IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0075

SARAH L. BIRCHFIELD,
Plaintiff Below, Petitioner

vs.)

Appeal from a final order
of the Circuit court of Raleigh County (15-C-733)

ZEN'S DEVELOPMENT, LLC,
a West Virginia limited liability company;
UPTOWN PROPERTIES, LLC,
a West Virginia limited liability company; and
KENNETH W. MCBRIDE, JR.
an individual,
Defendant Below, Respondents

PETITIONER'S CONSOLIDATED REPLY TO RESPONDENTS KENNETH W. MCBRIDE, JR., UPTOWN PROPERTIES, LLC AND ZEN'S DEVELOPMENT, LLC

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COMES NOW, Petitioner, Sarah L. Birchfield, by her counsel, Mark A. Sadd of Lewis Glasser PLLC, and under Rule 10(g) of the West Virginia Rules of Appellate Procedure, to submit her Consolidated Reply to the Responses of Respondents, Kenneth W. McBride, Jr., Uptown Properties, LLC and Zen's Development, LLC, to her Petition, filed by them under Rule 10(d). Petitioner submits this Consolidated Reply in lieu of and as a full substitution for her Reply to the Response of Respondent, Kenneth W. McBride, already filed by her and lodged with the Clerk of the Supreme Court of Appeals of West Virginia. Petitioner replied in a separate pleading to the Response of Zen's Development, LLC, and attests that she did not timely receive the Response of the third Respondent, Uptown Properties, LLC, until August 31, 2020, by email. Accordingly, in accordance with the 20-day period to reply as set in the Scheduling Order for this case, Petitioner submits her Consolidated Reply under Rule 10(g) of the West Virginia Rules of Appellate Procedure and for her Consolidated Reply states as follows:

I.

POINTS IN REPLY TO RESPONDENT, KENNETH W. MCBRIDE, JR.

1. Respondent McBride correctly states on p. 5 of his Response that the "party wall agreement has never been terminated by the owners of the respective lots and remains in effect." Yet, despite that the party wall agreement and the servitude relationship, *de facto*, have never been terminated by the owners of Lots 4 and 5, the rulings of the Raleigh County Circuit Court *de jure* have terminated the party wall agreement and the relationship. The lower court has forfeited Petitioner Birchfield's property rights based on no legal principle within the law of real property in West Virginia. Indeed, the lower court has stripped from Petitioner Birchfield all of her rights and benefits arising out of the Party Wall Agreement. To accomplish this unjust result, the lower

court crafted new principles regarding the party wall relationship whose effect is no less than to destroy the Party Wall relationship between Petitioner Birchfield and each of Respondents.

The lower court has expressed no rationale for this outcome.

2. Respondent McBride sanctions in his Response the lower court's reliance on a false dichotomy between acts of commission and of omission in relation to the parties' use and care of the Party Wall. Under the lower court's rationale, Respondents would be barred from knocking the Party Wall down while they would be free, through inaction, to allow their one half of the Party Wall to deteriorate and collapse because of water and the elements, conditions that the original owners of the Party Wall could not have possibly contemplated nor desired.

West Virginia law does not acknowledge this dichotomy. In fact, the lower court's rulings directly contradict West Virginia case law. A party wall "agreement must be construed with reference to the conditions in and the construction of the building at the time the party-wall agreement was made." Syl. Pt. 2, *A. W. Cox Dep't Store v. Solof,* 103 W. Va. 493, 138 S.E. 453 (1927). In 1919, when the Party Wall Agreement was made, the owners of Lots 4 and 5 agreed to split the ownership of a single structural party wall down the middle. That is evident in the documentary record. The Party Wall, 18 inches wide, straddles the boundary between Lots 4 and 5, with nine inches on either side of that line. Petitioner, Birchfield literally owns one half while each of Respondents owned the other half. Further, the lower court with its rulings sanctions Respondents' failing to take steps to prevent the flow of surface water from Lot 5 through the Party Wall and into Petitioner Birchfield's basement on Lot 4.

Petitioner Birchfield is left without a legal remedy for the loss of the Party Wall. This cannot be the outcome that West Virginia law dictates. Petitioner Birchfield's building is a complete loss to her. The Supreme Court cannot allow the lower court's rulings to stand

unremarked or untouched to the effect that Petitioner Birchfield's building and her personal finances are left in ruins.

3. On page 8 of his Response, Respondent McBride echoes the lower court's puzzling claim that "there was a dearth of case law relating to the obligations imposed upon parties to a party wall agreement under the common law in West Virginia." There is no such dearth of case law as Petitioner Birchfield demonstrates in her Petition. The rules exist even if the lower court declines to honor and extend them to this case. In West Virginia, a party wall obligor has both the right to increase the height of a party wall and the corresponding obligation on the exercise of that right "if it can be done without injury to the adjoining building." *Gates v. Friedman*, 83 W. Va. 710, 98 S.E. 892 (1919). Justice Brown in a concurrence in *List v. Hornbrook* 2 W. Va. 340 (1867): "I admit that a party wall may exist in this State, but it must arise from contract express or implied, or from prescription, *and after the wall obtains that character, but not before, equity will raise the duty and liability to keep the same in repair* . . ." (emphasis supplied).

