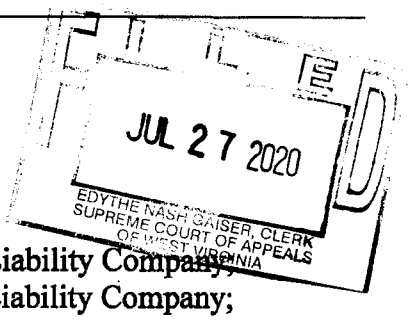
No. 20-0075

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 ZEN'S DEVELOPMENT, LLC'S RESPONSE TO PETITIONER SARAH L. BIRCHFIELD'S PETITION FOR APPEAL

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Respondent and Defendant below, Zen's Development, LLC (hereafter "Respondent"), by counsel J. Victor Flanagan, Daniel J. Burns and the law firm of Pullin, Fowler, Flanagan, Brown and Poe, PLLC, respectfully represents unto this Court that the Circuit Court of Raleigh County, West Virginia ruled appropriately and lawfully, and committed no reversible error in the underlying action by granting partial summary judgment in favor of the Respondent and denying Petitioner's Motion for Summary Judgment on other grounds. The Respondent respectfully asks this Honorable Court to reject the Petitioner's Petition for Appeal.

STATEMENT OF THE CASE

The underlying civil action arises from Petitioner Birchfield's ownership of a lot, parcel or tract 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., pgs. 5-10). The physical address of the subject 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.* It is undisputed that Petitioner continues to own the property located at 322 Neville Street, Beckley, Raleigh County, West Virginia.

Respondent, Zen's Development, LLC, is a limited liability company operating and doing business in Raleigh County, West Virginia. (A.R., pgs. 2, 6). This Respondent acquired Lot 5, the lot adjoining the Petitioner's, by a deed from Harper Rentals, Inc., dated December 14, 2015. *Id.* It is undisputed that this Respondent is the current owner of Lot 5, which adjoins the subject lot owned by the Petitioner.

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.*[123] 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

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[1] Petitioner filed her initial Complaint in July 2015 against Matthew Bickey, Mine Power Systems, Inc., and Harper Rentals, Inc., which did not name the current Respondents. By way of information, Mr. Bickey and Mine Power Systems, Inc. were later dismissed without prejudice. Harper Rentals, Inc. would later negotiate 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., pg. 12-14).

[3] The tortious interference claim against the Respondents was dismissed, with prejudice, via an Order dated December 14, 2018 and is not being challenged by the Petitioner. (A.R., pg. 396-411; *see generally* Petitioner's brief).

elements," and allowing "water infiltration into and through the Party Wall." (A.R. at pgs. 6-7). As to this Respondent, Petitioner has appeared to limit herself to the following as to her Party Wall claim: causing material, substantial and continuing damage to the Party Wall by allowing the Party Wall to remain exposed to the elements and allowing water infiltration into and through the Party Wall. (*See generally* A.R. at pgs. 5-10).[4]

Although the Petitioner sets for a general set of facts in her "Statement of the Case" and a more detailed set of facts in her "Argument" section (Pet.'s Brief at pgs. 5-6, 10-17), the Respondent maintains that the following recitation of facts and procedural history are all that is necessary for this Court to determine what is, based on Petitioner's Brief, a strictly legal question.

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. at pgs. 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 n lot 5) and the title to which shall pass by deed to each of said lots.

(A.R. at pg. 118).

The relevant chain of title as to Lot 4 is as follows: Petitioner obtained ownership of said property by a deed dated August 14, 2007 from Hylton Realty & Investments, LLC. (A.R. at pgs. 654-655). Said deed conveyed to the Petitioner all the right, title and interest in and to the party

[4] Petitioner has expressly stated or implied in her Brief, and throughout this case, that this Respondent was not responsible for the removal of any improvements from Lot 5 after it took ownership of the same. (Pet.'s Brief, at pg. 5-6, 11-12).

walls, making specific reference to the subject Party Wall Agreement. Id. As to Lot 5, the following chain of title is relevant to the same: Respondent Kenneth McBride obtained ownership from William and Rhonda Kinder by Deed in March 1992; Respondent Uptown Properties, LLC obtained ownership from Respondent McBride by deed in July 2008 (A.R. at pg. 123-124); Harper Rentals, Inc. (a former party) obtained ownership from Respondent Uptown Properties by deed (A.R. at pg. 129-130); and, this Respondent obtained ownership from Harper Rentals, Inc. by deed in December 2015. (A.R. at pgs. 222-226).

