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*.**

REPLY 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 AUTHORITIES.....iii

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES.....1

A. IN CONSTRUING AN AGREEMENT, THE COURT IS NOT AT LIBERTY TO CONSIDER THE SUBJECTIVE (AND UNEXPRESSED) INTENT OF THE DRAFTING PARTIES, MUCH LESS ONLY ONE OF THEM.....1

B. THE EVIDENCE AT TRIAL CONFIRMS MRS. CORR INTENDED FOR HER CHILDREN, MRS. JIMENEZ AND MR. CORR, JR., TO BE EQUAL SHAREHOLDERS IN THE COMPANY AND FOR ALL OF HER CHILDREN TO BENEFIT EQUALLY FROM THE VALUE REPRESENTED IN HER SHARES.....5

C. THE SHAREHOLDERS' AGREEMENT RECOGNIZES THAT SHARES OF A DECEASED SHAREHOLDER AUTOMATICALLY AND TEMPORARILY PASS TO AN EXECUTOR OR ADMINISTRATOR BY OPERATION OF LAW; HOWEVER, NEITHER THE SHAREHOLDERS' AGREEMENT NOR THE LAW REQUIRES THAT THE SHARES PASS TO A TRUSTEE.....7

D. THE COURT SHOULD NOT READ "TRUST" INTO THE SHAREHOLDERS' AGREEMENT AS A PERMISSIBLE TRANSFEREE JUST BECAUSE, AS IT TURNED OUT, THE BENEFICIARIES HAPPEN TO BE PERMISSIBLE TRANSFEREES AT THE INSTANT OF MRS. CORR'S DEATH.....8

E. SPECIFIC PERFORMANCE IS APPROPRIATE TO COMPEL THE ESTATE TO SELL ITS SHARES TO MRS. JIMENEZ.....10

F. THE TRUSTEES ARE NOT PERMITTED TO “FIX” THE DEFECTIVE OPTION EXERCISE 12

CONCLUSION 14

CERTIFICATE 16

TABLE OF AUTHORITIES

Page(s)

CASES

Ayres v. Harleysville Mut. Casualty Co.,
172 Va. 383, 2 S.E.2d 303 (1934) 5

Berry v. Klinger,
225 Va. 201, 300 S.E.2d 792 (1983) 1, 3

Bridgestone/Firestone, Inc. v. Prince William Square Assocs.,
250 Va. 402, 463 S.E.2d 661 (1995) 4

Farneth v. Windsor Dev. Corp.,
21 Va. Cir. 216 (Cir. Ct. 1990) 4

Potts v. Mathieson Alkali Works,
165 Va. 196, 181 S.E. 521 (1935) 14

Ted Lansing Supply Co. v. Royal Aluminum and Constr. Corp.,
221 Va. 1139, 277 S.E.2d 228 (1981) 13-14

Va. Hardwood Lumber Co. v. Hughes,
140 Va. 249, 124 S.E. 283 (1924) 13

Westbury Coal Mining v. J.S. & K Coal,
233 Va. 226, 355 S.E.2d 571 (1987) 4

Wilson v. Holyfield,
227 Va. 184, 313 S.E.2d 396 (1984) 8, 10

STATUTE

Va. Code § 8.01-30 11

OTHER AUTHORITIES

11 Williston on Contracts § 30:6 (4th ed.) 3-4

Restatement (Second) Contracts § 45 (1981) 13

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

A. IN CONSTRUING AN AGREEMENT, THE COURT IS NOT AT LIBERTY TO CONSIDER THE SUBJECTIVE (AND UNEXPRESSED) INTENT OF THE DRAFTING PARTIES, MUCH LESS ONLY ONE OF THEM.

