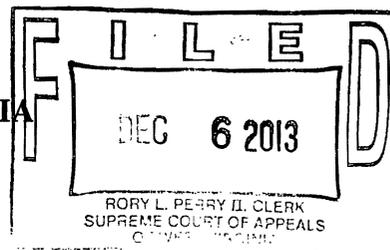


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Jerry N. Black, M.D.,  
Defendant below, Petitioner**

vs. No. 13-0926 (12-C-52)

**St. Joseph's Hospital of Buckhannon, Inc.,  
Plaintiff Below, Respondent**



**PETITIONER'S BRIEF**

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### **ASSIGNMENTS OF ERROR**

1. The Court erred in granting Plaintiff's Motion for Summary Judgment in a manner contrary to its announced ruling at the hearing of June 21, 2013.

2. As such, the Court erred by failing to enter the proposed order that was tendered by Defendant and by entering an erroneous order submitted by Plaintiff.

3. The Court erred in entering an order that stated the option contract was "a valid option contract" (emphasis added), when the parties only stipulated, and the Court announced, that the "Option to Repurchase" was "an option contract".

4. The Court erred in entering two orders that were clearly erroneous and contrary to the Court's rulings as announced at the hearings on October 1, 2012 and June 21, 2013.

5. The Court, therefore, erred by denying Defendant his day in Court on disputed factual and legal issues.

### **STATEMENT OF THE CASE**

1. Plaintiff below is St. Joseph's Hospital of Buckhannon, Inc. (St. Joseph's herein) a non-profit Corporation, affiliated with the Catholic Church, operating in the State of West Virginia, and doing business as a hospital in Buckhannon, West Virginia.

2. Dr. Jerry N. Black, M.D. (Dr. Black herein) is a private citizen and a medical doctor, ophthalmologist, and surgeon, who has conducted his practice, and continues to conduct his practice, in Upshur County, West Virginia.

3. Dr. Black graduated magna cum laude, as the valedictorian of his college class at West Virginia Wesleyan College, with a B. S. in Chemistry in 1966.

4. In 1972, Dr. Black earned his Ph.D. and post-doctoral fellowship in Nuclear Physics/Chemistry from Michigan State University.

5. Dr. Black earned his M.D. from the University of Miami School of Medicine in 1976.

6. Dr. Black completed an internship in internal medicine at Mt. Sinai Medical Center in Florida in 1977.

7. Dr. Black completed his residency in ophthalmology at Vanderbilt University in Nashville, TN, in 1980.

8. Prior to Dr. Black's return to West Virginia, he contacted both St. Joseph's Hospital in Buckhannon, Upshur County, West Virginia and the Golden Clinic in Elkins, Randolph County, West Virginia during the fall /winter of 1979/1980.

9. Dr. Black's medical practice started during the summer of 1980 at the Golden Clinic in Elkins, West Virginia.

10. Dr. Black returned to West Virginia, with an intention of opening up a surgical practice in Upshur County.

11. Dr. Black entered into negotiations in the fall/winter of 1981/1982 with representatives of St. Joseph's for the purchase of land and construction of offices and a surgical unit.

12. Dr. Black opened his practice in Upshur County in August, 1983.

13. As a result thereof, Sister M. Diane Bushee, Provincial Superior, executed on behalf of St. Joseph's, and Dr. Black, on his own behalf, the Memorandum Agreement dated June 3, 1982. The Memorandum Agreement is annexed to the Complaint for Declaratory Judgment as contained in the Petitioner's Proposed Appendix on page 16.

14. A document titled "Option to Repurchase" dated June 3, 1982 is attached to the Complaint for Declaratory Judgment contained in the Petitioner's Proposed Appendix on page 22.

15. Sister M. Diane Bushee, SAC, President on behalf of St. Joseph's also executed and delivered to Dr. Black, a Deed dated June 3, 1982, conveying unto Dr. Black, all of that certain tract, lot, or parcel of land situate in the City of Buckhannon, Buckhannon District, Upshur County, containing 13,069 square feet, more or less, as surveyed in October, 1982, by Burl J. Smith, RPCE #6988, Smith Engineering Company, Buckhannon, West Virginia. There was reserved from the conveyance a 40-foot right of way.

16. This deed is of record in the Office of the Clerk of the County Commission of Upshur County, West Virginia in Deed Book 306 at page 144. The Deed is attached to the Complaint for Declaratory Judgment contained in the Petitioner's Proposed Appendix on page 31.

17. Those three documents were drafted and prepared, following extensive exchanges and discussion, by St. Joseph's attorney, Terry D. Reed, Post Office Box 310, 23 West Main Street, Buckhannon, WV 26201. The Deed and Memorandum Agreement were notarized by Terry D. Reed.

18. St. Joseph's was a sophisticated party to the contract, acting under the auspices of the Catholic Church and at all times represented by competent counsel.

19. Dr. Black, an individual, was not represented by counsel throughout the negotiations and execution of documents. His vast learning and training was not in the law.

20. Dr. Black entered into the agreement in good faith believing at the time that he was agreeing to provide to St. Joseph's a "right of first refusal," and an option to repurchase during the last year of a 99 year term.

21. After this action was filed, and after Dr. Black conferred with counsel, and prior to filing his answer, the defense determined that the document in question, as a result of an error of St. Joseph's counsel, contained no right of first refusal.

22. However, St. Joseph's has never asserted a mutual mistake of fact, nor has it asserted a right of first refusal, and it has abandoned any such right.

23. St. Joseph's filed its Complaint for Declaratory Judgment on April 20, 2012.

24. Dr. Black was served with the Complaint for Declaratory Judgment on June 1, 2012.

25. Dr. Black filed a Rule 12(b)(6) Motion to Dismiss on June 27, 2012.

26. Dr. Black asserted (as is supported by the letter report and opinion of WVU College of Law Professor, and former Dean John W. Fisher, II, contained in the Petitioner's Proposed Appendix on page 322) that the date by which St. Joseph's may assert its option to repurchase is governed by paragraph 5 of the Option to Repurchase, which states:

...5. TIME DURING WHICH OPTION MAY BE EXERCISED: This first option will be exercised by giving written notice as set forth in paragraph 3 herein which notice can **only be given at any time within one year prior to the date of the expiration of this Option (June 3, 2081)**, or within ninety (90) days after a notice of default is tendered in the manner and terms required by provision 7 of the "Memorandum of Agreement By and Between (Physician) and St. Joseph's Hospital" bearing date of the 3<sup>rd</sup> day of June, 1982, and executed by the parties hereto... (date added) (emphasis added)

27. St. Joseph's responded to the "Rule 12(b)(6) Motion" on September 27, 2012.

28. During the argument on Dr. Black's Rule 12(b)(6) Motion, on October 1, 2012, counsel for St. Joseph's admitted to the Honorable Thomas H. Keadle, who has since retired from the bench, that there existed paragraph 3 and paragraph 5 each of which contained clear, but conflicting, provisions relative to the date an option to repurchase can be exercised.