If amplification of the principles already expressed in West Virginia's common law is desired in this case, then Petitioner Birchfield urges this Honorable Court to consult *Restatement Third, Property (Servitudes)* for guidance. Respondents seem to have an allergic reaction to this tremendous source that articulates, clarifies and explains servitudes. Indeed, Section 4.13 *Restatement Third, Property (Servitudes)* reconciles and harmonizes with West Virginia's existing jurisprudence:

> *Duties of Repair and Maintenance*
>
> Unless the terms of a servitude determined under § 4.1 provide otherwise, duties to repair and maintain the servient estate and the improvements used in the enjoyment of a servitude are as follows:
>
> (1) the beneficiary of an easement or profit has a duty to the holder of the servient estate to repair and maintain the portions of

> the servient estate and the improvements used in the enjoyment of the servitude that are under the beneficiary's control, to the extent necessary to
>
> > (a) prevent unreasonable interference with the enjoyment of the servient estate, or
> >
> > (b) avoid liability of the servient-estate owner to third parties.
>
> (2) Except as required by § 4.9, the holder of the servient estate has no duty to the beneficiary of an easement or profit to repair or maintain the servient estate or the improvements used in the enjoyment of the easement or profit.
>
> (3) *Joint use by the servient owner and the servitude beneficiary or improvements used in enjoyment of an easement or profit, or of the servient estate for the purpose authorized by the easement or profit, gives rise to an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance of the portion of the servient estate or improvements used in common.*
>
> *(4) The holders of separate easements or profits who use the same improvements or portion of the servient estate in the enjoyment of their servitudes have a duty to each other to contribute to the reasonable costs of repair and maintenance of the improvements or portion of the servient estate.*

(emphasis supplied).

Subsections (3) and (4) articulate the essential mutuality of obligations or duties when "joint use" of the "same improvements," such as the Party Wall in the instant case, are in issue.

Mutuality of rights and obligations are inherent in a party wall relationship.

4. The lower court's rulings are demonstrably unfair because they include no limiting principle to their obvious effects on real property rights. If, as the lower court believes, either party wall obligor is free to abandon her obligations, even if they run with the land, then the effect is to render a party wall agreement intended to run with the land as a mere license that either party may

terminate at will. The substance and application of the lower court's rulings effectively relieve Respondents of their Party Wall obligations that the law imposes (or should impose) of them and,

5. In Sections II and III of his Response, Respondent McBride claims that Petitioner Birchfield's negligence and party wall claims are "time barred". See pages 12 through 15. Respondent McBride has not tendered to this Honorable Court, and the agreed record for Petitioner Birchfield's appeal omits, any evidence that he either (a) made a valid and timely affirmative defense on these claimed statutes of limitations or (b) perfected those issues for his own cross-appeal. Thus, for this appeal, this Honorable Court may not properly consider Respondent McBride's arguments on the proper statute of limitations or on its applicability to this case.

6. Nonetheless, Respondent McBride incorrectly claims on p. 14 of his Response that Petitioner Birchfield's claims against him for his breach of his Party Wall obligations are "time-barred" under W. Va. Code § 55-2-12(a), *Personal actions not otherwise provided for*, which provides; "Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property . . ." Respondent McBride's reliance on W. Va. § 55-2-12(a) is misplaced. He ignores altogether W. Va. Code § 55-2-6a. *Deficiencies, injuries or wrongful death resulting from any improvements to or survey of real property; limitation of actions and suits,* fixing a 10-year statute of limitations, that primarily applies to this case:

> *No action, whether in contract or in tort*, for indemnity or otherwise, nor any action for contribution or indemnity to recover damages for any deficiency in the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property, or the actual surveying of real property, or, *to recover damages for any injury to real or personal property*, or, for an injury to a person or for bodily injury or wrongful death arising out of the defective or unsafe condition of any improvement to real property, or the survey of real property, may be brought more than ten years after the performance or

> furnishing of the services or construction. However, the above period is tolled according to section twenty-one of this article. The period of limitation provided in this section does not commence until the improvement to the real property, or the survey of the real property in question has been occupied or accepted by the owner of the real property, whichever occurs first.

(emphasis supplied).

