs. Corr intended for her shares to be transferred to the Trust, because she made no effort to designate her Company shares as "transfer on death" as she did for virtually every other asset and security that she owned. J.A., vol. II, pp. 467-68.

VII. The trial court erred in going beyond the four corners of the documents and interpreting the Shareholders' Agreement to effect what the trial court concluded was Mrs. Corr's 'intent' because the intent of the Shareholders' Agreement must be determined from the language contained in the document. J.A., vol. II, pp. 455-56, 460, 465, 532.

VIII. The trial court erred in looking only to Mrs. Corr's intent when interpreting the language of the Shareholders' Agreement because the Shareholders' Agreement is not a testamentary document governed by one person's intent, but rather an agreement among several parties whose collective intent must be determined based upon the language contained in the written instrument. J.A., vol. II, pp. 465, 530-31.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

A. THE TRIAL COURT ERRED IN ADDING A "TRUST" TO THE PERMITTED TRANSFEREES ENUMERATED IN THE SHAREHOLDERS' AGREEMENT. (ASSIGNMENTS OF ERROR I, II, & III).

This Court reviews "a circuit court's interpretation of a contract de novo." *Schuiling v. Harris*, 286 Va. 187, 192, 747 S.E.2d 833 (2013). This Court has "an equal opportunity to consider the words of the contract within the four corners of the instrument itself." *Id*. (internal citations omitted).

This Court's long standing precedent establishes that Virginia courts "do not rewrite contracts to insert provisions that have been omitted by the

parties." *Jones v. Harrison*, 250 Va. 64, 68, 458 S.E.2d 766, 769 (1995) (citing *Westbury Coal Mining P'ship v. J.S. & K. Coal Corp*., 233 Va. 226, 229, 355 S.E.2d 571, 572-73 (1987) and *Lipps v. First Am. Serv. Corp*., 223 Va. 131, 139, 286 S.E.2d 215, 220 (1982)). A Court must not speculate on what the parties to a contract or drafters of a document meant to express, and must instead, determine what the words in the document do express. This principle applies to wills and trusts, as well as contracts. *Spicely v. Jones*, 199 Va. 703, 706-07, 101 S.E.2d 567, 570 (1958) ("We cannot speculate upon what [the] testatrix intended to do. Our inquiry is not what she meant to express; but what the words she used do express.")

In this case, the language of the Shareholders' Agreement is perfectly clear—the *only* permitted transferees are "children, spouses, parents and siblings." J.A., vol. I, p. 177, § 3(d). There is no ambiguity. The trial court itself acknowledged that "there is no question in my mind that a trust is not a member of the immediate family." J.A., vol. I, p. 315. Yet, the trial court's ruling treats the Trust as just that.

The trial court's ruling redrafts the Shareholders' Agreement by adding a permitted transferee that was omitted by the parties. The trial court concludes that the transfer to the Trust should be permitted because "it is tantamount" to a bequest to her children. However, a transfer to a trust

is decidedly different than a bequest to a natural person. First and foremost, a transfer to a trust is accomplished only by transferring legal title to the trustees of the trust. *See Austin v. City of Alexandria*, 265 Va. 89, 574 S.E.2d 289 (2003) ("A change in the title occurs and a trust is created when the grantor conveys both equitable and legal title in the property to the trustee."). Those trustees, pursuant to Virginia Code § 64.2-778, may "exercise the rights of an absolute owner [of stock]", including, *inter alia*, the right to vote and exercise control over a corporation.

It makes sense, then, as explained by Mr. Ankney, that shareholders have a legitimate interest in distinguishing between stock held by specified individuals and those held by trustees who are not among the class of permitted individuals. It is usual and customary to include provisions regarding transfers to a trust when the parties intend to permit such transfers. Failure to adhere to the terms of the Shareholders' Agreement runs the risk of allowing the legal title and/or beneficial interest to reside in a non-permitted person. This concern, in fact, exists in this case because one of the trustees is not an immediate family member and yet has the ability to vote and exercise control over the Company.

Thomas Williams, a co-trustee of the Trust, is not "immediate family" of Mrs. Corr, and therefore, not an eligible shareholder of the Company's

shares.[3] Yet, the Court's ruling would allow him to take title to shares representing a majority of the Company's stock. Furthermore, the Trust includes potential beneficiaries that would not qualify as Mrs. Corr's immediate family as defined in the Shareholders' Agreement.