The deed conveying ownership of Lot 5 to this Respondent grants this Respondent all right, title and interest as set forth in the original Party Wall Agreement. (A.R. at pgs. 102-107). When this Respondent took ownership of Lot 5, the building that was previously erected there has been removed and it was, for all intents and purposes, a vacant lot. (A.R. at pg. 111-117; Pet.'s Brief pgs. 11-12). The subject party wall remains standings in its original location between Lots 4 and 5. (Pet.'s Brief, pg. 12; A.R. at pg. 111-117, 770).

Following some initial discovery, the parties presented their initial Motions for Summary Judgment. This Respondent filed its first of several owns Motion for Summary Judgment on or about August 24, 2018. (A.R. at pg. 15-32). In that Motion as it pertains to the issue now before the 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. (A.R. at pgs. 26-27). Alternatively, this Respondent maintained that the subject "contract" did not create a duty to the Petitioner and, thus, no breach occurred. (A.R. at pg. 27). 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. (A.R. at pgs. 27-28). On August 27, 2018, Petitioner filed a cross-Partial Motion for Summary Judgment as to the Party Wall claim. (A.R. at pgs. 260-273).

Following Motions by all parties being fully briefed, the lower Court convened for a hearing on or about October 10, 2018. (A.R. at pg. 396-411). Following the hearing, Judge John Hutchison, the then-presiding Circuit Court judge, denied Petitioner's Partial Motion for Summary Judgment on the party wall claims as well as denied Respondents' Motion on the same. (A.R. at pgs. 396-411). In announcing 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. at pg. 408). It does not appear that this ruling is being challenged in the instant appeal.

In November and December 2019, the parties again filed cross-Motions for Summary Judgment. (*See generally* A.R. at pg. 417-716, 762-945). Following a full briefing by all parties on all Motions for Summary Judgment, the lower Court entered an order on or about December 13, 2019. (A.R. pgs. 946-953). The Order, from which the Petitioner appeals, is reproduced by the Petitioner in her Brief and does not bear repeating, but the Respondent would note that it disposed only of the party wall claim against it. (Pet.'s Brief, pgs. 14-16, A.R. pgs. 946-953). Ultimately, based on the lower Court's findings, Petitioner's Motion for Summary Judgment was denied as was this Respondent's on the negligence claim, with the Court noting that "there remains a disputed issue of fact as to whether the actions of Zen in grading the vacant lot and *its actions after taking ownership* of the lot were negligent . . ." (A.R. at pg. 952-953)(emphasis added).

Absent from the totality of the Petitioner's Brief is any discussion of the events that

transpired *following* the entry of the lower Court's Order on December 13, 2019. Specifically, 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 January 3, 2020. (A.R. pgs. 954-1000). Respondent brings this to the Court's attention for two reasons: first, the lower Court makes it clear that it was applying the prior ruling of then-presiding Circuit Court Judge John Hutchison when it ruled on the aforementioned cross-Motions for Summary Judgment; and, second, it provides a more detailed look into the thought process and reasoning behind the lower Court's decision. Id.

SUMMARY OF ARGUMENT

As a preliminary matter, this Court lacks the proper jurisdiction to entertain any appellate review of the lower Court's rulings as to either the Petitioner's or this Respondent's Motion for Summary Judgment on the negligence claim. First, the lower Court determined that a genuine issue of material fact existed as to whether the actions of this Respondent in grading the vacant lot and its actions after taking ownership of the subject lot were negligent. More importantly, any discussion pertaining to negligence of this Respondent constitutes a procedurally improper attempt to appeal the non-appealable interlocutory decision of the Circuit Court. As such, any consideration of the negligence issue as it pertains to this Respondent should be refused.