7. In Section IV of his Response, Respondent McBride finally takes up the substantive issues of his obligations under the Party Wall Agreement, although with exceeding indifference to West Virginia's jurisprudence. He reverts to the simplistic approach that he and the other Respondents, including the lower court, to this case, the states: "Although the agreement assumed that a building would be constructed on Lot No. 5, it did not require the Rosses [then the owners of Lot 5) to construction one." McBride Response at page 16. What is the point? The Rosses, in fact, actually shared in the cost of constructing a single wall and used it for its purposes until they parted with ownership of Lot 5. Does Respondent McBride endorse the next step in his argument: That the Rosses could have abandoned the Party Wall as soon as the ink was dry in the Party Wall Agreement?

Also, Respondent McBride writes at page 17: "Although the written party wall agreement provides specific guidance about the construction of the wall and the attachment of the building to be constructed on Lot No. 5 to the wall, it did not consider the detachment of either building from the party wall or the destruction of one of the buildings by fire." Neither does the Party Wall Agreement expressly forbid that one party may not dismantle the party wall or that she may not punch a hole through it or excavate beneath it to destabilize it. To extend Respondent McBride's point, then that would mean that, notwithstanding *Gates v. Friedman,* 83 W. Va. 710, 98 S.E. 892 (1919), *Johnson v. Chapman,* 43 W. Va. 639, 28 S.E. 744 (1897) and other cases, any party wall obligor is

entitled to anything or nothing to maintain and repair a party wall if the written agreements creating the relationship are silent on those points.

Even that extreme position does not even square with the lower court's rulings.

II.

POINTS IN REPLY TO RESPONDENT, ZEN'S DEVELOPMENT, LLC

1. Respondent Zen's Development, LLC ("Zen's Development") founds much of its Response on the delusion — unsupported in West Virginia's jurisprudence of servitudes — that "the *right* [sic] of parties to any party wall agreement are [sic] governed by the respective deeds." Zen's Development's Response at page 15 (emphasis supplied). Respondent Zen's Development throughout this case, including in its Response at pages 15-17, falsely claims that West Virginia law requires that party wall duties and obligations must be expressed in the contract creating the party wall and the party wall relationship. That is false. Even the circuit court, although in error rejecting much of West Virginia's existing law of party wall, does not make that same conclusion.

In support of its false statement, Respondent Zen's Development cites the opinion of *Gates v. Friedman*, 83 W. Va. 710, 98 S.E. 892 (1919). A cursory review of this Court's opinion in *Gates v. Friedman* shows it holds just the opposite: That (1) while a party wall and the party wall relationship must be a matter of contract[1] in West Virginia (2) both the rights and obligations of the party law relationship do not have to be a matter of contract as they can and often are *implied* by law. To illustrate the latter principle, it is worth extensively excerpting *Gates*:

> As we have observed, the deed to plaintiffs not only conveyed to them the fee in the land to the center line of the easterly wall of the Courier Building, but also the right and authority to use said wall and also the side wall of the Rust Building 'as parts of the building to be constructed by them.' *It may be said, however, that no such*

[1] No party to this case debates this first point expressed in *List v. Hornbrook*, 2 W. Va. 340 (1867); yet, this rule has exceptions. But the issue merits no further discussion because neither party in this case nor the Raleigh County Circuit Court claims that the Party Wall is not party wall as a matter of West Virginia law. The Party Wall became a party wall as a matter of contract in 1919 when the two adjoining owners of Lots 4 and 5 agreed to treat it as one.

cross easements were reserved to the plaintiffs and that the defendant Friedman by his subsequent deed acquired no right or rights to any use of said wall beyond the center line of said wall to which his grant extended.[2] But did he not get by his deed everything and every right remaining vested in the bank, the common grantor? It seems to be well settled, at least in England, that where one grants a divided moiety of an outside wall of his own house with the intention of making such wall a party wall between his house and an adjoining one to be built by the grantee, *the law implies the grant and reservation in favor of the grantor and grantee respectively of such easements as may be necessary to carry out what was the original intention of the parties with regard to the use of the wall, the nature of those easements varying with the particular circumstances of each case.*[3] *Carson's Gale on Easements, supra,* pp. 407-8; *Washburn on Easements,* (4th ed.), p. 606 et seq. The Supreme Court of Appeals of Virginia says: 'A party wall is a dividing wall between two houses, to be used equally, for all the purposes of an exterior wall, by the respective owners of both houses.' *Bellenot v. Laube's Ex'r,* 104 Va. 842, 52 S.E. 698. While the right may not exist as a common law or statutory right, it exists in this State as the result of contract, express or implied. *List v. Hornbrook,* 2 W. Va. 340, 345. So that whatever rights were reserved by the grantor, were granted to Friedman in the deed to him, and were those which in this country have been held to appertain to the owners of a party wall. The wall in controversy then being a party wall, with the usual rights of each owner appertaining thereto, the question remains: Did Friedman have the right to enter upon it in the way and manner alleged and proven, to build up and extend it in the repair and extension of his building? The authorities on this question seem to be uniform in holding that either of the adjacent owners may increase the height or extend the length of such wall if it can be done without injury to the adjoining building and the wall is clearly of sufficient strength to bear the addition. This seems to be the general rule unless limited by the provisions of the contract or deed. *Jones on Easements,* secs. 696-699, and cases cited in notes. *Bloch v. Isham,* 28 Ind. 37, 92 Amer. Dec. 287, and elaborate note; *Calmelet v. Sichl,* 48 Neb. 505, 58 Amer. St. Rep. 700, 67 N.W. 467, and note; *Bright v. Bacon* (Ky.) 131 Ky. 848, 116 S.W. 268, 20 L. R. A. (N. S.) 386, and note. *In this note a long line of decisions is cited for the proposition that in this country, in the absence of agreement, express or implied, regulating the respective rights of the owners of a party wall, either one may increase the*

