

**SAY WHAT? THE RESOLUTION OF AMBIGUOUS WRITTEN
AGREEMENTS IN WEST VIRGINIA**

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I. INTRODUCTION

In West Virginia, a written agreement that expresses the intent of the parties in “plain and unambiguous language” is not subject to judicial construction or interpretation, but will be strictly applied as a matter of law.¹ Of course, instruments that express the parties’ intent in plain and unambiguous language are rarely litigated. Rather, it is the vague, incomplete, or inconsistent term that usually gives rise to conflict. The purpose of this Article is to describe the methodology West Virginia courts use to resolve such ambiguity in contracts, deeds, leases, and other written agreements. This Article is not intended to serve as a comprehensive survey of the law on this expansive topic, though the author hopes to provide the reader with a summary of the “rules” regarding the interpretation of ambiguity, as well as a brief discussion of the most pertinent jurisdictional cases related to each of those rules.

Section II of this Article addresses the question of what constitutes ambiguity within written agreements. Section III describes three recent cases in which the Supreme Court of Appeals of West Virginia applied the terms of unambiguous written agreements. Section IV provides two examples in which the court used extrinsic evidence to help supplement or complete ambiguous terms as matters of law, rather than fact. Section V describes two cases in which the responsibility for resolving ambiguous terms in a written agreement was delegated to a jury for resolution as a matter of fact, rather than law. This Article concludes with a summary of the case law discussed in Sections II through V.

II. CONFUSING THE EDUCATED AND FRUSTRATING THE UNLEARNED: WHAT IS AMBIGUITY?

Generally, when a disputed written agreement is deemed “ambiguous,” it is interpreted by a judge or a jury, usually with the aid of extrinsic evidence,

¹ See, e.g., *Orteza v. Monongalia Cnty. Gen. Hosp.*, 318 S.E.2d 40, 43 (W. Va. 1984) (quoting Syl. Pt. 2, *Bethlehem Mines Corp. v. Haden*, 172 S.E.2d 126, 126 (W. Va. 1969)) (“Where the terms of a contract are clear and unambiguous, they must be applied and not construed.”); see also Syl. Pt. 3, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 128 S.E.2d 626, 628 (W. Va. 1962) (“It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.”).

and enforced in accordance with the parties' intent.² When extrinsic or parol evidence contradicts an ambiguous writing, questions of fact are raised and should be submitted to a jury.³ When, on the other hand, extrinsic evidence merely clarifies or completes the disputed terms of an ambiguous contract, the question of what the parties intended to agree to remains a question of law for the court.⁴ Not surprisingly, if the court determines that the agreement in question is unambiguous, it will apply the agreement without reviewing any extrinsic evidence.

Because the outcome of so many contract disputes turns on the admission or exclusion of extrinsic evidence, the question of whether a contract is "ambiguous" is often a zealously contested one. But what is ambiguity? The Supreme Court of Appeals of West Virginia has repeatedly held that an agreement "is considered ambiguous where [its] 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."⁵

Generally, ambiguity can be categorized as "patent" or "latent." Patent ambiguity is apparent on the face of an instrument to anyone reviewing it, even if the reviewer is unfamiliar with the circumstances of the parties.⁶ A typo in which a parenthetical numeral differs from the associated written number is perhaps the simplest example of a patent ambiguity, such as "Grantor does hereby convey one-hundred and ten (110) acres of coal to Grantee." As a general rule, courts do not resort to parol evidence to resolve such ambiguities.⁷ Although the jurisdictional case law involving patent ambiguity is sparse, the Supreme Court of Appeals of West Virginia has contradicted⁸ and disregarded⁹ the general rule by allowing the admission of parol evidence. To date, the court has declined to set a standard regarding the admission of parol evidence to resolve patent ambiguities, and it is unlikely to do so going forward, given the low volume of litigation involving that type of ambiguity.

Latent ambiguities, in contrast, are frequently alleged and often vigorously contested. A latent ambiguity results "when the instrument upon its

² See *Energy Dev. Corp. v. Moss*, 591 S.E.2d 135, 144 (W. Va. 2003).

³ See *Stewart v. Blackwood Elec. Steel Corp.*, 130 S.E. 447, 449 (W. Va. 1925).

⁴ *Id.* at 450.

⁵ *City Holding Co. v. Kaufman*, 609 S.E.2d 855, 859–60 (W. Va. 2004) (noting that ambiguity in a statute or other instrument consists of susceptibility of two or more meanings and uncertainty as to which was intended; mere informality in phraseology or clumsiness of expression does not make it ambiguous if the language imports one meaning or intention with reasonable certainty).

⁶ See *Allegheny Int'l v. Allegheny Ludlum Steel Corp.*, 40 F.3d 1416, 1424 (3d Cir. 1994).

⁷ See *Devendorf v. W. Va. Oil & Oil Land Co.*, 17 W. Va. 135, 153 (1880).

⁸ See *Knowlton v. Campbell*, 37 S.E. 581, 582 (W. Va. 1900).