As to the remaining Assignments of Error discussed below, the Respondent maintains that the lower Court properly granted its Motion for Summary Judgment as to the party wall claims of the Petitioner. 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 rule of law pertaining to party wall duties and obligations. Additionally, the Court, again when faced with a lack of appropriate legal authority, did not err when it adopted a majority rules from other jurisdictions as to party wall duties and obligation. Furthermore, the lower Court did not err, as it did not rule that the subject wall was not a structural wall nor did it distinguish between an "interior or exterior" wall. The rules of law announced by the lower Court would apply to any party wall regardless of the designations given to the same. Finally, after announcing the applicable legal standard to be applied in this case, the lower Court properly held that the Respondent did not have a duty to protect the subject party wall from the elements, failure or collapse.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Respondent asserts that, pursuant to Rule 18(a)(3)-(4) of the West Virginia Rules of Appellate Procedure, oral argument is not necessary because the dispositive issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. If this Court determines that oral argument is necessary, Respondent respectfully asserts that oral arguments could be heard pursuant to Rule 19 and/or Rule 20 of the West Virginia Rules of Appellate Procedure.

ARGUMENT

A. STANDARD OF REVIEW

A circuit court's granting of summary judgment is reviewed de novo. Syl. Pt. 1, Painter v. Peavey, 192 W.Va. 189, 451 S.E.2d 755 (1994).

A Motion for summary judgment should be granted if pleadings, exhibits and discovery

depositions upon which the motion is submitted for decision disclose that the case involves no genuine issue as to material fact and that the party who made the motion is entitled to judgment as a matter of law. Redden v. Comer, 200 W.Va. 209, 488 S.E.2d 484 (1997); and Holleran v. Cole, 200 W.Va. 49, 488 S.E.2d 49 (1997).

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the non-moving party, such as where the non-moving party has failed to make a sufficient showing on an essential element of the case it has a burden to prove. Brady v. Deals on Wheels, Inc., 208 W.Va. 636, 542 S.E.2d 457 (2000); and Painter v. Peavey, 192 W.Va. 189, 451 S.E.2d 755 (1994).

A "material fact" for purposes of rule governing summary judgment, is one that has the capacity to sway the outcome of the litigation under the applicable law. Chafin v. Gibson, 213 W. Va. 167 S.E.2d 361 (2003).

"If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Aluise v. Nationwide Mut. Fire Ins. Co., 218 W. Va. 498, 625 S.E.2d 260 (2005).

B. BECAUSE PETITONER'S ASSIGNMENTS OF ERROR NOS. 8, 10, AND 11 CONSTITUTE A PROCEDURALLY IMPROPER ATTEMPT TO APPEAL INTERLOCUTORY RULINGS, THIS COURT SHOULD REFUSE TO CONSIDER THE SAME.

Respondent objects to Petitioner's attempts to seek appellate review on the Circuit Court's denial of Petitioner's summary judgment argument. Specifically, Petitioner's Assignments of Error Numbers 8, 10, and 11, which are addressed generally throughout Petitioner Brief and specifically on pages thirty-four (34) through thirty-seven (37), are not properly before this Court. (Pet.'s Brief, pgs. 34-37). Because Assignments of Error 8, 10, and 11 as well as any discussion pertaining to negligence of this Respondent constitutes a procedurally improper attempt to appeal the non-appealable interlocutory decisions of the Circuit Court, Respondent has not substantively responded to those arguments herein. Due to the nature of the remaining

