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## II. CORRECTION

As the Becketts point out on Page 7 of Response of Appellees, the deed description of the Via Lot recited on Page 4 of Brief of Appellant is in fact incorrect. Although the correct Trust Deed Book and Page Number which index the deed description at issue in this case are cited, the language was incorrectly transposed due to a clerical error. Mr. Via takes full responsibility for this error and would like to offer his sincerest apologies for any confusion or inconvenience this error may have caused to this Honorable Court. The language contained in the section of the Brief of Appellant entitled "Statement of Facts", quoting from Trust Deed Book T, Page 267 should read as follows:

BEGINNING at a stake at the intersection of East Neville Street, with East Park Avenue thence with East Park Avenue N 10 30 W 150 feet to a stake; thence leaving said Avenue S 65 10 W 49-1/3 feet to a stake, a corner to Lot No. 1; thence with the line of Lot No. 1 S 10 30 E 150 feet to a stake at the edge of East Neville Street, and thence with East Neville Street N 65 10 E 49 1/3 feet to the place of beginning, containing 7400 sq. ft.

Mr. Via further stipulates that the copy of the deed of record in the Office of the Clerk of the County Commission of Raleigh County in Trust Deed Book T, Page 267 appended to the Response Brief of Appellees is a true copy of said deed.

Mr. Via would like the Court to note, however, that this deed description was inserted by clerical error only into the section entitled "Statement of Facts" and was never quoted nor relied on in the "Argument" section of the Brief of Appellant. Mr. Via stands behind his Brief in all other respects. Again Mr. Via would like to offer his most humble apologies for any inconvenience caused to the Court by this clerical error.

**III.**  
**DISCUSSION OF APPELLEES'**  
**DETERMINATION OF THE "ISSUE"**  
**ON APPEAL**

The Becketts state in their argument that they have chosen not to "reiterate the standard of review for Summary Judgment to this Honorable Court, believing that the members of the Court are fully aware of its case law." Response Brief of Appellees, Page 9. After declining to discuss the case law setting forth the standard for review in this Court of a Circuit Court decision granting Summary Judgment (and incidentally seizing the opportunity to direct a little flattery toward this Court), the Becketts then proceed to mischaracterize the standard of review, characterizing the standard as follows:

"Was the Circuit Judge **clearly wrong** in granting Partial Summary Judgment pursuant to Beckett's Motion for Summary Judgment since both original deeds of respective chains of title to the boundary line between said two lots call for the line of the other with exactly the same calls and distance?" Response Brief of Appellees, Page 8. (Emphasis added)

As discussed in the Brief of Appellant, case law of this Court reveals that the standard of review of summary judgments is a de novo standard. See Graham v. Beverage, 211 W.Va. 466, 566 S.E.2d 603 (2002). This standard is much less deferential to the determination of the Circuit Judge than the "clearly wrong" standard suggested by the Becketts.

**IV.**  
**DISCUSSION OF APPELLEES**  
**ARGUMENT**

The Becketts begin their argument by stating that the Brief of Appellant relies on pure speculation as to the intention of the common grantor, Stansbury, Calloway, and Scott, Inc., evidence of which was not presented during the course of litigation. The Becketts then go on to make their own argument, based on pure speculation, as to what

*they* believe to have been the intent of the common grantor. The Becketts are missing the point of Mr. Via's discussion of the intention of the common grantor. Mr. Via is not arguing that he has presented factual evidence during the course of this appeal sufficient for a finding by this Court that the common grantor's intent was that which is asserted by Mr. Via. In fact, that is not the issue on appeal. The issue is whether the Circuit Judge erred in granting Partial Summary Judgment. Mr. Via argues that the answer to this question is yes; not because it was clear from the evidence presented at such an early stage in the litigation or during the course of this appeal that the intent of the grantors was clearly in favor of Mr. Via, but because there were factual issues concerning intent of the common grantor that would clearly make Summary Judgment improper. This is particularly true when such issues are resolved in the manner most favorable to the non-moving party, as the Circuit Judge is required to do.

