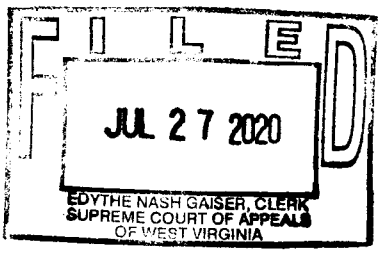
No. 20-0075

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SARAH L. BIRCHFIELD,
Petitioner and Plaintiff below,

v.



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.

RESPONDENT UPTOWN PROPERTIES, LLC'S BRIEF

Chip E. Williams, WV State Bar No. 8116
Jared C. Underwood, WV State Bar No. 12141
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
252 George Street
Beckley, WV 25801
cwilliams@pffwv.com
junderwood@pffwv.com
Counsel for Respondent Uptown Properties, LLC

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STATEMENT OF THE CASE

The underlying civil action arises from Petitioner Birchfield's ownership of a parcel of real property identified in the office of the Assessor of Raleigh County, West Virginia on Beckley Corporation Map 24 Parcel 58, which is located in Deed Book 56 at page 247. (A.R. pp. 5-10). The physical address for Petitioner's property is 322 Neville Street, Beckley, Raleigh County, West Virginia. *Id.* Petitioner obtained ownership of said property by a deed dated August 14, 2007. *Id.* Petitioner continues to own the property located at 322 Neville Street, Beckley, Raleigh County, West Virginia. Petitioner's property will sometimes be referred to as Lot 4 hereinafter.

Petitioner's Brief correctly sets forth the chronology of the ownership of the adjacent property commonly referred to as Lot 5 or 324 Neville Street, Beckley, Raleigh County, West Virginia. Uptown Properties, LLC acquired Lot 5 from Respondent McBride by deed dated July 30, 2008. (A.R. pp. 123-124). Uptown Properties, LLC owned Lot 5 from July 30, 2008 through December 13, 2012. *Id.* at pp. 129-130. When Uptown Properties, LLC purchased Lot 5, it was a vacant lot.

After purchasing Lot 5, Uptown Properties, LLC installed or constructed a deck on its lot which was connected to the subject party wall and spanned between Lots 6 and 4. (A.R. pp. 786-790). It is undisputed that the subject party wall agreement provided this Respondent the ability to attach the deck structure to the party wall. Petitioner's statement that "[l]ater, fire also destroyed the patio deck" (Petitioner's Brief p. 6) is incorrect as there was never any subsequent fire that destroyed the subject deck. Similarly, Petitioner's assertion that "Uptown Properties acquired Lot 5 with the wood elevated patio deck and later removed it, detaching it from the party wall and leaving penetrations without repair" (Petitioner's Brief p. 11) is also incorrect and unsupported by the record. The Petitioner's Brief provides no citation for the previous assertions because she

cannot, as such statements simply are not true. This Respondent constructed the subject deck after acquiring Lot 5. The Petitioner herself testified that, at the time this Respondent sold Lot 5 to Harper Rentals, the deck was still standing and that Harper Rentals was the entity that removed the deck structure which was attached to the subject party wall. (A.R. p. 786). Counsel's assertions in their Brief regarding the construction of the deck and removal of the same are incorrect, misleading to this Court, contrary to Petitioner's own sworn testimony, and unsupported by the record.

Absent from the record is evidence that any conduct of this Respondent in constructing the subject deck actually caused any damage to the subject party wall. Petitioner's own expert in this matter, Daniel Shorts, PE, has not provided any testimony or opinion that directly, or indirectly, evidences that any conduct of this Respondent caused any damage to the party wall. Plaintiff's own expert fails to state that any conduct of this Defendant caused any damage to the subject party wall. (A.R. pp. 791-799). Mr. Shorts opines that "the water damage along the interior of the wall and the basement is a direct result of the adjacent building demolition. The demolition project did little, if anything, to protect the wall from the weather and has resulted in an exterior wall that does not adequately protect the structure." *Id.*

Also, absent from Petitioner's expert's reports is any finding that this Respondent did anything to cause any damage to the subject party wall. During his deposition, Mr. Shorts provided the following testimony:

> Q. Do you have -- are you going to give any opinion that the way in which that decking was attached to the party wall was somehow inappropriate or improper?
>
> A. As far as how it was attached, the only thing that I recollect that I may have stated or might would state are the possible or probable holes that it left when it was taken down. As far as its structural capabilities and so forth, it wasn't something that I dwelt on or looked at or –

Q. Sure. And we'll get to how it was taken down. I'm talking about how it was attached. Do you have any opinion about the way in which it was attached and whether the attachment to the wall in any way created a problem with the integrity to the wall at the points at which it was attached, not taken down, but attached?

A. I won't say that I have an opinion, because it's not something that I looked at, I don't believe. On my first inspection, I don't think I examined how it was attached to the wall.

Q. Okay. So it wasn't something that you ever tried to ascertain during your first inspection?

A. How it was attached?

Q. Yes.

A. No.

Q. But that deck was there -- the framework of that deck was there during your first inspection?

A. That or something similar to it, yes.

Q. And you were charged with inspecting the integrity of the party wall for that inspection. Is that correct?

A. As far as "charged with inspecting" the –

Q. That's a poor -- that's what you were asked to do by Mr. Salvatore.

A. Yes. As far as -- I think it was more specifically expressed on the water intrusion of the party wall.

Q. Well, sure. And when I say the "water intrusion," certainly, if there was something about the way that deck was attached that concerned you, as far as water intrusion, you would have noted it in your initial report?

