No. 03-08-00061-CV

In the Third Court of Appeals
Austin, Texas

THE ARCHAEOLOGICAL CONSERVANCY,

Appellant

V.

WILSON LAND AND CATTLE COMPANY AND WILL R. WILSON, JR.,

Appellees

APPEAL FROM CAUSE NO. 06-384-C368
368TH JUDICIAL DISTRICT COURT OF WILLIAMSON COUNTY, TEXAS
HON. BURT CARNES PRESIDING

BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument.

This appeal presents important legal issues concerning of one of the most significant archaeological sites in North America. Those issues include whether a portion of the site set aside as an archaeological preserve reverted to the grantor under forfeiture provisions in a 1991 gift deed, which party bore the burden of proof, and whether the trial court properly considered parol evidence of the grantor's intent when neither side pleaded ambiguity. Appellant believes oral argument would significantly aid the Court in determining the issues presented. *See* TEX. R. APP. P. 39.8.

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TO THE HONORABLE THIRD COURT OF APPEALS:

Appellant, The Archaeological Conservancy ("the Conservancy"), files this brief requesting that the district court's final judgment be reversed. The Conservancy respectfully shows:

STATEMENT OF THE CASE

Nature of the Case:	This case involves whether ownership of an archaeologically significant tract reverted to the grantor under forfeiture provisions stated in a gift deed. CR 3-8, 82-89; PX 5 (App. Tab C).
Course of Proceedings:	The Conservancy sued the grantor, Wilson Land and Cattle Company ("WLCC"), and its successor in interest, Will R. Wilson, Jr.,[1] after being ousted from the property. CR 3-8, 82-89. WLCC answered and filed a counterclaim seeking a declaration that title had reverted under the deed. CR 12-13, 75-76.
Trial Court's Disposition:	After a bench trial, the district court rendered a final judgment declaring that title had reverted to WLCC "and/or its successors and assigns." CR 419 (App. Tab A). At the Conservancy's request, the trial court issued findings of fact and conclusions of law. CR 421, 437 (App. Tab B).

ISSUES PRESENTED

1. Conclusive evidence establishes that WLCC, as the grantor, also drafted the Gift Deed. Under established rules of construction, if the Court cannot determine the grantor's intent from the Gift Deed itself, should the deed be construed against WLCC?

[1] Unless otherwise specified, all references to "WLCC" in this brief include both Wilson Land & Cattle Company and Will R. Wilson, Jr.

2. In a declaratory-judgment action, the party asserting an affirmative claim—not necessarily the plaintiff—bears the burden of proof. WLCC pleaded that title had reverted under the Gift Deed, and the Conservancy would have retained title if that position were incorrect. Did WLCC bear the burden of proof in this case?

3. Neither party pleaded ambiguity, and the issue was not tried by consent. Did the trial court err by admitting parol evidence of the grantor's intent and imposing requirements on the Conservancy beyond those stated in the Gift Deed?

4. Among other conditions, the Gift Deed allowed the Conservancy to retain title if it "used [the property] predominantly to provide an archeological laboratory for intermittent research excavations, restoration of Indian artifacts and habitats, exhibition of artifacts and restored habitats to the public or for any other archaeological purpose." In archaeology, preservation is a "use" of land that serves a valid archaeological purpose. WLCC presented no evidence that the Conservancy used the property predominantly for a non-archeological purpose. Are the trial court's fact findings supported by legally sufficient evidence?

5. Among other conditions, the Gift Deed allowed the Conservancy to retain title if it "acknowledged [the gift] with a plaque on the Property in memory of Marjorie Ashcroft Wilson." Conclusive evidence establishes that the Conservancy satisfied this requirement. Are the trial court's fact findings supported by legally sufficient evidence?

6. Among other conditions, the Gift Deed allowed the Conservancy to retain title if it "named [the property] the "Marjorie Ashcroft Wilson Archaeological Preserve."

Conclusive evidence establishes that the Conservancy met this requirement. Are the trial court's fact findings supported by legally sufficient evidence?

7. The district court did not award the Conservancy attorney's fees under the Declaratory Judgment Act as requested. If the judgment is reversed on appeal, should the issue of attorneys' fees be remanded so the trial court may consider whether an award to the Conservancy would be appropriate?

STATEMENT OF FACTS

The Wilson-Leonard Site: The Wilson-Leonard Archaeological Site is situated near the intersection of Brushy Creek and Spanish Oak Creek in southwestern Williamson County. 2 RR 35-37; 3 RR 34; PX 2; DX 25 at 1, 2 & 5; DX 26. The site was identified in the 1970s as the result of an archaeological survey undertaken when the Texas Department of Transportation prepared to build Highway 1431. 2 RR 35, 83; DX 1; DX 25 at 1. A state-sponsored excavation conducted between 1982 and 1984 revealed a detailed archaeological record going back 8,000 to 13,000 years, one of the oldest human occupations in North America. 2 RR 90, 159-60; 3 RR 12; DX 25 at 1, 5. The excavation also produced what became known as "the Leanderthal Lady," human remains from one of the oldest intentionally interred burials ever discovered in the New World. 2 RR 37, 40, 158-59; 3 RR 12-13; PX 3-4, 45. This find was of national and international significance. 2 RR 40. *See generally* DX 25.[2]

[2] *See also* http://www.texasbeyondhistory.net/plateaus/images/ap5.html.

The Conservancy and Its Purpose: The Archaeological Conservancy is a nonprofit corporation whose sole mission is to identify, acquire, and preserve the most significant archaeological sites in the country. 2 RR 64; 3 RR 47, 128; 4 RR 22-23. Through the creation of preserves, defined portions of archaeological sites are dedicated and protected for future study. 3 RR 33-34, 136. Of about twenty-two archaeological preserves in this state, the Texas Historical Commission holds about six, and the Conservancy holds the remainder. 3 RR 150-51, 153. The Conservancy has a proven track record and national reputation for managing and preserving finite archaeological resources. 3 RR 159-60, 162; PX 11.

