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

APPELLANT'S REPLY BRIEF

D. Todd Smith
State Bar No. 00797451
1250 Capital of Texas Highway South
Building 3, Suite 400
Austin, Texas 78746
(512) 329-2025
(512) 329-2026 (fax)

Patrick L. Reznik
State Bar No. 16806780
GEORGE & BROTHERS, L.L.P.
114 West 7th Street, Suite 1100
Austin, Texas 78701
(512) 495-1400
(512) 499-0094 (fax)

Counsel for Appellant
The Archaeological Conservancy

ORAL ARGUMENT REQUESTED

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TO THE HONORABLE THIRD COURT OF APPEALS:

Appellant, The Archaeological Conservancy, files this reply brief to address certain arguments made in the brief for appellees. The Conservancy respectfully shows:

PRELIMINARY STATEMENT

Because this case involved deed construction and validity, the Conservancy was entitled to pursue relief under the Declaratory Judgments Act ("DJA"). The four corners of the Gift Deed contemplate preservation of archaeological values as a permitted use of the property, and such a reading is required to harmonize the deed's provisions. Even if that were incorrect, the Court must construe the Gift Deed in the Conservancy's favor because WLCC's parol evidence—which it disguises as "surrounding circumstances"—cannot be considered without an alleged ambiguity.

WLCC bore the burden of proof as the party seeking the affirmative relief of reverter, but its brief does little to buttress the trial court's judgment with record evidence. The findings upon which the judgment turns fail the "reasonable fact-finder" standard established in *City of Keller v. Wilson*, and this Court should reverse.

ARGUMENT

I. The Conservancy Properly Pursued Relief Under the DJA

A. Deed Construction and Validity Were Central to This Case

WLCC first contends that the Conservancy is barred from obtaining declaratory relief under *Martin v. Amerman*, 133 S.W.3d 262 (Tex. 2004). *See* Appellees' Br. at 8-14. This argument ignores the DJA's plain language, which provides in relevant part:

> A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

TEX. CIV. PRAC. & REM. CODE § 37.004.

In its amended petition, the Conservancy asked the trial court to declare the rights, status, or other legal relations between the parties under the Gift Deed, specifically that the Conservancy had not violated the Gift Deed's terms. CR 87-88. The Conservancy further sought a declaration that the Reverter Deed purporting to convey the Preserve from Will Wilson, Sr. to Will Wilson, Jr. was invalid. CR 88. These pleadings are consistent with the Conservancy's position at trial, where it asked the district court to hold that it had complied with the Gift Deed's terms and to declare the Reverter Deed void. 2 RR 15-16; 4 RR 45-46, 99-108. Because this case turned on proper construction of the Gift Deed and the validity of the Reverter Deed, the DJA was an appropriate vehicle for resolving the parties' dispute. *See* TEX. CIV. PRAC. & REM. CODE § 37.004.

The Texas Supreme Court's *Martin* decision does not change this conclusion. The sole question in that case was whether the petitioners could use the DJA to resolve a boundary dispute between two competing landowners that arose from conflicting surveys. *See* 133 S.W.3d at 264-65. The supreme court held they could not because the legislature had determined that the trespass-to-try-title statute was "*the* method for determining title to . . . real property" and because a boundary determination necessarily

involves the question of title. *See id*. at 267 (quoting citing TEX. PROP. CODE § 22.001(a) (emphasis the Court's)).

Martin is distinguishable because it did not involve deed construction or validity, the assessment of which is an express function of the DJA. *See* TEX. CIV. PRAC. & REM. CODE § 37.004.[1] And despite its broad language, *Martin* did not purport to establish a bright-line rule barring declaratory-judgment actions anytime title is involved. As this Court stated in *Florey v. Estate of McConnell*:

> Although a declaration regarding the validity of the deed of trust could ultimately have impacted title and possessory rights to the property, we doubt that the legislature intended for the trespass-to-try-title statute to displace or subsume every statutory or common law claim (*e.g.*, suits to rescind deeds) having such an impact.