The Shareholders' Agreement is unambiguous and the trial court erred to the extent that it relied on parol evidence of intent in construing the document.[1] The trial court's interpretation of the unambiguous provisions of the Shareholders' Agreement should have been limited to the four corners of the document. *See Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983). Furthermore, even if the trial court believed the Shareholders' Agreement to be ambiguous, it would be error to consider the intent of *only one* of the four parties to the Shareholders' Agreement.[2]

In his Appellee Brief, Mr. Corr, Jr. argues that this Court should only consider the "substantive intent" of the Shareholders who were involved in drafting the Shareholders' Agreement—Mrs. Corr and Mr. Corr, Jr. (Corr Appellee Br. at 22.) ("The only substantive intent for the trial court to consider was that of Mrs. Corr and Jim Corr.") Mr. Corr, Jr. rationalizes that

---

[1] It is not clear to what extent, if any, the trial court relied on parol evidence. The trial court made no express findings based upon parol evidence.

[2] In fact, 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. (*See* Jimenez Opening Br. at 5.)

Mrs. Jimenez had no involvement with the Shareholders' Agreement other than to sign it and inexplicably concludes that she could not, therefore, rely on the plain language of the agreement placed in front of her, but must instead by bound by the unexpressed, secret intent of Mr. Corr, Jr. (Corr Appellee Br. at 23.)[3]

According to Mr. Corr, Jr., he and Mrs. Corr secretly drafted the Shareholders' Agreement for the sole subjective purpose of preventing Mrs. Jimenez from selling her anticipated, future stock holdings to a non-family member. (Corr Appellee Br. at 22.) They then (apparently) disguised that intent in the form of the seven-page Shareholders' Agreement that "appeared" to bind all shareholders equally. Mr. Corr, Jr. then withheld the Shareholders' Agreement from Mrs. Jimenez until the day that she signed it.

Mr. Corr, Jr. now wants to be rewarded for hiding his subjective intent from Mrs. Jimenez and excluding her from the drafting of the Shareholders' Agreement until it was time to sign it.

Mr. Corr, Jr. is asking this Court to interpret a document based upon the *subjective intent* of two out of the three Shareholders who signed the

[3] Mr. Corr, Jr. asserts that "The record is similarly clear that she [Mrs. Jimenez] signed the Agreement for one simple reason: without it, she would have received no gift of stock." (Corr Appellee Br. at 23.) There is no citation to the record.

Agreement, and because Mrs. Corr is deceased, Mr. Corr, Jr. is effectively asking the Court to *only consider his subjective intent* in construing the Shareholders' Agreement. In Virginia, each party is bound by the words used, not by the other party's subjective intent—and a party should surely not be rewarded for hiding subjective intentions behind plain, objective language.

This Court has steadfastly maintained that Virginia adheres to the plain meaning rule. "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." *Berry*, 225 Va. at 208, 300 S.E. 2d at 796. Furthermore, where it becomes necessary for the Court to decipher the intent of the parties to a contract, the Court must analyze the agreement *objectively*; the *subjective* intent of the parties—much less that of just one party—should not control the interpretation.

Professor Williston—a source relied upon by Mr. Corr, Jr.—states that "the test for determining the meaning of contract language is not what the parties intended it to mean but what *a reasonable person in the position of the parties when the contract was entered, aware of all relevant circumstances, would have thought it meant*." 11 Williston on Contracts

§ 30:6 (4th ed.) (emphasis added). Applied here, the Shareholders' Agreement clearly provides for the Company or the remaining Shareholders to purchase a decedent's shares unless they are conveyed or bequeathed to specified natural persons.

One party's subjective intent does not control; rather, a court must consider the intent of *all the parties to a contract*, gleaned from an *objective reading* of the language contained within the four corners of the document. *See Bridgestone/Firestone, Inc. v. Prince William Square Assocs.*, 250 Va. 402, 407, 463 S.E.2d 661, 663 (1995) ("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." (citing *Westbury Coal Mining v. J.S. & K Coal*, 233 Va. 226, 229, 355 S.E.2d 571, 573 (1987))).

Limiting judicial interpretation to the subjective intent of the "drafting" party would promote unfair dealing and allow the drafter to "pull a fast one" on another party who has no involvement in drafting the agreement. Not only is this not the law, but Virginia precedent reflects the opposite policy choice. Contracts are construed *against* the drafter. *See Farneth v. Windsor Dev. Corp.*, 21 Va. Cir. 216, 220-21 (Cir. Ct. 1990) (holding that a contract "is construed most strongly against the party who drew the

contract and selected the terms for whose benefit they were inserted" (citing *Ayres v. Harleysville Mut. Casualty Co.*, 172 Va. 383, 390, 2 S.E.2d 303 (1934))). To the extent that Mr. Corr, Jr. claims to be responsible for the drafting of the Shareholders' Agreement, it should be construed most strongly against him. Though, with the clarity in the document, there is no need for the Court to resort to that rule of construction in order to rule in favor of Mrs. Jimenez.