29. Mr. Sellards stated, in pertinent part:

...Well, Your Honor, it doesn't make sense, if you read the – if you read paragraph five from the beginning, it says, "The first option will be exercised by giving written notice as set forth in paragraph three, herein which notice can only be given at any time within one year." The problem is, is that paragraph three talks about notice and exercising it outside of the last year, paragraph five says the only time you can exercise it is by providing the notice and exercising it within one year. **They are mutually exclusive**... (Page 7 Transcript of hearing October 1, 2012) (emphasis added)

30. Paragraph 3, page 1, of the Option to Repurchase states:

...3. NOTICE OF EXERCISE: This option shall be exercised by written notice signed by St. Joseph's and sent by registered mail **at least one year prior to the expiration date** (June 3, 2081) to Physician or his successor and assigns, including but not limited to Physicians Office Building at his office located within the Physicians Office Building... (date added) (emphasis added)

31. The Court, finding an ambiguity in the document, denied the Rule 12(b)(6) Motion to Dismiss as reflected in the order entered on October 9, 2012. The Court stated, in pertinent part,

...BY THE COURT: Well, as I read paragraph three and five, five is saying that three can be – paragraph three says it has to be exercised at least a year prior to the expiration date. Paragraph five turns around and said they can do it within that one year.

**So I think it's ambiguous.** And I so find and deny your Motion to Dismiss... (Pg. 22 Transcript of hearing October 1, 2012) (emphasis added)

32. The antecedent to pronoun “it”, quite clearly, is the option contract, not paragraph 3 and not paragraph 5.

33. The Order Denying Defendant Jerry N. Black's Motion to Dismiss Plaintiff's Complaint, drafted by St. Joseph's Counsel, entered on October 9, 2012, stated, in pertinent part:

...2. The language of Paragraph 3 of the Option Contract allows St. Joseph's to exercise the Option at any time prior to June 3, 2080. Therefore, Paragraph 5 of the Option contract is ambiguous as a matter of law and fact...

34. This paragraph drafted by St. Joseph's counsel was erroneously and incorrectly represented and was contrary to the Court's announced rulings at the hearing. The Court never stated, “Paragraph 5 is ambiguous”.

35. Paragraph 5 states unambiguously that St. Joseph's right to repurchase may be exercised only during the last year of the 99 year term. Paragraph 5 takes precedence over any apparent conflict with paragraph 3 for reasons explained by Dean Fisher (contained in the Petitioner's Proposed Appendix on page 322) and the law cited below. (emphasis added)

36. Counsel for St. Joseph's prepared an order which was signed by the Court, and not noticed at the time by Dr. Black's counsel, which incorrectly says that the Circuit Court found paragraph 5 ambiguous. This "mistake" is part of a pattern.

37. Dr. Black moved that this error be corrected in Defendant Jerry N. Black's Objections to Plaintiff's Proposed Orders filed on July 2, 2013.

38. Of course, even if paragraph 5 were ambiguous, which it is not, that ambiguity should be resolved against the drafter, St. Joseph's. That issue has never been addressed.

39. During the October 1, 2012 hearing, St. Joseph's counsel did not tell Judge Keadle, as he later did to Judge Henning, that St. Joseph's only wanted a ruling, "...that the Option to Repurchase is an option contract" (Transcript page 10 of Hearing on June 21, 2013). That clearly was not disputed. He asked the Court, on October 1, 2012, "Your Honor, put us on a quick docket." (Transcript page 21 of Hearing on October 1, 2012).

40. There was no doubt at that hearing that the true issue in question was when, if ever, St. Joseph's can exercise the Option to Repurchase. Later, after Defendant retained Dean Fisher as his expert, the enforceability of any provision of the contract came into question.

41. Following a scheduling hearing of the same date, an Order was entered on December 3, 2012 setting the trial for June 4, 2013.

42. On or about April 23, 2013, Plaintiff filed "Plaintiff, St. Joseph's Hospital of Buckhannon, Inc.'s Motion for Summary Judgment" and "Plaintiff, St. Joseph's Hospital of Buckhannon, Inc.'s Memorandum of Law in Support of Motion for Summary Judgment".

43. Defendant filed the following in response to St. Joseph's Motion for Summary Judgment:

- a. Dr. Black's Response to Motion for Summary Judgment filed on May 10, 2013;
- b. Dr. Black's Supplement to Response to Motion for Summary Judgment filed on May 31, 2013; and
- c. Dr. Black's Supplement to Response to Motion for Summary Judgment and Renewal of Motion to Dismiss filed on June 14, 2013.

44. These responses explain that the terms, enforceability, and timing of the subject "option contract" are strongly disputed. The Defendant's position on these issues are fully supported by the law and the letter opinion of Dr. Black's expert, Dean Fisher (contained in the Petitioner's Proposed Appendix on page 322).

#### **DEFINITION OF "VALID"**

45. Black's Law Dictionary, 7<sup>th</sup> Edition, page 1548, contains the following definition of "valid".

- a. Legally sufficient, binding, and;
- b. Meritorious.

46. Merriam Webster's Collegiate Dictionary, 10<sup>th</sup> Edition, page 1304, contains, in pertinent part, the following definition of "valid"

- a. having legal efficacy or force; *esp*: executed with the proper legal authority and formalities,
- b. well-grounded or justifiable: being at once relevant and meaningful, b. logically correct.

47. www.Dictionary.com provides the following definition for "valid".

- a. right,
- b. genuine.

## DEFINITION OF “ENFORCE”

48. Black’s Law Dictionary, 7<sup>th</sup> Edition, page 549, contains the following definition of “enforce”.

- a. to give force or effect to (a law, etc.); to compel obedience to, and;
- b. loosely, to compel a person to pay damages for not complying with (a contract).

49. www.Dictionary.com provides the following definition for “enforce”.

- a. to put or keep in force; compel obedience to: *to enforce a rule; traffic laws will be strictly enforced.*
- b. to obtain (payment, obedience, etc.) by force or compulsion.
- c. to impose (a course of action) upon a person: *The doctor enforced a strict dietary regimen.*

50. Thus, the terms “valid” and “enforceable” are synonymous. i.e. “The valid contract is enforceable.”; and “The invalid contract is unenforceable.”

51. A hearing was conducted on St. Joseph’s Motion for Summary Judgment on June 21, 2013.

52. At that hearing, contrary to Plaintiff’s position taken on October 1, 2012, to Judge Keadle, St. Joseph’s counsel made the surprising statement to Judge Henning who had replaced Judge Keadle on a temporary basis:

...Well, the Court ruled that it was an option contract. That's the question, the only question that we moved for and asked for clarification on in the complaint for declaratory judgment. (Transcript pages 8-9 of hearing on June 21, 2013)

53. The following exchange took place:

...BY THE COURT: Okay, so you are saying that since they agreed that it was an option contract -

MR. SELLARDS: That's all we ever asked.

BY THE COURT: And the Court said before it was an option contract, that it's a done deal?

MR. SELLARDS: Yes, Your Honor, and -

BY THE COURT: I understand your position. Let me hear from Mr. Hunter and see if he agrees with you.

MR. HUNTER: Your Honor, I was in a day or two of mediations where the real issue was discussed in much more candor than we're hearing today.

BY THE COURT: But we don't talk about mediations in Court, do we?

MR. HUNTER: No, I won't -

BY THE COURT: And we're not going to go around it and talk about them in Court.

MR. HUNTER: No, what I want to tell the Court is that the real issue in this case is whether St. Joseph's can exercise that option now or during the last year of a 99-year term and if St. Joseph's is saying -

BY THE COURT: So you're saying -

MR. HUNTER: - (if) they are not seeking a ruling on that issue and they want to take their marbles and go home, I think we would take them up on that. Because I don't think they would ever dare file suit again now that they know that...

BY THE COURT: So you are saying that you agree with them that it's an option contract?

MR. HUNTER: Always have.

BY THE COURT: Period. Done deal. Case dismissed. Right?

MR. HUNTER: Well, if that's what they're saying. But it's our understanding -

BY THE COURT: That's what they are saying and they are saying you agree with them.

