IN THE

Supreme Court of Virginia

RECORD NO. 160999

JAMES T. DENTON,

Appellant,

v.

BROWNTOWN VALLEY ASSOCIATES, INC.,

Appellee.

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

ASSIGNMENTS OF ERROR 1

ASSIGNMENTS OF ERROR 1
ORDER OF MARCH 23, 2105, SUSTAINING BROWNTOWN'S MOTION TO STRIKE PLAINTIFF'S EVIDENCE, INCORPORATED INTO FINAL ORDER OF APRIL 7, 2016 AND ARGUMENT FOR EXENTSION OF THE LAW OF PEERS v. BARNETT, 53 Va. 410, 1855 Va. LEXIS 30

ASSIGNMENTS OF ERROR 3
FINAL ORDER OF APRIL 7, 2016 AWARDING DEFENDANT/APPELLEE BROWNTOWN ATTORNEY'S FEES ON ITS COUNTERCLAIM

NATURE OF THE CASE 5

MATERIAL PROCEEDINGS BELOW 5

STATEMENT OF FACTS 7

STANDARD OF REVIEW 16

ARGUMENT AND AUTHORITIES 17

CONCLUSION 41

CERTIFICATE OF SERVICE 44

TABLE OF AUTHORITIES

Cases

Ames v. American Nat'l Bank…….……19
163 Va. 1, 39, 176 S.E. 204 (1934)

Chawla v. BurgerBusters, Inc…….……39
255 Va. 616, 499 S.E.2d 829 (1998)

Cogito v. Dart…….....2, 21, 30, 31
183 Va. 882, 33 S.E.2d 759 (1945)

Conquest v. Mitchell…….23
618 F.2d 1053, 1980 U.S. App. LEXIS 18832

Dominion Savings Bank F.S.B v. Costello…..……28
257 Va. 413, 417, 512 S.E.2d 564, 567 (1999)

Golding v. Floyd……28
261 Va. 190,192, 539 S.E.2d 735, 236 (2001)

Horton v. Horton……...…….20, 39
254 Va. 111, 116, 487 S.E.2d 200 (1997)

Jackson v. Ligon……...3, 31, 32
30 Va. 161, 1831 Va. LEXIS 44

Kyer v. Commonwealth…….…..36
43 Va. App. 603, 601 S.E.2d 6 (2004)

Landrum v. Chippenham & Johnston-Willis Hospitals, Inc.…….....16, 17
282 Va. 346, 717 S.E.2d 134 (2011)

Lash v. County of Henrico……..37
14 Va. App. 926,929, 421 S.E.2d 851, 853 (1992)

Monahan v. Obici Medical Mgmt. Services……..…38
271 Va. 621, 628 S.E.2d 330 (2006)

Mullins v. Richlands Nat'l Bank……..39
241 Va. 447, 403 S.E.2d 334 (1991)

Mundy's Ex'rs v. Garland……28
116 Va. 922, 83 S.E. 401 (1914)

Neely v. White……...……39
177 Va. 358, 366, 14 S.E.2d 377, 340 (1941)

New Dimensions, Inc. v. Tarquini……..……37, 38
286 Va. 28, 743 S.E.2d 267 (2013)

Peers v. Barnett…..…….….....1, 3, 33, 36, 42
53 Va. 410, 1855 Va. LEXIS 30

Quatannens v. Tyrrell…….,,…17
268 Va. 360, 601 S.E.2d 616, 618 (2004)

Turner v. Caplan……..17
268 Va. 122, 596 S.E.2d 525, 527 (2004)

Va. Elec & Power Co. v. Hylton…….24
292 Va. 92, 103, 787 S.E.2d 106 (2016)

Winn v. Aleda Constr. Co……28
227 Va. 304, 307, 315 S.E.2d 193, 194-195 (1984)

Statues and Rules

Va. Code §8.01-236…….……33

Va. Code §8.01-246……..…….……5

Va. Code §8.01-839(C)……...23

Va. Sup. Ct. R. 2:803(14)(15)…….…....23, 26

Va. Sup. Ct. R. 5A:18……..36

Va. Sup. Ct. R. 5:25……..……...…….24

To the Honorable Chief Justice and Justices of the Supreme Court of Virginia:

Pursuant to Rule 5:27 of the Rules of the Supreme Court of Virginia, Nikki L. Marshall, Esquire, counsel for Appellant/Plaintiff ("Counsel"), James T. Denton, respectfully submits the following Opening Brief.

ASSIGNMENTS OF ERROR

ASSIGNMENTS OF ERROR – ORDER OF MARCH 23, 2015, SUSTAINING BROWNTOWN'S MOTION TO STRIKE PLAINTIFF'S EVIDENCE, INCORPORATED INTO FINAL ORDER OF APRIL 7, 2016 AND ARGUMENT FOR EXTENSION OF THE LAW OF *PEERS v. BARNETT*, 53 Va. 410, 1855 Va. LEXIS 30

1. The trial court abused its discretion in granting Defendant/Appellee Browntown Valley Associates, Inc.'s Motion to Strike Plaintiff's evidence based on its finding that that there is a "substantial issue as to ownership" (March 10, 2015 Letter Opinion at Paragraph 1, App. 226-228) of the 4.191 acre portion of the 122.281 acre contract parcel, where the court based its finding on improper evidence. (Plaintiff's Objections to Order Sustaining Defendant's Motion to Strike the Evidence at Number 1, App. 236-237 and Plaintiff's Objections to Final Order, filed 4/13/16, at Number 1, App. 788-793)

2. The trial court abused its discretion in not giving significant weight to Defendant/Appellee Browntown's failure to instruct its closing

agent to conduct a title examination of the contract property at the time of contract or through the trial of this matter to identify legitimate issues of ownership. (Plaintiff's Objections to Order Sustaining Defendant's Motion to Strike the Evidence at Number 2, App. 236-237 and Plaintiff's Objections to Final Order, filed 4/13/16, at Number 1, App. 788-793)

3. The trial court abused its discretion and procedurally erred in admitting and giving significant weight to the Substitute Trustee's Deed (Defendant's Exhibit 42, App. 1422-1427) in support of Defendant/Appellee Browntown's proposition that the Deed, standing alone, casts a cloud on Plaintiff/Appellant's title to his property. (Plaintiff's Objections to Order Sustaining Defendant's Motion to Strike the Evidence at Number 3 App. 236-237 and Plaintiff's Objections to Final Order, filed 4/13/16, at Number 1, App. 788-793)

4. The trial court erred by misapplying the law of *Cogito v. Dart*, 183 Va. 882, 33 S.E.2d 759 (1945) where in that case the title issue was properly submitted to a title insurance company at the time of contract. (Plaintiff's Objections to Order Sustaining Defendant's Motion to Strike the Evidence at Number 4, App. 236-237 and Plaintiff's Objections to Final Order, filed 4/13/16, at Number 1, App. 788-793)