⁹ See *Devendorf*, 17 W. Va. at 154–55.

face appears to be clear and unambiguous, but there is some collateral matter which makes the meaning uncertain.”¹⁰ In determining whether an instrument is latently ambiguous, courts will assess the “everyday meaning” of the words it contains.¹¹ Hyper-technical, esoteric definitions are ignored, as parties to a contract “are not expected to be wordsmiths, schooled in the craft of lexicology . . . because the law disfavors the employment of arcane[,] subtle definitions of common words which but promise to confuse even the educated and frustrate the unlearned.”¹²

*Energy Development Corp. v. Moss*¹³ presents one example of the Supreme Court of Appeals of West Virginia’s approach to determining whether a latent ambiguity existed in a contract. In 1986, Hall Mining Company (Hall) leased oil and gas to Energy Development Corporation (EDC).¹⁴ The disputed lease conveyed to EDC the right to develop

all of the oil and gas and all of the constituents of either in and under the land hereinafter described in all possible productive formation therein and thereunder within the definition and meaning of the term “shallow well” as set forth and defined in [the West Virginia Code].¹⁵

The lease included no explicit reference to coalbed methane (CBM) development rights, and EDC had not engaged in CBM development at the time the lease was signed.¹⁶

Hall subsequently sold the right to extract CBM from the property in question to GeoMet, Inc. in 2001.¹⁷ EDC sued Hall stating that the term “all oil and gas” included the right to extract CBM.¹⁸ A bench trial took place in the Circuit Court of McDowell County, during which EDC argued that “the broad, ‘all gas’ language in the 1986 [deed] conveyed to it the right to develop the coalbed methane”¹⁹

¹⁰ *Energy Dev. Corp. v. Moss*, 591 S.E.2d 135, 144 (W. Va. 2003) (citing *Collins v. Treat*, 155 S.E. 205, 206 (W. Va. 1930)).

¹¹ *See Payne v. Weston*, 466 S.E.2d 161, 171 n.7 (W. Va. 1995).

¹² *Id.*

¹³ 591 S.E.2d 135 (W. Va. 2003).

¹⁴ *Id.* at 139.

¹⁵ *Id.*; *see also* W. VA. CODE § 22C-8-2(21) (1994) (defining “shallow well” as “any gas well drilled and completed in a formation above the top of the uppermost member of the ‘Onondaga Group’”).

¹⁶ *See Energy Dev. Corp.*, 591 S.E.2d at 139.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 141.

The circuit court disagreed, deemed the lease ambiguous, and denied EDC's request for summary judgment.²⁰ On appeal, the Supreme Court of Appeals of West Virginia affirmed the circuit court's decision, finding that, because CBM was rarely extracted or sold at the time the 1986 lease was executed, it was possible that neither party contemplated the transfer of CBM as part of the leasehold estate conveyed in that instrument.²¹ The lease, the court held, was therefore latently ambiguous,²² and raised a question of fact to be resolved by the jury with the aid of extrinsic evidence.²³

III. WHEN A WRITTEN AGREEMENT IS PLAIN AND CLEAR: "NIMBLE MENTAL GYMNASTICS" WILL NOT CREATE ARTIFICIAL AMBIGUITY

Where an integrated agreement's terms are unambiguous, "there can be no doubt that it is for a trial court . . . to construe the contract according to its plain meaning."²⁴ Courts do not interpret or reconstruct unambiguous written agreements. Rather, they are strictly applied in accordance with the terms to which the parties mutually agreed.²⁵ Following are three examples in which written agreements were deemed unambiguous and enforced according to their terms.

²⁰ *Id.* at 140–41.

²¹ *Id.* at 141 (affirming the lower court's assertion that "[a]n oil and gas lease entered into before any commercial coalbed methane wells had been permitted and drilled in West Virginia and before West Virginia law contemplated coalbed methane development which leased to the lessee 'all oil and gas' does not unambiguously grant the lessee the right to drill into the lessor's coal seams to produce coalbed methane").

²² *Id.* at 140 (noting that an agreement will be interpreted and construed as of the date of its execution). Though EDC claimed to have contemplated the possibility of extracting CBM from Hall's land, the circuit court made a specific finding that it regarded EDC's testimony on the matter "unreliable." EDC's president claimed to have traveled to the home of the original lessor to discuss the CBM issue; he could not remember any of the details of his visit, despite the fact that the lessor's home was "memorably located 300 yards from the road, through a gate, across a creek, high on a hill, and stuffed with the [lessor's] glass collection." *Id.*

²³ *Id.* at 145.

²⁴ Fraternal Order of Police v. City of Fairmont, 468 S.E.2d 712, 715 (W. Va. 1996).

²⁵ Supervalu Operations, Inc. v. Ctr. Design, Inc., 524 S.E.2d 666, 670 (W. Va. 1999) (citing Bennet v. Dove, 277 S.E.2d 617, 619 (W. Va. 1981)) ("It is the safest and best mode of construction to give words, free from ambiguity, their plain and ordinary meaning.").

A. Brewer v. Hospital Management Associates, Inc.: *Context Modifies the Term “Liability”*

In *Brewer v. Hospital Management Associates, Inc.*,²⁶ the Supreme Court of Appeals of West Virginia considered a case in which the plaintiff, Ms. Brewer, gave birth at Williams Memorial Hospital in 1975.²⁷ Brewer claimed that the hospital’s negligence in providing neonatal care resulted in severe brain damage to her son,²⁸ though she did not file suit until 1994.²⁹ In 1978, three years after the alleged medical malpractice occurred, Williams Memorial was purchased by defendant Hospital Management Associates, Inc. (HMA).³⁰

The contract for the sale of the hospital obligated HMA to assume “all accounts payable and other liabilities of Hospital, represented to be in the approximate amount of One Hundred Thousand Dollars”³¹ Brewer claimed that HMA’s assumption of “accounts payable and *other liabilities*” included medical malpractice claims.³² HMA countered that the terms of the contract limited HMA’s liability to financial, rather than legal, affairs.³³ HMA argued that if it had intended to assume liability for medical malpractice claims, the agreement would have explicitly placed that burden on HMA.³⁴

The court sided with HMA, finding that the phrase “other liabilities” was modified by “in the . . . amount of One Hundred Thousand Dollars.”³⁵ Brewer, in fact, conceded that her claim did not fall into the “One Hundred Thousand Dollars” category.³⁶ The court therefore concluded the contract for the sale of the hospital did not transfer legal liability to HMA for medical malpractice that occurred before the 1978 purchase, and Brewer’s claim against HMA was dismissed.³⁷

²⁶ 503 S.E.2d 17 (W. Va. 1998) (per curiam).