MR. HUNTER: As far as it goes.

BY THE COURT: And that's **all they want to know**. (emphasis added)

MR. HUNTER: And if they are not seeking a ruling on whether they can exercise that option now, (I) go on record saying that if they try, we will resist it.

BY THE COURT: That's not part of the case. That's not part of the case, Mr. Hunter.

MR. HUNTER: I understand that.

BY THE COURT: **I'm not deciding that one way or the other. Please prepare an Order which says that the matter was determined by the Court to be an option contract...** (Transcript pages 10-11 of hearing on June 21, 2013) (emphasis added)

54. In effect, Mr. Hunter said that if St. Joseph's was seeking a ruling this is a valid option contract, Dr. Black would resist that.

55. The Court did not state that the contract is "valid" which, of course, it is not.

56. Ryan Q. Ashworth, counsel for St. Joseph's, with approval of lead counsel Robert M. Sellards, who authored the disputed orders, assured the Court that neither issue was raised in Plaintiff's complaint and that Plaintiff sought only a ruling that the contract in question is an "option contract", not a "valid option contract". When counsel stated,

...BY THE COURT: Okay, so you are saying that since they agreed that it was an option contract -

MR. SELLARDS: That's all we ever asked.

BY THE COURT: And the Court said before it was an option contract, that it's a done deal?

MR. SELLARDS: Yes, Your Honor, and - ... (Transcript pages 10-11 of hearing on June 21, 2013)

57. The word inserted into the Order, contrary to the ruling of the Court, is the adjective “valid”, as a modifier of the noun “option contract”.

58. The wording of the Proposed Order from the hearing on June 21, 2013 should simply say, “The document titled Option to Repurchase is an option contract.”

59. The Court did **NOT** rule on its validity, the meaning of its notice terms, or its enforceability. The Court, Judge Henning, on June 21, 2013, stressed the limited nature of its ruling.

BY THE COURT: **I am not deciding that one way or the other. Please prepare an Order which says that the matter was determined by the Court to be an option contract...** (Transcript pages 10-11 of hearing on June 21, 2013) (emphasis added)

60. If the Plaintiff’s counsel or the Court had uttered the word “valid”, Defendant’s counsel would have objected, and this matter would have gone to trial.

61. St. Joseph’s counsel stated to the Court that St. Joseph’s was not seeking such a ruling as evidenced by the transcript from the hearing.

...BY THE COURT: Okay, so you are saying that since they agreed that it was an option contract -

MR. SELLARDS: That's all we ever asked.

BY THE COURT: And the Court said before it was an option contract, that it's a done deal?

MR. SELLARDS: Yes, Your Honor, and - ... (Transcript pages 10-11 of hearing on June 21, 2013)

62. St. Joseph’s counsel, for the second time in this action, prepared and submitted to the Court a proposed order that profoundly changed the meaning of the decision announced by the Court from the bench.

63. Counsel for Dr. Black sought, and received, as did the Court, express assurances that St. Joseph's sought a ruling on the narrow issue of whether the contract is an "option contract" and not a "right of first refusal". However, St. Joseph's counsel sought a much broader ruling by the language used in the Proposed Order Granting Motion for Summary Judgment submitted to the Court.

...BY THE COURT: Okay, so you are saying that since they agreed that it was an option contract -

MR. SELLARDS: That's all we ever asked.

BY THE COURT: And the Court said before it was an option contract, that it's a done deal?

MR. SELLARDS: Yes, Your Honor, and - ... (Transcript pages 10-11 of hearing on June 21, 2013)

...BY THE COURT: So you are saying that you agree with them that it's an option contract?

MR. HUNTER: Always have.

BY THE COURT: Period. Done deal. Case dismissed. Right?

MR. HUNTER: Well, if that's what they're saying. But it's our understanding -

BY THE COURT: That's what they are saying and they are saying you agree with them.

MR. HUNTER: As far as it goes.

BY THE COURT: And that's **all they want to know**. (emphasis added)

MR. HUNTER: And if they are not seeking a ruling on whether they can exercise that option now, (I) go on record saying that if they try, we will resist it.

BY THE COURT: That's not part of the case. That's not part of the case, Mr. Hunter.

MR. HUNTER: I understand that.

BY THE COURT: **I am not deciding that one way or the other. Please prepare an Order which says that the matter was determined by the Court to be an option contract...** (Transcript pages 10-11 of hearing on June 21, 2013) (emphasis added)

64. As part of a pattern, three times in this case, Plaintiff's counsel has alleged grossly incomplete facts. Plaintiff's assertions in the Complaint for Declaratory Judgment, Response in Opposition to Defendant's Motion to Dismiss, Plaintiff, St. Joseph's Hospital of Buckhannon, Inc.'s Memorandum of Law in Support of Motion for Summary Judgment, and the final Order are incorrect and misleading.

65. Judge Henning had already caught St. Joseph's counsel in inconsistencies:

a. He noted St. Joseph's insistence that Dr. Black had attempted to activate an "option of right of first refusal", when he had done no such thing. The Court properly noted Dr. Black had simply sent an "offer to purchase". (Transcript Pages 2-4 of hearing on June 21, 2013)

b. And he noted that Plaintiff's counsel failed to inform the Court that Dr. Black's letter of February 1, 2011 was simply a response to an offer to him months earlier offering to purchase the property from him, following a visit to his office by Sue E. Johnson-Phillippe, St. Joseph's C.E.O., who had been the one to raise the question of a possible sale. (Transcript Pages 2-4 of hearing on June 21, 2013)

c. And Judge Henning noted that if Plaintiff's counsel, or Judge Keadle, intended his ruling to be dispositive, Mr. Sellards would not have requested, "Your Honor, put us on a quick docket - ...". (Transcript page 21 of hearing on October 1, 2012)

d. Judge Henning stated, "Well, Judge Keadle apparently didn't find it to be the end of the case, because he didn't dismiss the case." (Transcript page 9 of hearing on June 21, 2013)

e. In fact, it says, "The Court hereby holds, as stated above, it denies the Defendant's motion to dismiss. Defendant shall have 20 days from the date of this ruling to submit his answer to the Plaintiff's complaint." (Transcript page 9 of hearing on June 21, 2013)

66. Although Dr. Black's counsel admittedly missed St. Joseph's Counsel's subtle misuse of the pronoun "its" in the order from the October 1, 2012 hearing, he did not miss counsel's insertion of the word "valid" into the order from the June 21, 2013 hearing. These disingenuous insertions are also part of the pattern.

67. Defendant filed his "Objections to Plaintiff's Proposed Orders" on July 2, 2013.

68. Counsel are officers of the Court:

a. Counsel are not to leave out reference to a key competing paragraph when providing a "statement of facts" to the Court.

b. Counsel are not to leave out essential facts such as when Dr. Black wrote to C. E. O. Sue E. Johnson-Phillippe on February 1, 2011 and offered to sell his property, that he had been asked by Ms. Johnson-Phillippe to sell months before and was simply responding.

c. Counsel must not leave out essential facts such as there was never an effort to activate a “right of first refusal” by Dr. Black.

d. Counsel are not to “pretend” that a pronoun, “ambiguous”, relates to a noun that he already conceded during oral argument is unambiguous instead of “the agreement” which the Court meant to rule is ambiguous.

e. Counsel are not to insert a word never spoken by the Court into the Court’s Order which changes the decision to a “win” for his client.