5. The trial court abused its discretion in attributing a specific

value to the 4.191 acre tract with no supporting facts or evidence and improperly applying that value to the law of *Jackson v. Ligon,* 30 Va. 161, 1831 Va. LEXIS 44, where the court stated that "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 specific execution of a contract." (Plaintiff's Objections to Order Sustaining Defendant's Motion to Strike the Evidence at Number 5 and 6, App. 236-237 and Plaintiff's Objections to Final Order, filed 4/13/16, at Number 1, App. 788-793)

6. The law of *Peers v. Barnett*, 53 Va. 410, 1855 Va. LEXIS 30, should be extended to provide that a *seller,* (1) who has been in "uninterrupted possession" of his property for a period in excess of the fifteen (15) year statute of limitations for adverse possession claims and (2) whose ownership remains unchallenged, "with no suggestion of disturbance, or the assertion of any adverse claim up to the time of the hearing" is not required to further establish his good title through the pursuit of a quiet title action where "the lapse of time" "quieted the [vendor's] title", "and cured the defects therein". [422, 424]

ASSIGNMENTS OF ERROR – FINAL ORDER OF APRIL 7, 2016 AWARDING DEFENDANT/ APPELLEE BROWNTOWN ATTORNEY'S FEES ON ITS COUNTERCLAIM

7. The court erred as a matter of law in finding that

Plaintiff/Appellant James Denton was required to plead “first breach” as an affirmative defense to bar Defendant/Appellee Browntown’s Counterclaim for Attorney’s Fees where the defense was apparent from the allegations pled by Plaintiff/Appellant in his Amended Complaint for Specific Performance and was directly related to the elements of the plaintiff’s cause of action. (Plaintiff’s Objections to Final Order, filed 4/13/16, at Number 2, App. 788-793)

8. The court abused its discretion in finding that “rather cryptic” invoice entries are reasonable even where a) time entries fail to articulate, in any way, the subject of time charged, b) time charged in defense of Plaintiff/Appellant’s Complaint for Specific Performance is commingled with time charged to pursue Defendant/Appellee’s third party claim, with no separation of charges and c) time is charged for consultation between counsel in the firm without a description of the service rendered. (Plaintiff’s Objections to Final Order, filed 4/13/16 at Number 3, App. 788-793)

9. The court abused its discretion in awarding Defendant/Appellee Browntown $11,000.00 of claimed fees in pursuit of its attorney’s fee award where there was valid argument as to the fees claimed, as stated in Error 8. (Plaintiff’s Objections to Final Order, filed 4/13/16, at Number 6, App. 788-793)

NATURE OF THE CASE

This case arises out of a purchaser's (Defendant/Appellee Browntown) breach of a non-contingent, thirty (30) day close, contract (the "Contract") for the purchase of seller's (Plaintiff/Appellant) 122.281 acres of land in Front Royal, Virginia (the "Property"). Purchaser failed to close on the Contract at the expiration of a third requested extension for failure to reach an agreement with an adjacent land owner regarding improvement of the right-of-way servicing the contract Property, a reason unrelated to the title to the Property or any other contract terms. Purchaser presented seller with a release that seller refused to execute. Seller did re-list the property for sale to reduce his injury from the purchaser's breach. Seller was unsuccessful in selling the property to a third party and filed a Complaint for Specific Performance to compel the purchaser to proceed to closing, pursuant to the Contract terms. The Complaint was filed within the statutory five-year period for enforcement of written contracts (§8.01-246, 1950, Code of Virginia, as amended). Purchaser defended the suit claiming deficient title to a 4.191 acre tract of the Contract Property.

MATERIAL PROCEEDINGS BELOW

Browntown demurred to seller, Denton's, initial Complaint for Specific Performance on grounds it did not adequately allege good title to the

contract Property. Denton was granted leave to amend his Complaint. Browntown answered the Amended Complaint and counter-claimed for its attorney's fees in defending the matter.

Browntown contemporaneously filed a third-party complaint against its realtor, Weichert Co. of Virginia ("Weichert"), and its real estate agent, Christina Dawn Boies ("Boies"), individually. The third parties filed a demurrer, pleas in bar and motion for an award of attorney's fees. The court sustained the Weichert/Bois demurrer and deferred its ruling on attorney's fees until the conclusion of the case.

Denton answered Browntown's counterclaim for attorney's fees and the matter moved forward to trial on the Amended Complaint for Specific Performance only. Cross-objections to the parties' Witness and Exhibit List were heard pre-trial, and noteworthy is Denton's objection to and subsequent Motion in Limine to exclude Browntown's use of a Substitute Trustee's Deed in the chain of title of a property adjacent to Denton's that was substantially relied upon by the trial court in its decision. At the close of Denton's case at trial, Browntown made a motion to strike the evidence, based on deficient title, and the court deferred its ruling until the close of Browntown's evidence. At the conclusion of the two day bench trial, the trial court took the matter under advisement and issued a letter opinion

sustaining Browntown's motion to strike the evidence based on "a substantial issue as to the ownership" of the 4.191 acre portion of the 122.281 acre Contract parcel. Seller filed a Motion for Reconsideration and the motion was denied.

Browntown settled the Weichert/Bois claim for attorney's fees and Browntown's counterclaim for attorney's fees against Denton was heard in a half day trial. The court took the matter under advisement. In a letter opinion the court awarded Browntown $54,964.00 in attorney's fees, expert witness fees and costs and court costs in the amount of $349.00 (Letter from Judge Hupp to Attorneys Marshall and Light, App. 781, 781A, 781B). Denton appealed from the Final Order of the court that awarded Browntown attorney's fees and costs and incorporated by reference the court's order sustaining Browntown's motion to strike the evidence.

STATEMENT OF FACTS

In June, 2005, Denton and Browntown entered into the Contract for the sale and purchase of Denton's 122.281 acre Property in Front Royal, Virginia. (Exhibit 6 to Amended Complaint, App. 61, and Plaintiff's Trial Exhibits 6, App. 1312-1332 and 10, App. 1338-1339) Through its pleadings and evidence at trial, Browntown does not dispute it entered into the Contract with Denton and further admits the contract was valid and

binding. (Answer, Grounds of Defense & Counterclaim Browntown Valley Associates, Inc., Pages 2 and 3 at Paragraphs 12 and 18, App. 91-92) The contract price is $740,000.00 with a $500.00 deposit.

