In The

Supreme Court of Virginia

RECORD NO. 160999

JAMES T. DENTON,

Appellant,

v.

BROWNTOWN VALLEY ASSOCIATES, INC.,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE[1]

This matter originated with a claim for specific performance filed on October 28, 2010 by Appellant James Denton ("Denton") against Appellee Browntown Valley Associates, Inc. ("Browntown") (App. at pp. 1-32) based upon a Sales Contract for Land executed in June 2005. App. at pp. 1312-19.

Although marketable title issues were evident in the initial Complaint, App. at pp. 33-38, Denton alleged in his Amended Complaint that any such issues were resolved by a Deed of Boundary Settlement and Dedication of Plat (hereafter the "Boundary Settlement Deed") made between Denton and Wayside Inn Limited Partnership (hereafter, "Wayside"). App. at pp. 43-44; 1303-1310. After a hiatus of 2 ½ years in which Denton took no action to prosecute his claim, a two-day trial on Denton's specific performance claim (and Browntown's related defenses) was finally held on February 19-20, 2015. At the close of Denton's case in chief, Browntown moved to strike Denton's evidence, a motion the trial court took under advisement until after the trial's conclusion. App. at pp. 1028-1043; 1054.

On March 10, 2015, the court granted Browntown's motion to strike. App. at pp. 226-28. It concluded that Denton had failed to establish a *prima facie* case for specific performance, specifically ruling that the evidence failed to establish that Denton possessed marketable and insurable title to a critical 4.191-acre portion of

[1] For purposes of this Brief, "App." shall refer to the Joint Appendix filed by Denton on March 13, 2017.

the subject property. It so ruled because the Boundary Settlement Deed (upon which Denton's assertion of marketable and insurable title completely depended) was recorded *after* a Substitute Trustee's Deed showed that the Wayside property had already been foreclosed upon pursuant to a 1991 deed of trust. App. at pp. 227; 1422-27. The plain result of this ordering of events was that the new owner of the Wayside property simply had no notice of the Deed of Boundary Settlement, was not bound by its terms, and that the Deed of Boundary Settlement did not and could not resolve the marketable and insurable title issues that infected Denton's title. *Id.* at pp. 226-27. Although Denton filed a motion for reconsideration on May 21, 2015, App. at pp. 464-483, the trial court denied that motion by letter ruling dated August 17, 2015. App. at pp. 557-58.

On March 3, 2016, the trial court conducted a hearing on Browntown's counterclaim against Denton for attorney's fees, costs and expenses pursuant to the fee shifting provisions of the 2005 Sales Contract for Land. The evidence included three attorneys' fee affidavits with attached and detailed invoices submitted by Browntown's counsel (App. at pp. 1430-1532) as well as testimony and a report (App. at pp. 1533-38) from Browntown's expert witness. Although Browntown asked for $106,348.15 in attorney's fees and costs, the trial court determined that a total award of $54,964.00 was appropriate. App. at pp. 781-781B. Denton

appealed both the trial court's decision to grant Browntown's motion to strike and the court's award of attorney's fees.

STATEMENT OF FACTS & MATERIAL PROCEEDINGS

By Deed dated January 27, 1993, and recorded in the Warren County, Virginia Circuit Court Clerk's Office on February 2, 1993 (hereafter the "1993 Deed") (App. at pp. 1275-1277), John A. Boyer and Carol P. Boyer conveyed to Denton the real estate described in a plat dated August 28, 1992, that had been prepared by H. Bruce Edens, Land Surveyor, recorded immediately prior to the 1993 Deed. App. at pp. 1279-1286. Critically, as noted on the plat, the surveyor cross-hatched 4.191 acres of the property conveyed to Denton and added a note: "No definite deed reference could be found to verify ownership. *I specifically do not assure ownership of this area*." App. at p. 1283 (emphasis added). (This hereafter is the "Disputed Acreage").

Denton also obtained a title insurance policy for the property conveyed in the January 27, 1993, Deed from Chicago Title Insurance Company, effective February 2, 1993 (hereafter the "Title Policy"). App. at pp. 1297-1302. The Title Policy contained a specific exception from coverage as to "rights or claims of others" as to the Disputed Acreage. App. at p. 1300.

Conscious of his title issues, on or about March 19, 1993, Denton entered into the Boundary Settlement Deed with Wayside. App. at pp. 1303-1310. The

purpose of the Boundary Settlement Deed was to have Wayside, as the adjacent landowner, concur that the Disputed Acreage belonged to Denton, and thus to cure the title exception noted in the Title Policy. The Boundary Settlement Deed was recorded in the aforementioned Clerk's Office on *December 13*, *1994*. App. at p. 1306.

However, the land records of the Warren County Circuit Court Clerk's Office reveal that the Wayside property was subject to a 1991 deed of trust for the benefit of NationsBank of Maryland, N.A. App. at p. 1422. Wayside, alas, had defaulted on its loan with NationsBank, and on *February 28*, *1994*, the substitute trustee foreclosed on the deed of trust, and sold Wayside's property to NationsBank at auction. App. at pp. 1422-23. *The Substitute Trustee's Deed (hereafter the "Trustee's Deed") was recorded in the Warren County Circuit Court Clerk's Office on April 22*, *1994 – nearly eight (8) months prior to the recordation of the Boundary Settlement Deed*. *Id.* at p. 1427. Wayside had no interest in its property when Denton recorded the Boundary Settlement Deed.

Moreover, as the trial court would observe (App. at pp. 227), the Boundary Settlement Deed does not indicate that NationsBank ever reviewed the Boundary Settlement Deed, let alone executed it.

On or about June 10, 2005, Denton and Browntown entered into a Sales Contract for Land (hereafter the "Contract") for the sale and purchase of Denton's

property (which included the Disputed Acreage). App. at pp. 1312-1319. At about the same time, Denton and Browntown also entered into various addenda related to the Contract. App. at pp. 1322; 1328-1332.

When the Contract was submitted by Browntown to Denton on or about June 4, 2005, Christi Boies, Browntown's real estate agent, had provided not only a cover letter (App. at p. 1333) but also a copy of a written agreement executed on June 4, 2005, between Browntown and Clay Gilliam in his capacity as President of COGIL Corporation, the owner of land adjacent to Denton. App. at p. 1337. The purpose of the agreement between Browntown and COGIL was to allow Browntown to make various road improvements so as to allow Browntown to develop and subdivide the Denton property upon completion of the purchase. App. at pp. 1333, 1337). As Denton was aware from Ms. Boies' letter and written agreement with COGIL, Browntown sought to purchase the property for the purpose of developing a subdivision. *Id.* In an unfortunate and untimely development, after the Contract had been fully executed, COGIL sent a letter to Browntown stating that (unbeknownst to Browntown) there had been no corporate resolution from COGIL authorizing Mr. Gilliam to enter into the June 4, 2005 agreement. Consequently, COGIL was treating the agreement as invalid. App. at p. 1082, 1084.

Prior to receiving COGIL's disavowal of the agreement, pursuant to the terms of the Virginia Jurisdictional Addendum to the Contract (hereafter the "Jurisdictional Addendum") (App. at pp. 1328-1330), Martha Buracker, Browntown's corporate treasurer, contacted J. Daniel Pond, II, the settlement attorney specified in Paragraph 7 of the Jurisdictional Addendum (App. at p. 1319) to provide him with the Contract and addenda and to schedule settlement. App. at pp. 1081-82. According to the Jurisdictional Addendum, Mr. Pond represented the Contract and was tasked with the obligation to order the title exam required by Paragraph 19 of the Contract. App. at p. 1319.

Upon learning of COGIL's disavowal, Ms. Buracker contacted Mr. Pond to request that he "hold off on everything" until the situation with COGIL could be resolved. App. at p. 1082. Browntown engaged in extensive negotiations with COGIL to arrive at a written agreement for the road improvements previously discussed with Mr. Gilliam. App. at pp. 1084-1085. To provide time for COGIL and Browntown to work on a new agreement, Denton and Browntown agreed to a series of addenda to the Contract extending the settlement date with a final extension to October 31, 2015. App. at pp. 1346-1349. Moreover, Browntown provided Barbra Greco, Denton's real estate agent, with updates on the status of its discussions with COGIL from time to time (*See*, *e.g.*, App. at pp. 1353; App. at p. 1356). Unfortunately, Browntown was unable to come to an agreement with

COGIL, and on December 9, 2015, Ms. Buracker sent an email message to Ms. Greco requesting that the Contract be terminated. App. at 1360. Ms. Greco responded that the request to terminate was "perfectly understandable." *Id.*

Although Denton did not execute a release terminating the Contract, neither he nor any agent acting on his behalf ever communicated his refusal to sign a release to Browntown. App. at 1069. Indeed, neither Denton nor any agent on his behalf (i) communicated with Browntown declaring that it was in default under the Contract or (ii) communicated with Mr. Pond, the settlement agent, to schedule a closing. App. at pp. 919-922; 1058; 1070.