²⁷ *Id.* at 18.

²⁸ *Id.*

²⁹ *Id.* at 19.

³⁰ *Id.* at 18.

³¹ *Id.*

³² *Id.* at 19 (emphasis added).

³³ *Id.*

³⁴ *Id.* (“HMA counters that the contract specifically designated every liability it would incur from the purchase. Such designation did not include the liability asserted by the Brewers.”).

³⁵ *Id.* (“[T]he specific clause at issue . . . [includes] two liabilities: accounts payable and liabilities represented to be in the amount of about one hundred thousand dollars.”).

³⁶ *Id.*

³⁷ *Id.* at 19–20 (application of the terms of the liability clause precludes assumption of the liability asserted).

B. Bass v. Coltelli-Rose: Case Law and Black's Law Dictionary Modify the Term "Liability"

In September 1990, Douglas Bass, a minor and a passenger in a car driven by Douglas Weakley, was injured when Weakley's car was struck by a vehicle driven by Cary Dunham.³⁸ Mabel Bass, Douglas's mother, retained Laura Coltelli-Rose (Rose) to act as Douglas's attorney.³⁹ Mrs. Bass signed an "Authority to Represent" agreement, which authorized Rose to represent Douglas in claims against "Cary Dunham, *or whoever is liable for my son, Douglas Bass*'[s] injuries or damages resulting from an accident or incident which occurred on or about September 30, 1990[,] at Berkeley County, WV."⁴⁰ The agreement provided Rose with a one-third contingency fee, specifying that "the fee will be calculated on the entire amount of the recovery (settlement or verdict)."⁴¹

Rose successfully represented Bass, recovering monies from the following sources: \$25,000 from Weakley's State Farm Insurance policy (from which Rose deducted her \$8,333 contingency fee); \$200,000 from Dunham's liability insurance carrier (from which Rose deducted \$60,000); and \$21,666 from Mrs. Bass's own insurance carrier (from which Rose deducted \$7,221).⁴² Mrs. Bass, unhappy with Rose's deductions, retained another attorney who "subsequently demanded that Rose refund the one-third contingent fee she took from the \$25,000 medical payment benefit on the Weakley vehicle."⁴³ At the suggestion of the West Virginia State Bar, Rose voluntarily reduced her one-third contingency fee on Weakley's \$25,000 medical payment benefit to one-fourth.⁴⁴

Mrs. Bass was not satisfied. She filed suit against Rose in the Circuit Court of Berkeley County, demanding a full refund on the \$21,666 payment received from her insurance carrier, as well as a full refund on the Weakley payment.⁴⁵ Bass argued that the term "persons liable" contained in the Authority to Represent covered only wrongdoers responsible for Douglas's injuries and that the insurance payouts from Weakley's and Bass's insurance carriers did not qualify as payments from "persons liable."⁴⁶ The circuit court

³⁸ Bass v. Coltelli-Rose, 536 S.E.2d 494, 495 (W. Va. 2000) (per curiam).

³⁹ *Id.*

⁴⁰ *Id.* (emphasis added).

⁴¹ *Id.*

⁴² *Id.* at 495–96.

⁴³ *Id.* at 496.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 497.

granted summary judgment to Bass, finding the unambiguous agreement “did not cover . . . any mon[ies] which would be payable under any contract of insurance, except insurance carried by [Dunham]”⁴⁷

A divided Supreme Court of Appeals of West Virginia reversed the circuit court’s summary judgment order.⁴⁸ The majority declined to limit Rose’s right to collect contingency fees to “recoveries obtained from third-party tortfeasors.”⁴⁹ Rather, the court read “the plain wording of the provision in question to encompass *any recovery secured from a party who is legally obligated to compensate Douglas Bass* for the losses occasioned by [the accident].”⁵⁰

The majority’s decision turned on the definition of the word “liable” as used in the phrase “whoever is liable for injuries or damages resulting from [the] accident.”⁵¹ “[L]iable,” the majority wrote, “has expansive meaning, which encompasses a party being ‘bound or obliged in law or equity’; ‘responsible, answerable, or compellable to make satisfaction, compensation, or restitution’ . . . or ‘chargeable with, as liable for money.’”⁵² Under this broad reading of “liable,” Rose was entitled to contingency fees on payments from Bass’s and Weakley’s insurance carriers, *in addition to* payments from tortfeasors.⁵³

Justice Robin J. Davis, dissenting in part, admonished the majority for implementing an archaic and all-encompassing definition of the word “liable,” asserting that “ambiguity existed as to whether the contract permitted the recovery of . . . [contingency fees] from medical payments obtained from the Basses’ own insurer.”⁵⁴ Justice Davis declined to focus solely on the word “liable,” citing the modifying language in the “Authority to Represent” agreement.⁵⁵ “The controlling language,” she wrote, “is ‘liable for . . . injuries or damages resulting from [the] accident.’”⁵⁶ Such language did not necessarily encompass payments from “friendly” insurance carriers such as those that provided coverage to Weakley and Bass.⁵⁷ Thus, according to Justice Davis’s

⁴⁷ *Id.* at 496.