It is undisputed that the Contract contains no contingencies, including no contingency for financing or a study period for Browntown to determine the Property's suitability for its purpose. (Contract at Paragraphs 2 and 5, Exhibit 3 to Amended Complaint, App. 49-50 and Plaintiff's Trial Exhibits 6, App. 1312-1332 and 10, App. 1338-1339) Further, Browntown, through Martha Buracker ("Buracker"), its Treasurer, specifically testified at trial that the Contract *was not* contingent on execution of an agreement with an adjacent land owner, Cogil Corp. ("Cogil") related to improvement of the road servicing the Property for development purposes. (Trial Transcript 2/20/2015, Testimony of Buracker, Page 131, Lines 19-23, App. 1083) It is further undisputed that Browntown's real estate agent, Boies, a realtor with Weichert, represented to Denton that Browntown had been doing research on the land from "the day the land came on the market" and that "they [had] done their homework in effort not to hold anything up with the sale." (Exhibit 1 to Amended Complaint, App. 47 and Plaintiff's Trial Exhibit 7, App. 1333) It is undisputed that Browntown, through its agent, supplied Plaintiff with a pre-approval letter from Browntown's bank and a copy of an agreement

with Cogil to improve the right-of-way servicing Denton's Property. (Exhibit 2 to Amended Complaint, App. 48, and Plaintiff's Trial Exhibits 8 and 9, App. 1335-1339)

Denton testified at trial that he had other offers on his Property, but he chose Browntown's offer because it had no contingencies and a quick close. He further testified that he needed to sell the Property to assist with college expenses for his eldest daughter. (Trial Transcript 2/19/2015, Denton Testimony, Page 34, Lines 3-6, App. 848 and Page 39, Line 17 – Page 40, Line 23, App. 853-854)

It is undisputed that Browntown requested three extensions of time to close on the contract for the specific purpose of allowing Browntown to continue to work out an agreement with Cogil related to the right-of-way servicing Denton's Property for Browntown's development purposes. (Exhibits 5 and 6 to Amended Complaint, App. 60-61, and Plaintiff's Trial Exhibits 14 and 15, App. 1348-1349). Denton continued to forbear based on Browntown's continued promises to close.

It is undisputed that Browntown did not proceed to settlement on the Denton Property on or before October 31, 2005, pursuant to the last extension. Browntown continued to make representations to Denton that it would close on the property until December 9, 2005 when Browntown,

through Buracker, emailed Denton that Browntown "was going to have to drop the contract" because it was unable to reach an agreement with COGIL regarding the right-of-way. (Plaintiff's Trial Exhibit 22, App. 1360-1361) Denton was presented with a release agreement prepared by Browntown's agent. (Plaintiff's Trial Exhibit 23, App. 1362) The proposed agreement released Browntown from the Contract and directed the return of the $500.00 deposit to Browntown. It was undisputed at trial that Denton did not sign the release. The evidence at trial further showed that Denton was presented with a release agreement prepared by his own agent, Barbara Greco, releasing Browntown from the Contract and directing the deposit be tendered to Denton. (Plaintiff's Trial Exhibit 24, App. 1363) It was undisputed at trial that Denton did not sign the release. Plaintiff's evidence and testimony at trial was that he made it clear to his agent that he had no intention of releasing Browntown from its contract to purchase his Property. (Plaintiff's Trial Exhibit 25, App. 1364-1365) At trial, Browntown and its real estate agent, Boies, testified that they never checked on the status of the release. They further testified that the deposit was returned to Browntown without verification that Browntown's release had been signed by Denton. (Trial Transcript 2/20/2015, Boies Testimony, Page 107, Line 13 – Page 109, Line 2; App. 1061-1063, and Buracker

Testimony, Page 125, Line 25 – Page 126, Line 11, App. 1079-1080)

The evidence at trial showed that Denton re-listed his Property for sale in the spring of 2006. He kept it on the market, almost continually, through the filing of his Complaint for Specific Performance in 2010 and up until November of 2014, when he felt certain that his lawsuit was proceeding to trial. (Plaintiff's Trial Exhibits 28-33, App. 1368-1409) Denton testified at trial that he hoped to sell his Property to another buyer so he wasn't forced to sue Browntown for the damage he sustained from their failure to close on the Property. Unfortunately, he never received any offers on the Property during that time. (Trial Transcript 2/19/2015, Denton Testimony, Page 74, Line 9 – Page 76, Line 13, App. 888-890)

Browntown never advised Denton of any perceived issue with the title to his Property prior to its answer to this lawsuit. Browntown pled that Denton does not have marketable title to his Property, specifically a 4.191 acre portion and, therefore, Browntown is not bound to perform under the Contract terms. (Answer, Grounds of Defense & Counterclaim Browntown Valley Associates, Inc., Page 9 at Paragraphs 64 and 66, App.98)

The Contract requires Browntown to direct its closing agent to conduct a title examination of the Property within ten (10) days of the Contract execution. (Exhibit 3 to Amended Complaint, App. 49-58 and Trial

Exhibit 6, Virginia Jurisdictional Addendum to Contract, Page 3 at Paragraph 7, App. 1319) Browntown testified at trial that it never requested a title examination. (Trial Transcript 2/20/2015, Buracker Testimony, Page 127, Line 8 – Page 128, Line 16, App. 1081-1082) The closing agent further testified that a title examination of the Property was never conducted. (Trial Transcript 2/20/2015, Daniel J. Pond, II Testimony, Page 69, Line 22 – Page 70, Line 5, App. 1023-1033) Through the trial of this matter, Browntown produced no evidence or testimony that a title examination was ever conducted and Browntown never supplied Denton with a title examination, abstract of title or title opinion, prepared by a licensed title examiner, reporting a title defect to the 4.191 acre tract, as complained of by Browntown.

Denton requested in discovery that Browntown produce any documents that were probative of the matters contained in the Amended Complaint (Plaintiff's Motion for Reconsideration, Page 4, Footnote 1, App. 467). The Amended Complaint at Paragraph 17 and 47 clearly state that Denton possesses good and marketable title to his Property. A title examination, abstract of title or title opinion would certainly have been probative of this issue.

Denton's Amended Complaint clearly pleads good and marketable

title to the entire 122.281 acre tract. [Amended Complaint at Paragraphs 17, App. 41 and 47, App. 45, and Exhibits 7 and 8, App. 62-71, attached thereto; Plaintiff's Trial Exhibit 1, App. 1275-1286). Denton secured title insurance for his Property at the time of purchase. (Plaintiff's Trial Exhibit 3, App. 1297-1302) The title policy did contain an exception as to the 4.191 acre tract that was cured with the recording of the Deed of Boundary Settlement and Dedication of Plat ("Boundary Settlement and Plat") (Exhibit 9 to Amended Complaint, App. 72-79 and Plaintiff's Trial Exhibit 4, App. 1303-1310), as required by Plaintiff's title insurance binder (Plaintiff's Trial Exhibit 2, App. 1287-1296).

Although Browntown alleges a title defect to the 4.191 acre portion of the Denton Property, it produced no testimony or evidence at trial that it was unable to secure title insurance or a mortgage on the Property because of a title defect. Further, Browntown produced no testimony or evidence at trial that there was a claim of another that clouded the title to the 4.191 acre tract.