Further, Denton testified at trial that he put the property back on the market and kept it continually listed from 2006 until about three (3) months prior to the February 19-20, 2015 trial in this matter. App. at pp. 885-86; 898-99; 911-919. Denton did not disclose the existence of the Contract for these listings (App. at pp. 911, 912, 914) and only told the last listing company that the property was in litigation in late November 2015. (*Id.* at pp. 917-18).

On October 28, 2010, Denton filed his initial Complaint for Specific Performance based upon the Contract, but did not include a copy of the Boundary Settlement Deed. App. at pp. 1-32. On November 30, 2010, Browntown filed a Demurrer to that initial Complaint, based in part on the obvious title deficiency regarding the Disputed Acreage. App. at pp. 33-36. By Order entered March 29,

2011, the trial court sustained Browntown's Demurrer concerning marketable title to the Disputed Acreage. App. at pp. 37-38.

In his Amended Complaint for Specific Performance filed on April 4, 2011, Denton alleged that any marketable title issues had been cured by the Boundary Settlement Deed. App. at pp. 43-44. For the period from October 2011 until April 2014, Denton took no further action to prosecute his claim. In response to a notice from the trial court under Virginia Code § 8.01-335, by Uniform Pretrial Order entered on June 16, 2014, the Amended Complaint was set for a two-day trial on February 19-20, 2015.[2]

Prior to trial, on November 21, 2014, Denton designated an expert witness regarding title matters. App. at pp. 147-152. However, on February 4, 2015 Denton filed his notice of withdrawal of his expert witness designation. App. at pp. 179-181.

At trial, Denton introduced among other exhibits (i) the 1993 Deed and the August 28, 1992 Plat showing the issue pertaining to the Disputed Acreage (App. at pp. 835; 1275-1286); (iii) Title Policy *excepting the Disputed Acreage from coverage* (App. at pp. 841; 1297-1302);[3] and (iv) the Boundary Settlement Deed

[2] By a consent Order entered by the trial court on January 12, 2015, the jury trial was waived and the matter was decided by a bench trial.

[3] Indeed, Denton conceded on cross examination at trial that the Disputed Acreage was an exception from the coverage of the Title Policy. App. at p. 925.

which Denton asserted resolved the marketable title issues surrounding the Disputed Acreage (App. at pp. 843-44; 1303-1310). These exhibits were admitted into evidence. *Id.* Denton also testified at trial that he did not pursue a quiet title action regarding the Disputed Acreage. App. at p. 977. In response, among other evidence, Browntown introduced at trial the Trustee's Deed demonstrating that *Wayside's property was foreclosed upon prior to the recordation of the Boundary Settlement Deed.* App. at pp. 969-71; 1422-27.

Per the Uniform Pre-Trial Order the parties were required to file all objections (other than on relevance grounds) to the other party's proposed witness and exhibit lists previously exchanged. Otherwise, any unstated objections would be waived. On February 11, 2015, Denton filed both a Motion in Limine and Objection pertaining to the Trustee's Deed (App. at pp. 196-201). As reflected in both his Objection and Motion in Limine, Denton objected to the Trustee's Deed on grounds of relevancy, lack of testimonial sponsor, incomplete chain of title, failure to name an expert witness and failure to produce document prior discovery cutoff. *Id. Nowhere in these pleadings did Denton object to the Trustee's Deed on hearsay grounds.* The trial court overruled Denton's Motion in Limine on grounds that the tendered Trustee's Deed had been certified by the court clerk (and therefore had been properly authenticated); however, Browntown retained the

burden of showing relevance (and therefore the admissibility into evidence) of the Trustee's Deed at trial. App. at pp. 961-62.

During the trial, Browntown's counsel argued that the Trustee's Deed constituted relevant rebuttal evidence to Denton's assertion that the Boundary Settlement Deed resolved the marketable title issue for the Disputed Acreage. Thus, Browntown's counsel moved that the Trustee's Deed be admitted into evidence. App. at pp. 969-71. Denton's counsel renewed objection to the introduction of the Trustee's Deed into evidence. *However*, *Denton's counsel raised no hearsay objection.* App. at pp. 971-73. The trial court overruled the renewed objection and admitted the document into evidence. It explained that at that point in the trial, it was only making a ruling as to the admissibility of the Trustee's Deed into evidence and not a ruling as to the weight to be given the instrument. The trial court further explained that the Trustee's Deed was relevant to the question of whether the Boundary Settlement Deed effectively resolved the status of the Disputed Acreage. App. at pp. 973-74

At the conclusion of Denton's case in chief, Browntown moved to strike Denton's evidence on grounds that the evidence had failed to establish that Denton was entitled to specific performance. Specifically Denton (i) had not established marketable and insurable title to the entire property (including the Disputed Acreage); (ii) the evidence demonstrated that, contrary to being prompt, ready,

eager and willing to go to closing as required by Virginia law, Denton was holding off from demanding that Browntown go to closing in order to sell his property to another at a better price; and (iii) Denton's evidence indicated that he had intended to abandon the Contract. App. at pp. 1028-1043.

The trial court took Browntown's motion under advisement until the conclusion of the trial so as to allow Browntown to present its evidence pertaining to its other defenses, such as laches. App. at p. 1054. On March 10, 2015, the trial court issued a letter ruling granting Browntown's motion to strike Denton's evidence. App. at pp 226-228. As the trial court explained:

> [T]he Plaintiff's own evidence, on the face of it at least, reflects that there is a title problem with the 4.191-acre tract (Pl. Ex. 1). *It is his burden to show that the defect has been cured*, *and in my view*, *he has not done so.* Denton has not proved that the title is insurable. His title policy excepts from coverage the 4.191 acre tract (Pl. Ex. 3). While Denton's title Insurance Binder (Pl. Ex. 2) suggests that title could be insured upon recordation of a specific boundary settlement agreement, *that had not occurred as of the date the final policy was issued and did not occur until almost two years later. In the interim*, *the property of the Wayside Inn Limited Partnership*, *the party releasing claims to the disputed tract*, *had been foreclosed upon*, *and Wayside no longer owned the adjoining property*.

App. at pp. 226-27 (emphasis added). The Order Sustaining Defendant's Motion to Strike the Evidence and incorporating the March 10 letter ruling was entered by the trial court on March 23, 2015. App. at pp. 229-235. On May 21, 2015, Denton filed his Motion for Reconsideration (App. at pp. 464-83), and Browntown subsequently filed its brief in opposition thereto (App. at pp. 530-543). By letter

opinion dated August 17, 2015, the trial court denied Denton's Motion for Reconsideration. App. at pp. 557-58. As the trial court stated, assuming that Browntown had breached the Contract, the question remained whether Denton had met his burden to show that he should be awarded specific performance. Viewed in that light, the trial court saw no reason to change his March 10, 2015 ruling. *Id.*

On March 3, 2016, the trial court conducted a hearing on Browntown's Counterclaim for Attorney's Fees based on the fee shifting provisions of Paragraph (20) of the Contract. To support its claim, Browntown submitted three (3) attorney's fee affidavits and detailed invoices reflecting the attorney's fees and costs incurred by Browntown of its defense against Denton's Complaint for Specific Performance (including post-trial matters) as well as those fees and costs incurred in prosecuting its claim for attorney's fees under the Contract. App. at pp. 1430-1532. Browntown further supported its claim with the expert report (dated October 15, 2015) of John H. Foote, Esq., a licensed Virginia attorney practicing law since 1974. App. at pp. 1533-1538. Browntown's attorney fee affidavits and Mr. Foote's report were all admitted into evidence without objection. App. at p. 1137. Mr. Foote also testified at the March 3, 2016 trial. On March 18, 2016, the trial court issued a letter opinion regarding Browntown's claim for attorney's fees awarding total attorney's fees, costs and expenses in the total amount of $54,964.00. App. at pp. 781-781B. The Final Order incorporating the trial court's

rulings was entered by the trial court on April 7, 2016. App. at pp. 782-787. Denton filed his Notice of Appeal on May 3, 2016. App. at 798-800.