212 S.W.3d 439, 449 (Tex. App.—Austin 2006, pet. denied); *see also Cadle Co. v. Ortiz*, 227 S.W.3d 831, 837 (Tex. App.—Corpus Christi 2007, pet. denied) (noting that distinction between cases necessarily involving question of title and those that do not "has been difficult to apply in practice because construing the terms of contracts and deeds frequently implicates the ultimate issue of title").[2]

This case more closely resembles a suit to rescind a deed—a matter this Court has indicated does not fall within the *Martin* rule—than a boundary dispute. *See Florey*, 212 S.W.3d at 449. In any event, a bright-line rule to the effect that declaratory relief is

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[1] The basis for the petitioners' argument in *Martin* that the DJA applied was not altogether clear. *See Martin v. Amerman*, 133 S.W.3d 262, 264-66 (Tex. 2004).

[2] WLCC's reliance on *Jordan v. Bustamante* is likewise misplaced. *See* Appellees' Br. at 12-13. In that case, because the district court granted a new trial, the Fourteenth Court of Appeals did not reach the issue of whether appellee waived his claims to the property by abandoning his trespass-to-try-title action and instead pursuing declaratory relief. *See* 158 S.W.3d 29, 34-36 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). Thus, the Fourteenth Court's discussion of the abandonment issue is pure dicta.

unavailable whenever title or possession is at issue would render the DJA's language concerning its use in construing deeds and determining their validity meaningless and would violate statutory construction rules. *See Cadle Co.*, 227 S.W.3d at 838; *Roberson v. City of Austin*, 157 S.W.3d 130, 137 (Tex. App.—Austin 2005, pet. denied); *see also* TEX. GOV'T CODE § 311.021(2) (presuming that legislature intended entire statute to have effect); *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 495 (Tex. 1993) (explaining that, "[w]here possible, courts are to construe language used in statutes so as to harmonize all relevant laws, not create conflict").

Relying on this Court's *Florey* decision, WLCC proposes a standard for determining whether the DJA is available based on "whether the suit has an indirect or 'more direct impact on title and possession to real property.'" Appellees' Br. at 10-11 (quoting 212 S.W.3d at 448). The Court made that comparison as one distinction between *Martin* and the facts it addressed in *Florey* (which involved whether the DJA was a valid means of prosecuting an equitable claim to quiet title), but did not adopt it as a test to apply whenever title might be affected in a DJA action. *See Florey*, 212 S.W.2d at 449. WLCC's proposal, like any bright-line rule that might be derived from *Martin*, fails to account for the DJA's plain language authorizing declaratory relief when deed construction or validity are in issue. *See* TEX. CIV. PRAC. & REM. CODE § 37.004.

The ultimate questions in this case are simple ones: (1) who owns the Preserve—the Conservancy or Wilson, Jr.—based on a construction of the Gift Deed's conditions and whether those conditions were met; and (2) whether, depending on that answer, the Reverter Deed is valid. There are no issues concerning the chain of title, competing

deeds, limitations, or adverse possession of the property. *See Martin*, 133 S.W.3d at 265 (listing facts plaintiff must usually prove to prevail in trespass-to-try-title action). Post-*Martin* case law has confirmed that the DJA is an appropriate vehicle for litigating the construction or validity of a deed, even if doing so ultimately decides the question of title. *See Korenek v. Korenek*, No. 13-07-00111-CV, 2008 WL 2894906, at *5 (Tex. App.—Corpus Christi July 29, 2008, no pet.) (mem. op.) ("We find that individuals instituting suit in order to determine the validity of a deed which may affect their property rights may recover attorney's fees under the [DJA]"); *Cadle Co.*, 227 S.W.3d at 837-38 (concluding that suit involving validity of lien was appropriately brought under DJA rather than trespass-to-try-title statute); *Florey*, 212 S.W.3d at 449 (declining to hold that trespass-to-try-title statute was only appropriate theory for quieting title when validity of deed was at issue).[3] The Court should reach the same conclusion here and reject WLCC's attempt to nullify the Conservancy's appeal merely because it pursued relief under the DJA.