69. These issues are too important to be seen as a “squabble between counsel”. The orders entered October 9, 2012 and August 8, 2013 constitute plain error and inappropriate and unethical actions, behavior, and conduct by counsel for St. Joseph’s.

70. By the terms of the contract, particularly paragraph number 5 of the Option to Repurchase, this is an option contract that may be exercised only during the last year of a 99 year term. But, as explained below, it definitely is not a “valid option contract”.

### **SUMMARY OF ARGUMENT**

The pleadings are sufficient on their face. The pleadings recite the facts disputed. Therefore, there are genuine issues of material fact.

The Orders entered on October 9, 2012 and August 8, 2013 do not comport with the announced rulings of the Court.

The Defendant’s answer and motions cite the Defendant’s position as to the validity and enforceability of the contract. However, if the contract is found to be enforceable, there are ambiguities that also must be resolved.

Thus, if this Court rules the “Option to Repurchase” is a valid (enforceable) option contract, paragraph 5 of the Option to Repurchase clearly states that St. Joseph’s repurchase can only be exercised during the final year of the 99 year term, or between June 3, 2080 and June 3, 2081.

The Court is directed to the opinion of John W. Fisher, II, that the “Option to Repurchase” violates the common law Rule Against Perpetuities and WV Code §36-1A-1, “Uniform Statutory Rule Against Perpetuities”. This rule is discussed in detail below.

Further, according to Dean Fisher, this “option contract”, drafted by Plaintiff’s lawyer, also violates the common law Rule Against Perpetuities. (See Petitioner’s Proposed Appendix on page 322) It is not “valid”. It is unenforceable.

### **STATEMENT REGARDING ORAL ARGUMENT**

Petitioner contends that oral argument in this case is necessary pursuant to the criteria in Rule 18(a).

Petitioner believes that this case can be set for Rule 19 argument because it is a case involving assignments of error in the application of settled law and a case claiming an unsustainable exercise of discretion where the law governing that discretion is settled.

Petitioner believes this case, even more properly, can be set for a Rule 20 argument because it involves issues of fundamental public importance.

Oral argument in this case is essential in light of the entry of two erroneous orders. In regard to the October 9, 2012, order, drafting counsel took license by naming a pronoun improperly. In the order entered August 8, 2013, drafting counsel inserted the word “valid”, which was never stated by the Court. This order was improper, inexplicable, and entered over the timely objection of Dr. Black’s counsel. The transcripts from the hearing on October 1, 2012 and June 21, 2013 fully support Appellant’s position.

## ARGUMENT

**1. The Court erred in granting Plaintiff's Motion for Summary Judgment in a manner contrary to its announced ruling at the hearing of June 21, 2013.**

**2. As such, the Court erred by failing to enter the proposed order that was tendered by Defendant and by entering an erroneous order submitted by Plaintiff.**

**3. The Court erred in entering an order that stated the option contract was "a valid option contract" (emphasis added), when the parties only stipulated, and the Court announced, that the "Option to Repurchase" was "an option contract".**

**4. The Court erred in entering two orders that were clearly erroneous and contrary to the Court's rulings as announced at the hearings on October 1, 2012 and June 21, 2013.**

1. The standard of review applicable to dismissal orders entered pursuant to West Virginia Rule of Civil Procedure 12(b)(6) is de novo." Syl. Pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995); accord Syl. Pt. 2, Noland v. Virginia Ins. Reciprocal, 224 W.Va. 372, 686 S.E.2d 23 (2009).

2. Plaintiff's counsel changed the Court's ruling of "an option contract" to "a valid option contract", a dramatic change of meaning.

3. The interpretation of the "Memorandum Agreement" and "Option to Repurchase" advocated by St. Joseph's would have the Court interpret these conflicting paragraphs to mean that Dr. Black took on a risk of investing one million two hundred thousand dollars (\$1,200,000) in the construction of an office complex while giving the right to St. Joseph's, the option, to buy it at fair market value, on the day it opened, or, as in this instance, to wait for a propitious time when the economy was depressed and fair market value would give the hospital a "windfall". Petitioner would have presented evidence from a bank officer had an evidentiary hearing been permitted.

4. Plaintiff's recitation of the facts fails to mention:

a. That Dr. Black negotiated "pro se" while St. Joseph's was a sophisticated seller, with legal representation;

b. St. Joseph's counsel, Terry D. Reed, drafted the documents in question; and

c. The Memorandum Agreement and Option to Repurchase are subordinated to Dr. Black's Deed of Trust and Promissory Note which prohibit the "repurchase option" as interpreted by Plaintiff.

5. The Memorandum Agreement and Option to Repurchase were drafted by counsel for St. Joseph's. There is a fundamental conflict between the two paragraphs (numbers 3 and 5) of the "Option to Repurchase". It is the conflict between the paragraphs that creates the ambiguity. There is no ambiguity in paragraph 5. Its meaning is quite clear.

6. Dr. Black's belief was that St. Joseph's retained a "right of first refusal". Dr. Black concedes it should have been in their agreement. St. Joseph's counsel mistakenly left it out.

7. The Memorandum Agreement and Option to Repurchase violate the Rule Against Perpetuities as further outlined and analyzed in Dean Fisher's letter to Dr. Black's counsel.

8. Dean Fisher has been identified by this Court as "the foremost authority in this field (real estate contract law) in the State", McClung Investments, Inc., v. Green Valley Community Public Service District, 485 S.E.2d 434, 199 W.Va. 490 (1997). Even as recently as November 6, 2013, this Court, in the case of Douglas W. Wilson II, and Joellen Wilson v. Johnny L. Staats and Lori A. Staats, September, 2013 Term, No. 12-0042, drew attention to Dean Fisher's article, "A Survey of the Law of Easement in West Virginia", 112 W.Va.L.Rev. 637 (2010) as "a comprehensive article explaining the law of easements". Who better to address the contested issues of law in this case?

9. The “Memorandum Opinion and Order” dated March 28, 2007, in the case of Anthony Mancuso and Alice D. Mancuso v. The Meadowbrook Mall Company Limited Partnership, et. al., rendered by the Honorable Irene M. Keeley, Judge of the United States District Court for the Northern District of West Virginia is pertinent to the case at bar.

10. This cited case appears to be “on all fours” with the case at bar on relevant issues. The cited case had a “notice issue” and a “covenants to maintain property issue” which do not exist in the case at bar, but the Meadowbrook Mall Company Limited Partnership, relied strongly on an “Option to Repurchase” with language quite similar to the “Option to Repurchase” at issue in this case.

11. Based upon Judge Keeley’s opinion in Mancuso v. The Meadowbrook Mall Company Limited Partnership, et. al., and the “Rule Against Perpetuities,” it is apparent the “Option to Repurchase” is not a valid option contract. Therefore, Petitioner is free to sell the office building and his practice as he sees fit without interference by St. Joseph’s.

12. The Bankruptcy Court was affirmed on appeal to the District Court in its ruling that the repurchase option was invalid (unenforceable) because it violated West Virginia’s then “Rule Against Perpetuities”.

13. The District Court quoted the repurchase option which read, in pertinent part:

In the event the improvements on [the property] are substantially damaged or destroyed by fire, casualty or any other cause ... Purchaser shall promptly restore and rebuild the same .... In the event Purchaser (a) fails to commence the restoration of the Property within one ... year from such occurrence, or (b) fails to complete such restoration within [eighteen months] from the date of such occurrence, Seller shall have the right, but not the obligation, to acquire the property from Purchaser for the Purchase Price set forth in Clause 3 hereof.