The Becketts then go on to accuse Mr. Via of ignoring the fact that the Via Lot (Lot 2) was the senior out-conveyance from the larger tract of land owned by Stansbury, Callaway, & Scott, Inc. and the fact that "there is no ambiguity whatsoever in the description of Lot 2 (Via Lot)". Response of Appellees, Page 9. (parenthetical clarification added) Mr. Via concedes that the Via Lot (Lot 2) is the senior out-conveyance, and the idea that there is no ambiguity of the face of the description would seem correct when reading the description of the Via Lot (Lot 2) taken alone. However, the description of the Via Lot (Lot 2) taken from Trust Deed Book T, Page 267 refers on two separate occasions to "Lot 1" (Beckett Lot). The whole issue in this case is the location of the very line of the Beckett Lot (Lot 1) which the Via Lot (Lot 2) description refers to. Thus, how can the description of the Via Lot (Lot 2) be said to be unambiguous

when it refers to an line whose location is uncertain? One would not say a deed description was free from ambiguity if it referred to a line that no one could find, simply because when read alone it “seems” clear. Yet, that is exactly what the Becketts are asking this Court to do. In making this argument, the Becketts rely on the decision in Vandall, et al. v. Casto, et al., 81 W.Va. 76, 93 S.E.1044 (1917) in which this Court states “calls in a deed for an adjoining tract of land are calls for a monument, and where the location of such adjoining tract is certain it becomes a monument of the highest degree”. Mr. Via not only acknowledges this argument in his Brief; he relies upon it. The Becketts seem to ignore the second phrase of the quote used in their own Response, which states “...and where the location of such adjoining tract is certain...”. Again, the location of the adjoining tract is not certain based on an ambiguity in the deed to the Beckett Lot (Lot 1). Furthermore, the Becketts do not even attempt to address Mr. Via’s argument concerning the discrepancy between the Circuit Judge’s interpretation of “calls in a deed for an adjoining tract” and the interpretation found in case law.

The next portion of the Becketts’ argument revolves around the statement that “appellant claims that you should completely disregard the call for the corner of Lot 2 (in the description of the Beckett property) and the description of the exact same line as contained in the senior out-conveyance by metes and bounds and instead create a pie shaped gap by creating an undescribed line parallel to the Daniel Boone line based solely upon the discrepancy of the distance of the back line of the alley to the right of way being too short”. (parenthetical clarification added) This characterization of Mr. Via’s argument is flawed in several respects. First, Mr. Via has never asked this Court to disregard any of the deed descriptions; Mr. Via simply asks that this Court recognize that

there are factual issues causing discrepancy among the various calls in these two deeds that were not resolved by the Circuit Judge. Second, the Becketts again make reference to the fact that the Via Lot (Lot 2) was the senior out-conveyance. As discussed above, it would be illogical to rely solely on the deed to the senior out-conveyance in a case such as this where there is ambiguity. Since the description of the Via Lot (Lot 2) refers to the Beckett Lot (Lot 1) and the description Beckett Lot (Lot 1) refers to the Via Lot (Lot 2), if the location of the boundary in either description is ambiguous then both descriptions are necessarily ambiguous. Third, the Becketts contend that Mr. Via's interpretation of the deed descriptions, as proposed by surveyor James Wentz, leaves a pie shaped gap of interlocked property. This is simply not true. The only issue raised in this appeal is the location of the boundary line between the Via Lot (Lot 2) and the Beckett Lot (Lot 1). No matter where this line is determined to be, it will be a boundary line for *both* lots. To say that placing the line where Mr. Via asserts that it should be will leave a pie shaped gap is nonsensical. However, the Circuit Judge's ruling, which the Becketts are arguing to uphold, does exactly what the Becketts say is "beyond reason" – that is, it does leave a pie shaped gap of interlocked property between the Beckett Lot (Lot 1) and the adjacent tract of land on the other side of the Beckett Lot (Lot 1). Fourth, this statement argues that Mr. Via is seeking to create an "undescribed line...based solely upon the discrepancy of the distance of the back alley to the right of way being too short". The Becketts then go on to point out that the deed description of the Beckett Lot (Lot 1) actually reads "about 49 1/3 feet". The initial problem with this statement is that Mr. Via's argument is not based solely on distance, but on the words "parallel to the line of the lot formerly owned by Tobin Stover", together with evidence of the grantor's intent, particularly as