A. I think I would have, yes.

Q. So as far as being able to make an affirmative statement as to something that Uptown Properties did to affirmatively damage the wall, is it fair for me to say you can't do that?

A. I'm –

> Q. Assuming they didn't take it down.
>
> A. First off, who did what, I don't know. So I would strike Uptown Properties from the statement I would make. And I would say, during my inspection, there was nothing about the remainder of these structures that I noted as affecting the integrity of the water intrusion to the wall.

(A.R. pp. 800-803).

The only claim concerning the subject deck structure causing damage to the party wall was the removal of said structure. However, as testified to by the Petitioner in her deposition, this Respondent did not remove the subject deck structure. The structure was removed by a previously dismissed Defendant, Harper Rentals.

In June 1919, a party wall agreement was entered into between the then-owners of Lot 4 and Lot 5, Mabel L. and Charles T. Ross and Peter Lipari. (A.R. pp. 118-119). The relevant portions of the Party Wall Agreement state as follows:

> . . . the said first party does hereby Give, grant and sell unto the said second party one-half of said 18-inch wall and the strip of land on which it is being built, with the right to join said wall and to the use of said wall as a party wall . . .
>
> 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. p. 118).

The deed conveying ownership of Lot 5 to this Respondent grants this Respondent all rights, title and interests as set forth in the original party wall agreement. (A.R. pp. 123-124). When this Respondent took ownership of Lot 5, the building that was previously situated there had been destroyed by fire and removed and Lot 5 was a vacant lot. (Petitioner's Brief p. 11). The subject party wall remains standing in its original location between Lots 4 and 5. (A.R. p. 770).

In her Amended Complaint, Petitioner alleges that this Respondent, as well as the others, were liable for tortious interference with a business relationship, breach of a Party Wall

Agreement, and negligence. *Id.* pp. 771-773.[1,2,3] Generally, Petitioner has alleged that the Respondents are in breach of a Party Wall Agreement by "removing improvements to Lot 5," causing "material, substantial and continuing damage to the Party Wall," by exposing the Party Wall "to the elements," and allowing "water infiltration into and through the Party Wall." (A.R. at pp. 6-7).

Following some initial discovery, each of the Respondents presented their initial Motions for Summary Judgment. This Respondent filed its initial Motion for Summary Judgment on August 24, 2018. (A.R. p. 334). On August 27, 2018, Petitioner filed a cross-Partial Motion for Summary Judgment as to her party wall claim. (A.R. pp. 260-273). In this Respondent's Motion as it pertains to the issue(s) presently before this Court, Respondent maintained the following: the subject party wall was a contract that afforded a shared interest in the wall with Petitioner failing to demonstrate breach of the same.[4] Alternatively, this Respondent maintained that the subject "contract" did not create any duty owed by this Respondent to the Petitioner and, thus, no breach occurred. Finally, this Respondent argued that Petitioner had failed to put forth any evidence to support that it engaged in any conduct that actually damaged the subject wall, maintaining that the record demonstrated that any damage pre-dated this Respondent's ownership of the adjoining lot. This Respondent also argued during the hearing on the parties' Motions for Summary Judgment

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[1] Petitioner filed her initial Complaint on July 30, 2015 against Matthew Bickey; Mine Power Systems, Inc.; and Harper Rentals, Inc., and did not name any of the current Respondents. Mr. Bickey and Mine Power Systems, Inc. were later dismissed without prejudice. Harper Rentals, Inc. negotiated a settlement with the Petitioner in December 2018.

[2] Petitioner's Amended Complaint was filed pursuant to, and upon granting, a Motion to Amended her Complaint. (A.R., pp. 12-14).

[3] The tortious interference claim against this Respondent was dismissed, without prejudice, in the lower court's Order regarding Uptown's MTD and said claim was dismissed, with prejudice, against all current Respondents via an Order dated December 14, 2018 and is not being challenged by the Petitioner. (A.R. pp. 396-411; *see generally* Petitioner's brief).

[4] Petitioner's Appendix Record failed to include this Respondent's Memorandum of Law filed in support of its Motion for Summary Judgment, however this Respondent represents that this is an accurate representation of the arguments set forth therein.

that Petitioner's negligence claim against it was barred by the applicable statute of limitations.

Following Motions by all parties being fully briefed, the lower court convened for a hearing on October 10, 2018. (A.R. pp.396-411). Following the hearing, then Circuit Judge John A. Hutchison denied Petitioner's Partial Motion for Summary Judgment on the party wall claim, as well as denied Respondents' Motions on the same. (A.R. pp. 396-411). In making its ruling, the Court held, "there is a general duty placed on all persons involved in a party wall situation. Each person in a party wall agreement has an obligation to NOT use the party wall in such a manner that it causes damages to the other party/parties." (A.R. p. 408). The lower court granted this Respondent's Motion for Summary Judgment as to Petitioner's negligence claim and ruled that said claim was barred by the applicable two (2) year statute of limitations. (A.R. pp. 402, 410). It does not appear that the Petitioner in her appeal is challenging the previous rulings.

In November and December 2019, the parties again filed cross-Motions for Summary Judgment or Renewed Motions for Summary Judgment. (*See generally* A.R. pp. 417-716, 762-945). Following a full briefing by all parties on all Motions for Summary Judgment, the lower court entered its Order regarding the same on December 13, 2019. (A.R. pp. 946-953). The Order, from which the Petitioner appeals, only disposed of the party wall claim against this Respondent as all other claims against it had previously been dismissed. (A.R. pp. 396-411, 946-953).