[2] In the preceding italicized excerpt, this Court expresses the argument of Respondent Zen's Development and then proceeds to reject it.

[3] The preceding italicized excerpt supports one of two essential point in issue in the party wall portion of the Petition: The law will imply and impose on party wall obligors both rights and obligations in relation to the party wall.

> *height if the wall is of sufficient strength and can be raised without injury to the adjoining building and without impairing the cross easement to which the other owner is entitled, and it is there said that no American authority can be found, and we find none, which disputes the proposition.*[4]And upon the same principle and for like reasons the rule permitting the raising of a party wall permits the extension thereof unless restrained by the contract. *Matthews v. Dixey*, (Mass.) 5 L.R.A. 102; *Everett v. Edwards*, (Mass.) Id. 110.

(emphasis supplied).

The holdings in *Gates* stand for precisely the opposite of what Respondent Zen's Development claims in its Response. The law of servitudes frequently (and perhaps usually) *implies* and *imposes mutual* duties and obligations on the parties within the relationship that the contract creates. This is the essence of a party wall relationship understood within servitudes.

Perpetual cross-easements in and to a party wall alone are insufficient to describe the implied duties and obligations arising out of their possession, use and enjoyment.

2. Respondent Zen's Development is bothered that there are not many party wall cases in West Virginia. Despite West Virginia's case law, Respondent Zen's Development (as the circuit court essentially incorrectly found below) claims that our West Virginia party wall cases do not express or impose on a party wall obligor a duty to protect the party wall. That simply is false. This Honorable Court long ago expressed the duty to protect a party wall in this *holding*:

> A strong pillar and a weak one may support a wall, but if they are both weak, the wall will fall. *Two separate persons are obligated to make each pillar strong. If either does his duty the wall may stand; but if each neglects his duty and the wall falls, they are jointly and severally liable for the injury that follows to anyone.* As each contributed to the injury they are each liable for the whole injury, and therefore can be sued jointly without in any wise increasing their separate liabilities.

Johnson v. Chapman, 43 W. Va. 639, 28 S.E. 744 (1897) (emphasis supplied).

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[4] In the preceding italicized excerpt, this Court expressed one of the rights and thus corresponding obligation to raise the height of a party wall so long it does not impair "the cross easement to which the other owner is entitled".

3. At pages 13-14 of its Response, Zen's Development states its dislike of property law cases that are *old.* a tiresome trope of litigants who do not respect the immutability of the law of real property as being one of its strengths. "The cases from West Virginia, upon which Petitioner relies, all pre-date 1933 and none of the same, as discussed below, set forth the actual duties or obligations of parties to a party wall like the one at issue in this case.

First, it ought to be discouraging (and odd) to this Court for Respondent Zen's Development to reject *stare decisis* as a prudential and stabilizing force in the law, especially when it comes to property rights. There is no case or statute that undermines or casts doubt on, for example, the implied duty to keep a party wall "strong" as this Court long ago expressed in *Johnson v. Chapman, supra.* Is it okay to ignore *Johnson v. Chapman* merely because it is "old"?

Second, that Respondent Zen's Development denigrates "pre-1933" case law as inapplicable to the instant case is risible given that the Party Wall that is the object in issue was erected in 1919.

Third, Petitioner Birchfield continues to rely on the structural stability and strength of the Party Wall even after 101 years. Nothing in the nature of its structure or her building's reliance on it to hold it up and to protect her building from water and the elements has changed in a century. What Respondent Zen's Development desires essentially is an end to its duties under West Virginia law to hold up (so to speak) its end of the bargain made in 1919. What the lower court has effectively accomplished with its rules of the case is to terminate the Party Wall Agreement.

Fourth, the current law of the case abrogates and destroys Petitioner Birchfield's property rights in the Party Wall and the expectations she reasonably has that West Virginia will protect those rights. Why are servitudes as a class of real property undeserving of protection?