⁴⁸ *Id.* at 498.

⁴⁹ *Id.*

⁵⁰ *Id.* (emphasis added).

⁵¹ *Id.* at 497.

⁵² *Id.* (citing *Wilhelm v. Parkersburg, M. & I. Ry. Co.*, 82 S.E. 1089, 1091 (W. Va. 1914) (citing BLACK’S LAW DICTIONARY 915 (6th ed. 1990))).

⁵³ *Id.* at 498.

⁵⁴ *Id.* at 499 (Davis, J., dissenting in part).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

dissent, the language of the contract was ambiguous, and “[i]t is also well settled that any ambiguity in a contract must be resolved against the party who prepared it.”⁵⁸

C. Fraternal Order of Police v. City of Fairmont: “*Nimble Mental Gymnastics*” Do Not Change the Meaning of the Term “Per Year”

*Fraternal Order of Police v. City of Fairmont*⁵⁹ presents a third and equally straightforward example of the court reviewing and strictly applying the terms of an unambiguous contract. In 1992, a collective bargaining unit (Fraternal Order of Police) negotiated a wage increase for its constituent police officers with the City of Fairmont (Fairmont).⁶⁰ The written “Wage and Benefit Agreement” was executed by both parties on June 24, 1992, and called for a “4% *per year* wage increase, effective the first day of the fiscal year beginning immediately after execution of this agreement.”⁶¹ The agreement covered fiscal years 1992 and 1993.⁶²

The meaning of the term “a 4% per year wage increase” was called into question when Fairmont provided a wage increase for only one of the two fiscal years covered by the agreement.⁶³ The Fraternal Order of Police filed suit against Fairmont, stating that the term “a 4% per year wage increase” was “clear and unambiguous,” calling for a four percent wage increase for each of the two years that the contract covered.⁶⁴ Fairmont countered that the term “a 4% per year wage increase” should be interpreted in such a way that only one raise was actually promised during the two-year life of the contract,⁶⁵ noting that “the indefinite article ‘a’ precedes a singular noun (*i.e.*, a wage increase), rather than a plural noun (*e.g.*, wage increases).”⁶⁶ Fairmont argued that this ambiguity raised questions of fact that should be submitted to a jury to decide with the aid of extrinsic evidence.⁶⁷

⁵⁸ *Id.* (citing *Nisbet v. Watson*, 251 S.E.2d 744, 780 (W. Va. 1979)).

⁵⁹ 468 S.E.2d 712 (W. Va. 1996).

⁶⁰ *Id.* at 714.

⁶¹ *Id.* (emphasis added).

⁶² *Id.* (the agreement took effect on July 1, 1992, and expired on June 30, 1994; it is the author’s assumption that these dates represent the fiscal years 1992 and 1993).

⁶³ *Id.*

⁶⁴ *Id.* at 714–16.

⁶⁵ *Id.* at 717.

⁶⁶ *Id.*

⁶⁷ *Id.*

The Circuit Court of Marion County deemed the contract ambiguous and sent the matter to a jury for resolution.⁶⁸ The jury returned and the trial court entered a verdict in favor of Fairmont.⁶⁹ The Fraternal Order of Police appealed to the Supreme Court of Appeals of West Virginia, which reviewed the case under the “clearly erroneous” standard.⁷⁰

The Supreme Court of Appeals of West Virginia discarded Fairmont’s “artful” assertion that the term “a 4% per year wage increase” gave rise to ambiguity.⁷¹ While noting that Fairmont’s “mental gymnastics [were] indeed nimble,” the court refused to read any ambiguity into the agreement’s plain language.⁷² The court referenced the *Black’s Law Dictionary* definition of the term “per year,” which reads “the phrase ‘per year’ in a contract is the equivalent to the word ‘annually.’”⁷³ The terms “per year” and “annually” mean “by the year.”⁷⁴ Thus, the court held that “the only reasonable interpretation of the disputed language we can conceive is that the contract provided for a 4% wage increase in each and every year of the contract.”⁷⁵ In short, the court refused to interpret the contract at all, opting instead to apply its plain and unambiguous language.⁷⁶

IV. AMBIGUOUS CONTRACTS: WHEN THE EVIDENCE SUPPLEMENTS OR COMPLETES A WRITTEN AGREEMENT, INTERPRETATION OF THE PARTIES’ INTENT IS A MATTER OF LAW FOR THE COURT TO DETERMINE

Where the terms contained in an ambiguous contract are clarified or supplemented by parol evidence, the court will admit parol evidence and use it as an aid in resolving the agreement’s ambiguous terms as a matter of law.⁷⁷

⁶⁸ *Id.* at 714.

⁶⁹ *Id.*

⁷⁰ *Id.* at 715 (“When a trial court’s answers rest not on plain meaning but on differential findings by a trier of fact, derived from extrinsic evidence as to the parties’ intent with regard to an uncertain contractual provision, appellate review proceeds under the ‘clearly erroneous standard.’”).

⁷¹ *Id.* at 718 (“[Defendant’s] argument has the shrill ring of desperation.”).

⁷² *Id.*

⁷³ *Id.* at 717 (citing BLACK’S LAW DICTIONARY 1145 (6th ed. 1990)).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 718 (“The agreement is clear, and lengthy judicial proceedings [will] not make it any clearer.”).