B. WLCC Had the Burden of Proof

WLCC denies that it was required to prove that title reverted to it under the Gift Deed. *See* Appellees' Br. at 31-36. In doing so, however, WLCC never confronts the

[3] WLCC concedes that "no appellate court has held that a title dispute involving a reversion to the grantor is likewise covered exclusively by the trespass to try title statute." Appellees' Br. at 11. To the contrary, although the precise theory underlying many decisions is unclear, Texas courts have applied the DJA when determining whether a condition subsequent stated in a reverter deed has occurred. *See, e.g.*, *Sabine River Auth. v. Willis*, 369 S.W.2d 348, 350 (Tex. 1963); *CenterPoint Energy Houston Elec., L.L.P. v. Old TJC Co.*, 177 S.W.3d 425, 427-31 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *Howard v. Arhopulos*, No. 01-00-00844-CV, 2001 WL 522528, at *1-2 (Tex. App.—Houston [1st Dist.] May 17, 2001, pet. denied) (not designated for publication).

rule that "the party asserting the affirmative of the controlling issues" in a declaratory judgment action bears the burden of proof. *See Graff v. Whittle*, 947 S.W.2d 629, 634-35 (Tex. App.—Texarkana 1997, writ denied); *see also 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.) (noting that "the burden of proof is on the party who, upon the pleadings, asserts the affirmative claim, and who, therefore, in the absence of evidence will be defeated" (citing *McCart v. Cain*, 416 S.W.2d 463, 466 (Tex. Civ. App.—Ft. Worth 1967, writ ref'd n.r.e.)).

Forfeiture of property by a condition subsequent is disfavored in the law. *See K.M. Van Zandt Land Co. v. Whitehead Equities, JV*, No. 02-06-00294-CV, 2008 WL 2510602, at *4 (Tex. App.—Ft. Worth June 19, 2008, pet. filed) (mem. op.); *Sewell v. Dallas Indep. Sch. Dist.*, 727 S.W.2d 586, 589 (Tex. App.—Dallas 1987, writ ref'd n.r.e). By seeking declaratory relief, the Conservancy asked the Court to determine whether, as WLCC affirmatively asserted, the conditions necessary for WLCC to have regained title had been met. CR 12-13, 75-76, 87-88. WLCC thus bore the burden of establishing those conditions subsequent to support the trial court's declaration that the Preserve reverted to WLCC and its successors or assigns. *See Stewart*, 2007 WL 677865, at *3 n.2 (concluding that "Angelina County, as the party who asserted that an implied dedication occurred, bore the burden of proof on that issue").

WLCC criticizes the Conservancy's reliance on *Sewell* and *Van de Mark* as somehow inconsistent with this position. *See* Appellees' Br. at 35-36. As WLCC points out, both decisions involved a grantor's claim that a grantee in possession of gifted

property had forfeited title through a condition subsequent, thus rendering them mirror images of this case. *See City of Houston v. Van de Mark*, 83 S.W.3d 864, 865-66 (Tex. App.—Texarkana 2002, pet. denied); *Sewell*, 727 S.W.2d at 587-88. The Conservancy cited those cases to illustrate that, by reviewing verdicts favoring the grantors under the "no evidence" standard of review, both the Dallas and Texarkana appellate courts impliedly concluded that the grantors had the burden of proving the conditions had been met. *See* Appellant's Br. at 15-16; *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983) (noting that no-evidence points "are appropriate when the party without the burden of proof complains of a [fact] finding").[4] That procedural observation is consistent with and supports the Conservancy's argument on who bore the evidentiary burden here.

C. If the Conservancy Obtains Relief on Appeal, It is Entitled to a Determination on Its Request for Attorneys' Fees

WLCC next appears to argue that the Conservancy cannot recover attorneys' fees, even if it appropriately brought this action under the DJA. *See* Appellees' Br. at 14. Three of the cases WLCC cites for that proposition are distinguishable because the court held that the claim at issue should have been brought under the trespass-to-try-title statute—which does not provide for recovery of attorneys' fees—rather than the DJA. *See Aguillera v. John G. & Marie Stella Kenedy Mem. Found.*, 162 S.W.3d 689, 698 (Tex. App.—Corpus Christi 2005, pet. denied); *Sani v. Powell*, 153 S.W.3d 736, 746 (Tex. App.—Dallas 2005, pet. denied); *Hawk v. E.K. Arledge, Inc.*, 107 S.W.3d 79, 84 (Tex. App.—Eastland 2003, no pet.). The fourth disallowed attorneys' fees for other