Following the entry of the lower court's Order on December 13, 2019, Petitioner filed a "Rule 60(b) Motion for Relief from Judgment or, in the Alternative, Her Motion to Certify Questions," which was fully briefed and later heard by the lower court on January 3, 2020. (A.R. pp. 954-1000). Respondent brings this to the Court's attention for three reasons: first, the lower court makes it clear that it was applying and extending the prior ruling of then-presiding Circuit Court Judge John A. Hutchison when it ruled on the aforementioned Motions for Summary

Judgment; second, it provides a more detailed look into the thought process and reasons behind the lower court's decision; and third, it demonstrates that only after the Petitioner received an adverse ruling did she seek to certify any question which was approximately 4 ½ years after filing suit. *Id.*

SUMMARY OF ARGUMENT

This Respondent maintains that the lower court properly granted its Renewed Motion for Summary Judgment as to Petitioner's party wall claim. Specifically, the lower court, after carefully reviewing and analyzing the relevant law and facts in the underlying action, properly determined that the totality of West Virginia law was insufficient to be outcome determinative, properly considered the same, and properly announced its rules of law pertaining to party wall duties and obligations. Additionally, the lower court, again when faced with a lack of appropriate West Virginia legal authority, did not err when it adopted a majority rule from other jurisdictions as to party wall duties and obligation. Furthermore, the lower court did not err in finding that the subject party wall was not "structural," as it never made any such finding. Finally, after announcing the applicable legal standards to be applied in this case, the lower court properly held that this Respondent did not have a duty to protect the subject party wall from the elements.

Assignments of Error VIII, X, and XI, as asserted against this Respondent by Petitioner should not be considered by this Court as the lower court never made any such findings and Petitioner's negligence claims against this Respondent were dismissed based upon the appropriate statute of limitations which Petitioner is not appealing.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Respondent respectfully states that oral argument is unnecessary pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure regarding the specific assignments of error.

ARGUMENT

I. STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed *de novo*. Syl. pt. 1, *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994). The test for determining the propriety of summary judgment is set forth in Syllabus Point 3 of *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 133 S.E.2d 770 (W.Va. 1963), where the Court held, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." The decision in *Painter v. Peavy* marked a significant shift in the attitude of the Court toward summary judgment. This shift in judicial attitude was reflected in the following statement:

> Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State. It is "designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial," if in essence there is no real dispute as to salient facts or if only a question of law is involved...Indeed, it is one of the few safeguards in existence that prevents frivolous lawsuits that have survived a motion to dismiss from being tried. Its principal purpose is to isolate and dispose of meritless litigation...To the extent that our prior cases implicitly have communicated a message that Rule 56 is not to be used, that message is hereby modified. When a motion for summary judgment is mature for consideration and is properly documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists. Otherwise, Rule 56 empowers the trial court to grant the motion.

451 S.E.2d at 758. As the Circuit Court of Raleigh County correctly found below, this is such a case.

II. THE LOWER COURT DID NOT ERR IN ITS CONSIDERATION AND APPLICATION OF THE LIMITED WEST VIRGINIA LAW IN THIS MATTER.

In Assignment of Error I, Petitioner maintains that the lower court erred when it concluded "[s]ince there are no statutes in West Virginia pertaining to party walls, the case law in West Virginia dealing with party wall rights and duties is limited. Therefore, the Court was required to look to other

jurisdictions in determine governing law in this case." (A.R. pp. 17-30). However, when examining the lower court's ruling and Judge Poling's statements during a subsequent hearing, it is clear that he did not err in the consideration and application of the limited West Virginia case law when he announced the duties and obligations of parties to a party wall agreement.

The cases from West Virginia, which Petitioner cites, all pre-date 1933 and none of them set forth the actual duties or obligations of parties to a party after one of the structures or buildings have been removed. To the extent the aforementioned West Virginia cases are analogous or applicable to this case, they all stand for general propositions or statements and not the creation or imposition of specific duties and obligations. Despite Petitioner's contention that there is sufficient West Virginia case law to determine the duties of each party in the instant matter, she crafts her own rules of law taken from cases in Indiana, Tennessee, and general principles from the law of servitudes, which Petitioner claims is applicable and mandatory in this jurisdiction without support for the same. Thus, it seems disingenuous for the Petitioner to take issue with the lower court's ruling and attempt to craft her own rule(s) based upon authority from other jurisdictions and sources.

A review of the entire record in this case demonstrates that the lower court examined and gave appropriate weight to mandatory, relevant West Virginia authorities. The lower court's Order being appealed by Petitioner examines several cases that the Petitioner herself relies upon now. (A.R. pp. 946-947). The lower court correctly recognizes that party wall obligations run with the land, but none of the chains of title contain any reference to any specific rights or obligations associated with the subject party wall. (A.R. p. 947). The lower court then advised that it undertook a review of available case law related to duties, rights, obligations, and other issues arising out of disputes pertaining to party walls, which is further evidenced by the hearing on Petitioner's Rule 60 Motion. (A.R. pp. 947, 977-996). Due to the limited authoritative, relevant case law and lack of statutory authority, the lower

court advised that it had to look elsewhere for guidance. A review of the applicable case law in West Virginia fully supports the lower court's decision to look elsewhere to determine what specific duties or obligations exist under the party wall agreement as there is no West Virginia case directly on point. (A.R. p. 982).