For these reasons, and the reasons set forth in the Opening Brief, the judgment must be reversed.

B. THE EVIDENCE AT TRIAL CONFIRMS MRS. CORR INTENDED FOR HER CHILDREN, MRS. JIMENEZ AND MR. CORR, JR., TO BE EQUAL SHAREHOLDERS IN THE COMPANY AND FOR ALL OF HER CHILDREN TO BENEFIT EQUALLY FROM THE VALUE REPRESENTED IN HER SHARES.

Mrs. Jimenez testified at trial that her mother, Mrs. Corr, stated that it was Mrs. Corr's intent to make her children, Mrs. Jimenez and Mr. Corr, Jr., equal Shareholders in the Company. J.A., vol. I, p. 286. Mr. Corr, Jr. attempts to diminish Mrs. Jimenez's credibility on this point by alleging that Mrs. Jimenez's statements and actions during the administration of Mr. Corr's estate in 2000 somehow contradict her position that the Shareholders' Agreement controls (and was intended by Mrs. Corr to control) the disposition of her shares. (Corr Appellee Br. at 36, 38.)

However, even if the Court were to believe the recitation of Mr. Corr, Jr.'s self-serving testimony found in his Brief at pages 36 to 38, his argument becomes moot in light of the fact that the Shareholders' Agreement was executed, and Mrs. Jimenez made an equal shareholder, in December 2002—more than two years *after* Mr. Corr, Jr. alleges Mrs. Jimenez "denounced" his option.

Mrs. Jimenez's testimony has been consistent and fully supported by Mrs. Corr's actions after executing the Shareholders' Agreement—Mrs. Corr intended for her children, Mrs. Jimenez and Mr. Corr, Jr., to be equal shareholders in the Company—in fact, she made them so. Furthermore, *if* Mrs. Jimenez really had taken issue with the Trust and Mr. Corr, Jr.'s purchase option during the administration of Mr. Corr's estate, it would seem *inconceivable* that Mr. Corr, Jr. would not have taken steps to include the Trust as a permitted transferee when drafting the Shareholders' Agreement. The only rational inference is that trusts were intentionally omitted from the permitted transferees and that Mr. Corr, Jr. acquiesced. A reasonable person, aware of the existence of a trust and expecting shares to be transferred to a trust, would have included a trust as a permitted transferee.

The facts, even as described by Mr. Corr, Jr., are entirely consistent with the interpretation advanced by Mrs. Jimenez that her mother gave Mrs. Jimenez 5 shares so that her two children would be equally vested in the Company, and simultaneously executed the Shareholders' Agreement requiring the Company (or those two children) to pay for Mrs. Corr's value in the Company so that it could be shared equally among her three children.

C. THE SHAREHOLDERS' AGREEMENT RECOGNIZES THAT SHARES OF A DECEASED SHAREHOLDER AUTOMATICALLY AND TEMPORARILY PASS TO AN EXECUTOR OR ADMINISTRATOR BY OPERATION OF LAW; HOWEVER, NEITHER THE SHAREHOLDERS' AGREEMENT NOR THE LAW REQUIRES THAT THE SHARES PASS TO A TRUSTEE.

The Shareholders' Agreement recognizes that upon the demise of an Agreeing Shareholder, by operation of law, the shares would automatically be transferred to the Agreeing Shareholder's executor or administrator. The transfer of title is unavoidable. 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, the Executors of Mrs. Corr's estate hold 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. It does not follow, as suggested by Defendants, that Mr. Corr, Jr. and Mr. Williams should also be permitted to hold title as "Trustees". (*See* Corr

Appellee Br. at 12–16; Trustees Appellee Br. at 22–26; Capitol Appellee Br. at 12–15.)