4. Respondent Zen's Development avers on pages 13-14 of its Response that Petitioner Birchfield essentially is a hypocrite for both claiming that West Virginia law already adequately expresses party wall duties to protect, maintain and repair and also referring this Honorable Court to the Restatements of the law of servitudes for guidance. This Court, Petitioner Birchfield suggests, will not fall for that trick. If Respondent Zen's Development cannot, this Court fully understands that the American Law Institute authors the Restatements, which, according to its website, "are primarily addressed to courts and aim at clear formulations of common law and its statutory elements, and reflect the law as it presently stands or might appropriately be stated by a court".[5] It is neither a hypocrisy nor a sin to visit the Restatements for clarifying formulations of West Virginia's existing law of servitudes in the area of party walls. Although the circuit court avoided the Restatements, this Court would be well-served to consider, for example, Section 4.13 *Restatement Third, Property (Servitudes)*, which reconciles and harmonizes with West Virginia's existing law of party wall duties, including the identified duties of "*Repair and Maintenance*":

> Unless the terms of a servitude determined under § 4.1 provide otherwise, duties to repair and maintain the servient estate and the improvements used in the enjoyment of a servitude are as follows:
>
> (1) the beneficiary of an easement or profit has a duty to the holder of the servient estate to repair and maintain the portions of the servient estate and the improvements used in the enjoyment of the servitude that are under the beneficiary's control, to the extent necessary to
>
> (a) prevent unreasonable interference with the enjoyment of the servient estate, or
>
> (b) avoid liability of the servient-estate owner to third parties.
>
> (2) Except as required by § 4.9, the holder of the servient estate has no duty to the beneficiary of an easement or profit to repair or

[5] https://www.ali.org/about-ali/how-institute-works/

> maintain the servient estate or the improvements used in the enjoyment of the easement or profit.
>
> (3) *Joint use by the servient owner and the servitude beneficiary or improvements used in enjoyment of an easement or profit, or of the servient estate for the purpose authorized by the easement or profit, gives rise to an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance of the portion of the servient estate or improvements used in common.*
>
> *(4) The holders of separate easements or profits who use the same improvements or portion of the servient estate in the enjoyment of their servitudes have a duty to each other to contribute to the reasonable costs of repair and maintenance of the improvements or portion of the servient estate.*

(emphasis supplied).

Subsections (3) and (4) *supra* are merely simplified expressions (or, gosh, restatements!) of the duties that West Virginia's case law already imply and impose on party wall owners.

5. To be plain about it, the lower court and Respondents believe that West Virginia law does not imply nor impose duties to protect, to maintain and to repair a party wall while Petitioner Birchfield believes that it does. (From a colloquy with counsel for Petitioner Birchfield, the circuit court said: "Because part of the trouble I have your motion is this: Is the ruling that I made with regard to the party wall, I believe is just an extension of the rule that Judge Hutchison made. His rule, from on with the party wall agreement only required that no one do any harm – to the property." A.R. 0977. " . . . but I've expanded it to say, based upon that and the other cases, that do no harm means that you have no obligation to protect from other elements and things of that nature." A.R. 0978-9). Based on that false and incorrect understanding of West Virginia law, the lower court announced the adoption of new rules, borrowed from other jurisdictions, excluding the duties of maintenance and repair (that is, protection), notwithstanding that West Virginia

decisional law has expressed them. *See e.g., Johnson v. Chapman, supra*; *Mutual Improvement Co. v. Merchants' & Business Men's Mut. Fire Ins. Co.*, 112 W. Va. 291, 164 S.E. 256 (1932).

6. Petitioner Birchfield is pleased that Respondent Zen's Development concedes that the Party Wall is structural rather than non-structural. The character of the Party Wall is essential to establishing the law of the case. A party wall agreement "must be construed with reference to the conditions in and the construction of the building at the time the party-wall agreement was made." Syl. Pt. 2, *A. W. Cox Dep't Store v. Solof,* 103 W. Va. 493, 138 S.E. 453 (1927). The proper law, or rules of the case, then must include the duties to protect, to maintain and to repair the Party Wall as a structural party wall, including the duties to protect it from water and the elements.

Perhaps it is important to pause to remind Respondent Zen's Development and this Honorable Court that Petitioner Birchfield's expert structural engineer gave uncontested testimony that the failure, in essence, to protect, to maintain and to repair the Party Wall in accordance with its original composition and construction is the direct cause of its failure to perform. The expert structural engineer gave uncontested expert opinions that the failure to protect, to repair and to maintain the Party Wall is the direct cause of its damage and the flow of water into Petitioner Birchfield's basement. The result is an uninhabitable and unusable building, a complete economic loss to her.