[4] The opinions in *Van de Mark* and *Sewell* do not specify whether the grantor pursued relief under the DJA or some other theory.

reasons, namely that the plaintiff had not pleaded any specific cause of action against the defendant against whom fees were awarded and that this defendant had specifically disclaimed any interest in the property. *See Kennesaw Life & Acc. Ins. Co. v. Goss*, 694 S.W.2d 115, 118 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

As demonstrated above, the DJA was a proper means for the Conservancy to obtain judicial review of WLCC's reverter claim. That statute authorizes trial courts to "award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. Should this Court sustain the Conservancy's issues, the court below should have an opportunity to render such an award in the Conservancy's favor. *See Griffin v. Birkman*, 266 S.W.3d 189, 193-94 (Tex. App.—Austin 2008, pet. filed) (op. on reh'g) (noting that reversal "would necessitate a remand to the trial court to consider whether an award of attorney's fees . . . [under DJA] would be appropriate"). The Conservancy therefore seeks a limited remand for that purpose.

II. Properly Construed, and on This Record, Reverter Under the Gift Deed's First Condition Did Not Occur

WLCC purports to rely on the Gift Deed's four corners to support its arguments about the grantor's intent, yet it repeatedly falls back on what it says is evidence of "surrounding circumstances" the Court should consider. *See* Appellees' Br. at 15-31. As explained below, the Conservancy's reading of the Gift Deed is correct, and the trial court's judgment should be reversed.

A. WLCC's Emphasis on the Phrase "Archaeological Laboratory" Does Not Change the Analysis in Any Significant Way

WLCC criticizes the Conservancy's interpretation of the Gift Deed's first condition: that "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." PX 5 (App. Tab C).[5] In essence, WLCC contends that the Conservancy does not give proper weight to the phrase "archaeological laboratory" and that the phrase modifies everything immediately following it. *See* Appellees' Br. at 20-25. Even if WLCC's criticism is warranted, its argument ultimately does not affect the Conservancy's position or the outcome of this case.

Construing the Gift Deed as WLCC urges shifts the ultimate question ever so slightly to whether preservation of a significant archaeological resource for future study equates to "use[] predominantly ***to provide an archaeological laboratory*** . . . for an[] archaeological purpose." PX 5 (App. Tab C) (emphasis added); *see* Appellant's Br. at 21. Once again, WLCC bore the burden of proving that it does not.

B. The Four-Corners Approach Supports the Conservancy

The parties agree that the Court should look first to the Gift Deed's four corners and should construe the entire document together, harmonizing all of its provisions if possible. *See Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133-34 (Tex. 1994); *CenterPoint Energy Houston Elec., L.L.P. v. Old TJC Co.*, 177 S.W.3d 425, 430 (Tex.

[5] All appendix citations refer to the tabbed documents attached to the Conservancy's opening brief.

App.—Houston [1st Dist.] 2005, pet. denied); *Cherokee Water Co. v. Freeman*, 33 S.W.3d 349, 353 (Tex. App.—Texarkana 2000, no pet.); *Ely v. Briley*, 959 S.W.2d 723, 726 (Tex. App.—Austin 1998, no pet.). Predictably, WLCC contends that the document requires "active use" of the Preserve—such as ongoing scientific study or opening the property for public access—to avoid reverter. *See* Appellees' Br. at 16, 20-23, 38. WLCC is mistaken.

Though cited in the Conservancy's opening brief as an indication that the Gift Deed's four corners comport with the Conservancy's construction, WLCC ignores the provision stating that the Preserve was deeded "in consideration of the undertaking by the Grantee herein named to maintain the archaeological values of the Property herein conveyed."[6] PX 5 (App. Tab C). Instead, WLCC focuses solely on two instances in which the Gift Deed purportedly specifies how the Preserve should be "used." *See* Appellees' Br. at 17-25.[7]

WLCC's approach—not the Conservancy's—fails to construe the entire Gift Deed and harmonize all of its provisions. The only way to do so is to read the document to mean that maintaining the Preserve's archaeological values (*i.e.*, preserving the property for future study) was a contemplated "use" sufficient to avoid reverter. *See* PX 5 (App.