⁷⁷ *See* *Stewart v. Blackwood Elec. Steel Corp.*, 130 S.E. 447, 449 (W. Va. 1925) (“[W]here the written contract is ambiguous and uncertain, parol evidence is admissible . . . [Where] the parol evidence be not in conflict, the duty remains with the court to construe the writing; otherwise, it becomes a jury question under proper instructions.”) (referencing *Watson v.*

The interpretation of ambiguous contracts is, not surprisingly, usually far more contentious than the strict application of the terms of unambiguous contracts. Here, the court must determine that ambiguity exists (often a controversial issue in and of itself) before admitting extrinsic evidence to determine what terms the parties agreed to when the contract was executed. The following cases provide examples of the Supreme Court of Appeals of West Virginia using extrinsic evidence to interpret ambiguous terms contained in a written agreement.

A. *Jessee v. Aycoth: The Absence of Material Terms Constitutes Ambiguity*

In *Jessee v. Aycoth*, the Supreme Court of Appeals of West Virginia considered a case in which a couple had agreed, as part of their divorce settlement, to sell their house, but did not set a deadline for the sale of that property.⁷⁸ After the former couple's oldest child left the residence, the ex-husband (Aycoth) contacted his ex-wife (Jessee) to encourage her to sell the home.⁷⁹ She took no action, and Aycoth petitioned the Mercer County Circuit Court to order her to sell the residence.⁸⁰ The circuit court deemed the divorce settlement ambiguous, concluding, "[N]othing in the agreement precluded the marital residence from being sold upon the child reaching 18 years of age."⁸¹ The circuit court then ordered Jessee to place the residence on the market for sale.⁸²

Jessee appealed the order, arguing that the absence of an agreement to sell the residence on a particular date or upon the occurrence of a particular event did not constitute ambiguity.⁸³ In reviewing Jessee's appeal, the Supreme

Buckhannon River Coal Co., 120 S.E. 390 (W. Va. 1923)); *see also* Fraternal Order of Police v. City of Fairmont, 468 S.E.2d 712, 716 n.7, 717 (W. Va. 1996) (concluding that when ambiguity exists in a contract, resolution will turn on the parties' intent).

⁷⁸ *See* *Jessee v. Aycoth*, 503 S.E.2d 528 (W. Va. 1998). The agreement stated in pertinent part that the

[Ex-wife] shall retain and keep possession of the residential premises of the parties . . . [Ex-husband] shall pay all taxes, mortgage payments, or loss or casualty insurance premiums, upon said residence. . . . [Ex-wife] shall have the sole right to market and agree to the sale of said residential premises [A]t closing, the parties shall divide and receive equal shares of the equity in said residential premises.

Id. at 530.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 531.

⁸² *Id.*

⁸³ *Id.* at 530.

Court of Appeals of West Virginia reiterated its assertion that “[a]mbiguity in a statute or other instrument consists of susceptibility of two or more meanings and uncertainty as to which was intended. Mere informality in phraseology or clumsiness of expression does not make it ambiguous, if the language imports one meaning or intention with reasonable certainty.”⁸⁴ Under this standard, the court found that the Aycoth-Jessee settlement agreement was clear and unambiguous as to how profits from the sale of the residence would be split; however, for reasons it declined to explain, the court concluded that the agreement’s silence as to when the residence would be sold resulted in ambiguity.⁸⁵ Because the agreement was ambiguous, the court allowed for the admission of parol evidence to determine the parties’ intent regarding the date or time of sale.⁸⁶ Without identifying any specific parol evidence that indicated the parties intended to sell the residence when their oldest child reached eighteen years of age, the court affirmed the circuit court’s order to sell.⁸⁷

In a strong dissent, Justice Margaret L. Workman asserted that the divorce settlement was not in any way ambiguous, and should not have been altered by the court.⁸⁸ While the circuit court was correct in finding the agreement did not preclude the sale of the residence when the couple’s oldest child reached eighteen, Justice Workman stated, “nothing in the agreement *mandated* the sale of the marital residence upon the child’s majority.”⁸⁹ Justice Workman admonished the court for finding ambiguity “in order to render what the court believed to be a fairer result.”⁹⁰ After conceding that the ultimate result may have been more equitable, Justice Workman stated that “[b]oth of these parties were represented by lawyers in the negotiation of this agreement,” and if Aycoth intended for the home to be sold upon the occurrence of a particular event, his attorney should have ensured that the agreement reflected this intent.⁹¹ “Courts,” Justice Workman concluded, “should not be in the clean-up business for lawyers.”⁹²

⁸⁴ *Id.* at 531 (quoting Syl. Pt. 13, *State v. Harden*, 58 S.E. 715 (W. Va. 1907)).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 532.

⁸⁸ *Id.* at 533 (Workman, J., dissenting).

⁸⁹ *Id.* (emphasis in original) (noting that the settlement agreement gave Jessee the sole right to place the home on the market).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

B. *In re Joseph G.: Equity Plays a Significant Role in Resolving Ambiguity Contained in a Written Agreement*

In *In re Joseph G.*,⁹³ the Supreme Court of Appeals of West Virginia used extrinsic evidence to interpret, as a matter of law, the ambiguous terms contained in a health care provision contract. Here, defendant West Virginia Department of Health and Human Resources (DHHR) contracted with plaintiff Stepping Stone, Inc. (Stepping Stone), a non-profit residential child care facility, to provide health care for Joseph G.⁹⁴ Under the terms of the initial agreement (Agreement I), DHHR was obligated to pay Stepping Stone for Joseph G.'s per diem expenses (i.e., for room and board) and all health care services.⁹⁵ In November 2001, Joseph G. reached adulthood, and his eligibility for health care expenses expired.⁹⁶ His counsel, however, successfully moved for a waiver of the State's independent living age requirement, and Joseph G. remained at Stepping Stone until April 17, 2002.⁹⁷ While both parties agreed in writing (Agreement II) that after November 1, 2001, Joseph G.'s per diem expenses would be reimbursed by DHHR, neither DHHR nor Stepping Stone proposed a means of providing for Joseph G.'s health care expenses incurred between November 1, 2001, and April 17, 2002.⁹⁸ During that time, \$4,085 in health care expenses were incurred on Joseph G.'s behalf.⁹⁹