The parties to the Shareholders' Agreement *could have included*, within the definition of "immediate family", trusts for the benefit of immediate family; indeed, such language is not uncommon in those cases where shareholders *choose* to include them. *See, e.g.*, *In re Estate of Halas*, 568 N.E.2d 170 (Ill. App. Ct. 1991) (permitted transferee defined as spouse or lineal descendant *or the trustee of a trust for the sole benefit of the a transferor* [4]); *Lacos Land Company v. Arden Group, Inc.*, 517 A.2d 271, 274 n.2 (De. 1986) (permitted transferee defined as spouse, lineal descendant, *or trustee of trust for the benefit of the holder or a permitted transferee*). The Shareholders signing the Shareholders' Agreement *in this*

---

[3] Capitol Foundry in its opposition brief argued that Mr. Williams holds title as "Executor", suggesting thereby that he should be able to hold title as "Trustee" as well. Capitol Foundry's Opp. Br. at 10. The language in the Shareholders' Agreement contradicts this logical fallacy. The Shareholders' Agreement recognizes that upon a shareholders' passing, by operation of law, there is an unavoidable transfer of title. For this reason, the Shareholders' Agreement specifically states that the decedents' shares "shall be sold by his personal representative." J.A., vol. I, p. 176, § 3(a). Thus, as Executor, Mr. Williams holds title temporarily with the duty to sell the shares at a closing to occur within 150 days after death. J.A., vol. I, p. 178, § 5.

[4] By including trustee in the definition, the parties in *Halas* were further able to provide additional safeguards on who could be trustees.

case chose not to include such language—and the trial court should not be permitted to redraft their Agreement.

Parties are entitled to draft their own agreements, and are entitled to decide whether shares can be owned by natural persons, entities, or trusts. The trial court's ruling is not only erroneous in this case, but threatens hundreds if not thousands of shareholders' agreements that permissibly restrict ownership of shares and opens the door for results that were simply not intended by the parties that entered into the agreements.

It is difficult to imagine how a drafter, intending to limit transferees to certain specified natural persons, could have drafted a shareholders' agreement any clearer. The trial court's ruling suggests that a drafter must consider and *expressly exclude* all potential other transferees, such as trusts, wholly owned corporations, partnerships, limited liability companies, etc. The ruling creates a minefield for practitioners drafting agreements. Rather than simply stating specific, desired, permitted transferees, the drafter must imagine all potential future vehicles that could be used to circumvent the intended effect.

Mrs. Corr's Trust granted an option to Mr. Corr, Jr. to purchase certain shares of the Company "which Trust A may own." J.A., vol. I, pp. 159-61, Art. IV(B)(6). She subsequently executed a document that strictly

limited ownership of shares to certain natural persons—specifically excluding trusts. She *could have* included a provision including trusts as permitted transferees; she *could have* placed the shares into a trust prior to entering into the Shareholders' Agreement. She did neither. Thus, the condition precedent to the Option—that Trust A may own the shares—is missing and the Option does not arise. That is the intent of the parties as evidenced by the words that they used. The trial court erred in going beyond the language used by the parties and inserting additional language not desired by the parties. "Courts cannot read into contracts language which will add to or take away from the meaning of the words already contained therein." *Wilson v. Holyfield*, 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984).

This Court should enforce the Shareholders' Agreement as drafted and signed by the parties—without adding terms omitted by them.

B. THE TRIAL COURT ERRED IN DECLINING TO DETERMINE THAT THE COMPANY AND REMAINING SHAREHOLDERS HAD A JOINT RIGHT TO ACQUIRE THE ESTATE'S SHARES. (ASSIGNMENT OF ERROR IV) (ASSIGNMENT OF CROSS-ERROR I)

The trial court declined to rule on whether Section 3(a) of the Shareholders' Agreement created an enforceable right. In pertinent part, Section 3(a) provides: "on the death of an Agreeing Shareholder, all of the

Shares of Stock owned by such Agreeing Shareholder shall be sold by his personal representative and shall be purchased by the Company or the remaining Shareholders for the purchase price and under the terms set forth in Section 4."

Whether this language creates a contractual obligation is a matter of documentary and statutory interpretation, which is subject to de novo review by this Court.