ARGUMENT

A. The Trial Court Properly Granted Browntown's Motion to Strike Based On The Failure Of Denton's Evidence To Demonstrate Marketable and Insurable Title To The Disputed Acreage.

Although the matter was a bench trial, when the trial court ruled on the motion to strike, it was not sitting as a fact finder but was ruling as a matter of law to determine whether Denton had carried his burden of making a *prima facie* case for specific performance. *Claycomb v. Didawick*, 256 Va. 332, 336, 505 S.E.2d 202, 205 (1998) (quoting *Costner v. Lackey*, 223 Va. 377, 382, 290 S.E.2d 818, 820 (1982)). Consequently, in reviewing Browntown's motion to strike, the trial court must review all of the evidence and reasonable inferences therefrom in the light most favorable to Denton. *Austin v. Shoney's*, *Inc.*, 254 Va. 134, 138, 486 S.E.2d 285, 287 (1997) (citations omitted). However, the trial court may reject an inference from the evidence favorable to Denton if "it would defy logic and common sense." *Id.* Moreover, the trial court can consider evidence admitted by an adverse party. *Id.*, citing *Kendrick v. Katz*, 244 Va. 380, 384, 421 S.E.2d 447, 450, n. * (1992).

Denton's sole request for relief was specific performance**.** This Court has consistently held that specific performance is an extraordinary equitable remedy

which places the burden on Denton to establish in the record his entitlement to such a remedy.

> No principle of equity is more generally approved than that the specific performance of a contract *is not a matter of absolute right but rests in a sound judicial discretion.* In order for a litigant to avail himself of this extraordinary remedy, he must show that he has been able, ready, eager and willing to perform the contract on his part. *He must not have remained quiet or held himself aloof so as to enforce or abandon the contract as events might prove advantageous*.

Cranford v. Hubbard, 208 Va. 689, 695, 160 S.E.2d 760, 764 (1968) (emphasis added). Moreover, "a vendor cannot secure a decree of specific performance to force a defective title upon an unwilling purchaser . . . The standard test of the sufficiency of the vendor's title in this respect is its marketability. If the vendor is unable to convey a clear and marketable title, *or if there is such uncertainty about the title as to affect its marketable value*, *specific performance will not be granted." Cogito v. Dart*, 183 Va. 882, 887, 33 S.E.2d 759, 762 (1945) (emphasis and ellipses added) (citations omitted). Marketable title is *"dependent for its validity upon no doubtful questions of law or fact"* and "*one which will not expose the purchaser to the hazard of litigation . . ." Madbeth*, *Inc. v. Weade*, 204 Va. 199, 202, 129 S.E.2d 667, 669 (1963) (emphasis and ellipses added) (citations omitted). Denton has the burden to prove that any questions about the title's marketability have been removed or that title is otherwise marketable. *Id.*, 204 Va. at 203, 129 S.E.2d at 670; *Cogito*, 183 Va. at 887, 33 S.E.2d at 762. Indeed, as the

trial court noted in granting the motion to strike, Denton is required to show that, *at the time he demands specific performance*, he must prove that he can convey the quality of title specified in the Contract. *See* App. at p. 226 ("It makes no difference that this title question was not the reason, nor any part of the reason, Browntown declined to close on the transaction in 2005. Denton now seeks specific performance . . . .); *see also Mundy's Ex'rs v. Garland*, 116 Va. 922, 936, 83 S.E. 491, 495 (1914) (While it is not necessary for vendor to have been able to convey contracted-for quality of title at time of contract execution, the vendor must be able to do so at the time that vendor is required to perform).

With regard to burden of proof, this Court has recently summarized the relevant principles of law in *Suntrust Bank v. PS Bus. Parks*, *L.P.*, 292 Va. 644, 791 S.E.2d 571 (2016) as follows:

> The phrase "burden of proof" refers to two related but distinct concepts: (1) The "burden of production" *which is the obligation to come forward with evidence to make a prima facie case* . . ., and (2) the "burden of persuasion" *which is the obligation to introduce evidence that actually persuades the fact finder to the requisite degree or belief that a particular proposition of fact is true*. The burden of persuasion is sometimes referred to as the "risk of non-persuasion," because *the party that bears the burden of persuasion must lose the case if the evidence leaves the factfinder in doubt*.

Id., 292 Va. at 652, 791 S.E.2d at 575 (emphasis added) (citations omitted). Moreover, "Although the burden of production frequently 'passes' between the parties, *the burden of persuasion as to an element of the plaintiff's claim never*

shifts." *Id.*, 292 Va. at 653-4, 791 S.E.2d at 575-6, citing *Hall v. Hall*, 181 Va. 67, 80 S.E.2d 810, 815-16 (1943).

There can be no dispute that the 1993 Deed and the related August 28, 1992 plat amply demonstrate that Denton took his property with full knowledge of the title cloud hanging over the Disputed Acreage. App. at pp. 1275; 1283. If there were any doubt, Denton's 1993 Title Policy was likewise clear that the Disputed Acreage was an exception to the Title Policy's coverage. App. at p. 1300. As the trial court observed in its March 10, 2015 letter ruling, Denton was contractually obligated to provide good and marketable title to his entire property (including the Disputed Acreage) as well as provide insurable title with no additional risk premium. *See* App. at pp. 226; 1314. Denton's sole evidence of record supporting his assertion that he can convey marketable and insurable title to the Disputed Acreage was the Boundary Settlement Deed *recorded in the land records of the Warren County Circuit Court Clerk on December 13*, *1994*. App. at pp. 1303-1310. The question therefore becomes whether the Boundary Settlement Deed was sufficient to satisfy Denton's burden of proof (*i.e.* both his burden of production and persuasion) that he had made his *prima facie* case for marketable and insurable title.

Unfortunately for Denton, even viewing the evidence in the light most favorable to him, the Boundary Settlement Deed could not carry the weight it

needed to show a *prima facie* case for marketable and insurable title (and thus move forward to the remaining elements of specific performance). The trial court admitted the Trustee's Deed into evidence and noted that by its plain language the Trustee's Deed demonstrated that (i) the property of Wayside (one of the parties to the Boundary Settlement Deed) was subject to a deed of trust lien for the benefit of NationsBank; (ii) the substitute trustee foreclosed on Wayside's property and sold the property at auction; and (iii) the Trustee's Deed *was recorded several months prior to the recoding of the Boundary Settlement Deed*. *See* App. at p. 227; pp. 1422-27. What is more, the trial court noted that NationsBank was not a party to the Boundary Settlement Agreement. App. at pp. 227; 1305. It is therefore evident from viewing the land records in a light most favorable to Denton, that at the time that the Boundary Settlement Deed was recorded, Wayside had no authority to execute the Boundary Settlement Deed as it no longer owned the property. In analyzing Browntown's motion to strike, the trial court was not required to ignore the Trustee's Deed (and therefore logic and common sense).

The trial court noted that although the 1993 Deed contained a recitation that the predecessors in title claimed the Disputed Acreage by adverse possession, Denton's own testimony indicated that neither his predecessors in title nor he had ever actually filed a quiet title action. *See* App. at p. 227; 977. This Court's discussion in *Madbeth* is especially relevant here. In *Madbeth*, this Court

considered the possibility that title to the subject land could be established by adverse possession or that a "proper proceeding with proper parties before the court" could declare the deed giving rise to the defect as invalid. However, this Court rejected these possibilities as cure to title because they would subject the purchaser *"to the hazard of litigation and the necessity to resort to extrinsic proofs."* Hence, the vendor *"cannot pass title of the quality they contracted to convey to the defendant . . . ." Madbeth*, 204 Va. at 203, 129 S.E.2d at 670 (emphasis and ellipses added).

Viewing all the evidence in light most favorable to Denton (and without sacrificing logic and reason), the trial court thus properly found that Denton had not met his burden of making a *prima facie* case that the Boundary Settlement Deed resolved marketability and insurability issues surrounding the Disputed Acreage. It had no need to analyze any further the question whether Denton had produced sufficient evidence to make out a *prima facie* case with regard to the any remaining elements necessary to entitle it to specific performance and thus granted Browntown's motion to strike. *See* App. at pp. 227; 781A (The court specifically noted that Browntown did not lose its other defenses, since the court had no need to assess them after granting the motion to strike).