Browntown's entire title defect argument was based on a Substitute Trustee's Deed (Defendant's Trial Exhibit 42. App. 1422-1427) in the chain of title to the adjacent parcel, whose owner, Wayside Inn Limited Partnership ("Wayside"), was a party to the Boundary Settlement and Plat

confirming Denton's ownership of the 4.191 acre tract. Browntown proffered at trial that the Substitute Trustee's Deed, recorded April 22, 1994, was put to record before the Boundary Settlement and Plat, recorded December 13, 1994, creating a notice issue. Browntown argues that the Substitute Trustee's Deed revealed there was a lien on the Wayside property at the time the Boundary Settlement and Plat was executed by Wayside and the lienholder did not join in the deed of boundary settlement and further that the lienholder had no notice of the boundary settlement. (Trial Transcript 2/19/2015, Page 119, Line 16 – Page 123, Line 7, App. 933-937; and Trial Transcript 2/20/2015, Page 7, Line 10 – Page 20, Line 20, App. 961-974) Tellingly, there was no testimony or evidence at trial 1) that the lienholder referenced in the Substitute Trustee's Deed objected, *at any time,* to the recorded Boundary Settlement and Plat, even at the time of transfer of the Wayside property to a new owner, 2) that subsequent owners of the Wayside property ever objected to the Deed and Plat (Plaintiff's Motion for Reconsideration, Pages 12 (last three lines) – 14, App. 475-477), where subsequent owners of the Wayside property specifically held the boundary line of the Boundary Settlement Plat, or 3) that anyone asserting any interest in and to the Denton Property ever came forward through the trial of the matter with a claim after the recordation in

December of 1994, fully twenty-one (21) years after the Boundary Settlement and Plat were put to record.

Denton's testimony at trial as to the 4.191 acre parcel was that no one had ever made a claim to the 4.191 acre tract during his record ownership since February 3, 1993, including since the recordation of the Boundary Settlement and Plat on December 13, 1994 (Trial Transcript 2/20/2015, Denton Testimony, Page 36, Lines 14-18, App. 990) He further testified that his deed to the Property (Plaintiff's Trial Exhibit 1, App. 1275-1286) recites that his predecessors in title owned the 4.191 acre tract as part of the 122 acre parcel since 1939 (seventy-five (75) years prior to trial and seventy-one (71) years prior to the filing of Denton's Amended Complaint). (Trial Transcript 2/19/2015, Denton Testimony, Page 18, Line 12 – Page 19, Line 3, App. 832-833) The Boundary Settlement and Plat was presented to Denton by his title insurer in the form required by and acceptable to the insurer. The insurer did not require the signature of the mortgage company. (Plaintiff's Trial Exhibit 4, App. 1303-1310) Denton testified at trial that the Boundary Settlement and Plat was not executed by Wayside until after he went to settlement on his Property, so the exception regarding the 4.191 acre tract was not removed from his title insurance policy. (Trial Transcript 2/19/2015, Denton Testimony, Page 20, Line 8 –

Page 29, Line 23, App. 834-843) Denton testified that his attorney at the time failed to record the deed after it was finally executed by Wayside and Denton, and did so only after inquiry by Denton. (Trial Transcript 2/19/2015, Denton Testimony, Page 29, Line 24 – Page 30, Line 12, App. 843-844) Denton remains in undisturbed possession of the Contract Property.

STANDARD OF REVIEW

Specific performance is an equitable remedy and the standard of review is an abuse of discretion standard. The abuse of discretion standard is succinctly defined in *Landrum v. Chippenham & Johnston-Willis Hospitals, Inc.,* 282 Va. 346, 717 S.E.2d. 134 (2011) where the Court states that an abuse of discretion . . . "can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; where an irrelevant or improper factor is considered and given significant weight; and where all factors, and no improper ones, are considered, but the court, in weighing these factors, commits a clear error of judgment." Justice Millette, joined by Chief Justice Kinser concurred in the definition but expanded it "to emphasize . . . that the scenarios identified by the majority "are not all encompassing" . . . and specifically, "a [trial] court by definition abuses its discretion when it makes an error of law. . . The abuse-of-discretion standard includes review to determine that the

discretion was not guided by erroneous legal conclusions." *Id.*at 357, 717 S.E.2d at 139 (citations and additional quotation marks omitted). Also see *Turner v. Caplan,* 268 Va. 122, 125, 596 S.E.2d 525, 527 (2004) (Questions of law are subject to *de* novo review); and *Quatannens v. Tyrrell,* 268 Va. 360, 365, 601 S.E.2d 616, 618 (2004) (Regarding mixed questions of law and fact, where as in the instant case the facts are largely undisputed, a trial court's application of law is subject to *de* novo review).

Further, in reviewing an action of the trial court granting a motion to strike a party's evidence, the appellate court views the evidence in the light most favorable to the non-prevailing party, in the instant case, Appellant Denton.

ARGUMENT AND AUTHORITIES

ARGUMENT SUMMARY RELATED TO ORDER SUSTANING BROWNTOWN'S MOTION TO STRIKE PLAINTIFF'S EVIDENCE

Where specific performance of an unobjectionable contract for the sale and purchase of land is the relief sought, the contract terms are the law of the case, and the trial court erred, as a matter of law, in failing to give significant weight to Browntown's breach of the Contract.

Specific performance, by its very term, compels compliance with the

contract terms. In the instant case, specific performance of the Contract compels Browntown to purchase Denton's Property subject to the contract requirements, including but not limited to 1) directing the closing agent to conduct or authorize a title examination of the Contract Property, (Contract Jurisdictional Addendum, Paragraph 7, Exhibit 3 to Amended Complaint, App. 55 and Plaintiff's Trial Exhibit 6, App. 1319) 2) notify the Seller of the specific title defect (Contract, Paragraph 19, Exhibit 3 to Amended Complaint, App. 51, and Trial Exhibit 6, App. 1314)[1] and 3) give the Seller an opportunity to cure, if necessary (Contract, Paragraph 19, Exhibit 3 to Amended Complaint, App. 51, and Trial Exhibit 6, App. 1314).

The Contract, at the Jurisdictional Addendum, Paragraph 7, requires the *Purchaser* (Browntown) to contact the Settlement Agent within 10 days of contract acceptance to schedule settlement, and requires the settlement agent to order the title examination and survey, as required in Paragraph 19 of the Contract, where it provides that "the title report and survey shall be ordered promptly". The Seller is not required by the Contract to produce a title report, title abstract or title insurance proving his title at the time of contract. Title issues are identified through the process delineated in the Contract, with the *Purchaser* commissioning the title examination

[1] Customarily, the purchaser's title binder, with the insurer's requirements, are shared with the seller's agent for analysis and resolution.

and reporting any defects to the Seller for cure, within a reasonable time. Words used by the parties to a contract are normally given their usual, ordinary, and popular meaning. *Ames v. American Nat. Bank*, 163 Va. 1, 39, 176 S.E. 204, 217 (1934) No word or clause will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words aimlessly. *Id*. 176 S.E.2d at 216-17. These Contract provisions are the well-established protocol in the real estate industry, and they protect both the Purchaser and the Seller. The Purchaser is assured a property with good title and the Seller is protected against the Purchaser reneging on the contract for a bogus defect. Because Browntown breached the Contract first by failing to perform a *material* term of the Contract related to identification of title defects, as a matter of law, the court cannot consider Browntown's lone deed in an adjacent landowner's chain of title, recorded in 1994, as proof of a cloud on Denton's *current* title to his Property. As the trial court stated in its letter opinion, dated March 10, 2015, "Denton <u>now</u> seeks specific performance . . ." (March 10, 2015 Letter Opinion at Paragraph 1, App. 226-228)

A material breach is "a failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an

essential purpose of the contract". *Horton v. Horton*, 254 Va. 111, 116, 487 S.E.2d 200 (1997) The title examination required of Browntown goes to the very essence of the Contract – conveyance of good and marketable title. Denton reasonably expected a title binder or title report as evidence the defect Browntown complains of was properly identified and vetted by a licensed title examiner through the standard practice in the real estate industry.