In West Virginia, there are no statutes that provide for the duties and obligations that a party wall agreement creates. In West Virginia, "a party wall, in the legal sense of the term, can only exist in one of two ways: either by contract or by statute; for the common law creates no such right." *List v. Hornbrook*, 2 W. Va. 340, 342 (1867). In this case, the subject party wall is undeniably created via a contract. (A.R. p. 118). Additionally, there are very few cases that have been decided by this Court regarding the rights, obligations, conditions, etc. that a party wall agreement places upon the parties to the same, none of which are directly on point to this case as discussed herein.

Petitioner relies initially on *Gates v. Friedman*, 83 W.Va. 710 (1919), in her failed attempt to create new law. A thorough review of *Gates* clearly shows why the lower court did not provide it more weight as it is factually distinguishable and does not provide an appropriate rule of law to this case. In *Gates*, the Plaintiff brought an action for ejectment for trespass for extension of the subject party wall past its initial height. See generally *Gates v. Friedman*, 83 W.Va. 710 (1919). The plaintiff in *Gates* alleged that the defendant constructed a wall that was situated on plaintiff's side of the division line provided in the original deed. *Gates v. Friedman*, 83 W. Va. 710, 717, 98 S.E. 892, 895 (1919). The Court in *Gates* recognized a right, absent express or implied agreement, for a party to a party wall to "[i]ncrease the 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." *Id.* at 717.

Gates is clear that the right of parties to any party wall agreement are governed by the provisions in their respective deeds. *Gates* at 715. Additionally, the relevant portion of the party wall agreement in that case states "[s]ubject to the conveyance by the party of the first part to A. P. and C. A. Gates, by deed dated February 1, 1883, of record in the office of the clerk of the county court of Kanawha County, West Virginia, in Deed Book 39, page 144, in regard to the east wall of said building and the rights therein granted." *Gates* at 713. There is no discussion in *Gates* as to what the party wall agreement states are the general obligations and duties to each party to the agreement. As such, the lower court was correct in finding that *Gates* was not directly on point and that it did not provide the duties and obligations of the parties in the instant matter.

The Petitioner then cites to the case of *Johnson v. Chapman* in support of her position. Again, *Johnson* is distinguishable from this case and is not directly on point. First, the actual party wall agreement was not at issue in terms of the rights, duties, and obligations of the parties to the party wall agreement. See generally *Johnson v. Chapman*, 43 W. Va. 639, 28 S.E. 744 (1897). In fact, the case only makes two (2) references to a party wall agreement, and there is no discussion as to how the same is deemed to be a party wall nor the terms of the deed that created the same. *Id.* at 642. Secondly, the issue in *Johnson* is the duty and obligations between two parties whose wall failed and caused damage to the plaintiff. *Id.* Although not specifically stated, it does not appear that the wall at issue in *Johnson* was a party wall between plaintiff and defendant but was a shared wall between the defendants. *Id.* Therefore, this Respondent, much like the lower court, does not see how the *Johnson* is analogous to the instant matter or sets forth the duties and obligations of the Respondents in the instant matter.

In Petitioner's last attempt to create an improper rule of law, Petitioner moves into the realm of insurable interests. (Petitioner's Brief pp. 21-22). In *Mut. Improvement Co. v. Merchants'*

& Bus. Men's Mut. Fire Ins. Co., this Court was faced, as Petitioner correctly states, with the enforceability of an arbitration provision under an insurance policy. *Mut. Improvement Co. v. Merchants' & Bus. Men's Mut. Fire Ins. Co.*, 112 W. Va. 291, 164 S.E. 256, (1932). This is not an insurance case nor an arbitration case. This case pertains to the rights, duties and obligations of a party to a party wall agreement where the agreement is silent as to the rights, duties, and obligations of the parties. There is simply no portion of the decision in the *Mut. Improvement Co.* case that is persuasive, informative, or authoritative in the instant matter.

Despite the fact that Petitioner fails to provide one authoritative case which is directly on point to the instant matter, she asserts that the lower court erred when it found insufficient principles in West Virginia law to determine the duties and obligation of the parties in the instant matter. West Virginia Case law is clear that "a party wall, in the legal sense of the term, can only exist in one of two ways: either by contract or by statute; for the common law creates no such right." *List v. Hornbrook*, 2 W. Va. 340, 342 (1867). West Virginia law is also clear that party walls are, as a general rule, the "subject of agreement" between adjoining landowners. See *Gates v. Friedman*, 83 W.Va. 710 (1919). In this case, the subject party wall agreement is silent as to any specific or general rights, duties, or obligations owed by either party.

This Respondent maintains that the lower court did not err in declining to craft some rule based upon the distinguishable cases cited by the Petitioner because the same provide no specific or general guidance to the issues at dispute in this case. Petitioner now asks this Court to craft a rule that is favorable and self-serving to the Petitioner, i.e. that West Virginia law imposes some affirmative duty on a party to a party wall agreement who has purchased a vacant lot to protect a party wall from the elements. Rather than citing to any West Virginia case law to support this new rule of law, Petitioner does exactly what she faults the lower court for doing: turning to other

jurisdiction for guidance. However, the cases cited by the Petitioner from other jurisdictions are also distinguishable and should not be given any persuasive value by this Court.