B. Denton's Objections To The Trial Court Ruling On Browntown's Motion To Strike Are Without Merit.

As reflected in the Opening Brief, Denton raises six Assignments of Error related to the trial court's grating Browntown's motion to strike. *See* Opening Brief at pp. 1-3. These Assignments of Error center on essentially four issues: (i) objection to the trial court's interpretation of the Contract (Assignment of Error No. 2); (ii) objection to the trial court's introduction into evidence and taking cognizance of the Trustee's Deed (Assignment of Error Nos. 1, 3)[4]; (iii) objection to the trial court's application of the law of specific performance to the motion to strike (Assignment of Error Nos. 4 &5); and (iv) argument that this Court's prior unrelated case law should be extended and interpreted to allow a vendor to quiet title without a court adjudication under certain circumstances (Assignment of Error No. 6). For the reasons discussed below, these Assignments of Error have no merit.

[4] With respect to Assignment of Error No. 3, Denton supports his assertion that the trial court erred by giving significant weight to the Trustee's Deed by merely referencing his arguments found in Assignment of Error Nos. 1 & 2. Opening Brief at p. 30. Consequently, Browntown need not directly address Assignment of Error No. 3 but instead refers this Court to its arguments regard Assignments of Error Nos. 1 & 2.

1. Contrary to Assignment of Error No. 2, the Contract Supports the Trial Court's Ruling.

Browntown agrees that the Contract and its addenda are not ambiguous. The Contract and related addenda are to be interpreted on the basis of the four corners of those documents without any consideration of parol evidence. *See Virginia Elec. & Power Co. v. Northern Virginia Regional Park Authority*, 270 Va. 309, 315-16, 618 S.E.2d 323, 326 (2005) (citations omitted). Words used in the Contract are to be given "their usual, ordinary and plain meaning" *Ames v. American Nat'l Bank*, 163 Va. 1, 38, 176 S.E. 204, 217 (1934). Further, courts are to "construe the contract made by the parties, not to make a contract for them, *or to alter the contract they have made so as to conform it to the court's notation of the contract they should have made in view of the subject matter and the surrounding facts and circumstances.*" *Id.*, 163 Va. at 38, 173 S.E. at 216 (emphasis added). Finally, breach of contract requires three (3) elements: a legally enforceable contractual obligation owed by one party to another; breach of that obligation by the party owing the obligation; and injury or damage to the non-breaching party caused by the breach of obligation. *Filak v. George*, 267 Va. 612, 619, 594 S.E.2d 610, 614 (2004) (citations omitted).

Denton asserts that Browntown first breached the Contract by failing to instruct the closing agent to conduct a title examination of the property either at the

time of contract or during this litigation. Opening Brief at pp. 28-30; 19-21. There are several problems with Denton's analysis.

Denton's Assignment of Error No. 2 assumes that the Contract imposed upon Browntown the obligation to conduct a title search. Such assumption is not supported by the plain language of the Contract and the Jurisdictional Addendum. Paragraph (19) of the Contract states in relevant part: "The title report and survey shall be ordered promptly and, if not available at settlement, then settlement may be delayed for up to 15 business days to obtain the title report and survey after *which*, *if they are not received*, *this Contract*, *at the option of Seller*, *may be terminated and the Deposit shall be refunded in full to the Purchaser*." App. at p. 1314 (emphasis added). This provision (stated in the passive voice) does not impose the duty to order the title exam upon Browntown. However, Paragraph (7) of the Jurisdictional Addendum to the Contract (replacing Paragraph (12) of the Contract) states as follows: "Purchaser wishes to employ Daniel Pond, Attorney ("Settlement Agent") *to represent the Contract*. The Purchaser agrees to contact the Settlement Agent within 10 days of Contract Acceptance to schedule settlement, *which Settlement Agent shall order the title exam* and survey if required." App. at p. 1319. (emphasis added). The above provisions place the obligation to order a title exam on the Settlement Agent, not Browntown. The Jurisdictional Addendum further specifies that the Settlement Agent is to represent

the Contract and not Browntown. While Browntown can (and did) request that the Settlement Agent delay ordering the title exam to allow it to resolve the right of way issues with COGIL, the Settlement Agent was not acting as Browntown's agent and, therefore, was under no obligation to honor such request. Denton's premise of a Browntown Contract breach for failure to order a title exam fails because the Contract did not impose on Browntown such duty in the first place.

Assuming *arguendo* that the failure to obtain a title survey constituted a breach of the Contract by Browntown, the express language of the Contract provided Denton with a remedy to this very scenario in the form of the option to terminate the Contract under this circumstance. App. at p. 1314. Clearly, Denton did not exercise his remedy.

Nevertheless, Denton asserts that Browntown breached the Contract first and, further, that the Contract does not permit Browntown to simply introduce into evidence the Trustee's Deed without a full title examination. Opening Brief at pp. 19-20, 29. The first breach doctrine is a response (whether by counterclaim or affirmative defense) to an action by another seeking to enforce the terms of a contract. *See*, *e.g.*, *Horton v. Horton*, 254 Va. 111, 115-16, 487 S.E.2d 200, 203-204 (1997); *see also* App. at p. 781A, citing *Federal Insurance Co. v. Starr Electric Co.*, 242 Va. 459, 410 S.E.2d 684 (1991); *Matthews v. PHH Mortg. Corp.*, 283 Va. 723, 724 S.E.2d 196 (2012). The issue under discussion is whether

Denton met *his* burden to make the *prima facie* case for *his own* specific performance claim. The first breach doctrine has no applicability in this context. More fundamentally, *there is simply no language in the Contract providing that (i) Browntown waived title objections if a title report was not produced or a title examination was not conducted or (ii) modifying Denton's burden of proof regarding specific performance*. Denton's argument is essentially a request that this Court add provisions to the Contract – a request contrary to established Court precedent which Denton himself cites. *See Ames*, *supra*. It was and remains *Denton's* burden, not Browntown's, to produce sufficient evidence for a *prima facie* case of marketable title to the Disputed Acreage. *See Madbeth*, *Cogito*, *supra*. This burden includes assuming the risk of non-persuasion if the trial court remained in doubt whether the title question pertaining to the Disputed Acreage had been resolved. *See Suntrust Bank*, 292 Va. at 652, 791 S.E.2d at 575. If title expert testimony was needed, *it was Denton's obligation to produce such evidence so as to meet his burden.* Nevertheless, Denton decided to withdraw his expert witness designation. *See* App. at pp. 179-180.

2. Denton Did Not Raise The Hearsay Objection To The Trustee's Deed Before The Trial Court. To the Extent Raised by Assignment of Error Nos. 1 & 3, It is Barred Per Rule 5:25.

> No ruling to the trial court . . . before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice.

Va. Sup. Ct. Rule 5:25 (ellipses added). It is true that Denton was not required to reference the *exact* statute or rule upon he based his objection but need only give the trial sufficient notice of the substance of the objection. *Va. Elec. & Power Co. v. Hylton*, 292 Va. 92, 104, n.1, 787 S.E.2d 106, 113, n.1 (2016) (citations omitted). However, "A party will not be allowed to specify one or more grounds of objection to evidence offered in the trial court *and rely upon other grounds in the appellate court. He is regarded as having waived all other objections to the evidence except those which he pointed out specifically*." *Jackson v. Chesapeake & O. R. Co.*, 179 Va. 642, 650-51, 20 S.E.2d 489, 492 (1942) (emphasis added); *see also Boggs v. Commonwealth*, 153 Va. 838, 842, 149 S.E.2d 464, 465 (1929) ("[I]t must appear that the objections urged in the trial court to the admissibility of evidence are substantially the same objections which are relied upon in this court.")

Denton asserts that the Trustee's Deed cannot be used for the purpose of supporting "the proposition of a *current* title defect . . ." (Opening Brief at p. 26,

citing Va. Sup. Ct. R. 2:803(14) (15) (ellipses added)) and alleges that that he raised this objection at trial. *Id.* at p. 23, citing App. at pp. 834-843. However, nowhere in the cited trial transcript provisions did Denton object to the Trustee's Deed. Indeed, the Trustee's Deed had not yet even been proffered as evidence at that point in the trial.