As the trial court further states in its March 10, 2015 letter opinion, the Contract requires that "title is to be good and marketable, and insurable by a licensed title company with not [sic] additional risk premium". If defects are reported, pursuant to Paragraph 19 of the Contract, "the Purchaser may declare this contract void, and the Deposit shall be refunded in full, *unless the defects are of such character that they may be remedied within a reasonable time.*" [Emphasis added] The alleged defect in title identified by Browntown and adopted by the trial court was not identified through a proper title examination, performed at the time of contract, as required by the Contract terms, or performed at the time of suit and/or up until the time of trial.[2] A complete title examination of the adjacent landowner's property

[2] The standard in the industry is for a final "bring down" to be conducted prior to closing to ensure the title examination is current to the time of transfer. Browntown 1) admits it did not direct the closing agent to order a

would have revealed that there is no cloud on the 4.191 acre tract related to Browntown's complaint. While the trial court accurately states that Denton is required to convey good and marketable title, the Contract, the law of the case, sets forth the well-established procedure in the real estate industry by which valid title issues are identified, and the trial court clearly dismissed Browntown's material breach of the Contract.

While Browntown repeatedly represents in its Brief in Opposition that *Cogito v. Dart*, 183 Va. 882, 33 S.E. 181 (1910) stands for the proposition that Denton's burden to establish good and marketable title, as required in the Contract, is not predicated on the performance of the Contract terms by both Denton and Browntown, its analysis of the case is flawed and incorrect. In *Cogito,* on the day after the contract was signed, Cogito, the purchaser, employed his attorney to examine the title to the contract property. A title issue was discovered regarding an alley that was part of the contract property. The record indicates that the parties' attorney's discussed the defect and, ultimately, the Purchaser's attorney submitted the objection to the title to Lawyers Title Insurance Company. Lawyers agreed to insure the entire property with the condition that the city council

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title examination, 2) did not produce a title examination, report or binder during discovery, even though all documents probative of the allegations in the Amended Complaint were requested, and 3) did not proffer evidence or testimony at trial that a title examination was ever conducted.

abandon or disclaim any interest in the alley. The seller diligently pursued the city council to abandon or disclaim the interest in the alley, and the city council did so. When the purchaser was advised the condition of the title insurance company had been met and seller wanted to proceed to closing, the purchaser refused. The seller filed suit for specific performance. While the record does indicate that "neither side introduced a complete abstract of title," the record is clear that the seller's "title was traced to or through an old chancery suit"[3] and the perceived defect was submitted to a title insurance company by the purchaser's attorney. In this case, by contrast, Browntown admits to not conducting a title examination, admits that it breached the contract between the parties in 2005 for reasons other than a defect in title and admits that it was not refused insurance or a mortgage based on lack of marketable title. It is clear from the record that Browntown merely did not want the Property after its development plans were spoiled by failure to reach an agreement with an adjacent land owner concerning the right-of-way servicing the property. The trial court required that Denton rebut Browntown's alleged title issue at the time of trial, when he was first notified of Browntown's specific complaint at trial, and not

[3] Stated simply, title examinations trace title backwards, starting with the present grantor in the chain of title and going back in time for the required period.

pursuant to the Contract terms.

As a document admitted by the trial court as a hearsay exception, permitted pursuant to §8.01-839(C), 1950, Code of Virginia, as amended, revised, and Rule 2:803(14)(15), Rules of the Supreme Court of Virginia, in support of Browntown's allegation that Denton's title was deficient at the time of trial, Wayside's Substitute Trustee's Deed (Browntown's Trial Exhibit 42, App. 1422-1427), is subject to Rule 2:803(15) wherein it restricts such use if "dealings with the property since the document was made have been inconsistent with the . . . purport of the document."

Wayside's Substitute Trustee's Deed falls squarely into the Rule 2:803(15) restriction, where Browntown attempted to have Denton review certain references in the Deed for the purpose of affecting Denton's interest in the 4.191 acre parcel. Denton objected to the use of the Deed for the purpose intended by Browntown, including for reasons related to conflicting subsequent records and the current status of the property line between the Denton Property and Wayside property. (Trial Transcript 2/19/2015, Denton Testimony, Page 20, Line 8 – Page 29, Line 23, App. 834-843) While Denton did not cite specifically to Rule 2:803(15) in his objections, he raised them "in such a manner so as to give the trial court notice of [their] substance." *Conquest v. Mitchell*, 618 F.2d 1053, 1980

U.S. App. LEXIS 18832, (the court stated that such notice complies with Rule 5:25, Rules of the Supreme Court of Virginia, regarding preservation of issues for appellate review, and "will be deemed sufficient even though the objection could have been more definitively given." (Also see *Va. Elec & Power Co. v. Hylton*, 292 Va. 92, 103, 787 S.E.2d 106 (2016), where the court states that "preservation under Va. Sup. Ct. R. 5:25 does not require a party to precisely reference the exact statute or rule upon which they rely in making any argument. Rather, a party need only give a trial court sufficient notice of the substance of the objection.")

Denton clearly sets forth his objections to the proffer and admission of the Substitute Trustee's Deed in his Objections to Browntown's Witness and Exhibit List (App.199-201), Motion in Limine (App. 196-197), Motion for Reconsideration (App.464-523), contemporaneous objections at trial (Trial Transcript 2/19/2015, Page 119, Line 16 – Page 123, Line 8, App. 933-937 and Trial Transcript 2/20/2015, Page 7, Line 10 – Page 20, Line 20, App. 961-974) and in his stated objections to the Order Sustaining Defendant's Motion to Strike the Evidence (App,236-237). Denton objected to the admission of the Substitute Trustee's Deed on the grounds of lack of a proper testimonial sponsor because Browntown proffered the Deed through Denton, who could not opine on Wayside's title. Denton

further objected that the Substitute Trustee's Deed represented an incomplete chain of title of the Wayside property and testified that the property subject to the Substitute Trustee's Deed had been conveyed several times since 1994 and the boundary established in the Boundary Agreement and Plat had been held and no objections or claims had been made to his ownership of the 4.191 acres to the time of trial.

Browntown was fully aware Wayside's Substitute Trustee's Deed represented a "1994" snapshot it time. It defies reason that Browntown was not aware that the foreclosing bank, that Browntown complains had no notice of the Boundary Agreement and Plat and was not a party thereto, adopted the boundary line in the Boundary Agreement and Plat when it conveyed the property in foreclosure. Further, it defies reason that Browntown became aware of the Substitute Trustee's Deed but was not aware that all subsequent transfers of the Wayside property held the boundary line in the Boundary Agreement and Plat. Browntown's use of the Substitute Trustee's Deed at trial 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, was disingenuous. This act would be akin to Browntown producing a 1994 Deed of Trust on

the Property to prove a defect of title, with full knowledge that a subsequent release had been filed. Rule 2:803(15), Rules of the Supreme Court of Virginia, guards against just such an omission. Even though the trial court can take judicial notice of the Substitute Trustee's Deed, it should have been given no weight in regard to the question of Denton's title to the 4.191 acre tract without further evidence of the Wayside title to the time of trial.