this intent is evidenced through the repeated use of the 49 1/3 feet language, which demonstrates that the common grantor intended for the two (2) tracts of land to be of equal size. Despite the use of the word "about", which could have been included for numerous reasons, including clerical error, Mr. Via contends that when a number is inserted into the description of each tract of land being conveyed by a common grantor, such number would tend to shed some light on the intent of the grantor. This is perfectly consistent with Mr. Via's argument concerning the metes and bounds description in question (N 10 30 W 150 feet). While Mr. Via feels that these numbers are likely incorrect, he also acknowledges that the fact that the grantor used the same metes and bounds description in two (2) of the deeds adds to the argument that the common grantor likely wanted to create two (2) equal tracts of land. Furthermore, this argument is bolstered by the fact that there seemed to be a third tract of land intended to be of equal size, although the third tract was not ever possessed by Stansbury, Callaway, and Scott, Inc. E. Clyde Scott, who conveyed the two (2) lots in question in this case to Stansbury, Callaway, & Scott, Inc. by deed dated June 4, 1919 of record in the Office of the Clerk of the County Commission of Raleigh County, West Virginia in Deed Book 67, at Page 383, also owned piece of property adjacent to the Beckett Lot (Lot 1), whose frontage on Neville Street measures approximately 49.4 feet which he excepted from the conveyance to Stansbury, Callaway, & Scott, Inc. as it had already been conveyed. Finally, the Becketts continue to either misunderstand or misstate Mr. Via's position on appeal. Mr. Via is not, nor should he, argue that this Court should choose certain calls over others, based upon factual evidence submitted to this Court. Mr. Via is challenging the grant of Partial Summary Judgment by the Circuit Judge. Mr. Via is simply arguing that (1)

based on the ambiguity in the deeds to these two adjoining tracts of land there were material issues of fact to be determined in this case; and that (2) the Circuit Judge erred in granted partial summary judgment by failing to address those material issues of fact due to the his misapplication of the law. None of the Becketts' attacks on the arguments of Mr. Via address the validity of the law applied by the Circuit Judge, or discredit Mr. Via's argument that had the correct law been applied, there were questions of material fact yet to be resolved.

## V. CONCLUSION

Throughout the Response of Appellees, the Becketts continually mischaracterize the arguments of Mr. Via without ever rebutting any of Mr. Via's "Assignments of Error" in terms on their effect on the Becketts' entitlement to Summary Judgment. Furthermore, the Becketts ignore the fact that this is an appeal from an Order Granting Partial Summary Judgment and repeatedly attack Mr. Via's argument as not having been proven. Mr. Via's sole argument is that there were material questions of fact left unanswered by the Circuit Judge because of his misapplication of law to the facts of this case. The Beckett's acquiescence to the fact that there were outstanding questions of material fact concerning the intent of the common grantor coupled with cases such as Belcher, et al. v. Powers, et al., 212 W.Va. 418, 573 S.E.2d 12 (2002), which discuss the great weight to be given to the intent of the common grantor, make it clear that Summary Judgment was improper in this case. This is exactly what Mr. Via should and is attempting to prove to this Court.


Again, in conclusion, Mr. Via simply asks this Honorable Court to recognize that there is a material question of fact as to the location of the boundary line between the Via

Lot (Lot 2) and the Beckett Lot (Lot 1). While the Becketts have opined as to other possible interpretations of the facts, they have done nothing more than to bolster Mr. Via's argument that all questions of material fact were not resolved before the grant of Summary Judgment. Furthermore, the Becketts fail to take into consideration that when ruling on a Motion for Summary Judgment, the Circuit Judge was required to view the evidence in the light most favorable to the non-moving party, which in this case, is Mr. Via. It is clear that this was not done by the Circuit Judge in this case.

For the reasons set out above, Appellant, William R. Via, hereby respectfully requests that this Court reverse the Partial Summary Judgment Order in favor of the Becketts; and remand this case for further proceedings in which all evidence is heard and given its proper weight.

**William R. Via**

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**IN THE STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS**

IN THE STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS

At Charleston

WILLIAM R. VIA,

Plaintiff/Appellee,

v.

RALPH BECKETT and,  
JOAN BECKETT,


Defendants/Appellants.

Appeal No.: 041290

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing "Reply Brief of Appellant" was served upon the following by United States mail, first class postage prepaid on the 3rd day of January 2005:

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William R. Wooton