Denton points to other portions of the record indicating that he had raised his objection to the Trustee's Deed on grounds that it constituted inadmissible hearsay. *See* Opening Brief at p. 24. Here again, the records referenced by Denton do not support his position. Denton's Objection to Browntown's Witness and Exhibit List and Motion in Limine objected to the Trustee's Deed's admission solely on grounds of relevancy, lack of testimonial sponsor, incomplete chain of title, failure to name an expert witness[5] and failure to produce document prior discovery cutoff. *See* App. at pp. 196-201. These pleadings do not raise the substance of a hearsay-related objection in any way. Indeed, *the June 16, 2014 Uniform Pre-Trial Order expressly stated that any unstated objections to proposed witnesses and exhibits* (other than based on relevance grounds) *would be waived at trial.* While Denton's counsel objected to the Trustee's Deed on grounds of relevance (App. at pp. 934;

[5] At trial, in arguing against the admission of the Trustee's Deed into evidence, Denton's counsel indicated that the need for a title examination pertained to Denton's relevancy objection. App. at p. 964. It would therefore appear that Denton's only real objection at trial to the admission of the Trustee's Deed into evidence was relevance – a grounds of objection not raised with this Court.

964; 972-73) and that it was not Denton's deed (App. at p. 936), none of these objections raise the hearsay-related objection urged in his Opening Brief. Denton's Motion for Reconsideration likewise makes no mention of any hearsay-related objection. *See* App. at p. 477. Denton is now raising a new objection to the admission of the Trustee's Deed into evidence not previously raised before the trial court. Such an argument against evidence is barred by Rule 5:25 as interpreted by this Court in the *Jackson v. Chesapeake & O. R. Co.* decision cited above.

3. The Trial Court Did Not Abuse Its Discretion In Admitting The Trustee's Deed Into Evidence. Thus, Denton's Assignment of Errors No. 1 & 3 Have No Merit.

Assuming that this Court nevertheless finds that Denton has preserved his objection to the Trustee's Deed on hearsay grounds, the record supports the trial court's admission of the document into evidence.

This Court reviews the trial court's evidentiary rulings based on an abuse of discretion standard. With respect to a trial court's determination of the relevance of proffered evidence, "*a great deal must necessarily be left to the discretion of the [trial court], in determining whether evidence is relevant to the issue or not*." *Norfolk & Portsmouth Belt Line R.R. Co. v. Wilson*, 276 Va. 739, 743, 667 S.E.2d 735, 737 (2008) (emphasis added & citations omitted).

Properly authenticated official records of Virginia courts "shall be received as prima facie evidence." Va. Code Ann. § 8.01-389(A1). Moreover, "recitals of

any fact in a deed or deed of trust of record conveying any interest in real property shall be prima facie evidence of that fact." *Id.* at § 8.01-389(C).

The trial court ruled that the Trustee's Deed, as a certified record of the Warren County Circuit Court Clerk's Office, had been properly authenticated and was therefore admissible. App. at p. 961. Nevertheless, Browntown had the burden to demonstrate the relevance of the Trustee's Deed in order for it to be admitted into evidence. App. at p. 962. After hearing argument from both counsel, the trial court ruled that it was in fact relevant gave a detailed explanation as to why the Trustee's Deed was relevant evidence and therefore admissible. App. at pp. 973-74. In summary, the face of the Trustee's Deed recited that (1) there was a deed of trust lien on the property of Wayside (a party to the Boundary Settlement Deed); (2) the instrument conveyed the former Wayside property via foreclosure; and (3) the Trustee's Deed was recorded prior to the Boundary Settlement Deed. Hence, the Trustee's Deed was relevant to the question of whether the Boundary Settlement Deed "was defeated" and was admitted into evidence. *Id.*

Denton cites Virginia Rule of Evidence 2:803(15) for the proposition that the trial court abused its discretion in giving weight to the Trustee's Deed to support a current title defect without a title examination. Opening Brief at p. 25-27. Virginia Rule 2:803 simply lists certain exceptions to the hearsay rule, and the

hearsay rule itself is a rule concerning the *admissibility*, *not the weight*, of evidence.

This case concerns a motion to strike reviewed on the basis of *all* the evidence of record (and any reasonable inferences therefrom) in a light favorable to Denton. *See Austin*, *supra.* Such a framework does not require the trial court to *ignore* the Trustee's Deed in determining whether Denton has met his burden of showing a *prima facie* case. Once Browntown introduced the Trustee's Deed into evidence, *Denton*, not Browntown, had the burden of producing evidence persuasive to the trial court that the probative value of the Boundary Settlement Deed to Denton's *prima facie* case for marketable title (and hence his specific performance claim) was not adversely affected by the existence of the Trustee's Deed. *See Suntrust Bank*, 292 Va. at 652-4, 791 S.E.2d at 575-6. Denton's argument is not about the weight the trial court gave to the Trustee's Deed so much as it is an invitation for this Court to find, contrary to its own precedent, that the trial court should have disregarded the existence of the Trustee's Deed.

Denton further argues that Browntown was "disingenuous" in using the Trustee's Deed "to stand for the proposition that Denton did not have *current* good and marketable title to his property, with knowledge that the bank had cured the defect by accepting the Boundary Plat as put to record with the Boundary Settlement . . ." *Id.* at p. 25 (ellipses added). Denton apparently forgets that the

Trustee's Deed *was recorded several months prior to the Boundary Settlement Deed*. As the trial court observed in its March 10 letter ruling (App. at p. 227), neither the trustee nor NationsBank were a party to the Boundary Settlement Deed. The Trustee's Deed does not contain any language referencing the Boundary Settlement Deed or the accompanying plat, and Denton cites no supporting evidence of record for his remarkable assertion. Denton likewise asserts that "all subsequent transfers of the Wayside property held the boundary line" as reflected in the Boundary Settlement Deed. Opening Brief at p. 25. However, Denton again cites to no evidence of record for this proposition.

Perhaps most importantly, Denton retained the burden to introduce evidence showing that the Boundary Settlement Deed was binding upon the subsequent owners of Wayside's property as well as the burden of persuading the trial court that any evidence produced supported his *prima facie* case for marketable title. Once again, the Court should recall that Denton withdrew his title expert designation days prior to trial. There is therefore no basis in law or the record for finding that the trial court abused its discretion in either admitting the Trustee's Deed or in giving it consideration in granting Browntown's motion to strike.

4. The Trial Court Properly Applied The Law on Specific Performance. Thus, Denton's Assignment of Error Nos. 4 & 5 Lack Merit.

Denton *only* sought specific performance as a remedy for an alleged breach of the Contract. Specific performance is an extraordinary equitable remedy to which Denton is not entitled as a matter of absolute right but within sound judicial discretion. *Cranford v. Hubbard*, *supra*. To avail himself of this extraordinary remedy, *Denton* had the burden of establishing a *prima facie* case for the following at trial: (i) he had clear and marketable title to the property at issue *at the time that he demanded performance*; (ii) he had not remained quiet or aloof as opposed to opportunistically enforcing or abandoning the contract; and (iii) he was ready, able, eager, prompt and willing to perform. *Id.; see also Cogito v. Dart; Madbeth*, *Inc. v. Weade; Mundy's Ex'rs v. Garland*, *supra*. If Denton had met his burden to produce evidence supporting a *prima facie* case, he nevertheless retained the risk of non-persuasion if the trial court remained unconvinced that the evidence of record (1) supported his claim of a *prima facie* case of marketable title or (2) otherwise supported his specific performance claim generally.

The trial court focused its ruling granting the motion to strike on the question of marketable title to the Disputed Acreage. App. at pp. 226-28. Marketable title exists where such title depends on no doubtful questions of law or fact and does not expose the purchaser to the hazard of litigation. *Madbeth*, *Inc.*,

204 Va. at 202, 129 S.E.2d at 669. The specific question presented by the trial court in its ruling was whether Denton met his burden to make a *prima facie* showing that the title defects surrounding the Disputed Acreage (which existed at the time that Denton took title and constituted an exception to the Tile Policy) had been cured by the Boundary Settlement Deed. The trial court found that, in light of the existence of the Trustee's Deed that was recorded prior to the recordation of the Boundary Settlement Deed, title to the Disputed Acreage "remains in question." App. at pp. 227. Neither Denton nor his predecessors in title had ever filed a quiet title action concerning the Disputed Acreage. App. at p. 977. Thus, he had not met his burden of making a *prima facie* case for marketable title, and the trial court properly determined that Denton was not entitled to specific performance.

Denton argues that the trial court misapplied this Court's decision in *Cogito v. Dart* because Browntown did not order a title examination nor did it present any evidence that the title defect concerning the Disputed Acreage had been reviewed by a title examiner. Opening Brief at pp. 30-31. However, the Court in *Cogito* noted, "*Neither side introduced a complete abstract of title . . . Hence*, *we will determine the issues as the trial court did*, *on the record as presented*." *Cogito*, 183 Va. at 885, 33 S.E.2d at 760 (emphasis and ellipses added). The *Cogito* decision did not depend on the presence or absence of either testimony from a title

examiner or a complete title abstract. Rather, the decision instructs that the trial court must take the record as it finds it and analyze the motion to strike *based on the record before it*.

