In The

Supreme Court of Virginia

RECORD NO. 140112

NANCY C. JIMENEZ,

Petitioner – 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 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.,

Respondents – Appellees.

BRIEF OF APPELLEE CAPITOL FOUNDRY OF VIRGINIA, INC. WITH ASSIGNMENT OF CROSS–ERROR

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BRIEF OF APPELLEE

COMES NOW Capitol Foundry of Virginia, Inc. ("Capitol Foundry" or the "Company"), by counsel, a defendant in the lower court and appellee on appeal, and for its Brief of Appellee respectfully states as follows:

I. STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Nancy C. Jimenez ("Ms. Jimenez"), plaintiff in the lower court and appellant on appeal, filed her brief of appellant (the "Brief of Appellant") on May 19, 2014. Ms. Jimenez' statement of the nature of the case and material proceedings is clarified, corrected and supplemented as follows.

This is an appeal from the trial court's October 18, 2013 Order awarding judgment against Ms. Jimenez on her Amended Complaint and in favor of the Defendants named in her Amended Complaint. This case concerns a determination of how certain shares of stock in Capitol Foundry which were owned by Norma F. Corr ("Mrs. Corr") at the time of her death, should be disposed of by the executors of her estate (the "Estate"). The dispute turns upon the language of three instruments: (i) the Last Will and Testament of Norma F. Corr, dated July 17, 1992 (the "Will") [J.A., Vol. I, p. 137, ¶3, and pp. 143-52]; (ii) the Norma F. Corr Revocable Trust Agreement, dated July 17, 1992 (the "Trust Agreement") [J.A., Vol. 1, p. 137, ¶3, and pp. 153-74]; and (iii) a Shareholders' Agreement, dated

December 16, 2002 (the "Shareholders' Agreement"). [J.A., Vol. 1, p. 137, ¶4, and pp. 175-83] Hereinafter, the Will and the Trust Agreement shall be referred to collectively as the "Estate Planning Documents".

Prior to the initiation of the proceedings below, the executors, who also serve as trustees of the Norma F. Corr Revocable Trust (the "Trust"), were prepared to distribute all Capitol Foundry stock held in the Estate (the "Stock") in accordance with the terms of the Estate Planning Documents. In September 2012, however, Ms. Jimenez, through counsel, asserted that the Stock should be conveyed, not in accordance with the Estate Planning Documents, but rather pursuant to subparagraph 3(a) of the Shareholders' Agreement – which requires that Capitol Foundry or the remaining shareholders purchase the Stock under certain circumstances.

On October 23, 2012, Ms. Jimenez filed a Complaint for a decree of specific performance requiring Capitol Foundry to purchase all of the Stock. [Complaint, pp. 5-6] The executors of the Estate filed a Counterclaim seeking a determination as to the rights of the parties under the Estate Planning Documents and the Shareholders' Agreement [J.A., Vol. I, pp. 1-7], while Capitol Foundry filed a Demurrer to the Complaint. On March 29, 2013, the trial court entered an order authorizing Ms. Jimenez to file an Amended Complaint. [J.A., Vol. I, pp. 53-60] Unlike the initial

Complaint, the Amended Complaint sought, *inter alia*, a decree of specific performance directing the Estate to tender "some or all of [the Stock]" to her and the Corporation. [J.A., Vol. I, p. 58]

On October 1-2, 2013, the Circuit Court for the City of Virginia Beach conducted a trial on the merits. As reflected in the Final Order entered on October 18, 2013, the Court made four rulings. [J.A., Vol. II, pp. 574-81] Three of the four rulings are the subject of the instant appeal, as follows:

> 2. Under the terms of the Will, the Trust [Agreement], and subparagraph 3(d) of the shareholders' agreement (the "Shareholders' Agreement) (Joint Ex. 3), and the circumstances and facts presented in this action, subparagraph 3(a) of the Shareholders' Agreement is not applicable;
>
> 3. In light of the foregoing ruling, it is not necessary for the Court to address the contention of the Defendants that subparagraph 3(a) of the Shareholders' Agreement does not create a binding agreement which can be enforced by this Court; therefore, such contention is moot, and the Court declines to rule on it; and
>
> 4. Corr has properly exercised the Corr Stock Option pursuant to subparagraph 6 of Article IV.B of the Trust, as modified by the agreed order ("Agreed Order") (Joint Ex. 6) entered by this Court on November 15, 2012, by his execution and delivery of the Exercise of Option by Lewis S. Corr, Jr. to Purchase Company Shares in Accordance with the Terms of the Norma F. Corr Revocable Trust ("Exercise of Option") (Corr Ex. 4) dated November 29, 2012.
>
> [J.A., Vol. II, pp. 575-76]

II. STATEMENT OF FACTS

Mrs. Corr had three children: Lewis S. Corr, Jr. ("Mr. Corr"), Patricia Williams ("Mrs. Williams") and Ms. Jimenez. [J.A., Vol. I, p. 136, ¶ 2] On July 17, 1992, Mrs. Corr executed the Estate Planning Documents. [J.A., Vol. I, p. 137, ¶3] Roughly ten (10) years later, on December 16, 2002, Mrs. Corr, Mr. Corr and Ms. Jimenez executed the Shareholders' Agreement. [J.A., Vol. I, p. 137, ¶4]