7. Despite all the self-serving rhetoric that a party wall agreement must express the rights and obligations pertaining to the relationship it creates, Respondent Zen's Development hypocritically hails the lower court's new rule that *itself* implies and imposes new rights and duties where they do not exist in the Party Wall Agreement in this case. Respondent Zen's Development endorses the lower court's rule that, even in the absence of such right in the Party Wall Agreement, an owner is free to abandon the party wall relationship when and as it sees fit "without liability to

the adjoining owner so long as he gives notice of the removal to the adjoining owner and uses reasonable care to protect the structural integrity of the party wall and avoid damage to the adjoining owner's building resulting from the removal." Response at page 26.

8. This Court should ponder, then, that this new rule, even if a proper expression of West Virginia law, ought to give Petitioner Birchfield a cause of action against Respondent Zen's Development for its admitted failure to "use reasonable care to protect the structural integrity of the party wall." Petitioner Birchfield's expert structural engineer has testified precisely that. This duty is distinct from the second duty articulated in the new rule: to avoid damage to the adjoining owner's building resulting from the removal." The lower court ignored the first duty as soon as it was expressed and entered summary judgment against Petitioner Birchfield and in favor of the defendants below on the issue. In no way has any of the defendants below used "reasonable care to protect the structural integrity of the party wall". Indeed, all defendants below admit that they had nor have taken *no* steps whatsoever to protect the structural integrity of the Party Wall.

9. By extension, this same "standard" or "duty" of care is expressed and expanded in the Ordinances of the City of Beckley, which Petitioner Birchfield cited to the lower court below, but again to no apparent effect on the lower court. It had no effect on the lower court's ruling. Had defendants below followed city regulations that are directly on point, Petitioner Birchfield might well have avoided substantial damage to her building and water constantly flooded its basement:

> Section 3303.4 Vacant lot. Where a structure has been demolished or removed, the vacant lot shall be filled and maintained to the existing grade or in accordance with the ordinances of the jurisdiction having authority.
>
> Section 3303.5 Water accumulation. Provision shall be made to prevent the accumulation of water or damage to any foundations on the premises or the adjoining property.

> Section 3307.1 Protection required. Adjoining public and private property shall be protected from damage during construction, remodeling and demolition work. Protection shall be provided for footings, foundations, party walls, chimneys, skylights and roofs. Provisions shall be made to control water runoff and erosion during construction or demolition activities . . . [Written notice shall be given to the "owners of adjoining buildings"].
>
> Section 1502.1 Protection Required. Adjoining public and private property shall be protected from damage during construction and demolition work. Protection must be provided for footings, foundations, party walls, chimneys, skylights and roofs. Provisions shall be made to control water runoff and erosion during construction or demolition activities. The person making or causing an excavation to be made shall provide written notice to the owners of adjoining buildings advising them that the excavation is to be made and that the adjoining buildings should be protected. Said notification shall be delivered not less than 10 days prior to the scheduled starting date of the excavation.

Petitioner Birchfield cited in her reply to Respondents' various motions for summary judgment the existence of these Beckley building regulations, codified in City of Beckley Ordinances § 3303.4, 3303.5, 3307.1 and 1501.1 as a basis (among others) for liability for breach of duties to her.

These Ordinances are affirmations and extensions of the "duty to protect the structural integrity" of the Party Wall expressed in the lower court's "new rules". But the lower court ignored them entirely.

10. Respondent Zen's Development claims, in reviewing the totality of the record, Petitioner's position is that this Respondent failed to take steps to stop water intrusion that pre-dated its ownership of Lot 5, thereby cutting off her claims. Response at page 27. This is putting the cart before the horse. Respondent Zen's Development is trying to claim an *implied* duty of mitigation on Petitioner Birchfield and then allege her failure to mitigate. How unfair is this? First, there is ample evidence that Petitioner Birchfield indeed took steps to mitigate. Those steps failed

and, ultimately, the damage her building incurred became economically disastrous. Second, mitigation is relevant only in response to Respondent Zen's Development duties to protect, to maintain and to repair. This Court need not go there now.

11. Respondent Zen's Development understandably spends much of its Response, at pages 9-13, on the issue of pure negligence. The lower court left only a count of negligence in this case and then, inexplicably, limited Respondent Zen's Development duty whether it negligently filled in the vacant lot during its ownership. Respondent Zen's Development rightfully is nervous because, if the lower court's rulings for this case remain unchanged, then it is the sole remaining party with exposure to a finding of liability.

Thus, Respondent Zen's Development claims that this Court may not consider Assignments of Error Nos. 8, 9 and 10 because, they alleged, they "constitute a procedurally improper attempt to appeal interlocutory rulings".

The parties and this case have arrived in this Court for its review of the issues assigned in error directly because of and at the instigation and order of the Raleigh County Circuit Court. Respondent Zen's Development does not make any distinction between any of the issues assigned in error that would make some proper for review and some, as interlocutory, improper for review.