Denton's entire Opening Brief is permeated throughout with the assumptions that (i) the Contract placed upon Browntown the duty to order a title examination and (ii) because a title examination was not ordered, that Browntown has waived the ability to present rebuttal evidence regarding marketable and insurable title to the Disputed Acreage. As was demonstrated previously, such premises are not supported by the Contract. The Contract as amended by the Jurisdictional Addendum placed the duty to order a title examination on the Settlement Agent. *See* App. at pp. 1314, 1319. Even if Browntown was at fault, the Contract expressly provided Denton the option to terminate the Contract as a remedy for failure to obtain a title examination. App. at p. 1314. There is simply no Contract provision (1) waiving any challenge by Browntown to title not set forth in a title report or (2) modifying the law of specific performance (including Denton's burden thereunder).

Astonishingly, Denton asserts that Browntown did not "allege, testify or produce any evidence" that the property was not insurable. Opening Brief at p. 31. Browntown need not have done so because the Title Policy, *which Denton*

introduced into evidence, *specifically excepted the Disputed Acreage from coverage*. App. at p. 1300.

Denton next asserts that it was an abuse of discretion for the trial court to determine from Denton's own plat (App. at p. 1283) that the Disputed Acreage contains frontage along the Shenandoah River. Opening Brief at pp. 31-32. The trial court simply used the scale included in the plat *which Denton placed into evidence* to observe that the amount of river frontage within the Disputed Acreage amounts to approximately 200 feet. App. at p. 226. This Court has long recognized that courts may take notice of facts shown on a map as well as distances as calculated by a map. *See*, *e.g.*, *McClain v. Commonwealth*, 189 Va. 847, 853-54, 55 S.E.2d 49, 52 (1949) (citations omitted). Denton also criticizes the trial court's citation in the March 10 letter ruling of a letter from Browntown's real estate agent to Denton (App. at p. 1333) to find that "River frontage was a property feature that was clearly important to Browntown, and Denton was aware of Browntown's plans for the property from the outset." Opening Brief at p. 32. Denton's criticism ignores that fact that *he placed the letter into evidence.* It is certainly an odd thing for the proponent of evidence to contend on appeal that the trial court should have ignored that same evidence. Indeed, other evidence of record further illustrated that Denton recognized the value of river frontage to the

development potential of the land. *See* App. at pp. 906; 910 *see also* App. at pp. 1412-13 (Denton's 2006 Advertisement for Sale of the Property).

Finally, Denton's reliance on *Jackson v. Ligon*, 30 Va. 161 (1831) is clearly misplaced. Denton's argument centers on the "trifling deficiency of a few acres" quotation found in *Jackson*. *A more complete quotation* from the case states, "The are many cases that say, a trifling deficiency of a few acres in a tract of land, *possessing no peculiar value in relation to the general tract*, will not prevent the specific execution of a contract, *as such deficiency lies in compensation* . . ." *Jackson*, 30 Va. 161, 179-180 (emphasis and ellipses added). In considering the *Jackson* decision, the trial court noted that the Disputed Acreage contained river frontage. Denton was well aware of the "peculiar value" of river frontage (and indeed recognized its peculiar value to himself). Further, the trial court noted that Denton had made "no offer of compensation for that portion under cloud." App. at p. 227. Consequently, the *Jackson* case supports the trial court's decision to grant the motion to strike.

Finally, Denton cites *Mundy's Ex'rs* for the proposition that only good and marketable title, not perfect title, is required. Opening Brief at p. 28. The *Mundy's Ex'rs* decision does not change Denton's burden under *Madbeth.* Indeed, the *Mundy's Ex'rs* decision holds that, while it is not necessary for Denton to have been able to convey the quality of title contracted for at the time that the Contract

was executed (*i.e.*, marketable and insurable title), Denton *must be able to do so at the time that he is required to perform*. *Mundy's Ex'rs*, 116 Va. at 936, 83 S.E. at 495.

The above discussion amply demonstrates that the trial court properly applied the law of specific performance (particularly as to marketable title) in this case. It is equally clear that Denton's Assignments of Error to the contrary are fatally flawed and have no merit.

C. Denton's Invitation To Extend *Peers v. Barnett*, *53 Va. 410 (1855)* (Assignment Of Error No. 6) Is Untimely And Lacks Merit.

1. Denton's Assignment of Error No. 6 should not be considered for the first time on appeal per Virginia Supreme Court Rule 5:25.

> No ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice.

Va. Sup. Ct. R. 5:25 (ellipses added). "[A]rguments *made for the first time on appeal will not be considered*." *Appalachian Voices v. State Corp. Comm'n*, 277 Va. 509, 515, 675 S.E.2d 458, 460 (2009) (brackets and emphasis added) (quoting *Martin v. Ziherl*, 269 Va. 35, 39, 607 S.E.2d 367, 368 (2005)).

Denton asserts that this Court's decision in *Peers v. Barnett*, 53 Va. 410 (1855) should be extended so that he should "not be required to further establish his good title through the pursuit of a quiet title action . . ." Opening Brief at p. 36

(ellipses added). Denton's argument does not appear in the record before the trial court, nor does Denton allege that it was so raised. Rather, Denton cites the Virginia Court of Appeal's decision in *Kyer v. Commonwealth*, 43 Va. App. 603, 613, n.3, 601 S.E.2d 6, 13 (Va. Ct. App. 2004) for the proposition that "it is not necessary to rely on the same authority on appeal as at trial." Opening Brief at p. 36. Denton does not explain why a Court of Appeals decision overrides this Court's guidance in *Appalachian Voice*s. Nevertheless, even the *Kyer* decision does not stand for the broad proposition asserted by Denton. In *Kyer*, the Court of Appeals relied upon its prior holding in *Lash v. County of Henrico*, 14 Va. App. 926, 929, 421 S.E.2d 851, 853 (1992) holding that Rule 5A:18 (the counterpart to Rule 5:25) "does not prohibit reliance on statutes or cases not presented to the trial court to support, on appeal, *a position otherwise adequately described at trial*." (emphasis added). The key to the Court of Appeal's analysis is the condition that Denton *adequately present his position on the extension of Peers to the trial court for consideration*. The record confirms that Denton did not present this argument to the trial court for consideration, and he does not allege that he did so. Neither the *Kyer* nor *Lash* decisions override the guidance in *Appalachian Voices* that arguments not presented to the trial court for consideration cannot be raised for the first time on appeal.

2. The *Peers* Decision is clearly distinguishable.

Assuming *arguendo* that this Court decides to entertain Denton's argument, *Peers* is easily distinguishable. Unlike the specific performance case at issue, *the purchaser in Peers had already accepted a general warranty deed from the sellers and had taken possession of the property*. *Peers*, 53 Va. at 417. Indeed, the *Peers* decision revolved around this point. *Id.*, 53 Va. at 415-16. The suit in *Peers* involved a suit on the purchase money notes with the purchaser objecting to paying the note balances because sellers had not quieted title. *Id.*, 53 Va. at 416.

Moreover, *Peers* involved the application of the laches doctrine and did not address specific performance. Specifically, this Court in *Peers* based its decision both on the time *during which the purchaser had owned the property*, and "owing to the delays in the progress of the suit, *caused in part*, *apparently*, *by the claims to credits asserted by the appellant and his contumacy in resisting the orders of the court to produce his vouchers before the commissioner*, . . ." *Id.*, 53 Va. at 418 (emphasis and ellipses added). By contrast, in this matter, *the delays in litigation were the result of Denton not having prosecuted his claim from October 2011 until April 2014*. Denton certainly had sufficient time during this period in which to file a quiet title action to correct the title issue surrounding the Disputed Acreage.

3. The record does not support a finding of adverse possession.

Denton asserts that he "should not be required to further establish his good title through the pursuit of a costly title action where the lapse of time has quieted any alleged defects"; *i.e.*, by means of adverse possession. Opening Brief at p. 36. Denton ignores the obvious points that (1) *only a court through litigation* can determine whether Denton has in fact obtained title to the Disputed Acreage by adverse possession, *see Grappo v. Blanks*, 241 Va. 58, 62, 400 S.E.2d 168, 171 (1991) (citations omitted) and (2) neither Denton nor his predecessors in title had subjected their adverse passion claims to judicial scrutiny. App. at p. 227.