DHHR argued that Agreement II's silence on the issue of health care costs "plain[ly] and easily" indicated that Stepping Stone assumed responsibility for paying such expenses.¹⁰⁰ Agreement II stated that it "contains all the terms and provisions relating to the subject matter hereof and there are no other understandings, oral or otherwise."¹⁰¹ Thus, according to DHHR, Agreement II should have been strictly applied rather than construed by the court.¹⁰² Stepping Stone, in contrast, argued that Agreement II was ambiguous and that Agreement II's silence on the question of Joseph G.'s health care expenses did not equate to Stepping Stone's consent to pay those expenses.¹⁰³

⁹³ 589 S.E.2d 507 (W. Va. 2003).

⁹⁴ *Id.* at 509.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 510.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 511.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

The court agreed with Stepping Stone on the issue of ambiguity, as Agreement II “[did] not clearly indicate which party [was] responsible for payment of [the disputed monies].”¹⁰⁴ Such incomplete drafting made the contract ambiguous, and precluded the court from applying its plain language. Instead, the court opted to interpret the contract.¹⁰⁵ In order to interpret the contract, the court looked to Agreement I, which unambiguously provided that DHHR would cover Joseph G.’s health care expenses until adulthood, and briefly discussed the equitable concerns that *In re Joseph G.* presented, noting in particular that Joseph G. had no other means of financial support after November 1, 2001.¹⁰⁶

DHHR held the legal high ground in *In re Joseph G.* Agreement II assigned responsibility for specific costs to DHHR, but did not specify or even imply the assignment of health care costs to DHHR.¹⁰⁷ Indeed, Agreement I specifically assigned Joseph G.’s per diem and health care costs to DHHR, and it is unlikely that the parties would have simply forgotten to address those same costs in Agreement II. However, the court cited Agreement I as evidence that the parties intended to assign responsibility for Joseph G.’s health care costs to DHHR.¹⁰⁸ The court made no attempt to explain or justify the transfer of obligations from one old, ineffective agreement to a new agreement when there was no evidence (parol or otherwise) to indicate that such a resuscitation of extinguished obligations reflected the parties’ mutual intent.

In re Joseph G. appears to be a case tailor-made for the admission of parol evidence; yet notably absent from the court’s analysis was any reference to discussions (or the absence of discussions) that DHHR and Stepping Stone had when drafting Agreement II. No evidence was presented regarding whether the parties discussed and dismissed the subject of who would bear Joseph G.’s health care costs. Nonetheless, a unanimous court assigned responsibility for paying the costs to DHHR.

Equity, it appears, played the dominant role in the resolution of the disputed terms in both *Aycoth* and *Joseph G.*¹⁰⁹ In each case, the court strained

¹⁰⁴ *Id.* at 512.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (“[A] non-medically eligible child, namely Joseph, was, in fact, housed at Stepping Stone while Agreement II was in force and effect . . . [and] some party is responsible either for paying for the [services] . . . or for absorbing such costs.” To charge Stepping Stone the costs would be unjust and inequitable, as “no other placement plan [for Joseph G.] had been devised, much less implemented.”).

¹⁰⁷ *Id.* at 510.

¹⁰⁸ *Id.* at 512.

¹⁰⁹ *See id.*; *Jessee v. Aycoth*, 503 S.E.2d 528 (W. Va. 1998). While we do not know specifically what equitable concerns were at issue in *Aycoth*, Justice Workman’s dissent refers to

to find ambiguity, which was resolved in a manner that the court deemed just. While a discussion of judicial restraint is beyond the scope of this article, in the wake of *Aycoth* and *Joseph G.*, parties to written agreements governed by West Virginia law may now wonder whether they are agreeing to the terms set forth within the document's four corners, or the terms a court may later determine are equitable.

V. AMBIGUOUS CONTRACTS: WHEN EXTRINSIC EVIDENCE CONTRADICTS THE TERMS OF AN AMBIGUOUS CONTRACT, THE QUESTION OF THE PARTIES' INTENT IS A MATTER OF FACT FOR THE JURY

When the terms of a contract are ambiguous and are contradicted by extrinsic evidence, a court should deem the evidence admissible and send the question of the parties' intent to the jury to resolve as a matter of fact.¹¹⁰ There is surprisingly little case law in this area of West Virginia's jurisprudence, because courts appear to be prone to resolving ambiguity as a matter of law rather than as a matter of fact. Nonetheless, two relatively recent cases provide illustrations of ambiguous written agreements that were resolved as a matter of fact.