Mrs. Corr passed away on May 22, 2012. [J.A., Vol. I, p. 137, ¶8] Thomas Williams ("Mr. Williams"), Mrs. Corr's son-in-law, and Mr. Corr, her son, serve as co-executors (the "Executors") of the Estate, as well as co-trustees (the "Trustees") of the Trust. [J.A., Vol. I, p. 137, ¶¶9, 10]

A. THE ESTATE PLANNING DOCUMENTS.

The Estate Planning Documents utilize what is commonly referred to as "pour over" will in order to assist with the distribution of assets. Pursuant to the terms of the Will, because Mrs. Corr was predeceased by her husband, the Stock, along with the rest of her property, of every kind and description, "pour over" to the Trustees to be administered and distributed according to the terms of the Trust Agreement. [J.A., Vol. I, p. 146, Art. VII] The Will also provides that the Executors may distribute property directly to a beneficiary without it passing through the Trust, if

such property would have been immediately distributed to the beneficiary by the Trustees in accordance with the terms of the Trust Agreement. [J.A., Vol. I, pp. 146-47, Art. VII]

The Trust directs the Trustees to divide the Trust assets, including the Stock, into three separate lots of equal value, for distribution to Mrs. Corr's children. [J.A., Vol. I, p. 158, Art. IV(B)(3)] Notwithstanding the foregoing, the Trust Agreement also provides (a) Mr. Corr an "exclusive right and option to purchase (i) any or all of the shares of stock in Capitol Foundry" that the Trust may own (the "Corr Stock Option") [J.A., Vol. I, 159-60, Art. IV(B)(6)]; and (b) any beneficiary the right to "request and receive, outright and free of trust, his or her entire share." [J.A., Vol. I, p. 158, Art. IV(b)(3)]

B. THE SHAREHOLDERS' AGREEMENT.

Subparagraph 3(a) of the Shareholders' Agreement provides that upon the death of a shareholder, all of the stock owned by that shareholder "shall be purchased by the Company or the remaining shareholders", subject to the rights of the shareholders under subparagraph 3(d) of the Agreement. [J.A., Vol. I, p. 176, ¶3(a)] Subparagraph 3(a) further states that such offer "shall be deemed made and accepted on the ninetieth (90th) calendar day following the date of death, whether actually made and

accepted or not." *Id.* The record is devoid of any evidence that any party offered to purchase shares within this 90-day time period.

Subparagraph 3(d) of the Agreement states that a shareholder "shall have the right to convey or bequeath his/her shares to a member of such Agreeing Shareholder's immediate family." [J.A., Vol. I, p. 177, ¶3(d)] Such right "shall apply during the 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." *Id.* The term "immediate family" is defined as "children, spouses, parents and siblings" of the shareholder. *Id.*

C. ADMINISTRATION OF THE ESTATE.

As of the date of Mrs. Corr's death, Captiol Foundry had 105 shares of stock outstanding, which were owned as follows: (a) 95 shares were owned by Mrs. Corr; (b) 5 shares were owned by Mr. Corr; and (c) 5 shares were owned by Ms. Jimenez. [J.A., Vol. I, p. 137, ¶11] After the commencement of these proceedings, the parties entered into an agreed order (the "Agreed Order") which provided, *inter alia*, that (a) pursuant to section 303 of the Internal Revenue Code, Capitol Foundry was permitted to redeem 64.4 shares from the Estate as a tax-beneficial means of generating funds to pay estate taxes (the "Redemption") [J.A., Vol. I,

p. 138, ¶¶12-13]; and (b) the remaining stock was to be held in the Estate, as opposed to passing into the Trust, pending a conclusion of this matter. [J.A., Vol. I, p. 138, ¶14] Capitol's Redemption was undertaken pursuant to a written Stock Redemption Agreement [J.A., Vol. I, pp. 226-29], which the Company's Board of Directors approved by unanimous vote. At that time, the Company's Board was made up of Mrs. Corr's children, including Ms. Jimenez and Mr. Corr. As a result, the Company's purchase of the 64.4 shares was done with the approval of all parties to this action. The remaining 30.6 shares (*i.e.*, the Stock) are still held by the Executors of the Estate.

On November 29, 2012, after the Redemption, Mr. Corr exercised the Corr Stock Option by executing and delivering to the Trustees the Exercise of Option by Lewis S. Corr, Jr. to Purchase Company Shares in Accordance with the Terms of the Norma F. Corr Revocable Trust ("Exercise of Option") dated November 29, 2012. [J.A., Vol. II, pp. 571-73, Record, Corr Exhibit 4[1]] In keeping with the terms of the Agreed Order, no action has been taken on the Exercise of Option pending a final ruling in this matter. [J.A., Vol. I, p. 138, ¶14]

[1] The copy of the Exercise of Option included in the Joint Appendix is incomplete as pages three and four are missing.

