

IN THE COURT OF APPEALS OF MARYLAND

JOHN TIMOTHY NEWELL,
FRANCES LUCINDA NEWELL,
KAREN NEWELL BRINDLEY,
SHARON NEWELL FAWCETT,
ELIZABETH BANKS RAY,
ESTATE OF BEULAH BANKS NEWELL,

Petitioners,

v.

THE JOHNS HOPKINS UNIVERSITY,

Respondent.

On Petition for Certiorari to the Maryland Court of Special Appeals

REPLY IN SUPPORT OF PETITION

David W. Brown
KNOPF & BROWN
401 E. Jefferson St.
Suite 206
Rockville, MD 20850
Telephone: (301) 545-6100
Facsimile: (301) 545-6103
Email: brown@knopf-brown.com

Carter G. Phillips*
Richard D. Klingler
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711
Email: cphillips@sidley.com

* Counsel of Record

Counsel for Petitioners

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ARGUMENT

Petitioners sought review of two issues of broad applicability and general importance to the law of contract, whose resolution will profoundly affect the legal framework determining not only the scope of charitable giving but also the willingness of donors to give to charities in the State. First, what legal standards apply to determine donative intent when the law of charitable donations and the law of contract collide in a single agreement. Second, even wholly within the law of contracts, how this Court's decisions that require lower courts to focus on the character of the contract and position of the parties should be applied to contracts involving charitable donations.

In response, what The Johns Hopkins University ("JHU") fails to say is as revealing as what it argues. JHU does not dispute that this case has attracted very significant public attention, due to its broad and harmful implications for charitable giving, the equities implicated when charitable donees disregard donors' intentions, and the consequences for Montgomery County residents of the particular development at issue. Nor does it dispute that, if faced with continuing uncertainty or undue rigidity in the law regarding enforcement of charitable gifts, charitable donors will give less frequently or to charities operating in other states, harming Maryland and the public in numerous respects. Nor does JHU dispute that completely different legal standards, much more favorable to enforcement of the gift component of the transaction at issue, would have applied had Mrs. Banks simply undertaken two transactions, selling the parcel of land that JHU was contractually permitted to develop and separately donating the adjoining restricted parcel now at issue in this case. Nor does it even address the second question presented, other than arguing the merits of the issue of contractual interpretation *assuming* that the charitable nature of the contract is irrelevant. These deficiencies confirm that review is warranted, and, as discussed below, what JHU does address presents no reason to decline review.

1. JHU's failure to address the second question presented is especially

significant. As petitioners addressed at length, Pet. 1-2, 13-14, 19-21, this Court’s cases require that construction of contracts, and particularly determining whether any contractual ambiguity exists, must “include[] a consideration of the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution.” *Calomiris v. Woods*, 353 Md. 425, 436 (1999) (quotation marks omitted); *see also, e.g., Anne Arundel Cnty. v. Crofton Corp.*, 286 Md. 666, 673 (1980); *Gen. Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261-62 (1985). The court below held that whether the contract by its terms implemented a charitable donation, and was between a donor and donee, were irrelevant to the construction of the document. *See* Pet. App. 67a-68a; Pet. 13-14. Review of the decision below would enable this Court to address the meaning and application of *Calomiris*, *Crofton Corp.*, and other decisions – providing clarity and resolving an issue with important implications for all contracts between charitable donors and donees and for the development of Maryland contract law more broadly.

In addressing the merits of the dispute, JHU invoked *Dumbarton Improvement Ass’n v. Druid Ridge Cemetery Co.*, 434 Md. 37 (2013), *see* Answer 16-17, but that case, too, follows the *Calomiris* line of cases and supports review of the petitioners’ second issue presented. *Dumbarton* had nothing to do with charitable donations, and JHU cited it for the unremarkable proposition that courts follow contract rules in construing restrictive covenants in real estate deeds. Answer 16-17. However, *Dumbarton* also required that in determining whether an ambiguity exists in contract and deed language, courts must look to “what a reasonable person in the position of the parties would have meant at the time it was effectuated.” *Id.* 52. So, when *Dumbarton* is applied in the context of charitable giving, the case undermines the holding below, and supports this Court’s review of the decision below.