"The tendency of the courts is to give to contracts life and virility by interpretation of their fair intendment—not to destroy them." *Kiser v. Amalgamated Clothing Workers*, 169 Va. 574, 590, 194 S.E. 727, 733 (1938). Recognizing that "parties must have intended something by their agreement," *Cobbs v. Fountaine*, 24 Va. 484, 487, 3 Rand. 484 (1825), it has long been the policy in this Commonwealth for courts to avoid discarding agreements. Instead, courts will try to ascertain the intent of the parties. In this case, the parties intention can reasonably be found within the language of the entire agreement, and the Court should, therefore, enforce the agreement.

"It is a rule of universal application that in construing a contract each and every part of it must be taken into consideration and given effect if possible, and that the intention of the parties must be ascertained from the

entire instrument." *Bott v. N. Snellenburg & Co.*, 177 Va. 331, 339, 14 S.E.2d 372, 374 (1941) (quoting *Harrity v. Continental-Equitable Title & Trust Co.*, 124 A. 493, 494 (Pa. 1924)) (internal quotation marks omitted).

> The law does not favor declaring contracts void for indefiniteness and uncertainty, and leans against a construction which has that tendency. While courts cannot make contracts for the parties, neither will they permit parties to be released from the obligations which they have assumed if this can be ascertained with reasonable certainty from language used, in the light of all the surrounding circumstances. This is especially true where there has been partial performance. *McDaniel v. Daves*, 139 Va. 178, 190, 123 S.E. 663, 666 [1924]; *Phillips Petroleum Company v. Buster*, 241 F.2d 178 [10th Cir. 1957], *cert. denied*, 355 U.S. 816, 2 L. Ed. 2d 33, 78 S. Ct. 18.

Reid v. Boyle, 259 Va. 356, 367, 527 S.E.2d 137, 143, (2000). Mrs. Jimenez has abided by each and every condition in the Shareholders' Agreement for over a decade. The Company and Mr. Corr, Jr. accepted her performance and now, when she seeks to enforce its terms, they argue that it is unenforceable. This Court should not allow them to escape their obligations. *Id*.

Section 3(a) of the Shareholders' Agreement provides that the Mrs. Corr's shares shall be sold to the Company or the remaining Shareholders. J.A., vol. I, p. 176. Section 14 of the Shareholders' Agreement further provides: "Any covenant or agreement made by the Company herein shall also constitute a covenant and agreement by the Agreeing Shareholders to

vote the Shares of the Company held by them to cause the Company to perform any such covenant or agreement." J.A., vol. I, p. 181.

The Virginia Code expressly allows shareholders to restrict the transfer of shares. Va. Code § 13.1-649. The Code further expressly allows for the restriction to "obligate the corporation or other persons (separately, consecutively, or *simultaneously*) to acquire the restricted shares." *Id*. (emphasis added).

"It is well settled in Virginia that where two or more parties jointly contract to do a single act, each is bound for the whole performance." *Link v. Weizenbaum*, 229 Va. 201, 203, 326 S.E.2d 667 (1985) (citing *Houston v. Bain*, 170 Va. 378, 391-92, 196 S.E. 657, 662-63 (1938)). The Shareholders' Agreement creates a joint and several, simultaneous obligation (and right) on the Company and the remaining Shareholders—enforceable against each of them for the whole performance. Read together with Section 14, in which the Shareholders covenant to vote to have the Company perform its obligations, it is apparent that the parties intended not only for the Company to purchase the shares, but also intended to jointly and severally bind the remaining Shareholders individually in order to assure performance. Section 13 of the Shareholders' Agreement, in fact, further clarifies that "This Agreement shall be

specifically enforceable by the Company and each Agreeing Shareholder." J.A., vol. I, p. 180. Thus, the parties evidently intended to create joint and several obligations and remedies for the Company and each Agreeing Shareholder.