III. ASSIGNMENTS OF CROSS-ERROR

1. The trial court erred by failing to rule that subparagraph 3(a) of the Shareholders' Agreement is not enforceable because it is uncertain with regard to material terms. [J.A., Vol. I, pp. 345-53; Final Order, J.A., Vol. II, p. 581]

IV. STANDARD OF REVIEW

This Court reviews a "circuit court's interpretation of an unambiguous contract de novo" as it has "an equal opportunity to consider the words of the contract within the four corners of the instrument itself." *Schuiling v. Harris*, 286 Va. 187, 192 (2013) (internal quotation marks omitted). "The question whether a writing is ambiguous is one of law, not of fact." *Tuomala v. Regent University*, 252 Va. 368, 374 (1996). (Assignments of Error 1-8; Assignment of Cross-Error 1).

V. PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES RELATING TO ASSIGNMENTS OF ERROR

A. THE TRIAL COURT CORRECTLY HELD THAT THE TERMS OF THE WILL, THE TRUST, AND THE SHAREHOLDERS' AGREEMENT PERMIT DISPOSITION OF MRS. CORR'S SHARES THROUGH THE ESTATE PLANNING DOCUMENTS. (ASSIGNMENTS OF ERROR 1-3, 6-8)

When distilled to its essence, the instant case turns upon whether the Estate Planning Documents and the Shareholders' Agreement can be harmonized, or whether they must be read in conflict. Ms. Jimenez argues that this Court should disregard the Estate Planning Documents, and

instead require that the Stock be disposed of in accordance with subparagraph 3(a) of the Shareholders' Agreement. The trial court correctly rejected that request, and instead construed subparagraph 3(d) of the Shareholders' Agreement to be consistent with the terms of the Estate Planning Documents, thus permitting disposition of the Stock in accordance with Mrs. Corr's estate plan.

As noted above, this Court reviews a "circuit court's interpretation of a contract de novo." *Schuiling v. Harris*, 286 Va. at 192. The various provisions of a contract are "harmonized, giving effect to each when reasonably possible, and are construed considering the circumstances under which they were executed and the condition of the parties." *Id*. Under Virginia law, "[w]here two papers [such as the Will and the Trust Agreement] are executed at the same time or contemporaneously between the same parties, in reference to the same subject matter, they must be regarded as parts of one transaction, and receive the same construction as if their several provisions were in one and the same instrument." *Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp.*, 109 Va. 513, 520 (1909); *see also Countryside Orthopaedics, P.C. v. Peyton*, 261 Va. 142, 151 (2001).

1. Ms. Jimenez' Argument.

Ms. Jimenez argues that because the Estate Planning Documents use a two-step process to transfer property from the Estate to the beneficiaries, they violate the terms of section 3 of the Shareholders' Agreement. That section states, in pertinent part:

> 3. Mandatory Sale and Purchase of Stock.
>
> (a) Death of an Agreeing Shareholder. Subject to subparagraph (d) hereof, on the death of an Agreeing Shareholder, all of the Shares of the 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. Such offer shall be deemed made and accepted on the ninetieth (90th) calendar day following the date of death, whether actually made and accepted or not.
>
> . . .
>
> (d) 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.

[J.A., Vol. I, pp. 176-77]

Under subparagraph 3(a) of the Shareholders' Agreement, upon the death of a shareholder, his or her stock is required to be purchased by "the Company or the remaining shareholders". That provision, however, is expressly "subject to the provisions of subparagraph 3(d) . . ." [J.A., Vol. I, p. 176, ¶3(a)], which permits a shareholder to "convey or bequeath his or her shares to a member of [the shareholder's] immediate family." [J.A., Vol. I, p. 177, ¶3(d)].

Ms. Jimenez apparently concedes that the Stock may be held by Mr. Williams and Mr. Corr, in their role as executors of the Estate. Once the stock passes to Mr. Williams and Mr. Corr in their roles as trustees,[2] however, she asserts that the provisions of subparagraph 3(a) of the

[2] Throughout her Brief, Ms. Jimenez inconsistently refers to the Stock as passing to the Trust or the Trustees. *Compare* "[A] transfer to a trust is decidedly different than a bequest to a natural person [Brief of Appellant, pp. 13-14]" *with* "Yet, the Court's ruling would allow [Mr. Williams] to take title to shares representing a majority of the Company's stock." [Brief of Appellant, p. 15] The Will provides that the rest, residue and remainder of Mrs. Corr's assets, including the Stock, "pours over" to the *Trustee* of the Trust Agreement. [J.A., Vol. I, p. 146, Art. VII] As a result, the Trust itself is not a transferee and Ms. Jimenez's arguments to that effect should be disregarded. Likewise, to the extent Ms. Jimenez emphasizes that the language of the Shareholders' Agreement suggests an intent to limit transfer of shares to natural persons [Brief of Appellant 14, 16], the plain language of the Estate Planning Documents accomplishes the goal of transfer to a natural person by providing that a Trustee (*i.e.*, Mr. Corr and/or Mr. Williams) is the transferee.