14. Judge Keeley stated as follows:

The rule against perpetuities applicable at the time of the creation of the repurchase option required that “every executory limitation, in order to be valid, shall be so limited that it must necessarily vest, if at all, within a life or lives in being, ten months and twenty-one years thereafter, the period of gestation being allowed only in those cases in which it is a factor.” Smith v. VanVoorhis, 296 S.E.2d 851, 853 (W. Va. 1982)

Specifically, under West Virginia law, a repurchase option, such as the one at issue here, is an interest subject to the rule against perpetuities. First Huntington Nat. Bank v. Gideon-Broh Realty Co., 79 S.E.2d 675, 684 (W. Va. 1953)

“The rule against perpetuities, being one of public policy, is absolute and is arbitrarily enforced, notwithstanding its enforcement may do violence to clearly expressed intent of the parties to the instrument” v. Meadow River Coal & Land Co., 113 S.E.2d 79, 83 (W. Va. 1960)

15. The Court also dealt with the fact that a “business organization” (a “person” that is not a human being) is treated differently under the Rule Against Perpetuities. The Court explained,

Applying this rule to the repurchase option at issue here, the Court finds that the option is an interest which, were it to vest at all, may vest more remotely than within a life in being plus 21 years from the date of its creation. Initially, the Court notes that the business organizations that were parties to the repurchase option at the time of its creation are not the proper lives by which to measure time under the rule. Cattail Associates, Inc. v. Sass, 907 A.2d 828, 840 (Md. Ct. Spec. App. 2006) (citing Fitchie v. Brown, 211 U.S. 321, 334 (1908)). **When business organizations are parties to the transactions, courts disregard the “lives in being” element of the rule, and adopt a strict 21 year limit.** Symphony Space, Inc. v. Pergola Properties, Inc., 669 N.E.2d 799, 806 (N.Y. 1996) Even if business organizations were not involved, however, it is clear from its terms that the repurchase option contains no definable outer limit within which it must vest. Accordingly, the Court concludes that the repurchase option is invalid under West Virginia law applicable in 1987. See Starcher Bros. v. Duty, 56 S.E. 524, 526 (W. Va. 1907). (emphasis added)

16. The Court points out that in 1992, West Virginia adopted the “Uniform Statutory Rule Against Perpetuities” (USRAP), WV Code §36-1A-1, which contains the following provision:

If a nonvested property interest or a power of appointment was created before the effective date of this article and is determined in a judicial proceeding, commenced on or after the effective date of this article, to violate this state’s rule against perpetuities as that rule existed before the effective date of this article, a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor’s manifested plan of distribution and is within the limits of the rule against

perpetuities applicable when the nonvested property interest or power of appointment was created.

17. In this case, a reformation of the “Option to Repurchase” following the Plaintiff’s theory will be most inequitable and prejudicial to Dr. Black since, as pointed out in Defendant’s Response, a forced repurchase of the real estate only, prior to the last year of the 99 year term would effectively destroy Dr. Black’s medical practice and his Ambulatory Surgery Center (ASC), damaging him in excess of two million dollars (\$2,000,000) and granting St. Joseph’s a windfall.

18. Judge Keeley points out, “Reformation under the USRAP is an inherently equitable action.” USRAP §5 cmt. (amended 1990); 66 Am. Jur. 2D reformation of Instruments §3 (2007).

19. The only fair re-interpretation would be that the right to repurchase existed for the one year period being the 21<sup>st</sup> year after the execution of the contract, in which event, St. Joseph’s has failed to file a notice timely.

20. Defendant respectfully cites the authority relied upon by Judge Keeley as follows:

a. Page 15 of the Memorandum Opinion and Order, First Huntington Nat. Bank v. Gideon-Broh Realty Co., 79 S.E.2d 675, 684 (W. Va. 1953);

b. Page 16 of the Memorandum Opinion and Order, Greco v. Meadow River Coal & Land Co., 113 S.E.2d 79, 83 (W. Va. 1960)

c. Page 16 of the Memorandum Opinion and Order, Cattail Associates, Inc. v. Sass, 907 A.2d 828, 840 (Md. Ct. Spec. App. 2006)

d. Page 16 of the Memorandum Opinion and Order, Fitchie v. Brown, 211 U.S. 321, 334 (1908)

e. Page 16 of the Memorandum Opinion and Order, Symphony Space, Inc. v. Pergola Properties, Inc., 669 N.E.2d 799, 806 (N.Y. 1996)

f. Page 17 of the Memorandum Opinion and Order, USRAP §5 cmt. (amended 1990)

g. Page 17 of the Memorandum Opinion and Order, 66 Am. Jur. 2D reformation of Instruments §3 (2007)

21. Dean Fisher states in his letter, "My opinion is reflective of my teaching of Property Law for over forty years and my research and writing on the subject area."

22. Dean Fisher has rendered three opinions. They are:

...The drafters of the "option to repurchase" by labeling paragraph 3 as "Notice of Exercise" and paragraph 5 as "Time During Which Option May be Exercised" clearly tells the reader the purpose of each section and makes it possible for the instrument to be read as a whole, not ignoring or disregarding any of its provision.

To read it otherwise would create an internal inconsistency that is not necessary and is inconsistent with the directions of the Court quoted above and the subheadings of the various paragraphs provided by the draftee...

...As we have discussed, the agreement, as drafted violates the common law rule against perpetuities. The facts of this case are very similar to a case decided by Judge Keeley in 2007. Like Judge Keeley's case, the agreement was entered into before West Virginia adopted the Uniform Statutory Rule Against Perpetuities ("USRAP") in 1992 and decided following its adoption. For the purpose of discussion, if one were to assume the Plaintiff's interpretation is correct, it leaves the Plaintiff with what I believe is an insurmountable Rule Against Perpetuity problem. If one accepts the Plaintiff's reading of the documents, I believe the agreement becomes patently inequitable, and a court would hold exactly as Judge Keeley did and the court would refuse to exercise its equitable power to reform the document...

...In conclusion, I note that I am in agreement with the interpretation of the documents involved in this case as articulated in your (Dr. Black's) motion to dismiss and the substance of your Response to the Plaintiffs notion (sic) for summary judgment...

23. It appears that Dean Fisher's opinion relative to the common-law "Rule Against Perpetuities" and West Virginia's "Rule Against Perpetuities" relies upon facts which are not in dispute and which, in fact, accepts as true St. Joseph's' statement of facts.

24. The "Option to Repurchase" which St. Joseph's is attempting to enforce, is, as is the "repurchase option" in Judge Keeley's opinion in the case of Mancuso v. Meadowbrook, Supra., void and unenforceable because it is violative of "The Rule Against Perpetuities". (see Petitioner's Proposed Appendix on page 322)

25. As previously submitted to the Court, Dean Fisher, in paragraphs 9 and 11 (page 2) of his letter opinion, states his belief that paragraph 5 is controlling when he says:

...The fifth paragraph is entitled "TIME DURING WHICH OPTION MAY BE EXERCISED:" The crucial part of this paragraph, for present purposes, provides "This first option will be exercised by giving written notice as set forth in paragraph 3 herein which notice can only be given at any time within one year prior to the date of the expiration of this option, or within ninety (90) days after a notice of default is tendered in the manner and terms required by provision 7 of the "Memorandum Agreement By and Between (Physician) and St. Joseph Hospital" bearing date of the 3rd day of June, 1982, and executed by the parties hereto." This paragraph also contains a provision dealing with the building being destroyed or damaged, which is not applicable to the present litigation. While it would perhaps have been clearer if the word "exercised" would have been used instead of "given" preceding the words "at any time within one year", in my opinion, the meaning of the paragraph is unambiguous when read in context of the entire document and the subtitle of this paragraph...