Mr. Corr, Jr., in his Brief in Opposition to the Petition, argues that "a deed that purports to transfer Blackacre to 'A or B' . . . is a nullity, transferring title to neither", (Lewis S. Corr, Jr. Br. in Opp. to Pet. at 12), and suggests that the same infirmity affects the Shareholders' Agreement. Without conceding the accuracy of Mr. Corr, Jr.'s argument as it pertains to a deed, the Shareholders' Agreement is *not* a deed of conveyance, but rather, an agreement that imposes an obligation that can be satisfied through alternative performance by multiple parties (*i.e*. multiple parties jointly contracting to do a single act). *Link*, 229 Va. at 203. A contract that calls for a seller to convey Blackacre to A or B is certainly valid and can be satisfied by conveying Blackacre to either A or to B. Conversely, a contract for A or B to purchase Blackacre is a joint obligation by two persons to perform one act.

This joint obligation makes particular sense where, as here, "A" (the Company) is owned by "B" (the remaining Shareholders). Thus, the intent of the parties in executing the Shareholders' Agreement is quite clear—the

Executors of Mrs. Corr's Estate must sell the shares to the Company (A) or to the remaining Shareholders (B). The Corporation (A) or the remaining Shareholders (B) must purchase, between them, all of the Estate's shares. Financially and for purposes of control, there is no difference to the remaining Shareholders whether the Estate's shares are purchased by the Company or jointly by the remaining Shareholders.

As with any contract made by more than one person, the Estate could enforce the obligation against either the Corporation (A), or against the remaining Shareholders (B). All are liable for performance, and an action to enforce the contract could be brought against any or all. *See* Va. Code § 8.01-30 ("Upon all contracts hereafter made by more than one person, whether joint only or joint and several, an action may be maintained and judgment rendered against all liable thereon, or any one or any intermediate number").

As set forth in Corbin on Contracts:

> If two or more persons promise one and the same performance, there is necessarily a relation of suretyship between them, governed by the rules of law that originated in the court of Chancery but fully incorporated into our existing legal system. There are two alternatives: (1) one of the promisors is sole principal debtor and another his surety only, or (2) each of them is a principal debtor as to his just proportion and a surety as to the just proportions of the others. This is true whether their promises are in form "joint" or "several" or "joint and several." It is true whether their promises are made orally, or in a single

> written instrument, or in separate writings executed at different times and places.

9-52 Corbin on Contracts § 52.3.

Conversely, each (or any) of the parties could seek to enforce the contract against the Estate, as Mrs. Jimenez has done here. J.A., vol. I, p 180, § 13. The Executors concede as much in the Brief in Opposition to the Petition. *See* Executors' Br. in Opp. to Pet. at 8 ("Such an argument might be sufficient if the problem was a lack of willingness on the part of the Eligible Purchasers to acquire the Decedent's Shares.") Although the Executors proceed to argue that their dilemma is that they are faced with excess demand for performance, the record does not support that contention. The *only* person (or entity) that has sought to purchase shares as required by the Shareholders' Agreement is Mrs. Jimenez. Nowhere in the record has the Corporation ever demonstrated any intention or desire to perform. Quite the contrary, the Company (under the leadership of Mr. Corr, Jr.) steadfastly and repeatedly denied any obligation to perform. J.A., vol. I, pp. 74-75.

Similarly, the record reflects that Mr. Corr, Jr. has *only* expressed an intention to purchase shares (if any) that may be owned by the Trust—at the price established in the Trust J.A., vol. II, p. 571; J.A., vol. I, pp. 429-30. The record is devoid of any expression of Mr. Corr, Jr.'s willingness or

desire to purchase any shares under the terms of the Shareholders' Agreement.

The *only* person that has sought, and is willing, to perform her obligations under the Shareholders' Agreement, is Mrs. Jimenez. She seeks an order directing that the Estate tender Mrs. Corr's shares to the Company and the remaining Shareholders, and specifically to her. In that regard, the Shareholders' Agreement provides that "Any covenant or agreement made by the Company herein shall also constitute a covenant and agreement by the Agreeing Shareholders to vote the Shares of the Company held by them to cause the Company to perform any such covenant or agreement." J.A., vol. I, p. 181, § 14. Pursuant to that provision, Mrs. Jimenez was (and remains) willing to vote her shares to cause the Company to perform on the purchase should such a vote be presented to the Shareholders. If the remaining Shareholders abide by the covenant, then the Company will perform and no further performance would be required by the remaining Shareholders. If the Company does not perform for any reason, Mrs. Jimenez stands ready to fulfill the obligation.