Shareholders' Agreement have been violated. [Brief of Appellant, pp. 14-15]

There is no dispute that the Executors and the Trustees are one in the same, or that the beneficiaries of the Estate and the beneficiaries of the Trust are identical. Likewise, Ms. Jimenez has not, and indeed cannot, assert that the Trustees are to preserve the Stock in the Trust as opposed to distributing it directly to the beneficiaries. Nevertheless, she appears to argue that because Mr. Williams is not a member of Mrs. Corr's "immediate family", as that term is defined in the Shareholders' Agreement, transfer of the Stock from Mr. Corr and Mr. Williams as executors, to Mr. Corr and Mr. Williams as trustees, is impermissible. [Brief of Appellant, pp. 14-15] Put another way, Ms. Jimenez claims that because the Estate Planning Documents employ a two-step process, instead of simply transferring the stock directly from the Executors to the beneficiaries, the estate plan must be disregarded. Under the terms of the instruments at issue and Virginia law, these claims are without merit.

2. Neither the Executors nor the Trustees acquire equitable title to the stock.

As an initial matter, Virginia law is clear that a beneficiary is the equitable owner of property held in trust and a trustee is a "mere representative whose function is to attend to the safety of the trust property

and to obtain its avails for the beneficiary in the manner provided by the trust instrument." *Fletcher v. Fletcher*, 253 Va. 30, 35, 480 S.E.2d 488, 491 (1997) (quoting Bogert, *The Law of Trusts and Trustees* § 961, at 2 (Rev. 2d ed. 1983)); *see also Doe v. Town of Colonial Beach*, 37 Va. Cir. 238 at *3 (Westmoreland Cnty. 1995) ("The essence of a trust is the division of legal and equitable title; the trustee is vested with legal title, and the beneficiary maintains equitable title."). Accordingly, a trustee never obtains full title to trust property.[3]

Subparagraph 3(d) of the Shareholders' Agreement expressly permits a shareholder to utilize an estate plan to transfer her shares to members of her "immediate family." Subparagraph 3(d) does not contain restrictions on how that estate plan may be comprised, nor does subparagraph 3(d) deprive a shareholder of the benefits available from various estate planning

[3] Ms. Jimenez concedes that a trustee only acquires legal title to trust property. *See* Brief of Appellant, p. 14 ("First and foremost, a transfer to a trust is accomplished only by transferring legal title to the trustees of the trust."). However, the case cited in support of this point, *Austin v. City of Alexandria*, 265 Va. 89, 574 S.E.2d 289 (2003), addresses principles of land trusts, which are inapplicable to the instant case. *See also Air Power, Inc. v. Thompson*, 244 Va. 534, 537, 422 S.E.2d 768, 770 (1992) ("Unlike a creditor trust where legal title resides in the trustee while the beneficiary retains equitable title, the trustee in a land trust receives both legal and equitable title to the property. In a land trust, the beneficiary retains no interest, legal or equitable, in the property itself, but instead holds only a personal property interest in the rents, proceeds, and profits from the property.") (internal citation omitted).

methods, provided that the beneficiary(ies) of the shareholder's stock is(are) a member(s) of her "immediate family." By utilizing the phrase "convey or bequeath", the Agreement provides each shareholder with flexibility as to how that transfer may be accomplished, as opposed to restricting the means of conveyance solely to a will or the intestacy statutes.

As stated above, Mrs. Corr's estate plan provides that the beneficiary(ies) of her Stock would be either her son, Mr. Corr, if he exercises his purchase option, or her children *per stirpes*, if not. As such, Mrs. Corr's estate plan is consistent with subparagraph 3(d) of the Shareholders' Agreement because the beneficiaries of her Estate are one or more members of her immediate family.[4] No other entity or person acquires full title, both legal and equitable, to the Stock at any time.

Throughout her Brief, Ms. Jimenez argues that the Shareholders' Agreement demonstrates the drafters' intent to limit the ability to vote or hold title to shares to specified individuals. Brief of Appellant, p. 14 ("Failure to adhere to the terms of the Shareholders' Agreement runs the

[4] Interestingly, Ms. Jimenez argues that allowing Mr. Corr to purchase stock under the option leads to "one heir [having] a significant disproportionate benefit." [Brief of Appellant, p. 1] However, if her argument prevails, Mrs. Williams (who is the other daughter of Mrs. Corr and thus an eligible recipient under the Shareholders' Agreement) will be prohibited from receiving any stock in the Company.

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").

Contrary to her argument, however, the Shareholders' Agreement does not contain a prohibition against a Shareholder granting a proxy to vote his or her shares, in accordance with Virginia Code § 13.1-663. Thus, in accordance with the terms of the Shareholders' Agreement, a Shareholder could grant a proxy to a non-family member, who would then be entitled to vote the Shareholder's shares. As a result, the potential ability of Mr. Williams, a non-immediate family member, to vote shares in his capacity as co-Trustee, without more, does not violate the Shareholders' Agreement.

The Shareholders' Agreement permitted Mrs. Corr to "convey or bequeath" her Stock to members of her immediate family. That is exactly what her Estate Planning Documents accomplish.