According to the final order of the lower court, his order and the rules of the case he articulated for trial are *not* interlocutory but rather ripe for review on appeal. What is sauce for the goose is sauce for the gander: all issues, especially the rules for the case on duties to be tried, are proper for review. If they are not, the parties and our courts are simply wasting their time and resources.

III.

POINTS IN REPLY TO RESPONDENT, UPTOWN PROPERTIES, LLC

1. Respondent, Uptown Properties, LLC, in its Response also writes that the "cases from West Virginia, which Petitioner cites, all pre-date 1933 and none of them set [sic] forth the actual duties or obligations of parties to a party [wall] after one of the structures of buildings have been removed." Response of Uptown Properties at p. 12. Uptown Properties also claims that Petitioner's "reliance" on West Virginia party wall cases constitutes "her failed attempt to create new law". Response at page 13.

Uptown Properties is no alone in its fixation on the age of the party wall cases comprising West Virginia's jurisprudence in the subject area. Respondents' collective fixation is odd especially because this Court holds that a party wall agreement "must be construed with reference to the conditions in and the construction of the building at the time the party-wall agreement was made." Syl. Pt. 2, *A. W. Cox Dep't Store v. Solof*, 103 W. Va. 493, 138 S.E. 453 (1927). The party wall in dispute in *Solof* was erected in 1916, or a mere three years before the Party Wall was constructed. The *Solof* opinion was issued seven years after the Party Wall was built and the Party Wall Agreement was made.

Both the conditions *and* the intentions of the parties in relation to those conditions are instrumental in defining the nature and extent of the obligations on the parties to the Party Wall. Both the conditions *and* the intentions of the parties to the Party Wall Agreement, the adjacent owners of Lots 4 and 5, are plain or plain enough. In the 1919 Deed from Peter Lipari to Mable L. Ross the parties recited their intentions:

> WHEREAS, the parties hereto are owners of adjoining lots in said County and State in the City of Beckley, and the said first part owning lot no. 4 in Beckley and said party of second part owning the adjoining lot No. 5, in Beckley Block; and

> WHEREAS, The said party of first part is erecting a two story building the build on the line between said lots, which wall is being built on the said lot No. 4. The Northwest edge of which is at the line between said lots, by Charles Pellini, under contract with said first part, and the said second party is willing to pay one-half of the cost of said wall, Seven Hundred and Ninety [sic] Three ($793.00) Dollars and Seventy Five ($75.00) Dollars for the Nine inches of land from street to alley of said lot, on which strip of land one-half of the said 18 inch wall is built, making a total of $868.00, and said first party is willing to accept said amount for a one-half interest in said wall and the Nine inches of land, on which strip the said wall is built.

A.R. 0238.

In the operating text of the deed and party wall agreement, the parties agree that:

> Mable L. Ross is to build front pier on her side of division line to support front of building. The said wall is 74 feet long, 18 inches thick to top of first story, which is to be high enough so that store room on first floor will be 14 feet from floor to ceiling, to be built of stone, of good workmanship and a good substantial wall; and the second story or remainder of said wall is to be brick 13 inches thick and build on center line and high enough so that rooms on second floor of said building will be 9 feet from floor to ceiling, with property height above roof.
>
> The wall to be a party wall and as such to be part of each building (when building is erected on Lot 5) and the title to which shall pass by deed to each of said lots.

A.R. 0238-9.

Mable L. Ross agreed to build a "front pier on her side" of the division line to "support front of building." *Id.* That pier is now gone. "Said wall" is "to be built of stone, of good workmanship and a good substantial wall". These conditions no longer exist because Respondents have abandoned them express obligation to maintain those conditions equally with Petitioner.

The lower court has terminated this agreement and, with its new rule — a fire loss of the building of one lot owner exonerates it from its perpetual party wall obligations — has unnaturally

cut off the property right of the adjoining lot owner to preserve the conditions to protect the party wall they continue to equally share.

2. All Respondents, including Uptown Properties, continue to ignore that each of them owned (and current owner, Respondent Zen's Development still owns) exactly one half of the Party Wall. Respondent's one half of the Party Wall was and continues to be a subsisting and insurable interest. Indeed, the current owner, Respondent, Zen's Development, continues to have the right to rebuild a building that incorporates the Party Wall into its essential structure.

3. Respondent, Uptown Properties on pages 11-15, tries to distinguish the West Virginia party cases cited as binding on the lower court based on those cases' different fact patterns. The essential principles threading the cases are the same: each owner has a right to use the party wall for its intended and reasonable purpose and each other has the obligation to maintain, repair and replace the party wall for its intended and reasonable purpose. If not the subject matter of a contract, then the law of servitudes imposes them on the parties. "The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man [or woman] in the defendant's position, knowing what he [or she] knew or should have known, anticipate that the harm of the general nature of that suffered was likely to result?" Syl. Pt. 4, *In re Flood Litig.*, 216 W. Va. 534, 607 S.E.2d 863 (2004) (citing Syl. Pt. 3, *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988).)