Of the Petitioner's eleven (11) assignments of error, eight (8) pertain to the Petitioner's party wall claims as to the Respondents, although not all pertain directly to this Respondent. The lower Court's Order on appeal grants summary judgement as to all Respondents under Petitioner breach of a party wall agreement, which arguably provides the necessary finality to grant this Court jurisdiction over the same. (A.R. pgs. 946-953). However, as to any assignment of error pertaining to negligence or any argument regarding the same raised in Petitioner's Brief, this Court lacks jurisdiction over the same because they are not "made appealable by statute or by the West Virginia Rules of Civil Procedure, or [ ] fall within a jurisprudential exception." *See* James M.B. v. Carolyn M., 193 W.Va. 289, 292-293, 456 S.E.2d 16, 19-20 (1995). Consequently, this Court should refuse to consider Petitioners' Assignments of Error Numbers 8, 10, and 11, as they are not properly before this Court.[5]

[5] It is anticipated that the other Respondents to this matter may address separate arguments for a dismissal of Assignments of Error 8, 10, and 11. These arguments may include, but would not be limited to, the same being

It is axiomatic that, "[a] court of limited appellate jurisdiction is obliged to examine its own power to hear a particular case. This Court's jurisdiction is either endowed by the West Virginia Constitution or conferred by the West Virginia Legislature." Id. at Syl. Pt. 1. Furthermore, "[p]arties cannot confer jurisdiction on this Court directly or indirectly where it is otherwise lacking." Syl. Pt. 5 Erie Ins. Co. v. Dolly, 811 S.E.2d 875 (W.Va. 2018) (*quoting* Syl. Pt. 2, James M.B., 193 W.Va. 289, 456 S.E.2d 16).

The general rules in West Virginia, as to which orders are appealable is found in the West Virginia Code:

> A party to a civil action may appeal to the Supreme Court of Appeals from a final judgment of any circuit court or from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties. The defendant in a criminal action may appeal to the Supreme Court of Appeals from a final judgment of any circuit court in which there has been a conviction or which affirms a conviction obtained in an inferior court.

W. Va. Code § 58-5-1 (1998). In James M.B. v. Carolyn M., Justice Cleckley explained why the Court should limit its review to final judgments: "[t]his rule, commonly referred to as the 'rule of finality,' is designed to prohibit 'piece-meal appellate review of trial court decisions which do not terminate litigation[.]" 193 W.Va. at 292, 456 S.E.2d at 19 (*quoting* U.S. v. Hollywood Motor Car Co., 458 U.S. 263, 265, 102 S.Ct. 3081, 3082 (1982)). The Court has declared that "[w]ith rare exception, the 'finality rule' is mandatory and jurisdictional." James M.B., 193 W.Va. at 292, 456 S.E.2d at 19. The rule "prevents the loss of time and money involved in piece-meal litigation and the moving party, though denied of immediate relief or vindication, is not prejudiced." Wilfong v.

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untimely. To the extent the arguments presented by the other Respondents would apply to this Respondent, they are incorporated herein by reference as if stated fully herein.

Wilfong, 156 W.Va. 754, 758-759, 197 S.E.2d 96, 99 (1973). "A case is final only when it terminates litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." Dolly, 811 S.E.2d 878 (*quoting* Syl. Pt. 2, C&O Motors, Inc. v. West Virginia Paving, Inc., 223 W.Va. 469, 677 S.E.2d 905 (2009)).

It is equally well-established that, "an order denying a motion for summary judgment is merely interlocutory, leaves the case pending for trial, and it not appealable except in special instances in which an interlocutory order is applicable." Syl. Pt. 8, Aetna Casualty & Sur. Co. v. Federal Ins. Co., 148 W.Va. 160, 133 S.E.2d 770 (1963). "Exceptions to the rule of finality include 'interlocutory orders which are made appealable by statute or by the West Virginia Rules of Civil Procedure or . . . [which] fall within a jurisdictional exception' such as the 'collateral order' doctrine. Robinson v. Pack, 223 W.Va. 828, 832, 679 S.E.2d 660, 664 (2009) (*quoting* James M.B., 193 W.Va. at 292-93, 456 S.E.2d at 19-20).