Creation of a Preserve: On April 11, 1991, Will R. Wilson, Sr., as president of WLCC, executed a deed ("the Gift Deed") conveying a 2.5-acre portion of the Wilson-Leonard site to the Conservancy subject to certain conditions subsequent. PX 5 (App. Tab C); *see* 2 RR 37; PX 23 & 27. As stated in the Gift Deed, those conditions were:

> (i) the Property shall be used predominantly to provide an archeological laboratory for intermittent research excavations, restoration of Indian artifacts and habitats, exhibition of artifacts and restored habitats to the public or for any other archaeological purpose; (ii) all artifactual materials removed from the Property shall be donated to the Texas Archaeological Research Laboratory, the University of Texas at Austin or its successor, or another appropriate Texas archaeological repository, in the name of Grantor; (iii) this gift of the Property shall be acknowledged with a plaque on the Property in memory of Marjorie Ashcroft Wilson; and (iv) the Property shall be named the "Marjorie Ashcroft Wilson Archaeological Preserve."

PX 5 (App. Tab C). The Gift Deed also stated: "[I]f at any time the Property shall no longer be used in conformity with the foregoing conditions, then this grant shall determine and come to an end, and without necessity for action on the part of Grantor, the

Property and all rights therein shall revert to and vest in Grantor, its successors and assigns." *Id.*

The Gift Deed was delivered to the Conservancy at a public ceremony held to dedicate the property as the Marjorie Ashcroft Wilson Archaeological Preserve ("the Preserve"). 2 RR 41; 3 RR 48-52; PX 41-46. As part of the ceremony, the Conservancy presented Will Wilson, Sr. with a mock-up of a plaque it had ordered for placement on the property. 3 RR 72-73; PX 55. The Conservancy and the Texas Historical Commission issued press releases, and the local news media and archaeology-related publications covered the event. 3 RR 50-51, 131-32; PX 43-46; DX 16, 61-62. In 1991 or 1992, the Conservancy placed the finished bronze plaque near the Preserve's front gate. 3 RR 72-74; PX 6; *see* 2 RR 43. The plaque reads:

> WILSON ARCHAEOLOGICAL SITE
>
> This archaeological site contains evidence of the first Texans who camped here nearly 13,000 years ago. It was intermittently occupied until at least A.D. 11. The site is now dedicated as the Marjorie Ashcroft Wilson Archaeological Preserve.
>
> The preserve was donated by the Will R. Wilson, Sr. Family to The Archaeological Conservancy on April 12, 1991.

PX 6; DX 93.

After it acquired the Preserve, the Conservancy arranged for its designation as a State Archaeological Landmark. 3 RR 54-55, 60-61; PX 9 & 47. The Conservancy had a fence erected, put in a driveway and culvert, and had the brush cleared. 2 RR 51-53, 132-33, 175; 3 RR 64-65; PX 17-21. The Conservancy also worked with the Texas Historical Commission and the Travis County Archaeological Society to make sure that site

stewards and others observed the property regularly. 3 RR 64-65; PX 8. Although the Conservancy focused on maintaining the Preserve's archaeological values, some excavation work, topographic mapping, and remote sensing projects have taken place there over the years. 2 RR 134, 149-50, 166-68; 3 RR 30-31; PX 24-30, 32-35.

The Reverter Deed: Between 1991 and 2005, no member of the Wilson family contacted the Conservancy about the Preserve's condition or how it was being managed. 3 RR 128, 4 RR 17-18. Nevertheless, on January 3, 2005, Will R. Wilson, Sr. signed a deed on behalf of WLCC ("the Reverter Deed") purporting to convey the Preserve to his son, Will R. Wilson, Jr. PX 40 (App. Tab D). The Reverter Deed—which Wilson, Jr. drafted—states that the property had reverted to WLCC because the Conservancy failed to use it according to the Gift Deed's conditions. PX 40 (App. Tab D); *see* 4 RR 14, 87. The Conservancy did not learn about the Reverter Deed until after it was recorded on August 17, 2006. 3 RR 42-43; DX 40 (App. Tab D).

The Exchange Proposal: Real estate and land development have boomed in the area surrounding the Preserve. 3 RR 61, 133. Several times over the years, the Conservancy was approached about selling a fifty-foot-wide strip on the Preserve's western boundary to a developer who intended to build a condominium on adjacent land and use the strip for driveway access. 3 RR 78-79; PX 31; DX 21. The Conservancy declined these overtures until the developer proposed that the Conservancy exchange the strip for a larger piece of land rather than sell it outright. 3 RR 79; DX 21. The Conservancy consulted the Texas Historical Commission and archaeologists who had studied the Preserve, and they agreed that the land the Conservancy would receive was

more significant archaeologically and would benefit the Preserve more than what it would be giving up. 3 RR 43-44, 79-80, 144-46; 4 RR 25; PX 29-30, 59-60. With the Historical Commission's approval—but unaware of the then-unrecorded Reverter Deed—the Conservancy and the developer entered into an agreement to exchange the fifty-foot strip for a larger parcel on the opposite end of the Preserve, plus $100,000 to offset the Conservancy's risks and expenses and protect its nonprofit status. 3 RR 86, 128-29, 146; PX 30-31.

Wilson, Jr. Seizes the Property: Will Wilson, Jr. became president of WLCC sometime after his father died in December 2005. 4 RR 5-6, 16. On August, 16, 2006, the Conservancy approached Wilson, Jr. about releasing the strip from the Gift Deed's conditions so the exchange could go through. 3 RR 87; 4 RR 87; PX 61. Rather than respond to the Conservancy's inquiry, Wilson, Jr. recorded the Reverter Deed the next day. 3 RR 89; 4 RR 16-17; PX 40 (App. Tab D). Wilson, Jr. later changed the lock on the entry gate and posted a "No Trespassing" sign on the property with his name and telephone number on it. 3 RR 157; 4 RR 20. The Conservancy returned the developer's earnest money upon concluding that it would not be able to resolve the matter amicably or otherwise cure the problem so the transaction could close. 3 RR 88-89; PX 58

Judicial Relief Sought: The Conservancy sued WLCC and Wilson, Jr., alleging trespass to try title and seeking to recover the Preserve. CR 3-8. WLCC and Wilson, Jr. answered and counterclaimed for a declaration that title had reverted under the Gift Deed. CR 12-13, 75-76. In an amended petition, the Conservancy also requested relief under the Declaratory Judgments Act. CR 82, 87-88.