Assuming *arguendo*, that Mr. Corr, Jr. has not waived his right to performance *and* assuming that in the future he declares that he is ready,

willing, and able to purchase the shares (if and when tendered by the Estate) then he can (at most) contribute ratably to the purchase. *Van Winckel v. Carter*, 198 Va. 550, 555, 95 S.E.2d 148, 152 (1956) ("The law implies a contract between [the co-obligors] to contribute ratably toward the discharge of the obligation.) The Shareholders' Agreement need not express such an agreement: it is a "broad principle[ ] of equity which courts of law enforce that where two persons are subject to a common burden it shall be borne equally between them." *Houston v. Bain*, 170 Va. 378, 389-90, 196 S.E. 657, 662 (1938). This equitable principle was recently reaffirmed by this Court in *Tuttle v. Webb*, 284 Va. 319, 327, 731 S.E.2d 909, 913 (2012).

Section 3(a) of the Shareholders' Agreement creates a binding joint and several obligation on the Company and the remaining Shareholders to perform one act; the purchase of Mrs. Corr's shares in the Company. This Court should enforce that obligation.

C. THE TRIAL COURT ERRED IN GRANTING RELIEF ON FACTS AND A CLAIM NOT PLED. (ASSIGNMENTS OF ERROR V)

"It is firmly established that no court can base its judgment or decree upon facts not alleged or upon a right which has not been pleaded and claimed." *Ted Lansing Supply Co. v. Royal Aluminum and Constr. Corp*.,

221 Va. 1139, 1141, 277 S.E.2d 228, 229 (1981) (citing *Potts v. Mathieson Alkali Works*, 165 Va. 196, 207, 181 S.E. 521, 525 (1935)). "Pleadings are as essential as proof and no relief should be granted that does not substantially accord with the case as made in the pleading." *Id.*

Contrary to this clearly established principle, the trial court ruled that Mr. Corr, Jr. had properly exercised his Option—despite the fact that 1) no pleading in the case alleged in any way that Mr. Corr, Jr. had properly exercised his Option, and 2) the Court *modified* the terms of Mr. Corr, Jr.'s Option. If the Defendants had wanted to obtain a ruling on the effectiveness of the exercise, then the question should have been properly pled and put at issue. And, if Mr. Corr, Jr. had properly exercised the Option, then it should have needed no modification.

After the commencement of this action, the trial court entered an agreed order allowing Mr. Corr, Jr. to exercise his Option, but that order, dated November 15, 2012, made no determination whatsoever as to the *effectiveness of the exercise*; indeed, it specifically contemplated that the Option would be exercised *in the future* and could not have determined whether the exercise was effective. *See* J.A., vol. I, pp. 219-25. At no time subsequent to that Order did the Defendants file any pleadings to seek a determination as to the *effectiveness* of the exercise, no discovery was

conducted on that issue, and the trial court should not have ruled on that issue.

Because the issue of whether the exercise was effective was not specifically pleaded, Mrs. Jimenez was not prepared to litigate the issue at trial. Defendants repeatedly claim that they put Mrs. Jimenez on "notice" of their intent to address the issue of validity because the Counterclaim requested that the trial court "construe and interpret the Will, the Trust, and the Agreement so as to determine the rights of the parties named herein with regard to the Corr Stock Option . . . ." J.A., vol. I, p. 6. However, the Counterclaim does not seek a declaratory judgment that Mr. Corr, Jr. effectively exercised the Option—indeed, this was impossible, as Mr. Corr, Jr. did not even exercise the Option until after the Counterclaim was filed. Furthermore, at no time after Mr. Corr, Jr.'s exercise of the Option did he request a ruling that the Option was properly exercised—until the end of the two-day trial.

It was not until the conclusion of trial that Defendants asked the trial court to make a ruling on the effectiveness of Mr. Corr, Jr.'s option to exercise. A discussion ensued that spanned approximately fifteen pages. *See* J.A., vol. I, pp. 539-54. During the discussion, the trial court asked Plaintiff's counsel whether he had "evidence that for some reason the offer

presented by Mr. Corr, the option to exercise the Option was not properly done?" *Id.* at p. 548. After Plaintiff's counsel explained some of his concerns to the court, the trial court admitted "You know, he is right, Mr. Albert. That issue—I mean, we have not—there has been no evidence either way on that issue." *Id.* at 548-49. Yet, the trial court ultimately decided to rule on the matter, notwithstanding the fact that there were still outstanding issues pertaining to the effectiveness of the exercise and that the relief sought was never specifically claimed in any of Defendants' pleadings. In essence, the trial court rewrote the Option contract between the parties, determining that "so long as the Option as exercised enures to the benefit of the three beneficiaries under the Will and Trust of Mrs. Corr equally, the Court is of the opinion that it is valid . . . ." *Id.* at p. 552. In doing so, the trial court clearly erred.