Relevant to this case, the lower Court's Order as to the complete dismissal of Petitioner's claims of a breach of the party wall agreement is arguably a final order susceptible to immediate appeal and review. (A.R., pgs. 946-953). Under Rule 54(b), "an order may be final prior to the end of the entire litigation on its merits if the order resolves the litigation as to a claim or a party." Durm v. Heck's, 184 W.Va. 562, 566, 401 S.E.2d 908, 912 (1991). An order "properly may be certified under Rule 54(b) only if it possesses the requisite degree of finality. That is, the judgment must completely dispose of at least one substantive claim." Hubbard v. State Farm Indem. Co., 213 W.Va. 542, 550, 584 S.E.2d 176, 184 (2003). As such, the lower Court's Order granting the Respondents summary judgment as to the breach of the party wall claim is arguably appealable and is discussed further *infra*.

On the other hand, the Assignments of Error 8, 10, and 11 are not properly reviewable by the Court because they are indisputably *not* final judgment and they failed to meet an exception to the rule of finality. The Order, as to the negligence claim which is the subject of these Assignments of Error, denies cross Motions for Summary Judgment, declares or otherwise implies that a genuine issue of material fact, and set forth the nature and extent of the issue to be presented at trial. (A.R., pgs. 946-953). Again, this Order clearly indicates that there is no finality as to the resolution of the negligence claim.

In Falls v. Union Drilling Inc., 223 W.Va. 68, 672 S.E.2d 204 (2008), this Court emphasized that this Court will only exercise its discretion to review an "interlocutory matter" that is not "technically proper before us on appeal . . . when the parties involved do no object." Id. at 71, n. 8, 672 S.E.2d at 207, n.8. In this case, this Respondent affirmatively and strongly objects to consideration of such extraneous issues on this appeal, and Respondent has deliberately refrained from substantively briefing those issues on this appeal.

Finally, this matter is before this Court as a Petition for Appeal and not upon a Writ of Prohibition. "Prohibition lies only to restrain inferior court from proceedings in causes over which they have no jurisdiction, they are exceeding their legitimate power and may not be used as a substitute for [a petition for appeal] or certiorari." Syl. Pt. 3, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483, S.E.2d 12 (1996) (*quoting* Syl. Pt. 1, Crawford v. Taylor, 138 W.Va. 207, 75 S.E.2d 370 (1953)). To be clear, Petitioner does not - and cannot - claim that the Circuit Court exceeded its legitimate power to deny her summary judgment motion. Rather, Petitioner merely disagrees with the lower Court's denial and asks this Court to reverse the same. As such, it is clear that Petitioner has not now nor can it seek a Writ of Prohibition.

Granting appellate review of these interlocutory issues would not only be contrary to established legal standards, it would establish a dangerous precedent. In the future, a party who is unsatisfied with a lower Court's denial of summary judgment – or any other non-appealable interlocutory order- would flood this Court with Petitioner for Appeal. In sum, Petitioner is not entitled to re-litigate any or all portions of her summary judgment on appeal where there is no right to do so and when Respondent has objected to any such purported right. Assignments of Error Numbers 8, 10 and 11 are not appealable and this Court should refuse to entertain the same.[6]

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

In her first Assignment of Error, Petitioner maintains that the lower Court erred when it concluded "Since 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. at pgs. 17-30). However, when examining the Court's ruling and his statements in a subsequent hearing, it is clear that he did not err in the consideration and application of the limited West Virginia case law on point when ruled on the underlying Motions for Summary Judgment.

As a preliminary note, it is interesting that Petitioner appears to be doing exactly what it claims the lower Court did in error, i.e. discuss West Virginia case law and then supplement the same with secondary, persuasive sources. The cases from West Virginia, upon which Petitioner relies, all pre-

[6] Respondent has not substantively briefed these Assignments of Error for the reasons set forth herein. However, to the extent that any response to such assignments of error would be deemed necessary, Respondent incorporates and restates by references each of the arguments and supporting evidence presented in their Motions for Summary Judgment and their Response to Plaintiff's Motions for Summary Judgment. (A.R. at 15-139, 814-904, and 919-939). Further, Respondent and incorporates all relevant findings of fact and conclusion of law adopted by the lower Court. (A.R. at 396-411 and 946-953).