Petitioner cites mainly to *Carroll Blake Const. Co. v. Boyle*, which is a Tennessee case. Factually, *Carroll* involves the complete destruction of a party wall and damages that result from the same. *Carroll Blake Const. Co. v. Boyle*, 140 Tenn. 166, 171, 203 S.W. 945 (1918). The same holds true for *J.C. Penney Co. v. McCarthy*, 93 Ind. App. 609, 617, 176 N.E. 637, 640 (1931), where direct damage was done that caused the collapse of a party wall, which is not the case here. Further, in *J.C. Penny*, the Court did state that the matter sounded in tort as the same was a claim for trespass and found that there was no breach of contract. *See generally J.C. Penney Co. v. McCarthy*, 93 Ind. App. 609. Petitioner's claims here are for "breach" of the party wall agreement, not for trespass.

Petitioner's other cases also pertain to complete or partial collapse of a party wall as the result of the conduct of one of the parties, which again is not the factual case here. The court in *J.C. Penny* announced that "each proprietor owes to the other a duty ***to do nothing*** that shall weaken or endanger the party wall." *J.C. Penney Co. v. McCarthy*, 93 Ind. App. 609, 617, 176 N.E. 637, 640 (1931) (emphasis added). This rule is almost identical to the initial holding of the lower court in this matter, which is not being challenged here. The aforementioned rule essentially states that parties to a party wall agreement owe to one another an affirmative duty to do nothing which harms, weakens, or endangers the party wall. The Petitioner has not, and cannot, establish that this Respondent used the subject wall in a manner that caused damage to the Petitioner. Further, the record is clear that the damage to the subject wall, including the water intrusion, pre-date this Respondent's ownership of the subject lot and there is no testimony that any affirmative act of this Respondent has caused any harm to the subject party wall.

Finally, and most curiously, the Petitioner appears to abandon her "breach" claim and attempts to convert her case to one sounding in tort. (Petitioner's Brief pp. 26-30). Petitioner extends party walls into the realm of tort-based claims, not because West Virginia law has done so, but because the same serves her purpose. West Virginia law is clear, as even recognized by the Petitioner, "a party wall, in the legal sense of the term, can only exist in one of two ways: either by contract or by statute; for the common law creates no such right." *List v. Hornbrook*, 2 W. Va. 340, 342 (1867). Further, again as stated by the Petitioner, party walls are, as a general rule, "subject of agreement" between adjoining landowners. *Gates v. Friedman*, 83 W.Va. 710 (1919). There can be no argument, given the lack of authority cited by the Petitioner, that a dispute as to a party wall is a contract claim and not a tort-based claim in the State of West Virginia. Moreover, to the extent that the subject claim does sound in tort law and not contract, such claim should be precluded by W.Va. Code § 55-2-12 as Petitioner was aware of water intrusion issues as early as 2008, this Respondent sold Lot 5 on December 13, 2012, and Petitioner did not file suit until July 30, 2015.

Therefore, the Respondent maintains that the lower court did not err in its review of, and rejection of, applicable West Virginia case law and reliance on the laws of other jurisdictions. The case law relied upon by the Petitioner is wholly inapplicable to this matter as the cases vary in fact as well as in law. Specifically, none of the cases cited by the Petitioner in her Brief set forth the rights, duties, and obligations of a party to a party wall agreement when the agreement is silent to the same. Moreover, the Petitioner fails to cite any authority which discusses the duties and obligations of a party when one of the buildings which share a party wall is demolished. While the Petitioner faults the lower court for relying on persuasive authority from other jurisdictions which adopts the majority rule and is directly on point, she does not challenge the accuracy of the laws

cited, but rather wishes this court to adopt her own, self-serving rule. Finally, any discussion of servitudes is wholly inapplicable as Petitioner's claim in this case stems from a breach of the subject party wall agreement, not a general tort where servitudes may apply. Therefore, the Circuit Court's granting of this Respondent's Renewed Motion for Summary Judgment as to the party wall claim should be affirmed.

III. THE LOWER COURT DID NOT ERR IN ADOPTING AND APPLYING RECOGNIZED LEGAL STANDARDS FROM OTHER JURISDICTIONS IN THIS CASE.

In Assignment of Error II, Petitioner asserts that the lower court erred "when, in adopting party wall duties from Kansas and Washington State for the common law of West Virginia and then applying them in this case, it conflated two separate and distinct party wall duties into a single duty." (Petitioner's Brief, pp. 4, 30). In doing so, the Petitioner appears to assert that the rule of law announced by the lower court is improper in both its scope and its intended outcome. *Id.* Further, the Petitioner then states that this new rule is an "incorrect expression of West Virginia law" and puts forth her argument that the same was incorrectly applied in this case. However, a discussed below, the lower court did not err in either its adoption of, or application of, these newly articulated duties.

As an initial matter, this newly fashioned law does not apply to any conduct allegedly undertaken by this Respondent in the underlying matter. This new rule specifically pertains to the removal of a building which has a party wall with an adjacent building and discusses the duties of the removing party in doing so. The undisputed record in this case demonstrates that the building formerly located on Lot 5, which shared the subject party wall, was destroyed by a fire in 2008 with the remaining structure being demolished and the lot cleared. This Respondent did not own the property when the fire occurred in 2008 and did not own the same when the remaining structure was demolished and the lot cleared. The only action that the Petitioner recognizes that this Respondent

undertook following obtaining possession of Lot 5 was constructing a deck which spanned between Lots 6 and 4. The Petitioner herself testified that, at the time this Respondent sold Lot 5 to Harper Rentals, the deck was still standing and that Harper Rentals was the entity that removed the deck structure which was attached to the subject party wall. (A.R. p. 786). As such, this rule of law has no bearing on the rights, duties, or obligations of this Respondent as to the party wall and would have no impact on the lower court's decision as to summary judgment on Petitioner's breach of party wall claim.