3. The Estate Planning Documents Permit the Stock to be Transferred Directly from the Executors to the Beneficiaries.

Even if Ms. Jimenez were correct that the transfer of the Stock from Mr. Williams, as co-executor, to Mr. Williams, as co-trustee, triggered the

mandatory purchase obligations in subparagraph 3(a) of the Shareholders' Agreement, the trial court still reached the correct conclusion since the Estate Planning Documents permit the Executors to transfer property directly to the beneficiaries if that property were to be distributed immediately upon being placed into the Trust. *See* J.A., Vol. II, pp. 492-93.

Article VII of the Will states, in pertinent part:

> In the event any of such property given, devised or bequeathed to the Trustee of such trust agreement is, under the terms of such trust agreement, to be distributed immediately to any beneficiary thereof, outright and free of trust, then such property may be transferred directly to such beneficiary by my Executor, without the necessity of passing through such trust.

[J.A., Vol. I, pp. 146-47, Art. VII]

The meaning of this language is clear. If any property to be conveyed to the Trustees will simply be re-conveyed immediately to a beneficiary, then the Executors need not go through the formality of placing the property into the Trust. Instead, the Executors may simply distribute the property directly to the beneficiary.

In light of this provision of the Will, Mrs. Corr's estate plan is consistent with the terms of the Shareholders' Agreement, and avoids the hyper-technical argument asserted by the Ms. Jimenez. Under the language of the Estate Planning Documents, the Stock is to be distributed

to (i) Mr. Corr, to the extent that he asserts his purchase option [J.A., Vol. I, pp. 159-61, Art. IV(B)(6)]; or (ii) the three beneficiaries, to the extent that Mr. Corr either fails to exercise his option, or elects to purchase less than all of the stock under that purchase option. [J.A., Vol. I, p. 158, Art. IV(B)(3)]

In the event that Mr. Corr elects to exercise his option, then the stock passes directly to him through the Trust. [J.A., Vol. I, pp. 159-60, Art. IV(B)(6)] In the event that he does not exercise his option, or elects to purchase less than all of the stock, then the remaining beneficiaries can make demand upon the Trustees for immediate distribution of their property. [J.A., Vol. I, p. 158, Art. IV(B)(3)] Under either scenario, the Stock could be distributed immediately to the beneficiaries. Accordingly, under Article VII of the Will, the Executors would be permitted to distribute the Stock directly to one or more of Mrs. Corr's children, instead of requiring that it pass through the Trust. Although Ms. Jimenez may argue that this provision renders the purchase option unenforceable since the option only arises under the Trust Agreement, the simple fact is that all property passing through the Trust does so under the terms of the Trust Agreement.

Because the Stock is still part of the Estate, Ms. Jimenez' entire argument is premised upon what she views as a mandatory transfer of the Stock from the Executors to the Trustees, before it can be distributed to the beneficiaries. Given that the Stock can, pursuant to the Estate Planning Documents, be distributed by the Executors instead, her argument again must fail.[5]

B. THE TRIAL COURT CORRECTLY REFUSED TO APPLY SUBPARAGRAPH 3(A) OF THE SHAREHOLDERS' AGREEMENT, BUT ERRED IN DECLINING TO RULE THAT SUBPARAGRAPH 3(A) IS TOO UNCERTAIN TO BE ENFORCEABLE. (ASSIGNMENT OF ERROR 4; ASSIGNMENT OF CROSS-ERROR 1)

Ms. Jimenez asks this Court to enforce subparagraph 3(a) of the Shareholders' Agreement. The trial court erred in declining to rule that subparagraph 3(a) is too uncertain to be enforceable. As stated above, this Court reviews a circuit court's interpretation of a contract *de novo*. *Schuiling*, 286 Va. at 192. Under Virginia law, it is well-established that "the contract sought to be specifically executed must be established by competent proofs, and be clear, definite, and unequivocal in all its terms. If the terms are uncertain, ambiguous, or not made out by satisfactory proofs, a specific performance will not (as, indeed, upon principle, it should not) be

[5] It also bears noting that Ms. Jimenez' argument would be rendered irrelevant if Mr. Williams resigned or was otherwise rendered incapable of serving as a trustee. *See* J.A., Vol. II, pp. 494-95.

decreed." *Henley v. Cottrell Real Estate, Ins. & Loan Co.*, 101 Va. 70, 43 S.E. 191, 192 (1903); *Duke v. Tobin*, 198 Va. 758, 760 (1957) ("It is an elementary principle that a court of equity will not specifically enforce a contract unless it be complete and certain. All the essential terms of the contract must be finally and definitely settled. None must be left to be determined by future negotiations."). Pursuant to rules of contract construction, "[a]n ambiguity exists when language admits of being understood in more than one way or when language is of doubtful import." *Westmoreland-LG&E Partners v. Virginia Elec. and Power Co.*, 254 Va. 1, 11 (1997) (internal citations and quotation marks omitted); *see also Eure v. Norfolk Shipbuilding & Drydock Corp., Inc.*, 263 Va. 624, 632 (2002) ("Contract language is ambiguous when it may be understood in more than one way or when it refers to two or more things at the same time.").