There is no provision in Virginia law that requires an automatic transfer to the trustee of a shareholder's trust upon his or her demise, and the Shareholder's Agreement does not include transfers to trustees of a trust and specifically excludes trustees as a permitted transferee under Section 3(d) of the Shareholders' Agreement. J.A., vol. I, p. 177, § 3(d). The parties could have included "trusts" as a permissible transferee under the Shareholders' Agreement; instead, they specifically excluded "trusts" and the trial court erred by effectively inserting additional language that was omitted by the parties. *See Wilson v. Holyfield*, 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984) ("Courts cannot read into contracts language which will add to or take away from the meaning of the words already contained therein.").

D. THE COURT SHOULD NOT READ "TRUST" INTO THE SHAREHOLDERS' AGREEMENT AS A PERMISSIBLE TRANSFEREE JUST BECAUSE, AS IT TURNED OUT, THE BENEFICIARIES HAPPEN TO BE PERMISSIBLE TRANSFEREES AT THE INSTANT OF MRS. CORR'S DEATH.

At the time of executing the Shareholders' Agreement, the parties could not have known whether the beneficiaries of the Trust would have all been permissible transferees under the terms of the Shareholders'

Agreement. Therefore, it was error for the trial court to narrowly consider the effect of the Shareholders' Agreement as of the date of Mrs. Corr's death. Instead, the trial court should have looked to the circumstances present as of the date the parties executed the Shareholders' Agreement.

Mr. Corr, Jr. and Thomas Williams, as Executors of the Estate of Norma F. Corr and Trustees under the Norma F. Corr Revocable Trust (the "Trustees") argue in their Appellee brief that "the only people who could conceivably have received [the Decedent's] Capitol stock as of the date of her death are her three children, all of whom meet the definition of "'immediately [sic] family.'" (Trustees Appellee Br. at 25.) But this is only because all three children were still living at her death, a fact that could not be known to the parties when executing the Shareholders' Agreement in 2002. The Trust contemplates potential beneficiaries—other than Mrs. Corr's children—depending upon the facts existing at the time of Mrs. Corr's death. If, for example, one of the children predeceased Mrs. Corr, the Trust provides that such child's share "shall go to his or her surviving issue, per stirpes . . . ." J.A. vol. I, p. 200–01, art. IV(B)(4). These would be grandchildren of Mrs. Corr and *not* permitted transferees as defined in the Shareholders' Agreement. Alternatively, if one of her children became disabled, the Trust provides for distribution to "a relative, friend guardian, or

committee, to be expended by such person for the education, maintenance, support or benefit of said beneficiary." J.A. vol. I, p. 204, art. V. These possible recipients under the Trust do not meet the definition of "immediate family" set forth in Section 3(d) of the Shareholders' Agreement. Thus, the Appellees propose an interpretation that would make the Shareholders' Agreement enforceable one day and unenforceable the next.

The Shareholders' Agreement explicitly limits permissible transferees to a narrowly defined category of "immediate family". Indeed, Mr. Corr, Jr. even concedes that, in drafting the Shareholders' Agreement, it was both his and Mrs. Corr's specific intent to prevent the shares from being transferred or sold to non-family members. (*See* Corr Appellee Br. at 22.) A Shareholder's trust was intentionally left out of the definition of "immediate family", and the trial court erred in inserting additional language that was omitted by the parties. *See Wilson*, 227 Va. at 187, 313 S.E.2d at, 398.

E. SPECIFIC PERFORMANCE IS APPROPRIATE TO COMPEL THE ESTATE TO SELL ITS SHARES TO MRS. JIMENEZ.

In its Brief, the Company asserts that "Mrs. Jimenez cannot request 'specific performance' against only one of what she claims are multiple parties obligated to perform the same duty." (Capitol Appellee Br. at 23.)

Setting aside the lack of legal foundation for that argument,[4] the Company simply misstates the facts. Mrs. Jimenez seeks specific performance against one and only one *obligor*—the Estate. While other co-obligees might not be willing to perform their obligation to purchase, Mrs. Jimenez is ready, willing, and able to perform, and the Estate should be ordered to comply with its obligation to sell.