...The construction set forth above follows the guidance provided by the West Virginia Supreme Court of Appeals to construe "a deed, will, or other written instrument... as a whole, taking and considering all the parts together, and giving the effect to the intentions of the parties wherever that is reasonably clear and free from doubt..." The drafters of the "option to repurchase" by labeling paragraph 3 as "Notice of Exercise" and paragraph 5 as "Time During Which Option May be Exercised" clearly tells the reader the purpose of each section and makes it possible for the instrument to be read as a whole, not ignoring or disregarding any of its provision...

26. Paragraph 5 of the Option to Repurchase clearly states that during a one year window of opportunity, between the 98<sup>th</sup> year and the 99<sup>th</sup> anniversary year from the date of the contract, St. Joseph's can buy back the property for "fair market value".

27. This makes sense. The 99<sup>th</sup> year can be argued to be the full life expectancy of the building in question. This option gives St. Joseph's the right to repurchase the property before Dr. Black, or his successor, gets the property for another ninety-nine (99) years. The option clearly gives the parties the benefit of their bargain. But, the contract violates the Rule Against Perpetuities.

28. It would also make sense that St. Joseph's retain a right of first refusal, as Dr. Black thought they did, but they have waived any such right.

29. St. Joseph's "Statement of Facts" fails to address the questions of why the parties would agree to permit the buyer to construct something likely to last at least 100 years but force him to sell it back before he ever could use it? That is what St. Joseph's interpretation requires.

30. Any evaluator of the facts of this case should keep in mind the identity of the parties. The owner of this property is the Catholic Church which has existed for 2,000+ years. Dr. Black would prove at trial that the Catholic Church has a policy of never giving up its property permanently.

31. To clarify; it was explained to Dr. Black by St. Joseph's representatives that the Catholic Church has a policy of not conveying property in fee simple, and, specifically, that St. Joseph's land immediately adjacent to the hospital building would not be conveyed away without giving the hospital some option to reacquire it in the future.

32. Syllabus Point 2 in the case of Patricia E. Lee v. Charles W. Lee, 228 W.Va.483; 721S.E.2d 53 (W.Va. 2011) states,

2. The mere fact that parties do not agree to the construction of a contract does not rendered it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court.

33. Syllabus Point 3 in Lee v. Lee, supra., states,

3. Contract language is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken.

34. This Court in Lee v. Lee, also states,

Generally, whenever the language of a contractual provision is reasonably susceptible of two different meanings or where reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous. Syllabus Point 1, Shamblin v. Nationwide Mut. Ins. Co., 175 W.Va. 337, 332 S.E.2d 639 (1985)

35. The case of Moore v. Chesapeake & O. Ry., 493 F. Supp. 1252 (S.D.W.Va. 1980), states,

A contract's language must be accorded its plain meaning and, where plain, the language must be given full effect.

36. The Court, in the cases of Cardinal State Bank, Nat'l Ass'n v. Crook, 184 W. Va. 152, 399 S.E.2d 863 (1990) and Kelley, Gridley, Blair & Wolfe, Inc. v. Parkersburg ex rel. Parkersburg San. Bd., 190 W. Va. 406, 438 S.E.2d 586 (1993) states,

Extrinsic evidence of statements and declarations of the parties to an unambiguous written contract occurring contemporaneously with, or prior to, its execution is inadmissible to contradict, add to, detract from, vary or explain the terms of such contract, in the absence of a showing of illegality, fraud, duress, mistake or insufficiency of consideration.

37. The Court, in the case of Melbourne Bros. Constr. Co. v. Pioneer Co., 181 W. Va. 816, 384 S.E.2d 857 (1989) states,

A valid written instrument which expresses the intent of the party in plain and unambiguous language is subject to judicial construction or interpretation but will be applied and enforced according to such intent.

38. Michie's Jurisprudence, Contracts, §40, book 4A, page 428, (1999), recited WV law when it states,

It is only where the language of a contract is ambiguous and uncertain and susceptible of more than one construction that a court may, under the well-established rules of construction, interfere to reach a proper construction and make certain that which in itself is uncertain. Griffin v. Coal Co., 59 W.Va. 480, 53 S.E. 24 (1905)

39. The case of Aetna Cas. & Sur. Co. v. Fireguard Corp., 249 Va. 209, 455 S.E.2d 229 (1995) states,

When a contract is ambiguous, a court should resort to parol evidence to ascertain the true intention of the parties.

40. The case of Douglas v. Hammett, 28 Va. App. 517, 507 S.E.2d 98 (1998) states,

An ambiguity exists when the language admits of being understood in more than one way or refers to two or more things at the same time. <sup>1</sup>

41. Michie's Jurisprudence, Contracts, §40, book 4A, page 429, (1999), states,

The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court. Berkeley County Pub. Serv. Dist. v. Vitro Corp. of America, 152 W.Va. 252, 162 S.E.2d 189 (1968); Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 196 W.Va. 97, 468 S.E.2d 712 (1996); Jessee v. Aycoth, 202 W. Va. 215, 503 S.E.2d 528 (1998)

42. Michie's Jurisprudence, Contracts, §41, book 4A, page 429, (1999), states,

Where it is necessary to determine the meaning of words not of certain and definite import, consideration will be given to the situation of the parties, the subject matter of the contract, the acts of the parties thereunder, the purpose sought to be accomplished thereby, and the general circumstances attending its execution. Wetterwald v. Woodall, 83 W.Va. 647, 98 S.E. 890 (1919); Butler v. Carlyle, 84 W.Va. 753, 100 S.E. 736 (1919); Garrett v. Patton, 81 W.Va. 771, 95 S.E. 437 (1918); Raleigh Lumber Co. v. Wilson & Son, 69 W.Va. 598, 72 S.E. 651 (1911); Knotts v. Bartlett, 83 W.Va. 525, 98 S.E. 590 (1887); Bragg v. Peytona Lumber Co., 102 W.Va. 587, 135 S.E. 841 (1926)

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<sup>1</sup> Note: In the case at bar there are two (2) different notice paragraphs with apparently different meanings.

43. Michie's Jurisprudence, Contracts, §42, book 4A, page 431-432, (1999), states,

Every contract ought to be construed so as to give effect according to the real intent of the parties, to be collected from all the terms of the agreement; and when the expressions are equivocal, such intent gathered from the whole of the instrument must determine the meaning of such expressions. If the terms conflict or are so inconsistent that the intent of the parties cannot be ascertained the contract may be nugatory by reason of such uncertainty, which is a consequence to be avoided, if possible. The parties must have intended something by their agreement, and they are presumed to have intended that which renders their agreement valid and capable of performance, not that which renders it void and impossible of execution. Taylor v. Taylor, 176 Va. 413, 11 S.E.2d 587 (1940); Bell v. Hagmann, 200 Va. 626, 107 S.E.2d 426 (1959)

44. The case of Cobbs v. Fontaine, 24 Va. (3 Rand.) 484 (1825) states,

A construction which will render the contract frivolous or ineffectual must be avoided.