Trial: The Honorable Burt Carnes held a bench trial during the first week of October 2007. CR 2; 2-4 RR. Before trial began, the Conservancy elected to proceed only on its declaratory-judgment action. 2 RR 27, 42. The Conservancy called four archaeology experts, including the Texas State Archaeologist and the director of the Texas Historical Commission's Archaeology Division. CR 262-67; 2 RR 30-35, 145-47; 3 RR 129-31; 4 RR 21-22. WLCC called Wilson, Jr. and one other witness, neither of whom professed any expertise in archaeology. 4 RR 6-7, 62, 68, 70. The Conservancy objected to much of WLCC's evidence on parol evidence and relevance grounds, all of which the trial court overruled. 2 RR 92-98, 100; 3 RR 90, 94, 98-104; 4 RR 76-77.

On November 1, 2007, the trial court rendered judgment declaring that "fee simple title to the property has reverted to Wilson Land and Cattle Company and/or its successors and assigns free and clear of any rights, titles, interests and claims of Plaintiff." CR 419 (App. Tab A). The trial court issued findings of fact and conclusions of law, holding among other things as follows:

- The Conservancy did not use the Property predominantly to provide an archaeological laboratory for intermittent research excavations, restoration of Indian artifacts and habitats, exhibition of artifacts and restored habitats to the public, or for any other archaeological purpose. CR 438 (App. Tab B) (Finding No. 15).

- By not providing public access to the Property, the Conservancy failed to acknowledge the gift [of] the Property in memory of Marjorie Ashcroft Wilson. CR 439 (App. Tab B) (Finding No. 23).

- The Conservancy did not maintain the name of the Property as the "Marjorie Ashcroft Wilson Archaeological Preserve." CR 439 (App. Tab B) (Finding No. 24).

- The Conservancy did not use the Property as required in the reversionary clause of the Gift Deed. CR 439 (App. Tab B) (Finding No. 26).

The Conservancy timely filed a notice of appeal. CR 441-42.

SUMMARY OF THE ARGUMENT

The Gift Deed vested title to the Preserve in the Conservancy as long as it fulfilled four conditions. To justify revoking the deed and reclaiming ownership in what has become a very valuable piece of real estate, WLCC had to prove that at least one of those requirements was not met. WLCC failed in that task, resorting to extrinsic evidence of matters that easily could have been made part of the conveyance, but were not.

Without a supporting pleading, the district court found the Gift Deed ambiguous, allowed extraneous and irrelevant facts into evidence over multiple objections, and imposed requirements on the Conservancy found nowhere within the Gift Deed's four corners. The district court's construction of the deed was erroneous, and its material fact findings cannot withstand legal sufficiency review.

STANDARDS OF REVIEW

In an appeal from a bench trial, the trial court's findings of fact "have the same force and dignity as a jury's verdict upon questions." *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991); *Ludwig v. Encore Med., L.P.*, 191 S.W.3d 285, 294 (Tex. App.—Austin 2006, no pet.). Findings of fact are reviewable for legal and factual sufficiency of the evidence by the same standards applied to a jury verdict. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996); *Ludwig*, 191 S.W.3d at 294.

The test for legal sufficiency is "[w]hether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). The reviewing court considers the evidence in the light most favorable to the judgment, crediting favorable evidence if a reasonable fact-finder could, and disregarding contrary evidence unless a reasonable fact-finder could not. *Id. at* 807. A challenge to the legal sufficiency of the evidence must be sustained when (1) the record discloses a complete absence of evidence to support a vital fact, (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *Id*. at 810; W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 234-35 (2006).

ARGUMENT

When construing documents such as deeds, contracts, and wills, Texas courts focus on the parties' intent as expressed in the instrument, limiting their review to its four corners whenever possible. *Cherokee Water Co. v. Freeman*, 33 S.W.3d 349, 353 (Tex. App.—Texarkana 2000, no pet.) (citing *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991); *see CenterPoint Energy Houston Elec., L.L.P. v. Old TJC Co.*, 177 S.W.3d 425, 430 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). The court considers the entire writing and attempts to harmonize and give effect to all of its provisions. *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133-34 (Tex. 1994); *CenterPoint Energy*, 177 S.W.3d at 430. If a document is worded such that it can be given a definite or certain

legal meaning, then the document is not ambiguous. *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995); *CenterPoint Energy*, 177 S.W.3d at 430-31. Extrinsic evidence of intent is not admissible unless the document is ambiguous, and ambiguity is a question of law. *See Cherokee Water*, 33 S.W.3d at 353; *Terrill v. Tuckness*, 985 S.W.2d 97, 101 (Tex. App.—San Antonio 1998, no pet.).

Courts interpreting deeds sometimes follow a three-step analytical process: (1) examining the deed's plain language to ascertain the grantor's intent; (2) applying deed construction rules; and (3) if necessary, considering extrinsic evidence to aid interpretation. *See, e.g.*, *Cherokee Water*, 33 S.W.3d at 353; *Terrill*, 985 S.W.2d at 102; *Marrs & Smith v. D.K. Boyd Oil & Gas Co.*, No. 08-00-00386-CV, 2002 WL 1445334, at *5 (Tex. App.—El Paso July 3, 2002, no pet.) (not designated for publication). An instrument is ambiguous only when applying these rules fails to resolve which of two reasonable meanings is the correct one. *See Cherokee Water*, 33 S.W.3d at 353; *Terrill*, 985 S.W.2d at 102.

Though not reflected in its findings of fact and conclusions of law, the trial court necessarily determined that the Gift Deed was ambiguous when it admitted extraneous evidence of intent over the Conservancy's objections.[3] *See Voges v. Lower Colorado River Auth.*, No. 03-97-00561-CV, 1999 WL 66205, at *3 (Tex. App.—Austin Feb. 11,

[3] In overruling the Conservancy's last parol-evidence objection, the trial court stated:

> I've been pretty much allowing parol evidence in all along. Nobody's shown me yet a Texas Supreme Court case telling me exactly what this language means in terms of law. It's pretty clear to me that the parties weren't in agreement on what it meant, and there's some ambiguity. So I've been allowing parol evidence.