The ordinary owner of one half of a single, structural party wall surely foresees that "harm" will result to the wall if it fails to protect its one half of the wall from exposure to water and the elements. Indeed, in the instant case, Respondents' successive failures to maintain and protect the Party Wall in the same condition in which it was built in 1919 are, according to the uncontested

testimony of Petitioner's expert structural engineer, Daniel R. Shorts, is the direct and proximate cause of its current deteriorating and failing condition.

4. Respondent, Uptown Properties, admits that the lower court adopted new rules from Kansas and Washington State jurisprudence. Response of Uptown Properties at p. 19-21. The rules taken from those cases do not harmonize with West Virginia's party wall jurisprudence. They unnaturally cut off one party's obligations to the other party when one party chooses to abandon them. There is no limiting principle to these new rules. For instance, what limits one party wall obligor from escaping its obligations to maintain and protect a party wall by removing its building and permitting the structure to deteriorate and fall down, even when the party wall obligors each owns one half of a wall that is incapable of division.

5. Respondent, Uptown Properties, claims that the lower court did not err in determining that the Party Wall is not "structural". *Id.* at p. 21. The rule that the lower court adopted from *Cameron* is clearly for a non-structural wall, as Respondent, Uptown Properties, admits on page 22. In the instant case, the Party Wall is indisputably structural, as the Party Wall Agreement itself clearly describes. Thus, how does a rule from another jurisdiction for a duty of care to a non-structural party wall have any role as the rule for the instant case in which the Party Wall is unquestionably structural? The *Cameron* rule is improper for the instant case.

6. Last, Respondent, Uptown Properties, as do the other Respondents, each claims that Petition has not made assignments of error in relation to Petitioner's count for negligence. That is categorically false. Petitioner asks this Court to refer to her Petition in Assignments of Error VI, VII, VIII and IX. The lower court entered summary judgment against Petitioner Birchfield and in favor of Respondents Kenneth W. McBride, Jr. and Uptown Properties on the empirically false finding or conclusion that Petitioner Birchfield's evidence failed to include a

scintilla of evidence of both causation and damage based on their actions in relation to the removal of the building and construction of a wood patio deck on Lot 5. Petitioner Birchfield refers this Court to her Petition on these points. She identified in the record evidence, including testimony of her expert structural engineer, Mr. Shorts, of ample evidence and opinion that they breached their duty to her to keep protect the Party Wall from water and the elements and surface water from Lot 5 from inundating the basement on her building on Lot 4.

7. In Assignment of Error X, Petitioner Birchfield explained that none of Respondents has followed Beckley's city ordinances on protecting party walls and the resulting vacant lots in the event of the removal of a building for any reason. See *Petition of Sarah L. Birchfield* at pp. 35-637. Respondents violated the City's ordinances on the very issues in the instant case; and, yet, the lower court entirely ignore them when it entered summary judgment in favor of Respondents, Kenneth W. McBride, Jr. and Uptown Properties.

8. The lower court has deprived Petitioner Birchfield even her right not to have surface water flow from Lot 5 into her basement on Lot 4. *Id.* at p. 37.

9. Respondent, Uptown Properties, leans heavily on the incorrect statute of limitations. It is not two years for damage to property; it is 10 years, most certainly the case for Petitioner Birchfield's property interest in her one half ownership of the Party Wall.

IV.

PRAYER FOR RELIEF

Based on the foregoing Reply to Respondents, Kenneth W. McBride, Jr., Uptown Properties, LLC and Zen's Development, LLC and other pleadings, Petitioner, Sarah H. Birchfield, prays that this Court reverse each and every error, both legal and factual, described *supra* and to

remand this case to the Circuit Court of Raleigh County with instructions to proceed with the case in accordance with specific directions on each and every error and the law of West Virginia.

Sarah L. Birchfield, Petitioner

By her counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0075

SARAH L. BIRCHFELD,

Plaintiff Below, Petitioner,

v.

Appeal from a final order
of the Circuit court of Raleigh County (15-C-733)

ZEN'S DEVELOPMENT, LLC,
a West Virginia limited liability company;
UPTOWN PROPERTIES, LLC,
a West Virginia limited liability company; and
KENNETH W. MCBRIDE, JR.
an individual,

Respondents and Defendants Below.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Plaintiff Sarah L. Birchfield, does hereby certify on this 16th day of September, 2020, that a true copy of the foregoing *Petitioner's Consolidated Reply to Respondents Kenneth W. McBride, Jr., Uptown Properties, LLC, and Zen's Development, LLC* was served upon opposing counsel by U.S. Mail, postage prepaid and by e-mail, upon the following:

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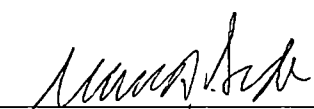
By: 
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