[6] Because it does not even acknowledge this provision, WLCC does not contend that the Conservancy had any hand in choosing its language. *Compare* DX 55 *with* PX 5 (App. Tab C).

[7] In its opening brief, the Conservancy thoroughly discussed and distinguished *City of Houston v. Van de Mark*, the principal case on which WLCC relies to support its "use" argument. *See* Appellant's Br. at 22-25. In the interest of brevity, the Conservancy will not do so again here.

Tab C); Appellant's Br. at 22-25. Otherwise, the reverter clause holds the Conservancy to standards inconsistent with the stated purpose of the grant, a truly absurd result.

C. WLCC's "Surrounding Circumstances" Cannot Be Considered

As stated in the Conservancy's opening brief, WLCC persuaded the district court to impose requirements beyond those stated in the Gift Deed based on Will Wilson, Sr.'s alleged expectation that the Conservancy would build an interpretive center or otherwise make the Preserve available to the public. *See* Appellant's Br. at 16-18. On appeal, WLCC insists that the four-corners rule governs this case, yet it goes on to re-cast its parol evidence of Wilson, Sr.'s intent as "surrounding circumstances" to try and escape the conclusion that this evidence was improperly offered and admitted to expand the Gift Deed's express terms. *See* Appellees' Br. at 27-30.[8]

The slope from surrounding circumstances to parol evidence is a slippery one. Although WLCC appears to believe that surrounding circumstances can always be considered when interpreting a contract, this Court and others have limited that review to situations requiring interpretation of ambiguous terms. *See Balandran v. Safeco Ins. Co.*, 972 S.W.2d 738, 741 (Tex. 1998) (noting that, "[w]hile parol evidence of the parties' intent is not admissible to create an ambiguity, . . . the contract may be read in light of the surrounding circumstances to determine whether an ambiguity exists" (citation omitted));

[8] The Conservancy disputes WLCC's characterization of the evidence cited to demonstrate surrounding circumstances. For example, WLCC attributes certain actions to the Conservancy "and its allies" (apparently the Texas Historical Commission) without specifying the Conservancy's role in the alleged activities. *See* Appellees' Br. at 28-29. WLCC's reliance on what the Conservancy said or did not say in press releases and correspondence merely underscores the need for interpreting the Gift Deed based on the four-corners rule rather than extrinsic evidence of intent.

Evergreen Nat'l Indem. Co v. Tan It All, Inc., 111 S.W.3d 669, 676 (Tex. App.—Austin 2003, no pet.) (stating that "[d]etermining whether a provision is ambiguous requires that we examine the entire contract in light of the circumstances that existed when the parties formed the contract" and that "extraneous evidence is not admissible to create a contractual ambiguity").

The parties agree that no one has alleged the Gift Deed is ambiguous. *See* Appellant's Br. at 18; Appellees' Br. at 27. Under the authorities cited above, having failed to plead ambiguity, WLCC is not entitled to rely on evidence of surrounding circumstances to support its desired interpretation.[9] *See also 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.) (mem. op.); *Terrill v. Tuckness*, 985 S.W.2d 97, 101-02 (Tex. App.—San Antonio 1998, no pet.). The Court therefore should either construe the Gift Deed based solely on its four corners or apply other contract construction rules, in which case the deed must be construed against WLCC. *See* Appellant's Br. at 13-15.

D. The Conservancy Permissibly Offered Expert Testimony to Explain the Gift Deed's Terms in the Archaeological Context

WLCC accuses the Conservancy of taking an inconsistent and self-serving position because it relied on archaeological expert testimony at trial. *See* Appellees' Br.