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. To the extent they would even apply to this case, they all stand for general propositions or statements and not the creation or imposition of specific duties. Petitioner then provides its own rules of law taken from cases in Indiana, Tennessee, and general principles in the Law of Servitudes, which Petitioner claims is applicable and mandatory in this jurisdiction without support for the same. (Pet.'s Brief, at pgs. 24-30). Therefore, it is clear to this Respondent, that the Petitioner does not necessarily take issue with how the Court fashioned its rule, but rather is unhappy that the rule was not favorable to his client.

It is clear, from a review of the totality of the entire record in this case, that the lower Court examined and gave appropriate weight to mandatory, relevant West Virginia authorities. The lower Court's Order now before the Court examines several cases that the Petitioner herself relies upon now. (A.R. at pgs. 946-953). The lower Court correctly recognizes that party wall obligations run with the land, but none of the subject deeds contain any reference to a specific right or obligation associated with the subject party wall. (A.R. at pgs. 946-947). The lower Court then advised that it undertook a review of available case law related to duties, rights, obligations and other issues pertaining to party wall disputes, which is further evidenced by the hearing on Petitioner's Rule 60 Motion. (A.R. at pg. 947 and 957-1000). Due to the limited case law and lack of statutory authority, the lower Court advised that it had to look elsewhere for guidance. Id. A review of the applicable case law in West Virginia fully supports the lower Court's decision to consult other jurisdictions to determine what *specific* duties or obligations exist under the party wall applicable to this case. (A.R. p. 982).

In West Virginia, there are no statutes that provide for the rights, terms, conditions, etc.

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 written contract. (*See* A.R. at pgs. 118-119). Additionally, there are very few cases that have been decided by the West Virginia Supreme Court regarding the rights, obligations, conditions, etc. that a party wall agreement places upon the parties to the same, none of which are directly applicable to this case.

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 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 that a right, absent express or implied agreement, for a party to a party wall "may increase 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. This has rule no applicability to the case now before this Court.

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 ""Subject 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 are duties to each party to the agreement, which is the key issue now before the Court. As such, the Court was correct in not providing Gates any further weight in this case.

The Petitioner then turned to the case of Johnson v. Chapman to further her position. Again, the Respondent can easily call into question the applicability of the Johnson decision to this case. First and foremost, the actual party wall agreement was not at issue in terms of its rights, duties or obligations. *See generally*, Johnson v. Chapman, 43 W. Va. 639, 28 S.E. 744 (1897). In fact, although the case makes two (2) references to a party wall agreement, there is no discussion as to how the same is deemed to be a party wall nor the terms of the deed that create the same. Id. at 642. Secondly, the issue is Johnson is the duty and obligations between two parties whose wall failed and caused damage to a third, the Plaintiff. Id. Although not specifically stated, it appears that the wall it issue that failed was a shared wall between the Defendants and not the Plaintiff. Id. Simply, put, the Respondent, much like the lower Court, does not see how the Johnson case has any bearing at the penultimate issue in this case, i.e. the duties of parties to a party wall agreement when the same is silent as to the right, duties, and obligations of each.

In her last attempt to improperly bind this and the lower Court to a duty where one does not exist, Petitioner moves into the realm of insurable interests. (Pet.'s Brief at pgs. 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 both pursuant to deed and in general. There is simply no portion of the decision in the Mut. Improvement Co. case that should have any bearing in this case.

After examining his selection of West Virginia cases, the Petitioner then makes the bold assertion that the lower Court erred when it found insufficient principles in West Virginia law to supply the law of the case as to nature and scope of party wall obligations and, to the extent she claims they exist, failed to abide by them. West Virginia Case law is clear "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 Plaintiff, party walls are, as a general rule, "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. The Court did not err is not looking to the limited cases cited by the Petitioner because the same provided no specific, or even general, guidance for the issues at dispute in this case.