ERROR 1 -The trial court abused its discretion in granting Defendant/Appellee Browntown Valley Associates, Inc.'s Motion to Strike Plaintiff's evidence based on its finding that there is a "substantial issue as to ownership" of the 4.191 acre portion of the 122.281 acre contract parcel (March 10, 2015 Letter Opinion at Paragraph 1, App. 226-227), where the court based its finding on improper evidence.

The trial court gave substantial weight to Defendant's Exhibit 42, the Substitute Trustee's Deed that Browntown improperly proffered into evidence during its cross-examination of Denton. While the court is permitted to take judicial notice of a recorded deed, a hearsay exception, the Substitute Trustee's Deed, recorded in 1994, cannot be submitted to support the proposition of a *current* title defect since "dealings with the property since the document was made have been inconsistent with the . . . purport of the document," proffered by Browntown. (Va. Sup. Ct. R. 2:803 (14)(15)) Denton testified at trial of no challenges to his ownership

from the time he purchased the Property in 1993 to the time of trial in 2015, and the Wayside property has been transferred several times since the execution and recordation of the Substitute Trustee's Deed. Further, the deed is not in Denton's chain of title and he was not a party to the deed. (Trial Transcript 2/20/2015, Page 36, Lines 14-18, App. 989, where the trial court acknowledges that the deed is not in Denton's chain of title) Where Denton had no knowledge of the deed and could not testify as to its contents, there was no opportunity for Denton to cross-examine the parties to the deed or to cross-examine a title examiner who would have examined the entire title and been able to opine on the deed's *current* significance, if any. Further, Denton could not cross-examine Mr. Light, Browntown's defense counsel, who testified to the deed's contents and significance.

The Substitute Trustee's Deed, recorded in April of 1994, standing alone, does not reflect the boundary status of the Denton property at the time of trial in February of 2015. Browntown produced no evidence at trial that the Property could not be mortgaged or insured, nor was there any evidence that a title examination had been conducted by a title examiner, pursuant to the Contract, Virginia Jurisdictional Addendum, Paragraph 7, revealing a legitimate title issue. As the trial court points out, title to the property had to be "insurable by a licensed title company with not (sic)

additional risk premium," (March 10, 2015 Opinion Letter at Paragraph 2, App. 226-227) but the court fails to consider that it is the *purchaser* in a contract for the purchase of land who applies for title insurance with a title insurer who has considered the title examination requested by the purchaser.

"A defect of title must be such as to justify the purchaser in refusing to accept it; and if the contract *does not require a perfect record title, the purchaser cannot justify a refusal to perform his part of the contract . . ." Mundy's Ex'rs v. Garland,* 116 Va. 922, 83 S.E. 491 (1914) (Emphasis Added). The parties' contract does not call for "perfect record title", but "good and marketable" title, and Browntown produced no evidence at trial, other than the improperly admitted Substitute Trustee's Deed, that Denton's title was objectionable by that standard.

ERROR 2 - The trial court abused its discretion in not giving significant weight to Defendant/Appellee Browntown's failure to instruct its closing agent to conduct a title examination of the contract property at the time of contract or through the trial of this matter to identify legitimate issues of ownership.

Where the terms of contract are clear and unambiguous, they will be given their plain meaning. *Golding v. Floyd,* 261 Va. 190, 192, 199 S.E.2d 735, 236 (2001); *Dominion Savings Bank, FSB v. Costello,* 257 Va. 413, 417, 512 S.E.2d 564, 567 (1999); *Winn v. Aleda Constr. Co.,* 227 Va. 304,

307, 315 S.E.2d 193, 194-195 (1984). The contract at issue in this case is not ambiguous and no pleading, testimony or argument at trial alleges such. Browntown was required to commission a title examination of the Denton Property within ten (10) days of ratification of the contract (Exhibit 3 to Amended Complaint, App. 49-58 and Plaintiff's Trial Exhibits 6 App. 1312-1332 and 10 App. 1338-1339, Page 3 of the Virginia Jurisdictional Addendum at Paragraph 7, App.1319) in order to identify *valid* title issues as determined by a *qualified* title examiner. Browntown testified at trial that it never requested a title examination. (Trial Transcript 2/20/2015, Buracker Testimony, Page 127, Line 8 – Page 128, Line 16, App. 1081-1082) The closing agent further testified that a title examination of the Property was never conducted. (Trial Transcript 2/20/2015, Pond Testimony, Page 69, Line 22 – Page 70, Line 5, App. 1023-1024) Browntown clearly breached an unambiguous, material term of its Contract with Denton.

The contract did not provide that the Purchaser could conduct its own title search, identify a lone deed in an adjacent owner's chain of title, analyze that deed to the exclusion of others in its chain and then object to the Seller's title. In fact, the Contract guards against such an approach to identifying title defects. The Jurisdictional Addendum provides a *required* protocol whereby *valid* title issues can be identified by a *qualified* title

examiner. The trial court improperly disregarded the requirement and allowed Browntown to improperly proffer a lone deed to stand for the allegation that Denton lacked good title to his Property.

ERROR 3 - The trial court abused its discretion and procedurally erred in admitting and giving significant weight to the Substitute Trustee's Deed (Defendant's Exhibit 42, App. 1422-1427) in support of Defendant/Appellee Browntown's proposition that the Deed, standing alone, casts a cloud on Plaintiff/Appellant's title to his property.

Argument and analysis of Errors 1 and 2 are incorporated herein by reference.

ERROR 4 - **The trial court erred by misapplying the law of *Cogito v. Dart*, 183 Va. 882, 33 S.E.2d 759 (1945) where in that case the title issue was properly submitted to a title insurance company at the time of contract.**

While the trial court cites *Cogito v. Dart* for the proposition that "good and marketable" title means that the title is "free from liens and incumbrances (*sic*) and dependent for its validity on no doubtful questions of law or fact," *Id* at 887, in that case the *purchaser notified the seller* of the issue regarding title to the alley in question and the issue was presented to Lawyers Title Insurance Company *at the time of contract*. The court in that case granted specific performance to the seller *over the purchaser's objections regarding marketable title.*

In the instant case, a) Browntown *did not* order a title examination, pursuant to the contract between the parties and b) did not allege, testify or

produce any evidence that its perceived title defect regarding the 4.191 acre portion of the Denton Property was presented to a title insurance company for investigation and opinion. Further, Browntown did not allege, testify or produce any evidence that Denton's Property was not insurable or mortgageable.

The court in *Cogito* was able to rely on the fact that the title issue, identified through a title examination, was submitted to a title insurance company by the purchaser's agent in making its determination regarding the validity of the purchaser's claim of a title defect. In the instant case, the trial court had no such information upon which to rely in making an informed decision and, as a result, Denton was unfairly deprived of the relief he sought, specific performance of his contract with Browntown.