However, assuming arguendo that this new rule of law applies to this Respondent, it is both a proper rule of law and was properly applied in this case. In closely examining the argument of the Petitioner as to this Assignment of Error, it is clear that the lower court clearly broke the cases into two separate and distinct rules of law. One, as to the duty, if any, concerning removal of a building attached to a party wall and two, any ongoing duty owed by a party to protect a party wall against the elements once the building or structure has been removed. As the lower court correctly identified, the full breadth of mandatory legal authorities in the State of West Virginia are not helpful in determining what, if any, legal duties are owed in this case. As such, the lower court looked to other jurisdictions for guidance.

In turning to the first duty concerning removal of a building sharing a party wall, the lower court turned to the case of *Lambert v. City of Emporia*, 616 P.2d. 1080, 5 Kan.App.2d 343 (1980). In the *Lambert* case, the Plaintiffs filed suit against the City of Emporia alleging that, in demolishing its building and leaving a party wall unprotected, it negligently and recklessly caused damage to their property. See generally *Id.* In deciding the case, the court in *Lambert* held as follows:

> the owner of a building sharing a party wall may remove his building 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.

Lambert v. Emporia, 5 Kan. App. 2d 343, 345, 616 P.2d 1080, 1083 (1980). In doing so, the court in *Lambert* cited to the following decisions in support: *Gorman v. TPA Corporation*, 419 S.W.2d 722, 724 (Ky. 1967); *First Investment Co. v. State Fire Marshal*, 175 Neb. 66, 77, 120 N.W.2d 549 (1963); *Zaras v. City of Findlay*, 112 Ohio App. 367, 382-383, 176 N.E.2d 451 (1960); *Thompson v. DeLong*, Appellant, 267 Pa. 212, 110 A. 251, 9 A.L.R. 1326 (1920); *Cameron v. Perkins*, 76 Wash. 2d 7, 15-16, 454 P.2d 834 (1969); and, *Third National Bank v. Goodlett Realty Co.*, 58 Tenn. App. 48, 60-61, 425 S.W.2d 783 (1967). *Id.*

Petitioner suggests that the rule of law in *Lambert* and adopted by the lower court in this case is an "incorrect expression of West Virginia law." (Petitioner's Brief p. 30). However, in doing so, Petitioner failed to provide any legal authority that even remotely suggests that the *Lambert* decision is inconsistent with West Virginia law, or even inconsistent with any other jurisdiction. As noted above, there is no legal authority in West Virginia that is directly on point with the specific issue addressed by the lower court in its adoption of this rule of law. Further, Petitioner seeks to bar the use of the rule from *Lambert* because it creates an "improper outcome" and could terminate a party wall agreement. *Id.* However, the rule of law expressed in *Lambert* and applied here speaks only to the duties of parties when removing the wall and does not suggest that the same would terminate the underlying party wall agreement. As such, it is clear that the lower court's reliance on *Lambert* is not only appropriate, but warranted in this case on the narrow issue presented by the lower court.

The lower court in its Order then proceeds to examine the questions of "what duty does a property owner have to protect a party wall which is left unprotected after the owner removes his building from the party wall?" Contrary to the Petitioner's argument, this is not a continuation of the prior rule announced pursuant to *Lambert*, but is, in fact, an entirely separate issue pertaining

to the ongoing duty to protect an exposed party wall. Again, as West Virginia authority is silent on the specific issue, the lower court sought guidance from another jurisdiction. In doing so, the lower court correctly adopted the majority rule of law announced in *Cameron v. Perkins*, 76 Wa.2d 7, 454 P.2d 834 (Washington 1969).

In *Cameron*, the lower court utilized the *Cameron* decision as well as 2 Thompson on Real Estate, § 403 at 629, and 40 Am. Jur. Party Walls to fashion the rule announced in this case. The rule, that the parties owed no duty to protect the now-exposed exterior portion of the party wall from the elements, is consistent with the source material cited by the lower court. The lower court's Order also places an affirmative duty on each Respondent to not add to the unstable condition of the wall, as well as a duty not to harm the wall or the Petitioner's building. As is supported by the record, the Petitioner has not identified any specific affirmative act that this Respondent undertook that directly added to the instability of the wall or that harmed the wall or Petitioner's building. As to this Respondent, it is undisputed that it did not undertake an affirmative action to protect the wall from the elements. However, as properly determined by the lower court it was under no duty to do so. Therefore, the Circuit Court's granting of this Respondent's Renewed Motion for Summary Judgment as to the party wall claim should be affirmed.

IV. THE LOWER COURT DID NOT RULE THAT THE SUBJECT WALL WAS A STRUCTURAL WALL AND, THUS, COULD NOT HAVE COMMITTED ERROR.

Although the heading of Petitioner's Assignment of Error III pertains only to the issue of whether or not the wall was structural, there are, in fact, two distinct issues which she summarily addresses in her argument. First, Petitioner maintains that the lower court erred in determining that the subject party wall was not "structural." Second, the Petitioner implies that there is some distinction between "interior" or "exterior" walls. However, as discussed below, neither of these issues has any bearing on the ultimate issue on appeal, i.e. the duties of parties pursuant to a party

wall agreement.