[9] WLCC contends in the alternative that its parol evidence was admissible under the "collateral and consistent" exception. *See* Appellees' Br. at 28 n.9. "Under the exception, parol evidence can be used to demonstrate a prior or contemporaneous agreement that is both collateral to and consistent with a binding agreement, and that does not vary or contradict the agreement's express or implied terms or obligations." *David J. Sacks, P.C. v. Haden*, ____ S.W.3d ____, 2008 WL 4370686, at *3 (Tex. 2008) (citing *Hubacek v. Ennis State Bank*, 317 S.W.2d 30, 31 (1958)). WLCC did not raise this theory in the trial court, and it points to no evidence of a separate agreement on which it relies. Moreover, any previous or simultaneous agreement to build an interpretive center or make the Preserve publicly accessible would alter the Conservancy's obligations under the Gift Deed rather than merely being collateral to it.

at 25-26. The gist of this argument is that this expert testimony was itself parol evidence that should not be considered. *See id.*

As indicated in the Conservancy's opening brief, each of its experts testified without objection that preservation of an archaeological resource for future study and analysis is a valid archaeological purpose. 2 RR 42, 137-39, 143-44; 3 RR 40, 136-37, 153; 4 RR 26-27. In *XCO Production Co. v. Jamison*, the Fourteenth Court of Appeals noted that "[e]xpert testimony may be particularly useful in explaining the 'commonly understood meaning in the industry of a specialized term'" and concluded that expert testimony addressing the meaning of certain language "was not admitted to create an ambiguity or to vary the terms of the Partnership Agreement, but to explain its specialized terms." 194 S.W.3d 622, 629 n.4 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (citations omitted); *see* Appellant's Br. at 21-22 (citing other authorities stating same proposition). The expert testimony presented in this case served the similar function of shedding light on the Gift Deed's terminology based on the specific purpose, function, and paradigm of archaeology.

Given the contrast between this testimony and WLCC's attempt to read additional requirements into the Gift Deed, WLCC's inconsistency complaint has no merit. The Conservancy property offered expert testimony about matters unique to archaeology, and this Court is permitted to assign that testimony all appropriate force.

E. WLCC's Evidence Was Legally Insufficient to Support the Trial Court's Judgment

As discussed previously, accepting WLCC's criticism that the Conservancy did not give sufficient effect to the phrase "archaeological laboratory" when construing the Gift Deed's first condition changes little about the obligation imposed. Title did not revert to WLCC unless the Conservancy failed to "use[] [the Preserve] predominantly to provide an archaeological laboratory . . . for an[] archaeological purpose." PX 5 (App. Tab C). Again, according to unrefuted expert testimony, preservation of the site was a sufficient "use" in archaeological circles. 2 RR 42, 137-39, 143-44; 3 RR 40, 136-37, 153; 4 RR 26-27.

The phrase "archaeological laboratory" requires no greater level of "use" than preservation for future study. *See* Appellant's Br. at 22-25. A recognized definition of "laboratory" is "a place providing opportunity for experimentation, observation, or practice in a field of study." *See* http://www.merriam-webster.com/dictionary/laboratory (last visited December 1, 2008). That definition is consistent with the Conservancy's expert testimony, which described an archaeological laboratory as a place where data may be collected that could be used to develop archaeological arguments, hypotheses, or test models. 2 RR 147-48, 185.[10] Neither definition required active excavation, public access, or regular activity on the Preserve.

While purportedly addressing the record evidence, WLCC does little more than regurgitate the trial court's fact findings and criticize the Conservancy's decision to

[10] Uncontroverted expert testimony indicated that research projects conducted at the Preserve over the years were sufficient by themselves to satisfy that requirement. 2 RR 148, 185; 3 RR 41, 142-43.

exchange a fifty-foot-wide strip for a larger piece of land with greater archaeological significance, a transaction that could not have become final absent modification of the Gift Deed's conditions as the Conservancy had sought. *See* Appellees' Br. at 36-40; *see also* Appellant's Br. at 6-7, 26. WLCC mentions some evidence of looting in 1993 and one instance that occurred in 2006, but fails to demonstrate that any particular harm came to the property's archaeological value as a result. *See id*. at 37 (citing 2 RR 129-30; PX 14; DX 17 & 18).