ERROR 5 - The trial court abused its discretion in attributing a specific value to the 4.191 acre tract with no supporting facts or evidence and improperly applying that value to the law of *Jackson v. Ligon, 30 Va. 161, 1831 Va. LEXIS 44,* where the court stated that "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 specific execution of a contract."

While the trial court states in its letter opinion granting Browntown's motion to strike the plaintiff's evidence that "river frontage was a property feature clearly important to Browntown," and that the 4.191 acres alleged to have a title deficiency "has river frontage" (March 10, 2015 Letter Opinion

at Paragraph 1, App. 226-228), the record is void of evidence to support the assertion. The court determined the amount of river frontage by its own calculation from Denton's plat. The subject was never explored by Browntown at trial, including whether the riverfront property was buildable, since Browntown admits it wanted the Property for development purposes. The only reference to Browntown's opinion or evaluation of the Denton Property was contained in the letter from Boies, Browntown's real estate agent, to Denton prior to contract, and Browntown denies in its answer to Denton's Amended Complaint that the letter was authorized by Browntown. (Answer, Grounds of Defense and Counterclaim Browntown Valley Associates, Inc., Paragraph 8, App. 91)

Further, *Jackson v. Ligon* does not require that the seller offer compensation to the purchaser for a defect in title to "a trifling deficiency of a few acres" where the defect is not proven. In *Jackson*, the seller did not hold clear title to a significant amount of the contract property (209 acres of a 698 acre tract), and the Court states that title, as to the 209 acres, was "clearly defective", as the Executor of the estate sold the property to the Vendor "while the wife was living and unmarried" in direct contradiction to the terms of the will, and "the children whose share the Executor sold, were infants." In the instant case, there is no valid evidence of alternative

ownership of the 4.191 acres or a case made that the title is "clearly defective" to trigger an offer of compensation by the seller.

It is clear that the trial court erred in giving significant weight to a factor that was not alleged or argued at trial.

ARGUMENT 6 - FOR EXTENSION OF THE LAW - The law of *Peers v. Barnett*, 53 Va. 410, 1855 Va. LEXIS 30, should be extended to provide that a *seller,* (1) who has been in "uninterrupted possession" of his property for a period in excess of the fifteen (15) year statute of limitations for adverse possession claims, pursuant to the provisions of §8.01-236, 1950, Code of Virginia, as amended, and (2) whose ownership remains unchallenged, "with no suggestion of disturbance, or the assertion of any adverse claim up to the time of the hearing" is not required to further establish his good title through the pursuit of a quiet title action where "the lapse of time" "quieted the [vendor's] title", "and cured the defects therein".

In the *Peers* case, the relevant facts are as follows:

The sellers and purchaser entered into a contract for the sale of land in 1828. Ownership of the contract parcel was vested in several persons other than the sellers, so purchaser took possession with the agreement that title would be clear prior to full payment of the purchase price. The purchaser took possession of the property and sellers executed a bond to the purchaser, with the condition to make title good. The purchase money was payable in four equal annual installments and purchaser executed a deed of trust on the land to secure same.

Purchaser failed to pay the purchase money and, in 1834, the sellers

filed a suit in equity to compel the trustees to execute on the trust, sell the property and, out of the proceeds, pay to the sellers the remainder of the purchase price. Purchaser answered that seller had not conveyed the amount of land promised and that the title to the property had not been cleared.

In 1836, the matter was referred to a Commissioner to determine the amount paid toward the purchase price. Over time, purchaser did not fully cooperate with providing adequate proof of the payments he alleged.

In 1842, the original plaintiff/seller died and the case was taken over by his administrator and, in 1843, the court made another order for accounting by purchaser. The Commissioner filed his report in July, 1843. Purchaser filed exceptions to the report, including exceptions based on a deficiency of acreage and lack of good title.

In 1852, the matter went to trial. The judge sustained only one exception related to the purchaser's purchase of the interest of one of the persons in interest of the property, and the Commissioner's findings as to the amount due on the purchase price was adjusted accordingly. The court directed the purchaser to pay the remainder of the purchase price within six months and, if not, the trustees were directed to sell the property and make a report to the court.

The purchaser appealed the decision. The trial court's decree was affirmed and the matter was remanded for sale of the property. The court's reasoning, in essence, was 1) that purchaser had waived his right to a survey of the property by agreeing to rely on the old survey and 2) the title defects, existing at the time purchaser took possession of the property, had been cured, the court stating

> ". . . that the parties might have perfected the title at any time before the hearing, so as under the pleadings to have entitled them to a decree subjecting the land to sale; the lapse of time, the uninterrupted enjoyment and possession of the land under the deed, the absence of any suggestion of any disturbance or the assertion of any adverse claim had at the time the decree was entered, quieted the title in the appellant, and cured all such defects in the title set forth in the answer or disclosed by the record . . ."[424]

The instant action is strikingly similar, except that in this instance the *seller* has been in possession of the Property since the *purchaser's breach* and the seller denies any defect in his title.

Denton has been in quiet and uninterrupted enjoyment and possession of his Property in excess of twenty-two (22) years from his date of purchase to the trial of this matter. There has been no suggestion of any disturbance to ownership or the assertion of any adverse claim through Denton's ownership, since 1993, or that of his predecessor in title, since

1939. The Boundary Settlement and Plat, recorded December 13, 1994, was agreed to and put to record, *only as an accommodation* to the title insurer; and, importantly, the then adjacent landowner, Wayside, had no objection to Denton's ownership of the 4.191 acre parcel and further agreed that the boundary line reflecting Denton as the owner of the 4.191 acre tract was the correct boundary line between the properties. Twenty-one (21) years have passed since its recordation with no disturbance or adverse claims being made. Certainly, here, as in *Peers,* Denton should not be required to further establish his good title through the pursuit of a quiet title action where the lapse of time has quieted the alleged defect complained of by Browntown. The foreclosing bank was the alleged aggrieved party concerning the late recordation of the Boundary Settlement and Plat, and any objection to same was waived when the bank adopted the boundary set forth in the Boundary Settlement Plat, clearly marking the 4.191 acre parcel as part of the Denton Property.

While Browntown objects, in its Brief in Opposition, to Denton's use of new case law on appeal, it is not necessary to rely on the same authority on appeal as at trial. *Kyer v. Commonwealth*, 43 Va. App. 603 n.3, 601 S.E.2d 6, 11 n.3 (2004) ("Rule 5A:18 'does not prohibit reliance on statutes or cases not presented to the trial court to support, on appeal, a position

otherwise adequately presented at trial.'") (Quoting *Lash v. County of Henrico*, 14 Va. App. 926, 929, 421 S.E.2d 851, 853 (1992) (en banc)).

Clearly, an argument for the extension of current case law is properly brought before this Court, and the underlying arguments supporting such an extension were adequately made before the trial court.