Moreover, it is well-established that a "court may not add to the terms of the contracts of parties by construction, in order to meet the circumstances a particular case." *Bentley Funding Group, L.L.C. v. SK&R Group, L.L.C.*, 269 Va. 315, 329 (2005) (internal quotation marks omitted).

The first sentence of subparagraph 3(a) states, in pertinent part, "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. . .". [J.A., Vol. I, p. 176, ¶3(a)] (Emphasis added.)

Upon Mrs. Corr's death, the remaining shareholders were Ms. Jimenez and Mr. Corr, each of whom currently owns five shares.[6] Under the plain language of subparagraph 3(a), if that instrument is deemed to trump the Estate Planning Documents, then either (i) Capitol Foundry, on the one hand; or (ii) Ms. Jimenez and Mr. Corr, on the other hand, would be required to purchase the Stock (Capitol Foundry, Ms. Jimenez and Mr. Corr shall be referred to collectively as the "Eligible Purchasers"). Subparagraph 3(a), however, contains no provision directing: (i) how many shares must be sold to each Eligible Purchaser (the use of the term "or" prohibits a simple pro rata division as Ms. Jimenez appears to suggest); (ii) whether an Eligible Purchaser may decline to purchase shares (indeed, the Shareholders' Agreement states that the obligation to purchase is mandatory [J.A., Vol. I., p. 176, ¶3(a)]); or (iii) the consequences of both

[6] Although not part of the record below, on December 10, 2013, Ms. Jimenez filed in the Circuit Court for the City of Virginia Beach a dissolution action under Virginia Code § 13.1-747. *See Nancy C. Jimenez v. Capitol Foundry of Virginia, Inc.*, Virginia Beach Circuit Court case no. CL 13-6364. On February 3, 2014, Capitol Foundry made an election to purchase Ms. Jimenez' five shares as authorized under Virginia Code § 13.1-749.1(A). The election has not been consummated because the Virginia Beach Circuit Court has stayed completion of that purchase pending the outcome of this appeal.

Capitol Foundry, on the one hand, and Ms. Jimenez and Mr. Corr, on the other hand, demanding a right to buy all of the shares.

As a result, subparagraph 3(a) of the Shareholders' Agreement lacks elements essential for its enforcement. Under Virginia law, "[i]t is well-settled that a contract must be complete and certain and that the essential elements of price and terms of sale must have been agreed upon before a contract will specifically enforce the contract." *Rolfs*, 202 Va. at 692; *see also Duke*, 198 Va. at 759. As subparagraph 3(a) is uncertain with respect to material terms (*i.e.*, exactly who must buy the shares and how many they are to purchase), specific performance is not an available remedy.

In an attempt to make subparagraph 3(a) meaningful, Ms. Jimenez argues that the tort law principal of joint and several liability should apply. Joint and several liability is a tort law concept to apportion liability amongst concurrent tortfeasors. Joint and several liability is defined as "[l]iability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion." BLACK'S LAW DICTIONARY 416 (2d Pocket Ed. 2001). "The joint- and several- liability doctrine represents a social policy choice of making a plaintiff whole over

any concerns that excessive liability could be imposed on an individual defendant." 74 Am. Jur. 2d Torts §§ 66.

While a contractual obligation can give rise to "joint and several" liability, the language of the contract must make clear that all parties are liable for full payment. "Whether a contract is joint or several or joint and several 'depends upon the intention of the parties, as ascertained from the contract by the ordinary rules of construction.'" *Virginia Black Mountain Coal Co. v. Virginia-Lee Co.*, 113 Va. 395, 74 S.E. 177, 182 (1912) (citing Page on Contracts, § 1132). A contract that is "plainly meant to be several is not to be treated as joint merely because several persons have signed it on one side or the other." *Id.* (internal quotation marks omitted). In this case, the use of the term "or" makes clear that all of the Eligible Purchasers are not obligated to purchase the Stock.

More importantly, joint and several liability is a damages remedy whereby multiple defendants are deemed liable for the same amount. It is not applicable to a request for specific performance. In this case, the issue raised by Ms. Jimenez is whether subparagraph 3(a) of the Shareholders' Agreement is enforceable by an order of specific performance. [J.A., Vol. I, p. 60] Assuming *arguendo* that subparagraph 3(a) is applicable in light of Mrs. Corr's Estate Planning Documents, then by its plain language that

section requires the purchase of Capitol Foundry's Stock by the Company **or** the remaining Shareholders. Thus, while Mrs. Corr's estate could conceivably make a claim for monetary damages against the Company and the remaining Shareholders based upon the failure of any of those parties to acquire the Stock, Ms. Jimenez cannot request "specific performance" against only one of what she claims are multiple parties obligated to perform the same duty. *See Henley*, 101 Va. 70, 43 S.E. at 192 ("[T]he contract sought to be specifically executed must be established by competent proofs, and be clear, definite, and unequivocal in all its terms. If the terms are uncertain, ambiguous, or not made out by satisfactory proofs, a specific performance will not (as, indeed, upon principle, it should not) be decreed."). Without supplementing the terms of the Shareholders' Agreement, the circuit court could not have awarded specific performance in light of the fact that the Agreement (i) contains a mandatory provision, (ii) for the Company **or** the remaining Shareholders, (iii) to buy all of the Stock held in the Estate.