Mrs. Jimenez, not wanting to take an opportunity away from the Company, initially filed her complaint seeking to allow the Company to perform. Upon receipt of the Company's objection and stated refusal to perform, Mrs. Jimenez, readily, and with the consent of all parties, amended her complaint to clarify that, irrespective of Mr. Corr, Jr.'s and the Company's refusal to perform, she stood ready to do so, and sought an order compelling the sole obligated "seller"—the Estate—to perform. Mrs. Jimenez is entitled to the relief sought and respectfully requests that this Honorable Court enter judgment directing the Estate to sell its shares of the Company to her.

---

[4] See, for example, Virginia Code § 8.01-30, which *expressly allows* enforcement of a contract against one of several obligors. This and other authority is cited in Mrs. Jimenez's Opening Brief at 22. These same authorities amply contradict the argument raised (and promptly abandoned) by the Company that joint and several liability is only a tort concept. (*See* Capitol Appellee Br. at 21–22.)

F. THE TRUSTEES ARE NOT PERMITTED TO "FIX" THE DEFECTIVE OPTION EXERCISE.

In their Appellee Brief, the Trustees argue that, notwithstanding Mr. Corr, Jr.'s failure to exercise his option in strict compliance with the terms set forth by the Trust, it is "their responsibility" to manage the remaining shares of Mrs. Corr within the Trust, and "they are not obligated to proceed according to any of Corr's directions (other than the number of shares to be purchased) that may have been set forth in the Corr Exercise of Option." (Trustees Appellee Br. at 37.) While it may be generally true that a trustee is not bound to follow the direction of a third party in executing his duties, the argument disintegrates where, as here, the director (Mr. Corr, Jr., individually) and the directee (Mr. Corr, Jr., Trustee) are one in the same. It appears that Mr. Corr, Jr., individually, was trying to gain a personal advantage by executing his "option" in a manner contrary to the interests of the Trust beneficiaries to whom he owes the utmost duty of care and loyalty. And, it was only at the 11th hour, while trying to gain relief not pled in their counterclaim, that the Trustees agreed to modify the option exercise.

The Trustees, like the trial court, recognize that the method of Mr. Corr, Jr.'s exercise deviated from the language of the Trust.[5] Virginia law is clear: an acceptance must mirror *exactly* the terms required by the option for the option to become valid and enforceable. *See* Restatement (Second) Contracts § 45 (1981) ("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."); *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.").

The trial court erred in ruling that Mr. Corr, Jr. had properly exercised his option, despite the fact that no pleading in the case alleged in any way that Mr. Corr, Jr. had properly exercised his option. *See Ted Lansing Supply Co. v. Royal Aluminum and Constr. Corp*., 221 Va. 1139, 1141, 277

[5] As previously stated in Mrs. Jimenez's Opening Brief, in its original form, Mr. Corr, Jr.'s exercise potentially exposes the Trust to greater risk by under-collateralizing the payment obligation.

S.E.2d 228, 229 (1981) ("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." (citing *Potts v. Mathieson Alkali Works*, 165 Va. 196, 207, 181 S.E. 521, 525 (1935))). The trial court further erred by modifying the terms of Mr. Corr, Jr.'s option to comply with the terms of the Trust.

For these reasons, and the reasons stated in the Opening Brief, the judgment on this issue must be reversed and the Court should find that Mr. Corr, Jr.'s exercise is noncompliant and, therefore, ineffective.

CONCLUSION

For the reasons stated above, and also for the reasons set forth in the Opening Brief, 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

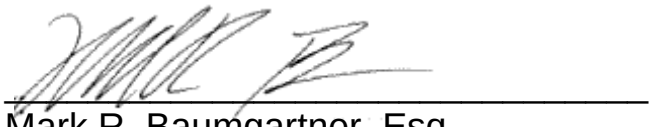
I hereby certify, pursuant to Rule 5:26(h), fifteen bond copies of the Reply Brief of Appellant and one electronic copy on CD, were hand-filed with the Clerk of the Supreme Court of Virginia on this 27th day of June, 2014. On this same day, three bound copies of the Reply Brief of Appellant and one electronic copy on CD of both, were served, via PS 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.