Even setting aside the obvious, Denton's argument incorrectly assumes that the record would support a finding of title to the Disputed Acreage by adverse possession. The trial court explicitly concluded that even the evidence Denton attempted to submit with his post-trial Motion for Reconsideration would be insufficient to establish adverse possession. App. at p. 557, citing *Harkleroad v. Linkous*, 281 Va. 12, 18, 704 S.E.2d 381, 383-84 (2011). As an example, the 1993 Deed and August 28, 1992 Plat indicate that the Disputed Acreage consists of open unimproved land. This Court has held that some act of use, cultivation or improvement of unimproved land is necessary to establish the open and notorious acts of ownership necessary for an adverse possession claim. *See*, *e.g.*, *City of Richmond v. Jones*, 111 Va. 214, 216-17, 68 S.E. 181, 182 (1910); *see also*

Maynard v. Hibble, 244 Va. 94, 97, 418 S.E.2d 871, 873 (1992), citing *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 233, 101 S.E.2d 225, 229 (1919). No such evidence regarding Denton's improvement of the Disputed Acreage is present in the record.

Finally, this Court in *Madbeth* already addressed Denton's argument by considering the possibility that an action of adverse possession or a subsequent "proper proceeding" could remedy a title defect. *However*, *the Court rejected this proposition because (i) the purchaser would be subjected to "the hazard of litigation and the necessity to resort to extrinsic proofs"* and (ii) *"the presence of defects make it impossible for the court reasonably to assure the defendant that it will not be embarrassed in the peaceable enjoyment of the land."* *Madbeth*, 204 Va. at 203, 129 S.E.2d at 670 (emphasis added).

4. The extension of *Peers* to the case at bar would significantly disrupt real estate law in Virginia.

Madbeth (along with a line of similar cases for approximately the last 120 years) hold that a seller seeking specific performance has the burden to establish marketable title and cannot shift the responsibility for a needed quiet title action to a purchaser. *Madbeth*, 204 Va. at 203, 129 S.E.2d at 670. To interpret *Peers* (an 1855 decision) in the manner urged by Denton would directly overrule *Madbeth* and related cases. In this scenario, a seller could obtain specific performance in the absence of marketable title by simply arguing for the existence of *the possibility* of

a successful quiet title action while placing the burden on the purchaser to pursue such litigation. To accept Denton's interpretation of *Peers* would additionally overrule long-established precedent (as noted in *Grappo* and similar decisions) that only a trial court can determine whether the conditions for adverse possession exist under a given set of circumstances.

The net effect of overruling the decisions represented by *Madbeth* and *Grappo* would be to allow a seller of real estate to obtain specific performance without marketable title by baldly declaring that title to real estate existed by adverse possession. The purchaser would then be obliged to bear the burden and expense of testing the seller's declaration through litigation. More broadly, title insurance underwriters and examiners would be exposed in such an environment to exponentially greater uncertainty and risk. Hence, were this Court to extended *Peers* as urged by Denton, such a decision would lead to significant chaos, increased litigation, and expense in Virginia real estate transactions in addition to likely increases in title insurance premiums resulting from the increased risk and uncertainty.

D. The Trial Court Properly Awarded Browntown Its Attorney's Fees & Costs.

On appeal a trial court's determination of the appropriate amount of attorney's fees to be awarded can only be set aside for abuse of discretion. *See*, *e.g.*, *Holmes v. LG Marion Corp.*, 258 Va. 473, 479, 521 S.E.2d 528, 533 (1999)

(citations omitted). The Contract contains a fee shifting provision calling for an award of reasonable attorney's fees and costs to the prevailing litigant. It is undisputed that Browntown was a prevailing party at trial. As noted by the trial court, the following factors are to be considered in awarding reasonable attorney's fees: (i) time and effort expended by the attorney; (ii) nature of the services rendered; (iii) complexity of the issues; (iv) the value of the services to the client; (v) results obtained; (vi) whether fees incurred and consistent with those customarily charged for the services and (vii) whether the fees were necessary and appropriate. App at p. 781, citing *Mullins v. Richards Nat'l Bank*, 241 Va. 447, 403 S.E.2d 334 (1993) and *Chawla v. BurgerBusters*, *Inc.*, 255 Va. 616, 499 S.E.2d 829 (1998).

During the March 3, 2016 trial on attorney's fees, the trial court received into evidence without objection three attorney's fees affidavits and detailed invoices from Browntown's counsel as well as the October 15, 2015 report from John H. Foote, Esq. App. at pp.1137; 1430-1538. The trial court also heard at trial expert testimony from Mr. Foote, Browntown's expert witness. At the trial's conclusion, the trial court indicated that it would consider the evidence and render a written letter ruling. App. at p. 1273. The trial court applied this Court's guidance on attorney's fees to the evidence presented and determined that Browntown was

entitled to reasonable attorney's fees and costs in the total amount of $54,964.00 out of the $106,348.15 claimed by Browntown. App. at pp. 781-781B.

1. **Denton Waived The Affirmative Defense of First Breach. Therefore, Assignment of Error No. 7 lacks merit.**

Affirmative defenses (such as the first breach defense) are those defenses that completely bar recovery by the claimant. App. at p. 781A, citing *Federal Insurance Co.*, 242 Va. 459, 410 S.E.2d 684 (1991), *Matthews v. PHH Mortg. Corp.*, 283 Va. 723, 724 S.E.2d 196 (2012). Such defenses "*must be pled in order to be relied upon at trial*." *Monahan v. Obici Medical Management Servs., Inc.* ("*Obici"*), 271 Va. 621, 632, 628 S.E.2d 330, 336 (2006) (citations omitted & emphasis added). While this Court in *New Dimensions, Inc. v. Tarquini*, 286 Va. 28, 743 S.E.2d 267 (2013) noted three exceptions to the requirement to plead an affirmative defense, the Court also concluded that the "affirmative defenses" at issue in *Tarquini* were actually express exclusions contained in the statute giving rise to the cause of action. *Id.*, 286 Va. at 36-37, 743 S.E.2d at 271. This situation is not present in the case at bar.

On April 25, 2011, Browntown filed its Counterclaim for attorney's fees pursuant to Paragraph (20) of the Contract. App. at pp. 98-99. Denton filed his Answer to Browntown's Counterclaim on May 13, 2011. App. at pp. 101-102. *Denton did not raise the first breach defense in his Answer.* On May 18, 2015 --

four (4) years after filing his Answer to the Counterclaim -- Denton *raised for the first time* the first breach defense. App. at pp. 393-94.

Denton argues that his failure to plead the affirmative defense of first breach is excused because there was no surprise or prejudice to Browntown due to the allegations in his Amended Complaint. Opening Brief at pp. 37-38. Denton asserts in support that "Browntown admits the breach in its Answer to the Amended Complaint." *Id.* Denton's characterization of Browntown's Answer is demonstrably false. In Paragraph (29) of its Answer, Grounds of Defense & Counterclaim cited by Denton, while Browntown did admit that no title report was ordered, Browntown stated, *"However, the June 10, 2005 contract does not expressly state that the responsibility for ordering the title report was Defendant's responsibility*." App. at p. 93 (emphasis added). Browntown obviously did not concede that it had breached the Contract by failing to order a title report.

Exceptions to the general rule that affirmative defenses must be expressly pled "have been recognized in *some factual* contexts where the *issue addressed by an affirmative defense* was *not disclosed in a plaintiff's* pleading *and only became apparent as the evidence was being received at trial*." *Obici*, 271 Va. at 632, 628 S.E.2d at 336-7 (citations omitted & emphasis added). Browntown did not concede in its Answer, Grounds of Defense & Counterclaim that the failure to obtain a title report constituted by breach of contract by it. Further, Browntown

relied in its Counterclaim for Attorney's Fees upon Paragraph (20) of the Contract. The need for Denton to plead the first breach defense in his Answer to the Counterclaim should have been obvious to him at the beginning. Under these circumstances, Denton's extreme neglect in not raising the first breach defense until four (4) years after filing his Answer (and several months after discovery had concluded in addition to the completion of the trial on the merits of Denton's specific performance claim) does not meet the standard for an exception under the *Obici* decision.

In any event, Denton bases his first breach claim on his allegation that Browntown was contractually obligated to order the title examination. Opening Brief at p. 37. As has been stated multiple times already, the Contract's plain language did not impose on Browntown the obligation to order the title examination. Thus, there is no substantive merit to Denton's position.