4 RR 77.

1999, no writ) (not designated for publication). By doing so, the court misconstrued the Gift deed and thus committed reversible error.

I. Title to the Preserve Could Have Reverted to WLCC Only Under Limited Circumstances

Before addressing the Conservancy's evidentiary points, the Court must consider the lens through which it should construe the Gift Deed and the evidence at issue. Despite the trial court's approach, the appropriate lens favors the Conservancy.

A. The Gift Deed Unambiguously Specifies the Conditions Under Which the Conservancy Would Forfeit Title

Based on the trial court's findings of fact, three of the four Gift Deed conditions are in play. They are:

- Whether the Conservancy "used [the Preserve] predominantly to provide an archeological laboratory for intermittent research excavations, restoration of Indian artifacts and habitats, exhibition of artifacts and restored habitats to the public or for any other archaeological purpose" (Finding Nos. 15, 16, 17, 18, 19, 20, & 21).
- Whether the Conservancy "acknowledged [WLCC's gift of the Preserve] with a plaque on the Property in memory of Marjorie Ashcroft Wilson" (Finding No. 23).
- Whether the Conservancy "named [the Preserve] the 'Marjorie Ashcroft Wilson Archaeological Preserve'" (Finding No. 24).[4]

[4] The trial court's fact findings do not address the second of the Gift Deed's four conditions, that "all artifactual materials removed from the Property shall be donated to the Texas Archaeological Research Laboratory, the University of Texas at Austin or its successor, or another appropriate Texas archaeological repository, in the name of Grantor . . . ." PX 5 (App. Tab C); *see also* PX 40 (App. Tab D) (omitting reference to same condition among grounds for executing Reverter Deed). In any event, the only relevant evidence presented at trial conclusively showed that the Conservancy complied with that condition. 2 RR 149-50, 162, 182; 3 RR 66-68.

PX 5 (App. Tab C); CR 438-39 (App. Tab B). The Gift Deed is unambiguous; within its four corners, these are plainly the only conditions upon which title to the Preserve could have reverted to WLCC.

The parties may disagree about what some of these words mean, but disagreement alone does not render a deed ambiguous. *See Coastal Mart, Inc. v. Sw. Bell Tel. Co.*, 154 S.W.3d 839, 853 (Tex. App.—Corpus Christi 2005, pet. granted); *Terrill*, 985 S.W.2d at 102; *GTE Mobilnet v. Telecell Cellular, Inc.*, 955 S.W.2d 286, 289 n.1 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). If a document is worded such that it can be given a definite or certain legal meaning, then the document is not ambiguous. *Nat'l Union Fire Ins. Co.*, 907 S.W.2d at 520; *CenterPoint Energy*, 177 S.W.3d at 430-31. If necessary, "the court must apply rules of construction to determine [a deed's] legal meaning." *Terrill*, 985 S.W.2d at 102. On this record, those rules require reversal and rendition of judgment for the Conservancy.

B. Any Uncertainty in the Gift Deed's Conditions Should Have Been Construed Against WLCC

"The law does not favor forfeiture provisions or restrictions on the use of conveyed property." *K.M. Van Zandt Land Co. v. Whitehead Equities, JV*, No. 2-06-294-CV, 2008 WL 2510602, at *4 (Tex. App.—Ft. Worth June 19, 2008, no pet. h.) (mem. op.); *see Sewell v. Dallas Indep. Sch. Dist.*, 727 S.W.2d 586, 589 (Tex. App.—Dallas 1987, writ ref'd n.r.e) ("We recognize the well accepted and longstanding policy in Texas that conditions subsequent are not favored by the courts . . . ."). Such clauses are construed against the grantor. *K.M. Van Zandt Land Co.*, 2008 WL 2510602, at *4; *see*

Davis v. Huey, 620 S.W.2d 561, 565 (Tex. 1981). Moreover, any doubt about how a deed should be read is resolved against the drafter, as that party is responsible for the language used. *See Cherokee Water*, 33 S.W.3d at 355; *Terrill*, 985 S.W.2d at 106.

Here, the trial court found that "[t]he Conservancy provided the language of the reversionary clause that [WLCC] used in the Gift Deed." CR 437 (App. Tab B) (Finding No. 4). This finding implies that the trial court construed what it thought were ambiguities in the Gift Deed in favor of WLCC and against the Conservancy. *See* 4 RR 77; *supra* note 3. On its face, however, this finding either is immaterial to the judgment or it acknowledges that WLCC, not the Conservancy, was responsible for preparing the instrument. CR 437 (App. Tab C). Either way, it confirms that the Gift Deed should be construed against WLCC if its language is unclear. *See Cherokee Water*, 33 S.W.3d at 355; *Terrill*, 985 S.W.2d at 106.

To the extent Finding No. 4 might suggest that the Conservancy drafted the Gift Deed, the record conclusively establishes otherwise. Although the Conservancy sent WLCC's outside counsel a copy of another deed containing reversionary language, it is undisputed that WLCC's lawyer prepared the Gift Deed and was free to use whatever language he or his client deemed appropriate. 3 RR 98-99, 128; 4 RR 9; DX 52, 55-57. From comparing the two documents, WLCC's counsel took some language from the earlier deed, added further conditions, and prepared a substantially different reversionary clause. *Compare* DX 55 *with* PX 5 (App. Tab C). There is no evidence that the Conservancy played any active role in drafting the Gift Deed, controlled the drafting process, or even suggested what language WLCC's counsel should use.

WLCC was not only the grantor, but it was the scrivener as well. The Gift Deed therefore should be construed strictly against WLCC and in the Conservancy's favor to avoid forfeiture. *See K.M. Van Zandt Land Co.*, 2008 WL 2510602, at *4; *Cherokee Water*, 33 S.W.3d at 355. Accordingly, and for the reasons explained below, the trial court's judgment should be reversed and judgment rendered for the Conservancy.