The trial court's modification of Mr. Corr, Jr.'s Option exercise, by itself, establishes that the option was not exercised in strict compliance with the terms of the Option. An acceptance must mirror *exactly* the terms required by the option for the option to become valid and enforceable: "The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer." Restatement (Second) Contracts

§ 45 (1981); *see also Va. Hardwood Lumber Co. v. Hughes*, 140 Va. 249, 124 S.E. 283, 285 (1924) ("The offerer has a right to prescribe in his offer any conditions as to time, place, quantity, mode of acceptance, or other matters, which it may please him to insert in and make a part thereof, and the acceptance to conclude the agreement must in every respect meet and correspond with the offer, neither falling within or going beyond the terms proposed, but exactly meeting them at all points and closing with these just as they stand."). As recognized by the trial court, the method of Mr. Corr, Jr.'s exercise deviated from the language of the Trust, and potentially exposed the Trust to greater risk by under-collateralizing the payment obligation. J.A., vol. II, pp. 552-53.[5]

"No court can base its decree upon facts not alleged, nor render its judgment upon a right, however meritorious, which has not been pleaded and claimed." *Potts*, 165 Va. at 207, 181 S.E. at 525. In this case, the trial court erred and based its judgment upon facts that were neither alleged nor disclosed in discovery. Mr. Corr, Jr. was afforded a right that had not been pleaded or claimed.

[5] Mrs. Jimenez does not take issue with the timing of Mr. Corr, Jr.'s exercise, the due date for which was extended by agreement to November 29, 2012, at 5 p.m. Mr. Corr, Jr. delivered his exercise at 4:56 p.m. on November 29, 2012, and was, therefore, timely.

The trial court erred in basing its judgment upon facts that were not alleged or disclosed and rights that had not been pleaded or claimed, and accordingly, the judgment on this issue must be reversed.

D. THE TRIAL COURT ERRED IN DETERMINING AND CONSIDERING MRS. CORR'S INTENT. (ASSIGNMENTS OF ERROR VI, VII, VIII)

The trial court did not explicitly make findings of fact in reaching its conclusion. The trial court based its decision on what it claimed was the *intent of Mrs. Corr* after considering the provisions of the *Trust* and the *Will. See* J.A., vol. II, pp. 536-37. In doing so, the trial court committed reversible error, as the trial court was required to consider the plain language of the *Shareholders' Agreement* in determining the intent of *all of the parties*, and any consideration of extrinsic parol evidence in determining the intent of only *one of the parties* was improper.

As set forth above, contract interpretation presents a question of law, subject to this Court's de novo review. *Schuiling v. Harris*, 286 Va. 187, 192, 747 S.E.2d 833 (2013). This Court reviews "questions of law de novo, including those situations where there is a mixed question of law and fact." *PMA Capital Ins. Co. v. US Airways, Inc.*, 271 Va. 352, 626 S.E.2d 369 (2006) (quoting *Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co.*, 270 Va. 566, 574, 621 S.E.2d 114, 118 (2005)) (internal

quotation marks omitted). To the extent that this Court determines there are mixed questions of law and fact, the Court gives deference to the trial court's factual findings. *See Barter Found., Inc. v. Widener*, 267 Va. 80, 90, 592 S.E.2d 56, 61 (2004). On review, this Court is "not bound by the trial court's construction of the contract provision here in issue." *Wilson v. Holyfield*, 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984). Rather, the Court has an equal opportunity to consider the four corners of the document itself in determining the intention of the parties. *See id.*

In making its ruling, the trial court indicated that

> the primary goal of a court in resolving a dispute such as this is *to look at the intent of the Testator, or Testatrix in this case*, in trying to interpret those documents which affect the distribution of that individual's estate. It is clear in this case that the intent of the Testator in this case is *governed by the Will and the accompanying Trust executed by Mrs. Corr, and it is also subsequently affected by the Shareholders' Agreement* executed by Mrs. Corr and the other two shareholders of this particular company, one being the Plaintiff in this case and the other being one of the named Defendants in this case.