2. Although JHU does address the petition’s first question presented, it mischaracterizes the point and thus avoids grappling with why that issue, too, merits

review. JHU opens its discussion by claiming that “[i]mplicit” in petitioners’ argument is a rejection of contract principles, and JHU then proceeds to a lengthy discussion of “the sufficiency of consideration in contract negotiations” and why “[a] contract ensue[d]” in this case (citing the Restatement (Second) of Contracts § 79). Answer 7, 8-9 (capitalization conformed). It is little wonder that JHU cannot quote the petition on either point; JHU attacks a strawman: petitioners fully accept that the courts below were construing a valid contract, supported by adequate consideration – and nothing in the petition was to the contrary. Instead, the first issue presented simply seeks this Court’s review of whether a valid contract that also sought to effect a charitable gift should be construed in part by reference to principles drawn from the law of donative transfers. *See* Pet. 1, 15-18. It asks the Court to address the rigidity and exclusivity of contract principles, not whether they apply. Of course, petitioners separately argued in the courts below and the petition that they should prevail under contract principles even if they are not informed by donative considerations. *See id.* 19-21. But the fundamental point of the first question is whether the use of standards derived from arms-length dealings should be applied to do violence to the clear intent of the donor.

Throughout its answer, JHU ignores how the parties amended their contract “for the purpose of clarifying Seller’s intent to make a charitable contribution to the Buyer.” E783. As amended, the contract states that the difference between fair market value and the purchase price “constitutes a gift.” *Id.* Neither does JHU acknowledge that, whether the donor uses a contract or other mechanism to effect a gift, there is often a two-way exchange of value and benefits. JHU thus ignores the broader issue presented by the case, as well as incorrectly dismissing the relevance of the donative-transfer cases cited in the petition. *See* Answer 12-13. For example, the certiorari petition cited *Kiel v. Brinkman*, in which a couple gave their daughter real property that was encumbered by a mortgage. 668 S.W.2d 926, 928 (Tex. App. 1984). The court acknowledged that the parents received the return

benefit of the daughter's paying off the mortgage, even though it characterized the transaction as a gift for purposes of community property law. *Id.* 929. In general, then, when a transaction includes significant elements of both a sale and a gift, that circumstance calls for this Court to reconcile both the law of contracts and the law of gifts to promote Maryland's public policy. *See, e.g., Cohen v. City of Lynn*, 598 N.E.2d 682, 685 (Mass. App. 1992) (applying the law of charitable trusts to a real-property transfer that was part gift, part sale). This issue is likely to recur as charitable gifts of land are increasingly undertaken through below-value sales ("bargain sales").

3. JHU incorrectly asserts that "[t]his Court recently rejected an almost identical argument" in *Long Green Valley Ass'n v. Bellevale Farms, Inc.*, 432 Md. 292 (2013). Answer 10 (capitalization conformed). However, in the immediately following discussion, JHU concedes that *Long Green Valley* did *not* address that issue of the below-value "surrender of development rights," much less reject it. *See* Answer 10-11. That concession is prudent: this Court decided the case, instead, on the ground that the petitioners lacked third-party standing to raise the broader issue in the absence of a charitable trust having been created. *See Long Green Valley*, 432 Md. at 296, 312, 324. Because this Court previously determined in *Long Green Valley* that the relevance of the charitable nature of a below-market transaction presents an important issue meriting review – and did not reach or resolve *that* issue – *Long Green Valley* only underscores that review is warranted in this case where the fundamental question is squarely presented. And here, petitioners' standing to present and enable the Court to address the broader issue is uncontested because the contract and deed at issue expressly provide for enforcement by petitioners. *See* Pet. App 5a.