45. Michie's Jurisprudence, Contracts, §42, book 4A, page 433, (1999), states,

Particular clauses or passages are not to be wrested from their context so as to destroy the unity of the contract and create conflict where there should be agreement. Baeber v. Fire & Marine Ins. Co., 16 W. Va. 658 (1880)

46. Michie's Jurisprudence, Contracts, §42, book 4A, page 433, (1999), states,

On the contrary, a desire to effectuate the intentions of the parties creates the necessity of looking to all the constituent elements of the contract, elucidating one by the other, and reconciling them, if practicable, to one common intent or design present to the minds of the contracting parties. Merchants Ins. Co. v. Edmond, etc., Co., 58 Va. (17 Gratt.) 138 (1866)

47. Michie's Jurisprudence, Contracts, §43, book 4A, page 434, (1999), states,

A contract not clear and free from ambiguity must receive a reasonable construction found as a matter of intent in the nature and condition of the subject, the situation of the parties and the purposes they had in view, subject to the limitation of consistency with the terms used. Conklyn v. Shenandoah Milling Co., 68 W.Va. 567, 70 S.E. 274 (1911); Young v. Ellis, 91 Va. 297, 21 S.E. 480 (1895).

48. Michie's Jurisprudence, Contracts, §43, book 4A, page 435, (1999), states,

A contract will not be construed so as to inflict unreasonable hardship, unless its terms clearly impose it. Carper v. United Fuel Gas Co., 78 W. Va. 433, 89 S.E. 12 (1884)

49. Michie's Jurisprudence, Contracts, §44, book 4A, page 435, (1999), states,

In the construction of a written instrument, in cases of doubt, the language is to be taken most strongly against the party using it. Epes v. Hardaway, 135 Va. 80, 115 S.E. 712 (1923); Castner, Curran & Bullitt, Inc. v. Sudduth Coal Co., 282 F. 602 (4<sup>th</sup> Cir. 1922); Price v. Stonega Coke, etc., Co., 26 F. Supp. 172 (S.D.W.Va. 1938), aff'd, 106 F.2d 411 (4<sup>th</sup> Cir.), cert. denied, 308 U.S. 618, 60 S. Ct. 263, 84 L. Ed. 516 (1939); Scott v. Goode, 152 Va. 827, 148 S.E. 689 (1929); Williams v. Benedict Coal Corp., 181 Va. 478, 25 S.E.2d 251 (1943); Worrie v. Boze, 191 Va. 916, 62 S.E.2d 876 (1951); Consolidated Sales Co. v. Bank of Hampton Roads, 193 Va. 307, 68 S.E.2d 652 (1952); Russell Co. v. Carroll, 194 Va. 699, 74 S.E.2d 685 (1953); Lewis v. Barnes Contracting Co., 179 F. Supp. 673 (N.D.W.Va. 1959); Hutchinson v. King, 206 Va. 619, 145 S.E.2d 216 (1965); United States v. Morrison, 370 F. Supp. 193 (E.D.Va. 1974).

50. The case of Williams v. First Fed. Sav. & Loan Ass'n, 651 F.2d 910 (4<sup>th</sup> Cir. 1981), aff'g 500 F.Supp. 307 (E.D. Va. 1980), states,

While it is true that **ambiguities are resolved against the party preparing the contract**, where a document is clear and unambiguous, the doctrine does not apply. (emphasis added)

51. Michie's Jurisprudence, Contracts, §44, book 4A, page 435-437, (1999), states,

Thus, where various stipulations are contained in a contract, some of which are particularly intended for the benefit of one of the parties, and others of which are particularly intended for the benefit of the other party, it is fair to say that the language of such provisions should be regarded as that of the party in whose favor they are inserted, and therefore to be construed most strongly against such party. However, this rule of construction is not favored by the courts and should not be invoked where the language of the contract is clear. Standard Ice Co. v. Lynchburg Diamond Ice Factory, 129 Va. 521, 106 S.E. 390 (1921); Russell Co. v. Carroll, 194 Va. 699, 74 S.E.2d 685 (1953). See United States v. Newport News Shipbuilding & Dry Dock Co., 130 F. Supp. 159 (E.D.Va.), aff'd, 266 F.2d 137 (4<sup>th</sup> Cir. 1955)

52. Michie's Jurisprudence, Contracts, §44, book 4A, page 437, (1999), states,

It is said that uncertainties should be resolved against the party who prepares an intricate and involved contract. Charleton v. Chevrolet Motor Co., 115 W.Va. 25, 174 S.E. 570 (1934); Correct Piping Co. v. City of Elkins, 308 F. Supp. 431 (N.D.W.Va. 1970)

53. Michie's Jurisprudence, Contracts, §44, book 4A, page 437, (1999), states,

Provisions of a contract effecting a forfeiture or exacting a penalty are strictly construed **against** the party for whose benefit they were incorporated in the instrument. Peerless Carbon Black Co. v. Gillespie, 87 W.Va. 441, 105 S.E. 517 (1920) (emphasis added)

54. Michie's Jurisprudence, Contracts, §45, book 4A, page 438-439, (1999), states,

A valid contract expressing the intent of the parties in unambiguous language will be applied and enforced according to such intent, and without resort to matters extrinsic to such contract. Babcock Coal, etc., Co. v. Brackens Creek Coal Land Co., 128 W. Va. 676, 37 S.E.2d 519 (1946)

55. Michie's Jurisprudence, Contracts, §48, book 4A, page 449, (1999), states,

When a contract is to be construed, a well-settled rule based on common sense is that the whole contract should be considered in determining the meaning of any or all its parts. Heatherly v. Farmers' Bank, 31 W.Va. 70, 5 S.E. 754 (1888); Johnson v. Welch, 42 W.Va. 18, 24 S.E. 585 (1896); Huddleston v. Mariotti, 143 W.Va. 419, 102 S.E.2d 527 (1958)

56. Michie's Jurisprudence, Contracts, §48, book 4A, page 450, (1999), states,

Thus, the whole instrument is to be considered; not any one provision only, but all its provisions; not the words merely in which they are expressed, but their object and purpose, as disclosed by the language, by the subject matter and the condition and relation of the parties. Millan v. Kephart, 59 Va. (18 Gratt.) 1 (1867); White v. Sayers, 101 Va. 821, 45 S.E. 747 (1903). See Epes v. Hardaway, 135 Va. 80, 115 S.E. 712 (1923); Foltz v. Conrad Realty Co., 131 Va. 496, 109 S.E. 463 (1921); Johnson v. Johnson, 138 Va. 487, 122 S.E. 100 (1924); Tabb v. Archer, 13 Va. (3 Hen. & M.) 399 (1809); Talbott v. Richmond & D. R. Co., 72 Va. (31 Gratt.) 685 (1879); State v. County Court, 105 W.Va. 589, 148 S.E. 674 (1928); Worrie v. Boze, 191 Va. 916, 62 S.E.2d 876 (1951); Clyborne v. McNeil, 201 Va. 765, 113 S.E.2d 672 (1960); Eastern Gas & Fuel Associates v. Midwest-Raleigh, Inc., 374 F.2d 451 (4<sup>th</sup> Cir. 1967), rev'g 253 F. Supp. 954 (N.D.W.Va. 1966), cert. denied, 389 U.S. 951, 88 S. Ct. 333, 19 L. Ed. 2d 360 (1967).