J.A., vol. II, pp. 535-36 (emphasis added).

As demonstrated by the trial court's statement, the trial court erred by improperly considering the Will and the Trust (extrinsic parol evidence) in determining Mrs. Corr's intent as to how she wished her shares to be distributed. The trial court further erred by determining that it was Mrs. Corr's intent, rather *than the intent of all of the Shareholders*, that controlled

the outcome of the dispute (i.e. the interpretation of the Shareholders' Agreement).

This Court has previously declined an invitation to "adopt a rule permitting extrinsic evidence of the intentions of contracting parties, regardless of the clarity of the contract language." *Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983). Instead, this Court reemphasized that Virginia adheres to the plain meaning rule, which states that "where an agreement is complete on its face, is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself . . . This is so because the writing is the repository of the final agreement of the parties." *Id.* Furthermore, "[t]he law will not insert by construction, *for the benefit of a party*, an exception or condition which the parties omitted from their contract by design or neglect." *Bridgestone/Firestone, Inc. v. Prince William Square Assocs.*, 250 Va. 402, 407, 463 S.E.2d 661, 663 (1995) (citing *Westbury Coal Mining v. J.S. & K Coal*, 233 Va. 226, 229, 355 S.E.2d 571, 573 (1987)) (emphasis added).

As previously set forth in Section A, *supra*, the trial court is not permitted to go beyond the plain language used by the parties to insert additional language in the Shareholders' Agreement that "take[s] away from the meaning of the words already contained therein." *See Wilson*, 227 Va.

at 187, 313 S.E.2d at 398. The trial court used provisions of the Trust and the Will—documents executed years prior to the Shareholders' Agreement—to justify its decision to read the term "trust" into the definition of "immediate family" that is contained in Section 3(d) of the Shareholders' Agreement. *See Cohan v. Thurston*, 223 Va. 523, 524, 292 S.E.2d 45, 45 (1982) ("Generally, extrinsic evidence is not admissible to vary the terms of a written instrument." (citing *Camp v. Camp*, 220 Va. 595, 598, 260 S.E.2d 243, 245 (1979)). The trial court's ruling completely changed the intended outcome of the Shareholders' Agreement, based on the Agreement's plain and unambiguous terms, and effectively made a new contract for the parties. This Court has specifically instructed trial courts to "construe the words *as written* and not make a new contract for the parties." *Bridgestone*, 250 Va. at 407, 463 S.E.2d at 663 (emphasis added).

The trial court also erred in going beyond the four corners of the Shareholders' Agreement in determining the intent of *a party*, where the trial court was fully capable of determining, and, indeed, was required to determine, the *parties' collective intent* by the plain language contained in the Agreement. To the extent that the trial court purported to give effect only to *Mrs. Corr's intent* in holding that the shares could be transferred to the Trust, Virginia law is clear in that it "will not insert by construction, *for*

the benefit of a party, an exception or condition which the parties omitted from their contract by design or neglect." *Id*. The Shareholders' Agreement is not a testamentary instrument where there is only one party executing the document; rather, it contains the collective intent of numerous parties. Yet, even in situations where a court is tasked with construing a document executed by only one party, such as a will, the court is no more at liberty to "speculate upon what [a] testatrix intended to do." *Spicely v. Jones*, 199 Va. 703, 706-07, 101 S.E.2d 567, 570 (1958) ("Our inquiry is not what she meant to express; but what the words she used do express. Where words have a clear meaning, we are not allowed to consider extrinsic evidence to vary, alter, or contradict that meaning."). The trial court would still be required to construe the document solely on the language that was used, without adding or omitting terms.

Assuming *arguendo* that it was proper for the trial court to give effect solely to Mrs. Corr's intent, the evidence at trial demonstrated that it was Mrs. Corr's intent to effect the Shareholders' Agreement's plain meaning, without additional terms. Mrs. Corr understood that the Shareholders' Agreement would govern the disposition of her shares at her death. Indeed, if Mrs. Corr truly intended for the shares to be conveyed into the Trust upon

her death, she had several opportunities to effectuate that intention. Instead, Mrs. Corr's actions, both in executing the Shareholders' Agreement, and her conduct after executing the Shareholders' Agreement, support Mrs. Jimenez's position that Mrs. Corr never had the intention of conveying the shares to the Trust upon her death.