A. *Stump v. Cunningham: Conflicting Parol Evidence Regarding an Employee's Commission on Sales of Cemetery Plots Raised Questions of Fact for a Jury*

In *Stump v. Cunningham*,¹¹¹ an independent contractor (Stump) was hired via written agreement by cemetery owners (the Smiths) to sell cemetery plots.¹¹² Stump was granted the exclusive right to sell "pre-need" cemetery plots in exchange for a commission.¹¹³ The agreement also gave Stump an exclusive option to purchase the cemetery and its assets, in the event the Smiths chose to sell.¹¹⁴ In 1985, the Smiths offered to sell the cemetery to Stump.¹¹⁵

the court's efforts to reach a "fairer" result through the finding and resolution of ambiguity. *Aycoth*, 503 S.E.2d at 533 (Workman, J., dissenting).

¹¹⁰ See *Stewart v. Blackwood Elec. Steel Corp.*, 130 S.E. 447, 449 (W. Va. 1925) ("[W]here the written contract is ambiguous and uncertain, parol evidence is admissible [Where] the parol evidence be not in conflict, the duty remains with the court to construe the writing; otherwise, it becomes a jury question under proper instructions.") (referencing *Watson v. Buckhannon River Coal Co.*, 120 S.E. 390 (W. Va. 1923)); see also *Fraternal Order of Police v. City of Fairmont*, 468 S.E.2d 712, 717 n.7 (W. Va. 1996) (concluding that when ambiguity exists in a contract, resolution will turn on the parties' intent).

¹¹¹ 419 S.E.2d 699 (W. Va. 1992).

¹¹² *Id.* at 702.

¹¹³ *Id.*

¹¹⁴ *Id.*

Stump rejected the Smiths' terms but sent a letter that reserved his right to make a counteroffer.¹¹⁶ The letter also informed the Smiths that Stump "claimed over \$77,000 in commissions were due him under the pre-need sales [contract]."¹¹⁷ In April 1986, the Smiths sold the cemetery to a third party buyer (Rowe).¹¹⁸ Subsequently, Stump filed suit, claiming that the Smiths had failed to honor (1) his exclusive right to sell pre-need cemetery plots by failing to pay his commission, and (2) his exclusive option to purchase the cemetery by refusing his purported acceptance of the 1986 offer and selling the cemetery to Rowe.¹¹⁹ At trial, the jury found for Stump on both counts.¹²⁰ The Smiths appealed.¹²¹

The Smiths argued that the agreement covering Stump's commissions was not ambiguous, and that the question of whether Stump was entitled to a commission on sales to walk-in customers should not have been sent to a jury.¹²² The issue raised by the Smiths on appeal was whether walk-in customers who purchased cemetery plots qualified as "pre-need" customers (i.e., customers on which Stump had the right to receive commission).¹²³ The Smiths cited provisions of the agreement which stated explicitly that sales to customers "previously solicited by Mr. Stump will be deemed to be sales by Mr. Stump."¹²⁴ According to the Smiths, this language clearly indicated that unless Stump had previously solicited a walk-in customer, he would not receive a commission on the sale to that customer.¹²⁵

The evidence at trial was contradictory.¹²⁶ Both parties claimed that they had parol evidence that supported their interpretation of the commission term in the contract, and both parties presented extensive and conflicting parol evidence at trial.¹²⁷ The Supreme Court of Appeals of West Virginia reiterated its assertion that when a contract is ambiguous, parol evidence is generally admissible "to show the situation of the parties, the surrounding circumstances when the writing was made, and the practical construction given to the contract

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 703.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 707–08.

¹²³ *Id.* at 707.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

by the parties themselves either contemporaneously or subsequently.”¹²⁸ When parol evidence is conflicting on a material point, responsibility for interpreting the agreement’s meaning should be delegated to the jury.¹²⁹ Applying this rule, the court determined that the contract at issue was ambiguous in that it failed to specify a material term (Stump’s commission).¹³⁰ Further, the court concluded that because each party had presented conflicting and contradictory parol evidence regarding that term, the trial court properly delegated responsibility for resolving the ambiguity to the jury.¹³¹ The verdict against the Smiths was therefore upheld.

B. Ambiguous Contracts: Conflicting Parol Evidence Regarding an Adult’s Status as a Member of Another Adult’s “Household” Raised Questions of Fact for a Jury

In *Farmers Mutual Insurance Co. v. Tucker*,¹³² the Supreme Court of Appeals of West Virginia reviewed a bizarre set of circumstances in which an injured plaintiff and an insurance company disputed the meaning of the word “household.” On July 25, 1996, plaintiff-appellant John Tucker (Tucker) drove to a farm owned by defendant-appellee Locie Taylor (Locie), intending to purchase livestock.¹³³ Two mobile homes were situated approximately 50 to 100 yards apart on Locie’s farm, one in which Locie resided and one in which Locie’s son, Darrell Lee Taylor (Darrell), lived.¹³⁴

Darrell, age 38, had drunk excessively earlier in the day, and had passed out while cooking on his stove.¹³⁵ The stove caught fire just as Tucker approached Darrell’s residence.¹³⁶ Tucker noticed smoke coming from inside the mobile home and knocked on the door, waking Darrell.¹³⁷ Tucker did not hear Darrell inside and kicked in the mobile home’s door, intending to rescue any stranded occupants.¹³⁸ As Tucker entered the mobile home, Darrell threw

¹²⁸ *Id.* (quoting Syl. Pt. 4, *Watson v. Buckhannon River Coal Co.*, 120 S.E. 390 (W. Va. 1923)).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² 576 S.E.2d 261 (W. Va. 1992).