57. Michie's Jurisprudence, Contracts, §48, book 4A, page 451, (1999), states,

No word or clause in a contract is to be treated as meaningless if any reasonable meaning consistent with the other parts of the contract can be given to it, and no word or clause should be discarded unless the other words used are so specific and clear in contrary meaning as to convincingly show it to be a false demonstration. Ames v. American Nat. Bank, 163 Va. 1, 176 S.E. 204 (1934). See Smith v. Ramsey, 116 Va. 530,

82 S.E. 189 (1914); American Health Ins. Corp. v. Newcomb, 197 Va. 836, 91 S.E.2d 447 (1956); Moore v. Johnson Serv. Co., 158 W. Va. 808, 219 S.E.2d 315 (1975)

58. Michie's Jurisprudence, Contracts, §49, book 4A, page 453, (1999), states,

Where two contracts are so connected as to be parts of the same transaction, they will be read together, and **the court may look to one in construing the other.** (emphasis added) Preston v. Heishell, 73 Va. (32 Gratt.) 48 (1879); Byrd v. Ludlow, 77 Va. 483 (1883); George v. Cooper, 15 W. Va. 666 (1879)

59. Michie's Jurisprudence, Contracts, §48, book 4A, page 453, (1999), states,

Thus, where two papers are executed at the same time, or contemporaneously, between the same parties, in reference to the same subject matter, **they must be regarded as parts of one transaction** and receive the same construction as if their several provisions were in one and the same instrument. (emphasis added) Oliver Refin. Co. v. Portsmouth etc., Refin. Corp., 109 Va. 513, 64 S.E. 56 (1909); Dime Deposit, etc., Bank v. Westcott, 113 Va. 567, 75 S.E. 179 (1912); Anderson v. Harvey, 51 Va. (10 Gratt.) 386 (1853); French v. Townes, 51 Va. (10 Gratt.) 513 (1853); Osborne v. Cabell, 77 Va. 462 (1883); King v. Norfolk & W.R. Co., 90 Va. 210, 17 S.E. 868 (1893); Walden v. Walden, 74 Va. (33 Gratt.) 88 (1880); Nye v. Lovitt, 92 Va. 710, 24 S.E. 345 (1896); Bolling v. Hawthorne Coal & Coke, Co., 197 Va. 554, 90 S.E.2d 159 (1955).

60. Petitioner, therefore, respectfully notes that “ambiguous contracts”:

a. Allow the admission of “parol evidence”; that is, evidence from sources outside of the four corners of the written agreement; (Petitioner would have presented evidence if an evidentiary hearing was permitted.)

b. Will be construed against the person asserting it; and

c. Will be construed against the drafter of the contract especially if the drafter is a lawyer and the other party is unrepresented.

61. St. Joseph's interpretation results in an abomination of a contract, one in which St. Joseph's could have sent Dr. Jerry Black the notice of repurchase the day that he finished the construction, depriving him of the benefit of his contract.

62. It is apparent that the bank insisted on an iron clad proof of absolute ownership and the loan would not have been considered had the bank believed St. Joseph's Option to Repurchase could be exercised at any time prior to the last year of the 99 year provision. Petitioner would have presented witness testimony had an evidentiary hearing been scheduled.

63. Dr. Black should not suffer from the mistake of St. Joseph's lawyer in drafting the agreement, and even an honest mistake of Dr. Black, if it gives St. Joseph's a windfall.

64. The deed to Dr. Black really means something. It means that he owns the property, has unfettered use of it for 99 years, and owns it permanently IF the hospital does not exercise the repurchase option during the "operant period" (the last year of the 99 year period).

65. St. Joseph's gets the property back IF it elects during the final year to exercise its option to repurchase for fair market value.

66. Dr. Black's desire was to construct a business from which to operate his practice during an entire 30-50 year career and to have something valuable to sell to someone else, and St. Joseph's desired to have such a structure, and the one Dr. Black was to build for the hospital, while also being able to protect itself through the right of first refusal and the repurchase at the end. **Those compatible goals are met by Dr. Black's interpretation, but certainly not by the Hospital's.**

67. The contract, as it exists, has a clear provision for the one year final window.

68. If St. Joseph's will not accept the right of first refusal instead of their asserted, draconian buy-back provision, St. Joseph's should be the one to suffer because, Dr. Black relied on an unambiguous notice provision, paragraph 5, of the Option to repurchase.

69. That paragraph must prevail because the “ambiguous contract” must be construed against:

- a. The party asserting the buy-back provision;
- b. The party who drafted the complicated contract; and
- c. The party seeking Summary Judgment.

70. The transcripts of the hearings conducted on October 1, 2012 and June 21, 2013 are fully supportive of the Dr. Black’s position in this case.

71. The erroneous orders were the product of the counsel for St. Joseph’s.

**The Court, therefore, erred by denying Defendant his day in Court on disputed factual and legal issues.**

1. The 5th Amendment of the US Constitution, states,

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.** (emphasis added)

2. The 14th Amendment of the US Constitution, states,

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.** (emphasis added)

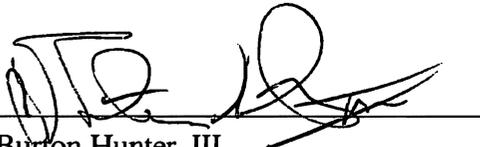
**CONCLUSION**

In light of the foregoing, Petitioner believes that the Order tendered by Dr. Black's counsel, which reflects the agreement of the parties at the hearing, and the precise ruling of the Court, be entered forthwith and that the Order submitted by St. Joseph's counsel that was ultimately entered be set aside.

Only in the alternative that this matter be remanded to the Circuit Court of Upshur County, West Virginia if this Court determines that factual development or trial on all issues is necessary. If it is found the agreements are unenforceable, the complaint should be dismissed and attorney fees and damages awarded to Dr. Black. If enforceable, the terms of the contract should be interpreted by the Court. The Petitioner is entitled to his day in Court to argue the validity of the Option to Repurchase and the ambiguity of the Option to Repurchase.

Dr. Black also moves for attorneys' fees and such sanctions as this Court deems appropriate.

Respectfully Submitted,  
JERRY N. BLACK, M.D., Petitioner  
By Counsel

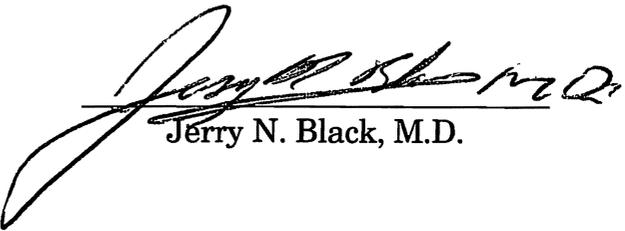


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STATE OF WEST VIRGINIA,

COUNTY OF UPSHUR, TO-WIT:

I, Jerry N. Black, M.D., being first duly sworn, says that the facts and allegations set forth in the *Petitioner's Brief* are true and correct, except insofar as they are therein stated to be upon information and belief, he believes them to be true and correct.

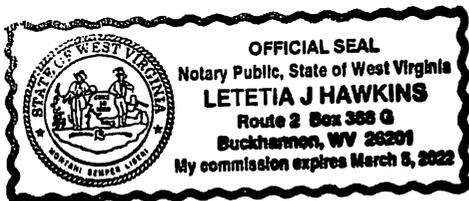
  
Jerry N. Black, M.D.

Taken, sworn to and subscribed before me this 5<sup>th</sup> day of December, 2013 by  
Jerry N. Black, M.D.

My commission expires: March 5, 2022

Letetia J Hawkins

Notary Public



**CERTIFICATE OF SERVICE**

I, J. Burton Hunter, III, attorney for Jerry N. Black, do hereby certify that I served the foregoing *Petitioner's Brief* upon the following counsel by depositing a true copy thereof in the United States Mail, with postage prepaid in envelopes addressed as follows:

Robert M. Sellards  
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Post Office Box 1856  
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Dated this 5th day of December, 2013.

  
\_\_\_\_\_  
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