C. WLCC Bore the Burden of Proving That the Conservancy Failed to Comply With the Gift Deed's Conditions

The plaintiff in a civil lawsuit—here, the Conservancy—ordinarily must prove its case by a preponderance of the evidence. *See Union Pac. R. Co. v. Williams*, 85 S.W.3d 162, 170 (Tex. 2002). In a declaratory judgment action, however, the designations of plaintiff and defendant are not determinative; the burden of proof lies with the party asserting an affirmative claim that will be defeated absent supporting evidence. *See Stewart v. Angelina County*, No. 12-06-00124-CV, 2007 WL 677865, at *3 n.2 (Tex. App.—Tyler March 07, 2007, pet. denied) (mem. op.); *Graff v. Whittle*, 947 S.W.2d 629, 634-35 (Tex. App.—Texarkana 2000, writ denied).

WLCC affirmatively pleaded that title had reverted under the Gift Deed, and the trial court awarded fee simple title to WLCC or its successors and assigns. CR 12-13, 75-76, 419 (App. Tab A). Because the Conservancy would have retained title if the defendants' position were wrong, WLCC bore the burden of establishing the facts necessary to support the trial court's judgment. *See Stewart*, 2007 WL 677865, at *3 n.2; *Graff*, 947 S.W.2d at 634-35. The burden did not shift to the Conservancy merely because Wilson, Jr. ousted it from the Preserve and forced the Conservancy to seek a

judicial remedy. *See City of Houston v. Van de Mark*, 83 S.W.3d 864, 868-69 (Tex. App.—Texarkana 2002, pet. denied) (applying legal sufficiency standard in reverter deed case); *Sewell*, 727 S.W.2d at 589 (same).

As the party without the burden of proof at trial, the Conservancy has framed its evidentiary issues under the "no evidence" standard of review. *See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983); *Stewart*, 2007 WL 677865, at *3.[5] Viewed in the appropriate light, the record evidence demonstrates that the trial court's judgment is erroneous and should be reversed.

II. No Evidence Supports the Trial Court's Findings on the Conditions Under Which Title Could Have Reverted to WLCC

The trial court found a number of facts that are either mere surplusage or are wholly irrelevant to the issues the Gift Deed raises. *See* CR 437-40; PX 5 (App. Tab C). When those findings and issues are distilled down to their essence, the record reveals no evidence capable of supporting the trial court's judgment. This Court should therefore reverse and render judgment for the Conservancy.

A. WLCC's Attempt to Vary From the Gift Deed's Express Terms Was Improper and Should Be Disregarded

WLCC's chief complaint at trial was that the Conservancy failed to build a museum or interpretive center on the Preserve and had no plans for doing so. According to the testimony of Will Wilson, Jr., "there was supposed to be something there for the public," and the Conservancy somehow led his father into thinking that would happen. 4

[5] The Conservancy respectfully submits that the outcome would be the same even if it had borne the burden of proof because the evidence discussed in Part II of this brief conclusively establishes compliance with the Gift Deed's conditions.

RR 78. On this point, WLCC contended that Will Wilson, Sr. and Conservancy representatives discussed an interpretive center before Wilson, Sr. executed the Gift Deed and that Wilson, Sr. later increased the amount of land to be donated. 2 RR 99; 3 RR 90-96, 124; DX 9-10, 49-50.[6] While testifying, Wilson, Jr. explained the decision to take the property back when he and his father visited the Preserve in 2004 and observed that "[t]here was absolutely nothing there." 4 RR 81. This evidence apparently informed the trial court's findings that: (1) "[a]lthough [WLCC] expanded the size of the grant in reliance on the Conservancy's [r]epresentation that an interpretive center would be built or maintained on the Property, no such interpretive center or visitor's center was ever built or maintained on the Property"; (2) [t]he Conservancy failed to set aside any area on the Property for an interpretive center or visitor's center"; (3) [t]he Conservancy had no plans for building or maintaining an interpretive center or visitor's center on the Property"; and (4) [t]he Conservancy attempted to sell a portion of the Property intended for use as an interpretive center and related parking to a real estate developer for $100,000 and for other land." CR 438 (App. Tab B) (Finding Nos. 9-12).

These findings are immaterial because they do not impact any of the conditions stated in the Gift Deed. *See* PX 5 (App. Tab C). Evidence regarding Wilson, Sr.'s desire for an interpretive center, discussions to that effect with the Conservancy, and what may have motivated Wilson, Sr. to change the acreage granted is irrelevant to the specific conditions under which reverter could have occurred and should have been excluded. 2

[6] In a letter dated December 18, 1989, the Conservancy informed Will Wilson, Jr. that it "does not directly get involved in developing sites for interpretation." DX 49.

RR 92-98, 100; 3 RR 90, 94, 98-104; 4 RR 76-77. The Gift Deed did not obligate the Conservancy to build an interpretive center, provide parking, or otherwise make the Preserve available to the public as a condition of retaining title. PX 5 (App. Tab C). At best, this kind of evidence was offered to try and expand the Gift Deed's requirements, yet parol evidence is inadmissible to show prior or contemporaneous agreements relating to a deed transaction or to vary from a deed's express terms. *See CenterPoint Energy*, 177 S.W.3d at 431; *Terrill*, 985 S.W.2d at 101.

Applying the rules of construction concludes this inquiry because no party pleaded or argued that the Gift Deed was ambiguous. CR 3-8, 12-13, 75-76, 82-89. Ambiguity is an affirmative defense that must be pleaded at the trial court level. *See* TEX. R. CIV. P. 94; *Nguyen v. JP Morgan Chase Bank*, No. 14-07-00086-CV, 2008 WL 2130430, at *3 (Tex. App.—Houston [14th Dist.] May 22, 2008, no pet.); *Terrill*, 985 S.W.2d at 101-02. "That the trial court itself, rather than [WLCC], raised the issue of ambiguity does not change the result." *Terrill*, at 102.