As to the structural versus non-structural ruling, the lower court never ruled that the subject party wall was not "structural." While the *Cameron* case cited by the lower court does discuss a non-structural party wall, the rules adopted by the lower court in this matter does not make any distinction between a party wall being structural or non-structural. The duties as articulated by the the lower court with consideration of the *Cameron* case are as follows: Respondents did not owe the Petitioner a duty to not take any steps to protect the exterior wall from the elements after removal of a former structure and did owe a duty to not add to the unstable condition of a party wall, in addition to the duty not to harm the party wall. Simply put, this portion of Petitioner's Assignment of Error disputes a ruling which was never made by the lower court and does not warrant further discussion by this Court.

In a similar fashion, the distinction of whether or not the subject party wall is an "interior" wall or "exterior" wall has no bearing on this case and the Petitioner acknowledges the same in her Brief. First, the lower court's announced rules of law specifically ignore the distinction which Petitioner now brings up. The rule of law crafted from the *Lambert* case pertaining to the removal of a building with a shared party wall also makes no distinction. The rule of law announced by the lower court after discussing the *Cameron* case specifically references, and implies, that the subject party wall is an "exterior" wall. As such, this portion of Petitioner's Assignment of Error incorrectly states the lower court's holding. Therefore, the Circuit Court's granting of this Respondent's Renewed Motion for Summary Judgment as to the party wall claim should be affirmed.

V. THE LOWER COURT DID NOT ERR IN FINDING THAT THE RESPONDENTS HAD NO DUTY TO PROTECT THE SUBJECT PARTY WALL FROM THE ELEMENTS.

In Assignment of Error IX, the Petitioner reasserts her prior argument that the lower court erred in finding that the Respondents had no duty to protect the party wall from the elements. The

Petitioner actually lumps Assignment of Error Numbers VI-IX into one brief, summary argument. In short, Petitioner maintains that, even if the court were to apply the new rules of law it articulated adopting the decisions in *Lambert* and *Cameron*, the facts of the case warranted the denial of summary judgment in her favor. This Respondent respectfully disagrees with this assertion.

Again, there are two rules of law that are now at issue when operating under the assumption that the lower court's rulings are appropriate, which the Respondent maintains that they are. The first new rule of law is as follows:

> The owner of a building sharing a party wall may remove his building 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.

(A.R. p. 948). As stated previously, this Respondent did not own the property when the fire occurred in 2008 and did not own the same when remaining structure was demolished and the lot was cleared. Thus, this Respondent could not have provided notice prior of any demolition, could not have taken any steps to protect the structural integrity of the wall during any demolition, and could not have damaged the adjoining owner's building during any demolition. Therefore, adopting this rule of law, summary judgment would have been appropriate as to this Respondent.

The second rule of law adopted by the lower court, which the Respondent maintains is also appropriate, announces that this Respondent did owe a duty to not add to the unstable condition of a party wall, in addition to the duty not to harm the wall of the Petitioner's building, but did not owe any duty to protect the wall from the elements. In support of her Assignment of Error, the Petitioner points solely to the opinions of her expert, Daniel Shorts. Namely, Petitioner relies on Mr. Shorts' opinions and summarizes the same to mean that the Respondents failed to protect the structural

integrity of the wall and failed to avoid damage to the wall.

After purchasing Lot 5, Uptown Properties, LLC installed or constructed a deck on its lot, which was connected to the subject party wall and spanned between Lots 6 and 4. (A.R. pp. 786-790). It is undisputed that the subject party wall agreement provided this Respondent the ability to attach the deck structure to the party wall. This Respondent constructed the subject deck after acquiring Lot 5. The Petitioner herself testified that, at the time this Respondent sold Lot 5 to Harper Rentals, the deck was still standing and that Harper Rentals was the entity that removed the deck structure which was attached to the subject party wall. (A.R. p. 786).

Absent from the record is evidence that any conduct of this Respondent in constructing the subject deck actually caused any damage to the subject party wall. Petitioner's own expert in this matter has not provided any testimony or opinion that directly, or indirectly, evidences that any conduct of this Respondent caused any damage to the party wall. Plaintiff's own expert fails to state that any conduct of this Defendant caused any damage to the subject party wall. (A.R. pp. 791-799). Mr. Shorts opines that "the water damage along the interior of the wall and the basement is a direct result of the adjacent building demolition. The demolition project did little, if anything, to protect the wall from the weather and has resulted in an exterior wall that does not adequately protect the structure." *Id.* Also, absent from Petitioner's expert's reports is any finding that this Respondent did anything to cause any damage to the subject party wall.

Moreover, during his deposition, Mr. Shorts provided the following testimony:

> Q. Do you have -- are you going to give any opinion that the way in which that decking was attached to the party wall was somehow inappropriate or improper?
>
> A. As far as how it was attached, the only thing that I recollect that I may have stated or might would state are the possible or probable holes that it left when it was taken down. As far as its structural capabilities and so forth, it wasn't something that I dwelt on or looked at or –

Q. Sure. And we'll get to how it was taken down. I'm talking about how it was attached. Do you have any opinion about the way in which it was attached and whether the attachment to the wall in any way created a problem with the integrity to the wall at the points at which it was attached, not taken down, but attached?

A. I won't say that I have an opinion, because it's not something that I looked at, I don't believe. On my first inspection, I don't think I examined how it was attached to the wall.