In an apparent attempt to remedy this situation, Ms. Jimenez argues that "[t]he *only* person (or entity) that has sought to purchase shares as required by the Shareholders' Agreement is Ms. Jimenez" [Brief of Appellant, p. 23 (emphasis in original)], suggesting that an award of

specific performance in her favor would thus be proper. However, the record is clear that none of the Eligible Purchasers (including Ms. Jimenez) presented an offer to purchase the Stock within ninety (90) days of Mrs. Corr's death, as required by the plain language of subparagraph 3(a). [J.A., Vol. I, p. 176, ¶3(a)]

In her initial Complaint, Ms. Jimenez sought specific performance of subparagraph 3(a) and an Order of the Court directing the Company, and only the Company, to purchase the Stock. Complaint, pp. 5-6. In response, the Company took the position, *inter alia*, that it could not be forced to purchase the Stock under the plain language of the Shareholders' Agreement. Capitol Foundry's Demurrer to Complaint, pp. 2, 4. Ms. Jimenez subsequently amended her complaint to seek an Order directing that "the Estate must tender its Shares in accordance with the Shareholder Agreement to the Corporation and the remaining shareholders including, specifically, Nancy Jimenez." [J.A., Vol. I, p. 60] In its Answer to the Amended Complaint, Capitol Foundry responded, among other things, that Ms. Jimenez is not entitled to specific performance because the Complaint does not allege that Ms. Jimenez offered to purchase all of the stock held by the Estate within ninety (90) days of Mrs. Corr's death, thus she did not allege that she is ready, willing and able to perform. [J.A., Vol. I., p. 75]

The Motion for Leave to File the Amended Complaint was filed on or about March 19, 2013, while Mrs. Corr passed away on May 22, 2012 [J.A., Vol. I, p. 137, ¶8]. Thus, Ms. Jimenez did not express any willingness to purchase the Stock until roughly 301 days after Mrs. Corr's death. Thus, Ms. Jimenez' suggestion that she is the only Eligible Purchaser to have timely offered to perform is incorrect.[7]

By requiring that the Stock be purchased by the Company **<u>or</u>** the remaining Shareholders, the language of subparagraph 3(a) of the Shareholders' Agreement places a burden on multiple parties to perform an

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[7] If this Court rules that the Shareholders' Agreement trumps the Estate Planning Documents, and thus the Company or the remaining Shareholders are obligated to purchase the Stock, then the Company will abide by that ruling and purchase all of the Estate's Stock. Ms. Jimenez' contention that "the Company (under the leadership of Mr. Corr, Jr.) steadfastly and repeatedly denied any obligation to perform" [Brief of Appellant, p. 23], misstates the facts of this case. In its Answer to the Amended Complaint, Capitol Foundry, relying on its interpretation of the relevant documents, argued, *inter alia*, that Ms. Jimenez is not entitled to specific performance requiring the Company to purchase all of the Shares because the Complaint "does not state with certainty the relief requested. . . . Specifically, the language fails to address whether Capitol and/or the remaining shareholders are obligated to purchase the stock currently held by the Estate, or whether one or more of those parties has nothing more than an option to purchase." [J.A., Vol. I, p. 75] Capitol Foundry also believes that the Estate Planning Documents do not violate the terms of the Shareholders' Agreement. These arguments are distinguishable from a steadfast refusal to perform should an obligation to perform exist. Unless and until a court determines the meaning of the relevant documents, Capitol Foundry is entitled to rely on its interpretation of those instruments and assert that interpretation through its various pleadings.

exclusive task. As a result, that provision is simply not capable of being enforced by specific performance. Although the circuit court correctly refused to apply subparagraph 3(a) of the Shareholders' Agreement, it erred in failing to rule that subparagraph 3(a) is unenforceable for lack of certainty.

C. THE TRIAL COURT CORRECTLY RULED THAT MR. CORR PROPERLY EXERCISED THE CORR STOCK OPTION. (ASSIGNMENT OF ERROR 5)

Ms. Jimenez asserts that the circuit court erred in granting relief on facts and a claim not pled. Brief of Appellant, p. 25. Specifically, she argues that the issue of whether Mr. Corr effectively exercised his option under the Trust was not before the trial court, and thus should not have been addressed in the court's ruling. This issue of Mr. Corr's ability to exercise his option, however, was addressed in the Executors/Trustees' Counterclaim. More importantly, Ms. Jimenez herself repeatedly raised the issue of the effectiveness of the Corr Stock Option before the lower court.

As Ms. Jimenez notes, "[i]t 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 or claimed." *Ted Lansing Supply Co. v. Royal Aluminum and Constr. Corp.*, 221 Va. 1139, 1141 (1981) (holding that trial court erred in submitting to jury claim on implied warranty theory of

recovery when claim for damages was based on breach of express warranty). However, this principle, "[l]ike any other rule," "must be reasonably applied, keeping in mind that its purpose is to prevent surprise." *Syed v. ZH Technologies, Inc.*, 280 Va. 58, 71 (2010).