The San Antonio Court of Appeals considered this procedural issue in *Terrill v. Tuckness*. In that case, although the defendants failed to plead ambiguity, the trial court admitted parol evidence over the plaintiffs' objection and allowed the jury to construe the deeds at issue. *See* 985 S.W.2d at 101-02. The court of appeals reversed, concluding that "it was error to allow the jury to construe the deeds in the absence of pleadings on ambiguity." *Id*. at 102. The appellate court also held that the jury submission was erroneous because the deeds were unambiguous as a matter law. *Id*.

WLCC may argue that the Texas Supreme Court's decision in *Sage Street Associates v. Northdale Construction Co.* supports a different result. There, a party who never pleaded ambiguity in the trial court contended on appeal that the subject contracts were ambiguous on an issue submitted to the jury. *See* 863 S.W.2d 438, 445 (Tex. 1993). Although the supreme court stated that "[a] court may conclude that a contract is ambiguous even in the absence of such a pleading by either party," it noted that the decisions cited for that proposition—because they were appeals from summary judgments—did not resolve what effect the jury's verdict should have in that case. *See id*. The supreme court affirmed, however, after holding that the parties had tried the ambiguity issue by consent. *See id*. The supreme court expressly declined to decide how the issue would have been resolved in a case like this one, "in which the issue was neither pled nor effectively tried by implied consent." *See id*.

"When construing a deed, the intent that governs is not the intent that the parties meant but failed to express, but the intent that is expressed." *Cherokee Water*, 33 S.W.3d at 353. WLCC never pleaded or argued that the Gift Deed was ambiguous, and the Conservancy objected every time parol evidence was offered to show the grantor's intent. 2 RR 92-98, 100; 3 RR 90, 94, 98-104; 4 RR 76-77. WLCC's efforts to impose requirements beyond those stated within the Gift Deed's four corners were inappropriate in the trial court, and they should not be considered here. Because evidence irrelevant to the Gift Deed's conditions is legally insufficient to support reverter, the trial court's judgment should be reversed.

B. WLCC Presented No Evidence That the Conservancy Used the Preserve Predominantly for a Non-Archaeological Purpose

The first condition stated in the Gift Deed required the Conservancy to "use[] [the Preserve] ***predominantly*** to provide an archeological laboratory for intermittent research excavations, restoration of Indian artifacts and habitats, exhibition of artifacts and restored habitats to the public or ***for any other archaeological purpose***." PX 5 (App. Tab C) (emphasis added). At trial, the Conservancy contended that it satisfied this requirement by protecting and preserving the archaeological site and conducting research on the property, among other ways. 2 RR 51-53, 132-34, 149-50, 166-68, 175; 3 RR 30-31, 64-65; PX 17-21, 24, 26-28.

1. Exclusive use for the enumerated purposes was not required

Giving effect to the word "predominantly," the Gift Deed did not require the Conservancy to use the Preserve exclusively for any of the purposes listed in the first condition. PX 5 (App. Tab C). Stated another way, the Conservancy could plainly retain title to the Preserve as long as did not use the property predominantly for something the Gift Deed did not expressly authorize. *Id*. This feature distinguishes the Gift Deed from those at issue in the cases on which WLCC relied in the trial court. *See Van de Mark*, 83 S.W.3d at 866 (noting that deed required donated land to be used for "public park purposes"); *Sewell*, 727 S.W.2d at 589 (acknowledging that deed required use for "school purposes only").

2. An "archaeological purpose" was enough

The last part of this disjunctive condition is a catch-all that helps frame the critical issue in this case. Does preservation of a significant archaeological resource for future study equate to "use[] predominantly . . . for an[] archaeological purpose?" PX 5 (App. Tab C). As the party with the burden of proof, WLCC had to show that it does not.

Though somewhat technical in nature, the meaning of the phrase "archaeological purpose" is not in dispute. Archaeology is "the scientific study of material remains (as fossil relics, artifacts, and monuments) of past human life and activities." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 60 (10th ed. 1995).[7] By definition, its purpose is to study humans of the past and to preserve discoveries for both present and future learning. Indeed, a subfield known as "conservation archaeology" has emerged that purposely limits short-term excavation and encourages preserving known archaeological sites for the future, when better technology and advances in excavation techniques will maximize learning opportunities. 4 RR 26; *see* 2 RR 42, 138-39; 3 RR 39-40. This approach is critical because the physical excavation process destroys an archaeological site, resulting in the loss of any uncollected information forever. 2 RR 42, 138-39, 167-68; 3 RR 39-40, 136; 4 RR 26-28.[8]

Without objection, each of the Conservancy's experts testified that preservation of an archaeological resource for future study and analysis is a valid archaeological purpose.

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[7] *See also* http://en.wikipedia.org/wiki/Archaeology.

[8] Aside from conservation issues, funding for large-scale excavations is a major concern, as the cost of undertaking such a project at the Preserve could run more than $5 million. 3 RR 37-39.

2 RR 42, 137-39, 143-44; 3 RR 40, 136-37, 153; 4 RR 26-27. Because WLCC offered no competing interpretation, and because archaeology is a specialized scientific field, expert testimony was admissible "to give the words . . . a meaning consistent with that to which they are reasonably susceptible . . . ." *See Nat'l Union Fire Ins. Co.*, 907 S.W.2d at 520-21; *Mescalero Energy, Inc. v. Underwriters Indem. Gen. Agency, Inc.*, 56 S.W.3d 313, 320 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *see also Templeton v. Dreiss*, 961 S.W.2d 645, 672 (Tex. App.—San Antonio 1998, pet. denied) ("[W]here the words or phrases are technical and aid is needed in their interpretation there is no prohibition against the use of expert opinion testimony."); *Atkins v. Fine*, 508 S.W.2d 131, 133 (Tex. Civ. App.—Austin 1974, no writ) (noting that expert testimony "may be considered to establish the meaning of trade terms or terms that are used in a local sense, if the meaning is not otherwise plain").

3. Preservation is an archaeological "use"

Resolving the critical issue thus boils down to whether preserving the property for archaeological purposes constitutes "use" for purposes of the Gift Deed. *See* PX 5 (App. Tab C). Starting with the document itself, the first paragraph acknowledges "the undertaking by the Grantee herein named to ***maintain*** the archaeological values of the Property herein conveyed . . . ." PX 5 (App. Tab C) (emphasis added). In addition to strongly supporting the Conservancy's position on "preservation as use," this language and the unique perspective of archaeology further distinguish the present case from *City of Houston v. Van de Mark*, the main case WLCC cited to the trial judge.