Q. Okay. So it wasn't something that you ever tried to ascertain during your first inspection?

A. How it was attached?

Q. Yes.

A. No.

Q. But that deck was there -- the framework of that deck was there during your first inspection?

A. That or something similar to it, yes.

Q. And you were charged with inspecting the integrity of the party wall for that inspection. Is that correct?

A. As far as "charged with inspecting" the –

Q. That's a poor -- that's what you were asked to do by Mr. Salvatore.

A. Yes. As far as -- I think it was more specifically expressed on the water intrusion of the party wall.

Q. Well, sure. And when I say the "water intrusion," certainly, if there was something about the way that deck was attached that concerned you, as far as water intrusion, you would have noted it in your initial report?

A. I think I would have, yes.

Q. So as far as being able to make an affirmative statement as to something that Uptown Properties did to affirmatively damage the wall, is it fair for me to say you can't do that?

A. I'm –

Q. Assuming they didn't take it down.

A. First off, who did what, I don't know. So I would strike Uptown Properties from the statement I would make. And I would say, during my inspection, there was nothing about the remainder of these structures that I noted as affecting the integrity of the water intrusion to the wall.

(A.R. pp. 800-803).

The only claim concerning the subject deck structure causing damage to the party wall was the removal of said structure. However, as testified to by the Petitioner in her deposition, this Respondent did not remove the subject deck structure. The structure was removed by a previously dismissed Defendant, Harper Rentals. Therefore, the Circuit Court's granting of this Respondent's Renewed Motion for Summary Judgment as to the party wall claim should be affirmed.

VI. ASSIGNMENTS OF ERROR VIII, X, AND XI, AS ASSERTED AGAINST THIS RESPONDENT SHOULD NOT BE CONSIDERED BY THIS COURT AS THE LOWER COURT NEVER MADE ANY SUCH FINDINGS AND PETITIONER'S NEGLIGENCE CLAIMS AGAINST THIS RESPONDENT WERE DISMISSED BASED UPON THE APPROPRIATE STATUTE OF LIMITATIONS WHICH PETITIONER IS NOT APPEALING.

As an initial matter, the Petitioner's Assignments of Error VIII, X, and XI, as they pertain to this Respondent should summarily be denied for two reasons: (1) the lower court never made any such findings regarding Petitioner's negligence claim against this Respondent and (2) Petitioner's negligence claim was dismissed against this Respondent pursuant to the applicable statute of limitations which is not being appealed. The Petitioner cannot point to any finding in the subject Order being appealed where the lower court made the findings asserted by Petitioner in Assignments of Error VIII, X, and XI. (A.R. pp. 951-953).

Petitioner's Brief contests the dismissal of her negligence claim against this Respondent for various reasons; however, Petitioner never contests the ruling which was the basis of the dismissal of the negligence claims against this Respondent. Petitioner's negligence claims against

this Respondent were dismissed because such claims were barred by the applicable statute of limitations. Then-presiding Judge John A. Hutchison ruled that "[t]he primary issue regarding negligence is the applicable statute of limitations. The undisputed evidence is that the Plaintiff knew of the damages prior to July 30, 2013. The statute of limitations on a negligence claim is two (2) years. It is clear that the Plaintiff failed to file her claim of negligence within the allotted timeframe under the statute as to... Defendant Uptown Properties, LLC...." (A.R. pp. 402, 410).

Uptown Properties, LLC acquired Lot 5 from Respondent McBride by deed dated July 30, 2008. (A.R. pp. 123-124). Uptown Properties, LLC owned Lot 5 from July 30, 2008 through December 13, 2012. *Id.* at pp. 129-130. The Petitioner alleges that her building sustained water intrusion following the removal of the building previously situated on Lot 5 in 2008. (Petitioner's Brief pp. 5-6). The Petitioner filed suit on July 30, 2015. (Petitioner's Brief p. 12). Therefore, it is clear that any negligence claim against this Respondent is barred by the applicable statute of limitations, which is uncontested by the Petitioner in her appeal. Therefore, the Circuit Court's granting of this Respondent's Motion for Summary Judgment (A.R. pp. 396-411) as to any negligence claim should be affirmed and is not properly before this Court.

CONCLUSION AND PRAYER FOR RELIEF

Based upon the foregoing reasons, this Respondent respectfully requests that this Court **DENY** the relief sought by the Petitioner and **AFFIRM** the lower court's decision in granting this Respondent's Renewed Motion for Summary Judgment.

Respectfully submitted,

UPTOWN PROPERTIES, LLC,

Respondent and Defendant below,

By Counsel,

Chip E. Williams, WV State Bar No. 8116
Jared C. Underwood, WV State Bar No. 12141

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
252 George Street
Beckley, WV 25801
Telephone: (304) 254-9300
Facsimile: (304) 255-5519

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Respondent ., does hereby certify on this 27th day of July, 2020, that a true copy of the foregoing ***"RESPONDENT'S BRIEF"*** was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

Angela C. Ramsey, Esq.
Mark A. Sadd, Esq.
Lewis, Glasser, Casey & Rollins, PLLC
300 Summers Street, Suite 700
Charleston, West Virginia 25326
Counsel for Petitioner

J. Victor Flanagan, Esq.
Daniel J. Burns, Esq.
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
252 George Street
Beckley, WV 25801
Counsel for Respondent Zen's Development, LLC

Gerald C. Hayden, Esq.
Hayden & Associates
102 McCreery Street
Beckley, WV 25801
Counsel for Respondent Kenneth W. McBride

Chip E. Williams, WV State Bar No. 8116
Jared C. Underwood, WV State Bar No. 12141

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
252 George Street
Beckley, WV 25801
Telephone: (304) 254-9300
Facsimile: (304) 255-5519