2. The Record Directly Contradicts Denton's Assignment of Error No. 8.

Browntown made a claim against Denton for reasonable attorney's fees and costs in the total amount of $106,348.15. In justifying a significant reduction in the the attorney fee award to $54,864.00, the trial court held that the fact that Browntown did not order a title examination was an "attending circumstance" contemplated by this Court's decision in *Mullins*. App. at 781A. The text of the trial court's ruling directly contradicts Denton's argument (*see* Opening Brief at

pp. 39-40) that the trial court did not consider the "attending circumstances" in *Mullins*.

Denton next contends that Browntown failed to separate fees incurred with regard to Denton's claim and the related counterclaim for attorney's fees from those incurred related to Browntown's unsuccessful third party claims. Appellant's Brief at p. 40. Denton's assertion is demonstrably false. In Browntown's initial Attorney's Fee Affidavit, counsel expressly excluded fees incurred concerning Browntown's third party complaint. In Paragraph (5) of the initial Attorney Fee Affidavit, counsel calculated the excluded fees at $17,903.75. App. at pp. 1431-32. Indeed, Mr. Foote testified that he prepared a worksheet based on his review of Browntown counsel's third party claim fee exclusions set forth in the initial Attorney Fee Affidavit and came up with "almost exactly" the same amount of excluded fees as noted in the initial Affidavit. App. at p. 1192. In the First Supplemental Attorney Fee Affidavit, Browntown's counsel also expressly excluded fees related to its third party claims. App. at p. 1491. The Second Supplemental Attorney Fee Affidavit contained no fees related to the third party matters as none were incurred during the relevant time period. Denton cites no evidence of record contradicting the assertions of Browntown's counsel or its expert witness.

Finally, Denton argues that the trial court did not give significant weight to Browntown counsel's alleged failure to describe its services in certain time entries. Opening Brief at p. 40. To the contrary, the trial court reviewed the evidence, considered Denton's arguments and ruled, "While some of the invoice entries are rather cryptic, *I think reading them in context and in the flow of the invoice provides an understandable explanation of the services rendered.*" App. at p. 781A (emphasis added). Denton does not explain why the trial court abused its discretion in finding that Browntown's billing entries provided "an understandable explanation of the services rendered."

3. Denton's Assignment of Error No. 9 is without merit because the attorney fee award is based on a contract provision and not on the sanctions statute found at Va. Code § 8.01-271.1. Further, this Court previously rejected a "good faith" defense to an attorney fee award.

Denton's Assignment of Error No. 9 relies entirely on the validity of the arguments he asserted in Assignment of Error No. 8. Opening Brief at p. 40-41. As noted above, Assignment of Error No. 8 has no merit because the supporting arguments are directly contradicted by the record. While the existence of good faith pleading may have relevance to a request for fees as sanctions pursuant to Virginia Code § 8.01-271.1, such an argument has no relevance to the fee shifting provisions of the Contract. Indeed, such a position was previously addressed and

rejected by this Court. *See Dewberry & Davis*, *Inc. v. C3NS*, *Inc.*, 284 Va. 485, 495, 732 S.E.2d 239, 244 (2012).

E. This Court Cannot Grant The Relief That Denton Has Requested.

Denton prays that this Court "reverse the Final Order of the Circuit Court of Warren County and remand to the trial court *for specific performance and for a hearing on award of Plaintiff's attorney's fees*. Opening Brief at p. 42 (emphasis added). Even assuming for argument's sake that Denton's appeal were successful, the procedural posture of this case renders his requested relief an impossibility. This case comes to this Court partially on the trial court's order granting Browntown's motion to strike App. at pp. 226-27. As noted in *Claycomb v. Didawick*, in granting the motion to strike, the trial court was not sitting as a trier of fact. *Claycomb*, 256 Va. at 336, 505 S.E.2d at 205. Were this Court to overrule the trial court's ruling on the motion to strike, it would only be making a determination that, as a matter of law, Denton had made his *prima facie* case for marketable and insurable title. The case would therefore have to be remanded back to the trial court for determination ***as trier of fact*** (1) whether Denton had met his burden to produce evidence persuasive to the trial court that it should use its discretion and award specific performance or (2) whether Browntown had met its burden of proof regarding the defenses it has asserted in the case (such as laches).

With regard to Denton's request for attorney's fees, this Court could not order an award of attorney's fees for Denton even assuming a successful appeal. Any attorney fee award would necessarily be based upon the fee shifting provisions of the Contract. According to Paragraph (20) of the Contract, a court may only award attorney's fees to a *prevailing party* in a dispute arising out of the Contract. App. at p. 1314. A "prevailing party" is the party for whom a decision or verdict has been rendered because such party *has succeeded in the action*. *Sheets v. Castle*, 263 Va. 407, 414, 559 S.E.2d 616, 620 (2002) (quoting *Richmond v. County of Henrico*, 185 Va. 859, 865, 41 S.E.2d 35, 41 (1947)). Were the motion to strike overturned by this Court, the trial court would have to determine as the tier of fact who succeeded on the merits. Until that decision were made, there would be no "prevailing party," and without a prevailing party, no attorney's fees could be awarded.

CONCLUSION

The trial court's rulings (i) admitting the Trustee's Deed into evidence; (ii) granting Browntown's motion to strike; and (iii) subsequently awarding attorney's fees to Browntown are firmly supported by the record and relevant legal authority. Simply put, viewing the evidence of record in a light favorable to Denton, he failed to make his *prima facie* case that the marketable title issues surrounding the Disputed Acreage, already evident in 1993, had been resolved.

Absent a *prima facie* case for marketable title, Denton can never be entitled to specific performance. Moreover, the trial court did not abuse its discretion in awarding reasonable attorney's fees to Browntown which were obviously due under the fee-shifting provision of the Contract.

Denton's contractual attacks on the trial court's rulings have no merit because the plain language of the Contract as amended (i) did not place the burden of ordering a title examination on Browntown; (ii) in any event gave Denton the right to terminate in the absence of a title report; (iii) did not waive Browntown's title objections due to the absence of a title examination or report; and (iv) did not modify the law of specific performance reflected in the relevant decision of this Court.

Denton's attacks on the admission and consideration of the Trustee's Deed were waived. Nevertheless, the trial court did not abuse its discretion in admitting the authenticated and relevant Trustee's Deed into evidence. Once admitted, the trial court was also not obligated to disregard the Trustee's Deed in deciding Browntown's motion to strike. If Denton believes that additional evidence exists that would have supported his argument that the Boundary Settlement Deed resolved any marketable title issues, it was his burden to introduce it at trial.

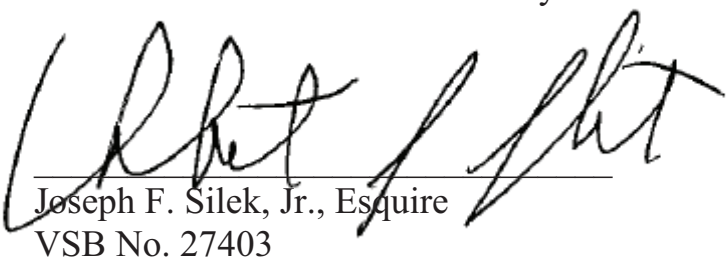
With regard to Denton's invitation for this Court to rule that the *Peers* decision (decided in 1855 and unrelated to specific performance) excused his

negligence in failing to bringing a quiet title action, the Court should decline his invitation because no such argument was submitted to the trial court for consideration and is therefore waived. Beyond the issue being waived, the case is easily distinguishable from the present litigation. Most importantly, if Denton's argument were accepted by this Court, the disruption to established law on specific performance and adverse possession as well as real estate transactions generally by such a decision would be incalculable.

Finally, the trial court did not abuse its discretion awarding attorney's fees to Browntown per the Contract. Not only had Denton waived the affirmative defense of "first breach," but his remaining arguments on appeal are directly contradicted by the record or are simply recycled legal arguments previously rejected by this Court.

Wherefore, this Court should affirm the decisions of the trial court granting the motion to strike and the award of attorney's fees and costs to Browntown, award Browntown its costs and expenses incurred in connection with this appeal, and for such other and further relief as this Court may find appropriate.

Respectfully Submitted,
BROWNTOWN VALLEY ASSOCIATES, INC.
By counsel



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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2017, an electronic copy of this Brief of Appellee was filed, via VACES, and ten printed copies were hand-delivered to the Clerk's Office in compliance with Rule 5:26(e). This Brief of Appellee complies with Rule 5:26(b) because the portion subject to that rule does not exceed 50 pages. A copy was also electronically mailed to:

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