Mrs. Corr entered into the Shareholders' Agreement *after* executing the Trust and the Will. The Shareholders' Agreement specifically foregoes any mention of conveying shares to the Trust. Whether this was intentional or by way of neglect makes no difference. Even if it were an obvious mistake on behalf of Mrs. Corr, it is not for the court to correct mistakes made by the parties to an agreement. *Bridgestone*, 250 Va. at 407, 463 S.E.2d at 663 ("The law *will not insert by construction*, for the benefit of a party, an exception or condition which the parties omitted from their contract by design or *neglect*.").

Likewise, Mrs. Corr's efforts to retitle substantially all of her assets to provide for a "transfer on death" designation, other than real estate *and her shares in the Company*, belie any assertion that she wanted the shares to be treated differently than what is set forth in the Shareholders'

Agreement.[6] The intent of Mrs. Corr, as demonstrated by the plain language of the Shareholders' Agreement, as well as her actions subsequent to the execution of the Shareholders' Agreement, was to treat her children equally and not to grant one a disproportionate benefit of her estate. Contrary to Mrs. Corr's intent, the trial court's ruling provides one child—Mr. Corr, Jr.—a disproportionate benefit from her Estate because it allows him to obtain control of the family Company. It further forces her other two children, Mrs. Jimenez and Mrs. Williams, into involuntary minority ownership. Mrs. Jimenez's request to specifically enforce the Shareholder Agreement's terms, as written, is supported by Virginia law and Mrs. Corr's actions after the Shareholders' Agreement was executed.

The trial court improperly traveled beyond the four corners of the Shareholders' Agreement to the terms of the Trust and the Will (instruments executed years prior to the Shareholders' Agreement) to effectuate the supposed, and unsubstantiated, intention of *only one* of the parties to the Agreement. Simultaneously, the trial court ignored extrinsic evidence of Mrs. Corr's actions *after* the Shareholders' Agreement was

[6] Of course, the Shareholders' Agreement does not allow a Transfer on Death to a Trust, but if Mrs. Corr had so designated the shares, it might have been evidence of her intention. The significant (and undisputed) fact is that she never even tried.

executed, which further supports the plain reading of the terms of the Agreement. For these reasons, the judgment must be reversed.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the circuit court and enter judgment in favor of Nancy C. Jimenez and directing the Executors to tender Mrs. Corr's Shares of Capitol Foundry stock to Mrs. Jimenez, or in the alternative, remand for a new trial on the merits.

Respectfully submitted,

By:_____
Of Counsel

Mark R. Baumgartner, Esq. (VSB No. 45171)
Kristen R. Jurjevich, Esq. (VSB No. 80532)
PENDER & COWARD, P.C.
222 Central Park Ave., Suite 400
Virginia Beach, Virginia 23462
(757) 490-3000 (Telephone)
(757) 497-1914 (Facsimile)
mbaumgartner@pendercoward.com
kjurjevich@pendercoward.com

Counsel for Appellant

CERTIFICATE

I hereby certify, pursuant to Rule 5:26(h), fifteen bound copies of the Brief of Appellant and ten copies of the Appendix, with ten electronic copies on CD of both, were hand-filed with the Clerk of the Supreme Court of Virginia on this 19th day of May, 2014. On this same day, three bound copies of the Brief of Appellant and one copy of the Appendix, with one electronic copy on CD of both, was served, via UPS Ground Transportation to:

Alan D. Albert, Esq.
Neal P. Brodsky, Esq.
LeClairRyan
999 Waterside Drive, Suite 2100
Norfolk, VA 23510

Winthrop A. Short, Jr., Esq.
KAUFMAN & CANOLES, P.C.
One City Center
11815 Fountain Way, Suite 400
Newport News, VA 23606

Neil L. Rose, Esq.
Wilcox & Savage, P.C.
222 Central Park Avenue, Suite 1500
Virginia Beach, VA 23462

John Wilson, Esq.
John D. McIntyre, Esq.
Wilson & McIntyre, PLLC
500 East Main Street, Suite 920
Norfolk, VA 23510

Mark R. Baumgartner, Esq.