¹³³ *Id.* at 264.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

the flaming grease into the doorway that Tucker had just breached, severely injuring him.¹³⁹

Tucker filed suit against Darrell, Locie, and Locie's insurer (Farmers Mutual).¹⁴⁰ Darrell admitted fault, but Farmers Mutual argued that Darrell's tort was not covered by Locie's policy.¹⁴¹ Locie's policy with Farmers Mutual provided coverage for "all sums for which an insured is liable by law because of bodily injury[.]"¹⁴² The policy defined "'insured' to include 'you,' meaning the person . . . named on the Declarations" (Locie), and "your relatives if residents of your household."¹⁴³ Farmers Mutual moved for summary judgment on the grounds that its agreement with Locie was clear, and under its clear terms, Darrell did not qualify as a member of Locie's "household."¹⁴⁴ The trial judge granted Farmers Mutual's motion, and Tucker appealed.¹⁴⁵

At issue on appeal was whether Darrell qualified as a member of Locie's household.¹⁴⁶ Farmers Mutual argued that the term "household" is "a clear, well-defined term, and not subject to a broad construction."¹⁴⁷ When the Supreme Court of Appeals of West Virginia previously analyzed the scope and meaning of that term, it determined that relatives of an insured living in a house owned by the insured—but paying their own bills and taxes—were not members of the same household.¹⁴⁸ Darrell's unique situation, however, forced the court to reevaluate its previous analysis of "household," as Darrell was dependent on Locie for financial support.¹⁴⁹ Thus, Tucker argued that because Darrell's situation could be distinguished from previous cases in which the court analyzed the word "household," his tort fell within the scope of the agreement's coverage.¹⁵⁰

The court stated that the "determination of whether a person is a resident of a particular household is an elastic concept" and is usually a

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (Farmers Mutual agreed to liability coverage for any of Locie's relatives if the relatives lived in his household).

¹⁴² *Id.* at 265 (alteration in original).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 263.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 265.

¹⁴⁷ *Id.* (specifically arguing that "household" means a group of persons living under the same roof, "not those living in separate abodes").

¹⁴⁸ *Id.* (citing *Spangler v. Armstrong*, 499 S.E.2d 865 (W. Va. 1997)).

¹⁴⁹ *Id.* at 270.

¹⁵⁰ *Id.* at 265.

question of fact for a jury.¹⁵¹ Moreover, the term “household” was not defined in Locie’s Farmers Mutual policy, and “[t]he parties . . . [were] able to give the policy language differing but equally reasonable constructions.”¹⁵² The language, therefore, was ambiguous.¹⁵³

In order to resolve the ambiguity, the court set forth a five-factor test to determine whether a person is a member of an insured’s household.¹⁵⁴ The court then stated that because the question of whether a person is a member of an insured’s household typically turns on intent, the question should be resolved by a jury as a matter of fact.¹⁵⁵ Thus, the court reversed and remanded the case for further proceedings.¹⁵⁶

VII. SUMMARY

An author willing to make a decisive, sweeping statement about the law regarding the resolution of ambiguous written agreements in West Virginia is bolder than this one. Nevertheless, the common law “rules” we have reviewed are clear enough:

- In West Virginia, courts will hold parties to the terms set forth in written agreements if those terms are clear and unambiguous. (Section I)
- When a plain error or patent ambiguity exists within a written agreement, West Virginia courts may, in contrast with most other jurisdictions, allow the admission of parol evidence to help resolve the ambiguity. (Section II)
- When ambiguity is less apparent, or latent, courts will generally allow for the admission of extrinsic evidence to

¹⁵¹ *Id.* at 270.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

These factors include, but are not limited to, (1) the intent of the parties, (2) the formality of the relationship between the person in question and the other members of the named insured’s household, (3) the permanence or transient nature of that person’s residence therein, (4) the absence or existence of another place of lodging for that person, and (5) the age and self-sufficiency of that person.

Id.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

help resolve the offending terms of the agreement. (Section II)

- When the extrinsic evidence merely completes or supplements the ambiguous term, courts will resolve the matter as a question of law. (Section III)
- When, however, the extrinsic evidence contradicts the terms of a written agreement, the court should delegate the matter to a jury to resolve as a question of fact. (Section IV)

The application of those rules in this jurisdiction has, however, been somewhat inconsistent. The *Joseph G.* and *Aycoth* cases described in Section IV each involved ambiguous terms of written agreements that raised questions of fact appropriate for resolution by a jury. The extrinsic facts at issue in those cases—much like *Stump* and *Farmer's Mutual* described in Section V—clearly raised questions of credibility appropriate for resolution by a jury. Nonetheless, in *Joseph G.* and *Aycoth*, the Supreme Court of Appeals of West Virginia determined that the extrinsic facts at issue did not contradict the terms of the disputed written agreements. The Supreme Court of Appeals of West Virginia's sense of equity may, to some extent, explain the discrepancy. However, while the end result in *Joseph G.* and *Aycoth* may, in the Court's view, have been equitable, parties to any written agreement subject to West Virginia law may now wonder whether they are agreeing to the terms they intend to be bound to, or the terms a court may later determine to be fair.

In any event, an attorney called upon to represent a party in a case involving an allegedly or potentially ambiguous written agreement must carefully navigate the labyrinth (perhaps "minefield" is a better analogy) by weighing the evidence supporting and undermining her client's position, and applying one or more of the principles described above to persuade the court to allow the favorable evidence in or to keep the unfavorable evidence out. Navigating that legal landscape could, of course, prove hazardous and costly to an individual who has unwittingly executed an agreement that includes a vague, incomplete, or inconsistent term. Drafters should therefore make every effort to predict potential sources of ambiguity—to see around the corner, so to speak—and replace any potentially ambiguous verbiage with language that precisely, clearly, and comprehensively describes each party's intent.