Petitioner then crafts a rule that is favorable to her interests in this case: West Virginia law imposes, to the extent their written agreement is silent on the matter, their mutual obligations to maintain and protect the party even if one of them no longer wants or needs the party wall. Rather than citing to a 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, those cases are, at best, persuasive on their face and, upon examination, should be given no weight

by this Court.

Petitioner cites mainly to Carroll Blake Const. Co. v. Boyle, which stems from Tennessee. Factually, Carroll involves the complete destruction of party wall and damages that result from the same. Carroll Blake Const. Co. v. Boyle, 140 Tenn. 166, 171. The same holds true for J. C. Penney Co. v. McCarthy, 93 Ind. App. 609, 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, which again is not the factual case here.

Further, the Respondent finds it perplexing that Petitioner seeks reliance on the J.C. Penny decision as an alternative to the lower Court's new rule when the two are wholly consistent. 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). This rule is almost identical to the initial holding of the lower Court, which is not being challenged here, and its application to this Respondent would not be supported by the record. Plaintiff has not, and cannot, establish that this Defendant used the subject wall in any matter that caused damage to the Plaintiff. Further, the record is clear that the damage to the subject wall, including the water intrusion, pre-date this Defendant's ownership in the subject lot and there is no testimony that any act, or use of the wall, has caused Plaintiff harm in this case. (A.R. 824-827, 876-879, 884-902).

Specifically, Petitioner herself states that she first experienced water in the basement of her

building during the winter of 2008 and leading into early 2009. (A.R. pg. 878). The Petitioner would later state that she has had standing water in her basement since 2014, which is prior to this Respondent's ownership of the adjacent Lot 5. (A.R. 879). Further, Petitioner's own expert fails to tie any direct of this Respondent to the damaged claimed to the party wall in either his report of his deposition. (A.R. at pgs. 880- 897). Finally, an undisputed report of a prior expert clearly indicates that the Petitioner noticed actual damage to the party wall in 2013 and that the water intrusion did not begin until ledger boards were removed in 2013, both of which pre-date this Respondent's ownership of the subject adjacent lot. (A.R. 898-899).

Finally, in an effort to save her case, the Petitioner appears to abandon her "breach" claim and attempts to convert her case to one sounding in tort. (A.R. at pg. 26-30). Petitioner extends party walls into the realm of tort-based claims, not because West Virginia law has done do, but because the same serves her purpose. Id. 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)(emphasis added). Further, again as stated by the Petitioner, party walls are, as a general rule, "subject of agreement" between adjoining landowners. *See* 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 exists as to whether a party wall claim sounds in tort or sounds in contract, which is the clear rule of law in West Virginia.

Therefore, the Respondent maintains that the lower Court did not err in in its review of, and rejection of, applicable West Virginia case law and reliance of 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, this Respondent notes that none of the cases cited by the Petitioner in her Brief set forth the general rights, duties and obligations to a party subject to a Party Wall Agreement when the same lacks sufficient language to establish the same, which is the key issue now before this Court. While the Petitioner faults the lower Court for relying on persuasive jurisdictions, she does not challenge the accuracy of the laws cited, but rather wishes this Court to adopt her own, self-serving rules of law from different persuasive jurisdictions. Finally, any discussion of servitudes is wholly inapplicable as Petitioners claim in this case stems from a breach of the subject Party Wall Agreement expressly sounding in contract, not a general tort where servitudes may arguably apply. Therefore, the Circuit Court's granting of Respondent's Motion for Summary Judgment as to the party wall claims should be affirmed.

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

In her second Assignment of Error, 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." (Pet.'s Brief, pg. 30). In doing so, the Petitioner appears to assert 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 rules 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 the adoption of or application of this new rule of law.