ERROR 7 - The court erred as a matter of law in finding that Plaintiff/Appellant James Denton was required to plead "first breach" as an affirmative defense to bar Defendant/Appellee Browntown's Counterclaim for Attorney's Fees where the defense was apparent from the allegations pled by Plaintiff/Appellant in his Amended Complaint for Specific Performance and was directly related to the elements of the plaintiff's cause of action.

As reflected in Denton's counsel's letter to the Court, dated July 8, 2015 (App. 546-549), in response to a letter to the Court from Browntown's counsel, Robert Light, the "first breach" bar to Browntown's attorney's fees claim need only be pled as an affirmative defense where the defense is "not apparent from the allegations pled and unrelated to the elements of the plaintiff's cause of action." *New Dimensions, Inc. v. Tarquini,* 268 Va. 28, 743 S.E.2d 267 (2013) There is no surprise or prejudice in this case because Denton clearly alleges in his Amended Complaint for Specific Performance that Browntown failed to order a title report on the Denton Property (See Amended Complaint for Specific Performance at Paragraph 29). Further, Browntown admits the breach in its Answer to the Amended

Complaint. (Defendant's Answer, Grounds of Defense and Counterclaim Browntown Valley Associates, Inc. at Paragraph 29, App. 93) The court in *New Dimensions* further says that "the requirement that most such defenses be specifically pled *arises from their collateral nature."* The court describes such collateral matters as ". . . statute of limitations, absence of proper parties, res judicata, usury, a release, prior award, infancy, bankruptcy, denial of partnership, bona fide purchaser, and denial of an essential jurisdictional fact alleged in the bill." Browntown's breach of the title examination requirement of the contract is not a matter *collateral* to or existing outside of the contract and it is a matter *admitted* by Browntown.

The *Monahan v. Obici Medical Mgmt. Services*, 271 Va. 621, 628 S.E.2d 330 (2006) decision, upon which the Court bases its decision, predates the *New Dimension* decision and specifically and narrowly addresses the necessity of pleading mitigation of damages as an affirmative defense. While the court does opine that typical affirmative defenses that act as a complete bar to recovery must be pled as an affirmative defense, it reiterates that the purpose of an affirmative defense is to avoid surprise and prejudice to the opposing party. The case does not stand for the proposition every defense that acts as a complete bar to recovery must be pled as an affirmative defense.

Browntown's failure to order a title examination is a material breach of the Contract. Browntown admits the breach. There is no surprise or prejudice to Browntown concerning Denton's claim of their breach. The title examination is fundamental to establishing good and marketable title of the Contract Property, an essential purpose of the Contract. The breach defeats this purpose. As stated in *Neely v. White,* 177 Va. 358, 366, 14 S.E.2d 377, 340 (1941), "if the first breaching party committed a material breach . . . that party cannot enforce the contract." Accordingly, Denton should be excused from performing his contractual obligation of paying Browntown's attorney's fees. *Horton v. Horton,* 254 Va. 111, 487 S.E.2d 200, 1997

ERROR 8 - The court abused its discretion in finding that "rather cryptic" invoice entries are reasonable even where a) time entries fail to articulate, in any way, the subject of time charged, b) time charged in defense of Plaintiff/Appellant's Complaint for Specific Performance is commingled with time charged to pursue Defendant/Appellee's third party claim, with no separation of charges and c) time is charged for consultation between counsel in the firm without a description of the service rendered.

The trial court correctly states the factors to be considered in making an attorney's fee award (*Mullins v. Richlands 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)); however, it fails to apply the law of *Mullins* where the Supreme Court states that "in determining a reasonable fee, the fact finder

should consider such circumstances as time consumed, the effort expended, *the nature of the services rendered and other attending circumstances."* [Emphasis Added]

In this case, the trial court did not give significant weight to Browntown's 1) complete *failure* to describe services rendered in certain time entries and 2) its failure to separate services as between defense of the Denton Amended Complaint and pursuit of the third-party claim against Weichert/Bois in certain other time entries, where the total amount charged for the deficient time entries is significant. (Plaintiff's Brief in Opposition to Defendant Browntown's Counterclaim for Attorney's Fees and Costs and Third-Party Defendant Weichert's Motion for Attorney's Fees and Costs, Exhibit 1, App. 401-404) As to these time entries, the trial court could not determine, with a "reasonable" degree of certainty, the nature of the services rendered as they relate to Browntown's defense of the Denton claim, particularly where Browntown was contemporaneously pursuing a third-party claim.

ERROR 9 - The court abused its discretion in awarding Defendant/Appellee Browntown $11,000.00 of claimed fees in pursuit of its attorney's fee award where there was valid argument as to the fees claimed, as stated in Error 8.

Where Browntown's counsel completely failed to give a description of the service rendered for the time charged and where counsel failed to

segregate charges as between the Denton claim and the third-party claim, requiring argument as to the fee necessity and reasonableness, the trial court abused its discretion in awarding additional attorney's fees to Browntown in pursuit of its claim for attorney's fees.

CONCLUSION

The material facts of this case are undisputed. The crux of Denton's claim is that Browntown breached its 2005 Contract with Denton for the purchase of his land for reasons unrelated to the contract terms, and then defended Denton's 2010 specific performance action with a title defect claim related to a 4.191 acre portion of the 122.281 acre tract, without the benefit of a title examination as required by the Contract's Jurisdictional Addendum at paragraph 7. Browntown committed the first breach of the Contract between the parties by its failure to direct the closing agent to conduct a title examination of the Denton Property so that legitimate title defects could be identified, if any, and Denton notified of same and given the opportunity to cure, pursuant to the contract terms.

The matter went to trial in 2015. Denton testified that his ownership of the entire 122 acre parcel had never been challenged and he remained in peaceful enjoyment of his Property since its purchase in 1993. Browntown defended with a lone deed in the chain of title of an adjacent

land owner to stand for the proposition that, at the time of trial, there was a cloud on the 4.191 acre tract identified in the Boundary Agreement and Plat that was recorded in 1994 for the purpose of confirming the boundary line between Denton and his neighbor, as required by Denton's title insurer. At the conclusion of the evidence, the trial court sustained Browntown's motion to strike Denton's evidence and, in a separate hearing in 2016, awarded Browntown its attorney's fees and costs.

The trial court abused its discretion in granting Browntown's motion to strike Denton's evidence and awarding Browntown its attorney's fees because the decision is clearly contrary to the evidence and to the law of this case for the reasons stated herein.

Further, the law in *Peers v. Barnett* should be extended to protect a seller from pursuing a quiet title action where the undisturbed possession, absence of adverse claims and the passage of time has cured any alleged defect in title.

WHEREFORE, Appellant/Plaintiff Denton respectfully requests that this Court (1) examine the case and the applicable law and (2) reverse the Final Order of the Circuit Court of Warren County and remand to the trial court for specific performance of the Contract by Browntown and for a hearing on award of Plaintiff's attorney's fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In compliance with Rule 5:26, I hereby certify that on March 13, 2017, the correct number of true and accurate copies of this Opening Brief were hand-filed with the Supreme Court of Virginia and an electronic copy filed via VACES in PDF format, and an electronic copy via email in PDF format was served upon counsel for the appellee:

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