The issue in *Van de Mark* was whether the City of Houston failed to comply with a deed providing for reverter if the City were to "abandon said park and/or cease to use and maintain the same for public park purposes under the name of MacGregor Park or shall change or permit the name of said park to be changed from that of MacGregor Park . . . ." 83 S.W.3d at 866, 868. A jury found that the City had ceased to use and maintain a divided portion of the original park land for public park purposes. *Id*. at 866. The trial court rendered judgment declaring a reverter, divesting title from the City, and vesting title in the grantors. *Id*. at 865, 868. On appeal, the City raised sufficiency challenges to the jury's finding, contending that the undisputed evidence showed it had maintained and held the tract as undeveloped park land in its natural state. *Id*. at 868.

In attempting to divine the grantor's intent from the deed's four corners, the Texarkana Court of Appeals stated:

> The keys, we believe, to properly interpreting the reverter language are the words "use" and "public." From a review of the language contained in the deed as a whole, as well as a consideration of the grantors' purposes in making the grant, as stated in the deed, we believe the parties did not intend the word "use" to mean "set aside for non use." We believe the parties meant that the City would conduct some activity on the land to make it usable and accessible by the public for a public park. Likewise, we believe by their use of the word "public" in the reverter provisions, they meant that the City would perform some maintenance activity on the land that would make it accessible, attractive, and usable to the public.

Van de Mark, 83 S.W.3d at 868.

The court of appeals then reviewed the largely undisputed evidence to determine whether it supported the jury's finding. *Id*. Among other things, the evidence showed that the City had not developed the tract for recreational purposes in any manner

whatsoever. *Id*. at 869. Indeed, the City had left the tract "entirely undeveloped and in [its] natural state, even to the point that, when dead trees fall, they are left unattended where they fall." *Id*. Concluding that the evidence was legally and factually sufficient, the court of appeals affirmed the trial court's judgment. *Id*.

The decisive question in *Van de Mark* was what the grantor meant by "use and maintain for public park purposes." 83 S.W.3d at 870. The court of appeals construed that phrase to mean something more than preservation because the deed effectively required activity on the land that would make it more attractive, accessible, and useable to the public. *See id.* at 868. Here, the Gift Deed expressly stated a broader goal of "maintaining the archaeological values of the [Preserve]" and allowed the Conservancy to retain the property as long as it was "used predominantly . . . for any . . . archaeological purpose." PX 4 (App. Tab C). Thus, unlike the deed in *Van de Mark*, the Gift Deed did not require the Conservancy to "use" the property for anything other than a preserve to avoid forfeiture.

Without conservation of sites like the Preserve, economic development and construction would severely damage if not destroy a unique and irreplaceable historical record. Although the Preserve may not have been "used" in the manner or to the extent that WLCC and the Wilsons would have liked, archaeology recognizes and even encourages preservation of sites known to be archaeologically significant as an acceptable use of the land. From reviewing the Gift Deed's four corners—and, to the extent necessary, construing the deed against WLCC as both grantor and drafter—WLCC and Wilson, Jr. had to prove that the Conservancy used the Preserve

predominantly for some other, non-archaeological purpose for a reverter under the first condition to have taken effect.

4. The Conservancy did not use the Preserve for a predominant, non-archaeological purpose

Also in contrast to *Van de Mark*, the evidence in this case demonstrates a litany of actions taken at the Preserve to further the cause of archaeology. For example, significant looting had occurred before the Conservancy acquired the Preserve in 1991. 2 RR 46-47. Assisted by the Texas Historical Commission and local volunteers, the Conservancy cleared away brush, making the area easier to monitor, and repaired past looting damage. 2 RR 51-52, 132-33, 175; 3 RR 64-65. The Conservancy paid for the installation of a barbed wire fence around the tract, and a new gate, driveway, and culvert were installed. 2 RR 52-53, 65; 3 RR 64-65. As a result of these and other efforts, looting has not been a problem since the Conservancy acquired the property. 2 RR 56. The State Archaeologist and the director of the Historical Commission's Archaeology Division both testified that the Conservancy had managed the Preserve appropriately and in accordance with industry standards. 2 RR 65, 138; 3 RR 134-38; PX 63.

Furthermore, some excavation work was performed at the Preserve after the Conservancy acquired it. Archaeologists took core samples in 1993, and additional limited excavations and non-invasive studies occurred in 1994, 1999, 2002, and 2006.[9] 2 RR 134, 149-50, 160-61, 166-77. These studies have allowed archeologists to understand how this particular land structure formed and to develop opinions about the Preserve's

[9] Neither the Conservancy nor the archaeologists performing work at the Preserve in 2006 were aware that the Reverter Deed had been executed. 3 RR 42-43; DX 40 (App. Tab D).

archaeological potential. 2 RR 160-61, 177, 185; 3 RR 30-31, 41, 142-43. The conclusion they have drawn is that the prospects for subsurface deposits are quite high. 2 RR 160-61; 3 RR 39-40.

WLCC presented no evidence that the Conservancy used the Preserve for any non-archaeological purpose, much less one that predominated over preservation and conservation. *See City of Dallas v. Etheridge*, 253 S.W.2d 640, 642 (Tex. 1952) (building road through property dedicated "for park purposes only" violated condition subsequent and therefore forfeited easement); *Sewell*, 727 S.W.2d at 589-90 (evidence supported finding that grantee failed to use property "for school purposes only" when it leased majority to City of Dallas for recreational center). The closest it came was to imply that the Conservancy did something unseemly when it reluctantly agreed—with Texas Historical Commission approval—to trade a small segment on one end of the Preserve for a larger tract with greater archaeological potential, plus cash consideration to compensate for the difference in market value and other factors. 3 RR 43-44, 75-86, 128-29, 144-46; 4 RR 25; PX 29-31 & 60; DX 21. But that argument has no bearing because the Conservancy could not have completed the transaction without WLCC's consent and still retain title to the Preserve. PX 5 (App. Tab C). By the time the Conservancy signed the exchange agreement, Will Wilson, Sr. had already executed the Reverter Deed and theoretically rendered the proposed exchange moot. PX 31; DX 40 (App. Tab D).