4. Nor, in arguing the merits of the dispute, does JHU adequately address the implications of another decision of this Court, *Lowden v. Bosley*, 395 Md. 58, 66-69 (2006). JHU asserts that *Lowden* resolves one of the subsidiary

issues in the case: whether the contract is at least ambiguous in limiting the specified uses to the “Buyer’s use” and “its use” and thus limiting third-party uses. Answer 18. Petitioners argued that this contract language required JHU itself to use the property in the specified ways, and not lease it, consistent with the contract requirement that the property must be “the Belward Campus of The Johns Hopkins University.” See Pet. 7, 21. *Lowden* indicates that when a deed simply limits the use of the land, without specifying the restricted party, then the lessee’s use of the land can satisfy the restriction. See *Lowden*, 395 Md. at 66-69. However, in *Keseling v. Mayor & City of Baltimore*, 220 Md. 263 (1959), which JHU does not cite, this Court held that a deed provision, specifically limiting a *purchaser’s* use of the land to “residential” uses, prohibited the purchaser from leasing the property even though the *lessees* used the property for residential uses. That is, the leasing activity was itself commercial and thus an unspecified use – just as petitioners argue is the case here. For this reason, and those presented in the petition at pp. 19-21, there is a robust argument that the contract language does not unambiguously favor JHU, and JHU’s extensive and highly contentious discussion of the merits to the contrary does not undermine the importance of the issues presented by the case, or provide any reason for declining to review it.

5. Throughout JHU’s extensive discussion of the merits of the case, JHU ignores the case’s procedural posture, which actually *favours* review by this Court. JHU prevailed on summary judgment, which of course requires that the decision must be upheld, if at all, only on uncontested facts with all reasonable inferences drawn in petitioners’ favor. This posture makes the decisions below especially unjustifiable and underscores the conflict between the donors’ charitable intent and the contract as rigidly construed by the Court of Special Appeals. JHU’s Answer repeatedly ignores the standard applicable to review of a summary judgment motion. For example, as part of its effort to recharacterize one of its most significant donations ever as just a contract negotiated among equals, JHU baldly

asserts that it “constructed a half-million dollar residence on the farm for Miss Banks.” Answer 4. Nothing in the record confirms this as undisputed fact, and the truth is that the actual cost to the University was close to \$78,000, with the additional construction costs paid from State condemnation funds.

6. Finally, there is no merit to JHU’s suggestion (Answer 20-21) that review is unwarranted because the *Circuit Court* concluded that the extrinsic evidence would not support petitioners’ position in light of the high standard that the court held would apply if the contract is ambiguous. The Court of Special Appeals did not affirm this determination. Moreover, the Court of Special Appeals’ decision reflects a quite contrary conclusion, as the court repeatedly indicated that its rules of construction must trump the donors’ undeniable intent reflected in the extrinsic evidence. *See* Pet. App. 39a, 67a-68a. And, the Circuit Court’s conclusion was unsupported by any reasoning regarding the extrinsic evidence itself, and it rested on a legal standard that would be erroneous if this Court granted review and accepted petitioners’ arguments with respect to either of its principal issues presented. Pet. App. 31a-32a. The Circuit Court’s short, unreasoned, and erroneous treatment of the issue only provides additional reason for this Court to grant the petition.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for certiorari should be granted.

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David W. Brown
KNOPF & BROWN
401 E. Jefferson Street
Suite 206
Rockville, MD 20850
Telephone: (301) 545-6100
Facsimile: (301) 545-6103
Email: brown@knopf-brown.com

Respectfully submitted,

/s/ Carter G. Phillips
Carter G. Phillips*
Richard Klingler
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711
Email: cphillips@sidley.com

* Counsel of Record

Counsel for Petitioners

** This brief was prepared using Times New Roman 13-point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 27th day of January, 2014, I caused a true and correct copy of the foregoing Reply In Support Of Petition to be delivered by mail to:

James H. Hulme, Esq.
james.hulme@arentfox.com
Leah C. Montesano, Esq.
leah.montesano@arentfox.com
Arent Fox, LLP
1717 K Street, NW
Washington, DC 20036
Attorneys for Appellee

/s/ Carter G. Phillips
Carter G. Phillips