WLCC also completely overlooks the key modifier "predominantly," a word that removes this case from the realm of absolutes. *See id*. at 20. Indeed, the State Archaeologist and the director of the Texas Historical Commission's Archaeology division testified that the Conservancy managed the property appropriately and consistent with industry standards, foreclosing any possibility of a predominant use capable of triggering reverter. 2 RR 65, 138; 3 RR 134-38; PX 63.[11]

A reasonable fact-finder could not have disregarded the Conservancy's expert testimony regarding the archaeological significance of terms contained in the Gift Deed or whether the first condition was satisfied. *See City of Keller v. Wilson*, 168 S.W.3d 802, 820, 827 (Tex. 2005) (outlining no-evidence standard and recognizing that uncontroverted expert testimony binds fact-finder when "the subject matter is one for experts alone"); W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 254 (2006) (noting that, after *City of Keller*, legal sufficiency "test is not so much

[11] The Conservancy's activities on the Preserve are outlined at pages 25 and 26 of its opening brief.

whether there is a scintilla of evidence to support the verdict, but whether the reviewing court believes that the evidence at trial would allow reasonable and fair-minded people to reach the verdict under review"). Accordingly, the trial court's judgment was erroneous and should be reversed.

III. The Court Should Reject WLCC's Strained Arguments That the Preserve Reverted Under Other Conditions

Finally, WLCC half-heartedly argues that the remaining conditions at issue independently led to a reverter. *See* Appellees' Br. at 40-41. Its position lacks merit.

A. Placing the Plaque on the Property Was Sufficient Acknowledgement

Although it concedes that the Conservancy installed a plaque on the property in memory of Marjorie Ashcroft Wilson, WLCC contends that doing so was not enough to "acknowledge" the gift. *See* Appellees' Br. at 40-41; PX 5 (App. Tab C). WLCC assumes that the plaque had to be publicly visible, but never demonstrates that the Gift Deed's language required public access to the property.

None of the Gift Deed's conditions required the Conservancy to provide public access to the Preserve. *See* PX 5 (App. Tab C). Public exhibition of artifacts and restored habitats was but one several ways the Conservancy could comply with the first condition. *See id*. Indeed, the grant's stated purpose was to maintain the site's archaeological value, a task potentially inconsistent with providing public access.

The Conservancy plainly "express[ed] gratitude . . . for" the gift by placing the plaque on the property. *See* Appellees' Br. at 40. To the extent the trial court based the judgment on its contrary finding, this Court should reverse.

B. The Preserve Was Named in Compliance With the Gift Deed

WLCC once again attempts to inject requirements not contained within the Gift Deed's four corners by arguing that the property reverted because the Conservancy poorly maintained its name as the Marjorie Ashcroft Wilson Archaeological Preserve. *See* Appellees' Br. at 41. This argument concedes that the Preserve was so named.

As noted in the Conservancy's opening brief, nothing in the Gift Deed required the Preserve's name to be maintained in any specific way. *See* Appellant's Br. at 28-29; PX 5 (App. Tab C). The fact that the trial court found the Conservancy did not maintain the name does not change that conclusion. Because the Conservancy named the Preserve as the Gift Deed required, the trial court's judgment is erroneous and should be reversed.

CONCLUSION AND PRAYER

The Conservancy renews its request for the relief specified in its principal brief. The Conservancy requests all other appropriate relief to which it is entitled.

Respectfully submitted,

D. Todd Smith
State Bar No. 00797451
1250 Capital of Texas Highway South
Building 3, Suite 400
Austin, Texas 78746
(512) 329-2025
(512) 329-2026 (fax)

–and–

Patrick L. Reznik
State Bar No. 16806780
GEORGE & BROTHERS, L.L.P.
114 West 7th Street, Suite 1100
Austin, Texas 78701
(512) 495-1400
(512) 499-0094 (fax)

Counsel for Appellant
The Archaeological Conservancy

CERTIFICATE OF SERVICE

On December 2, 2008, in compliance with Texas Rule of Appellate Procedure 9.5, I served a copy of this reply brief upon all other parties to the trial court's final judgment by hand delivery as follows:

Rodney Varner
WILSON & VARNER, LLP
301 Congress Avenue, Suite 2025
Austin, Texas 78701
Lead Appellate Counsel for Appellees

D. Todd Smith