Assuming the Conservancy could have used the Preserve for a non-archaeological purpose, a reasonable fact finder could not have concluded that such motives predominated over protecting the Preserve in accordance with both its organizational

mandate and the Gift Deed's express terms. *See City of Keller*, 168 S.W.3d at 827. Under these circumstances, the trial court's fact findings—particularly Finding Nos. 15 and 26—cannot support a declaration that fee simple title reverted to WLCC. The trial court's judgment is erroneous and should accordingly be reversed.

C. WLCC Presented No Evidence That the Conservancy Failed to Place a Plaque on the Property in Memory of Marjorie Ashcroft Wilson

The third condition stated in the Gift Deed required the Conservancy to "acknowledge[] [WLCC's gift] with a plaque on the Property in memory of Marjorie Ashcroft Wilson." PX 5 (App. Tab C). The undisputed evidence established that the Conservancy placed such a plaque on the property after obtaining Will Wilson, Sr. and other family members' input on what it should say. 2 RR 43-55; 3 RR 72-79; PX 6 & 55. The plaque was maintained near the Preserve's front gate from 1991 or 1992 until long after Will Wilson, Jr. ousted the Conservancy from the property in 2006. 3 RR 72-74; 4 RR 95-96; DX 93. There is no evidence in the record that it has been removed.

The trial court found that, "[b]y not providing public access to the Property, the Conservancy failed to acknowledge the gift [of] the Property in memory of Marjorie Ashcroft Wilson." CR 439 (App. Tab B) (Finding No. 23). WLCC did not dispute that the Conservancy had placed the plaque on the Preserve; instead, Wilson, Jr. merely expressed dissatisfaction about where it was located. 2 RR 126; 4 RR 66, 68, 117. Nothing in the Gift Deed required the Conservancy to provide public access to the Preserve or to install the plaque in any specific place. PX 5 (App. Tab C).

Finding No. 23 cannot support the judgment because it imposes requirements on the Conservancy beyond those stated in the Gift Deed. CR 439 (App. Tab B); PX 5 (App. Tab C). Moreover, the only evidence relevant to the third condition conclusively establishes it was met. *See City of Keller*, 168 S.W.3d at 810. The trial court's judgment is erroneous and should be reversed.

D. WLCC Presented No Evidence That the Conservancy Failed to Name the Property the "Marjorie Ashcroft Wilson Archaeological Preserve"

The final condition in the Gift Deed required the Conservancy to "name[] [the property] the 'Marjorie Ashcroft Wilson Archaeological Preserve.'" PX 5 (App. Tab C). It is undisputed that the Conservancy organized, publicized, and hosted a ceremony at which it dedicated the property with that name. 2 RR 41; 3 RR 48-52; PX 41-46; DX 16. The plaque that the Conservancy placed on the property after the ceremony unequivocally states that "[t]he site is now dedicated as the Marjorie Ashcroft Wilson Archaeological Preserve." PX 6; DX 93.

The trial court found that "[t]he Conservancy did not maintain the name of the Property as the Marjorie Ashcroft Wilson Archaeological Preserve.'" CR 439 (App. Tab B) (Finding No. 24). How the Conservancy should have "maintained" the name is not entirely clear. On this point, WLCC seemed to complain that the Conservancy did not do enough to promote the name, as academic literature and other documents sometimes refer to the Preserve as "Wilson-Leonard" or "the Wilson Archaeological Site." *See* 2 RR 116, 152-53, 186-89; 3 RR 24, 93; 4 RR 118. Yet, the Conservancy's experts testified that the Marjorie Ashcroft Wilson Archaeological Preserve is the property's official name, and it

appears in several scientific publications. 2 RR 43-46, 52, 60-62, 72, 165; 3 RR 34-35; *see also* PX 9; PX 25 at xvi & 49; PX 45 & 53.

Nothing in the Gift deed required the Conservancy to go through any particular naming process or to "maintain" the name in any specific way. PX 5 (App. Tab C). Finding No. 24, like its predecessor, improperly charged the Conservancy with duties not imposed under the Gift Deed. CR 439 (App. Tab B); PX 5 (App. Tab C). Because the evidence conclusively establishes that the Conservancy named the Preserve as the Gift Deed required, the trial court's judgment is erroneous and should be reversed.

III. A Limited Remand Is Appropriate to Determine Whether the Conservancy Should Be Awarded Attorneys' Fees

The trial court has the discretion to award "equitable and just" attorneys' fees in a declaratory-judgment action. *See* TEX. CIV. PRAC. & REM. CODE § 37.009. In this case, the Conservancy requested and put on evidence of its attorneys' fees, but WLCC did not. CR 82, 87-88; 2 RR 20; 4 RR 33-44. If the Court sustains the Conservancy's legal sufficiency points and renders judgment in its favor, this issue should be remanded so the trial court may consider whether to award the Conservancy attorneys' fees, including those incurred in successfully prosecuting this appeal. *See* TEX. R. APP. P. 43.3; *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 643 (Tex. 2005); *Griffin v. Birkman*, No. 03-06-00412-CV, ____ S.W.3d ____, 2007 WL 4208222, at *2 (Tex. App.—Austin Nov. 28, 2007, no pet. h.).

CONCLUSION AND PRAYER

For the foregoing reasons, and pursuant to Texas Rule of Appellate Procedure 43, the Conservancy asks this Court to sustain the issues presented, reverse the trial court's final judgment, and render the judgment the trial court should have rendered. The Conservancy further asks the Court to remand the issue of whether it should be awarded attorney's fees under the Declaratory Judgment Act for the trial court's consideration. The Conservancy requests all other appropriate relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On July 28, 2008, in compliance with Texas Rule of Appellate Procedure 9.5, I served a copy of this brief (with accompanying appendix) upon all other parties to the trial court's final judgment by hand delivery as follows:

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