In their Counterclaim, the Executors/Trustees specifically 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 and subparagraphs 3(a) and 3(d) of the Agreement." [J.A., Vol. I, p. 6] These allegations were sufficient to put Ms. Jimenez on notice of the defendants' claims that the efficacy of Mr. Corr's exercise of his option was at issue. *See* Rule 1:4(d) (requiring every pleading to "state the facts on which the party relies" and "clearly inform the opposite party of the true nature of the claim or defense").

As stated above, Mr. Corr exercised the Corr Stock Option on November 29, 2012, after the Agreed Order was entered on November 15, 2012 and Capitol's 303 Redemption was concluded. The Agreed Order stated "the fact that the Executors have not transferred or distributed any Capitol shares to the Trust prior to the time of the exercise of the Corr Stock Option, does not and will not provide a basis for ruling that Corr did

not and does not have a right to exercise the Corr Stock Option." [J.A., Vol. I, p. 221]

Ms. Jimenez cannot, in good faith, claim surprise or prejudice in light of this issue not only being addressed in the pleadings, but also repeatedly raised before the trial court, often by Ms. Jimenez herself. During trial, counsel for Ms. Jimenez repeatedly argued that because the Stock had not been placed into the Trust within ninety (90) days after Mrs. Corr's death, Mr. Corr did not have the right to exercise his option. [J.A., Vol. I, pp. 241-43, 256] The written exercise of the Corr Stock Option was admitted into evidence without objection. [J.A., Vol. I, pp. 427-29] Ms. Jimenez did not assert that the validity of the exercise of the option was not before the Court until close to the end of the presentation of evidence during a colloquy with the Trial Court while cross-examining Mr. Corr. [J.A., Vol. I, p. 447]

During the Executors/Trustees' closing argument that the Exercise of Option was proper, counsel for Ms. Jimenez interrupted to argue: (i) why the Agreed Order did not allow Mr. Corr to exercise his option after the 90th day following Mrs. Corr's death; and (ii) that the Exercise of Option was not before the Court because it was not in the pleadings. [J.A., Vol. II, pp. 482-83] Counsel for the Executors/Trustees directed the Court's attention

to the Counterclaim, wherein the Executors/Trustees asked for relief with respect to the stock option. [J.A., Vol. II, p. 483] Thus, the issue of whether Mr. Corr properly exercised his option "'substantially accord[ed] with the case as made in the pleading.'" *Fein v. Payandeh*, 284 Va. 599, 660 (2012) (quoting *Ted Lansing*, 221 Va. at 1141) ("Though particularized for the first time, this argument was not a new or different claim" than raised in a pleading).

Finally, during the Court's announcement of its ruling, counsel and the Court discussed whether the Final Order should include a provision indicating that the Exercise of Option was proper in an effort to avoid further litigation. The Court asked counsel for Ms. Jimenez, "as an officer of the Court, . . . do you have evidence that for some reason the offer presented by Mr. Corr, the option to exercise the Option was not properly done?" . [J.A., Vol. II, pp. 547-48] Counsel for Ms. Jimenez raised a concern relating to the interpretation of the Corr Stock Option, which was already admitted into evidence. [J.A., Vol. II, p. 548] Specifically, that alternative constructions of the Option would result in differing amounts of collateral in the Trust. The Executors/Trustees and Mr. Corr agreed that the Option would be construed so as to provide the Trust with the greatest

amount of collateral. [J.A., Vol. II, p. 553] The Final Order incorporates this language. [J.A., Vol. II, p. 577]

The Court resolved the option exercise issue by concluding: (i) based on its reading of the Agreed Order, that Mr. Corr did have a right to exercise the Corr Stock Option; and (ii) that the Final Order would contain language construing the Option in a manner to provide the greatest amount of collateral to the Trust, which alleviates the concern raised by Ms. Jimenez. The procedural history reflects that the issue of the validity of the Corr Exercise of Option was not only addressed in the Executors/Trustees' Counterclaim, but also repeatedly raised before the trial court. As a result, this issue was properly before the Court and the trial court did not err in ruling on this issue.

VI. CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For the reasons stated above, Capitol Foundry of Virginia, Inc. requests that the trial court's Final Order be affirmed.

Respectfully submitted,
CAPITOL FOUNDRY OF VIRGINIA, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June 2014, in compliance with Rule 5:26(h), fifteen bound copies of the Brief of Appellee, with one electronic copy on CD, were hand-filed with the Clerk of the Supreme Court of Virginia. On this same day three bound copies of the Brief of Appellee, with one electronic copy on CD, were served, via UPS Ground Transportation, to all counsel at the following addresses:

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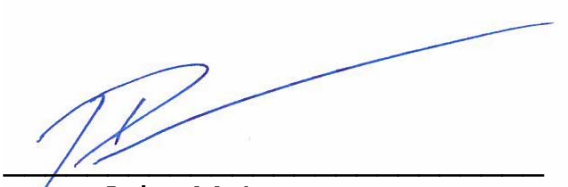

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