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 REPLY TO RESPONDENT KENNETH W. MCBRIDE, JR.

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TABLE OF AUTHORITIES

Cases

Statutes

Treatises

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.

PRAYER FOR RELIEF

Based on the foregoing Reply to Respondent Kenneth W. McBride, Jr. 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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CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Plaintiff Sarah L. Birchfield, does hereby certify on this 12th day of August, 2020, that a true copy of the foregoing *Petitioner's Reply to Respondent Kenneth W. McBride, Jr.* was served upon opposing counsel by U.S. Mail, postage prepaid and by e-mail, upon the following:

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