As a preliminary note, this newly fashioned law addressed in this Assignment of Error does not apply to any conduct allegedly undertaken by this Respondent in the underlying case. This new

rule specifically pertains to the removal of a building which has a party wall with an adjacent building and the duties of the removing party in doing so. The undisputed record in this case demonstrates that 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. (Pet.'s Brief, pg. 11; *e.g.* A.R. at pg. 512). 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 cleared. Pet.'s Brief, pg. 11; *e.g.* A.R. at pg. 222-226, 512). The only action that the Petitioner recognizes that this Respondent undertook following obtaining possession of lot 5 was placing fill dirt in the now-vacant lot. (Pet.'s Brief at pg. 512). As such, if it stands as it should, 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 decisions as to summary judgment.

However, recognizing the potential that this new rules of law could conceivably be construed to somehow apply 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, it is clear that it is the Petitioner, not the lower Court, that has confused and conflated the issues and standards announced by the lower Court. In its Order as to the various summary judgment motions, the lower Court clearly broke the case 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 one as to the ongoing duty to protect a party wall. As the lower Court correctly identified, the full breadth of mandatory legal authorities in the State of West Virginia are essentially useless in determining what, if any, legal duties are owed in this case. As such, the lower Court did what so many Courts, including this Court as well as the Petitioner, have done before it: 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.A.R.2d 343 (1980). In the Lambert case, the Plaintiffs filed suit against the City alleging that, in demolishing its building and leaving a party wall unprotected, it negligently and recklessly caused damage to their property. Id. at 343-345. 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.

Id. at 345. 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 A.R. 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. A.R. 48, 60-61, 425 S.W.2d 783 (1967). Id. This clearly demonstrates that the rule of law cited in Lambert, and reproduced above, it is the rule of law by a majority of jurisdictions as noted by the lower Court.

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." (Pet's Brief, 30). However, in doing so, Petitioner failed to provide any legal authority that even remotely suggests that the Lambert decision would be inconsistent with West Virginia law, or even inconsistent with any other jurisdiction. As noted above, there is no legal authority in West Virginia that even comes close to dealing with the specific issue addressed by the Court in the 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. However, just seven (7) pages prior, the Petitioner maintains that this rule with be a propert extension of West Virginia law. (Pet.'s Brief, pg. 23.) Petitioner cannot have it both ways as she seems to suggest in her brief. Finally, 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 the Lambert decision is not only appropriate, but warranted in this case on the narrow issues determined 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?" (A.R. 949-950). 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. Id. Again, as West Virginia authority to wholly silent on the issue, the lower Court sought guidance from another jurisdiction. In doing so, the lower Court correctly adopted a rule of law announced in Cameron v. Perkins, 76 Wa.2d 7, 454 P.2d 834 (Washington 1969).

In Cameron, the Court adopted a similar rule as the one announced above in Lambert and in the other majority of jurisdictions as the right to remove a building with a party wall. However, that is not the reason why the lower Court relied in Cameron in deciding the question of a duty of ongoing protection. Rather, 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. That rule, that the parties owed no duty to protect the now-exposed exterior portion of the

party was from the elements, is consistent with the source material cited by the lower Court.

What is missing from Petitioner's argument is the fact that the Court goes one step further in its legal analysis. In what appears to be the application of the lower Court's prior ruling, the subject Order places in affirmative duty on each Respondent to not add to the unstable condition of the wall as well as to a duty not to harm the wall or the Petitioner building. As is supported by the record, the Petitioner has not identified any specific 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, the records merely demonstrates that it did not undertake an affirmative action to protect the wall from the elements, which the lower Court has correctly determined under the circumstances present in this case, that it was under no duty to do. Therefore, as to this Respondent, the Circuit Court's granting summary judgment as to the party wall claims should be affirmed.

E. THE CIRCUIT COURT DID NOT RULE THAT THE SUBJECT WALL WAS NOT A STRUCTURAL WALL AND, THUS, DID NOT ERR.

Although the heading of Petitioner's third Assignment of Error pertains only to the issue of whether or not the wall was structural, there are, in fact, two distinct issue that she summarily addresses. First, Petitioner maintains that the lower Court erred in determining that the subject party wall was not "structural." Second, the Petitioner maintains that the lower Court in its distinction as to whether the subject wall was "interior" or "exterior" in nature. However, as discussed below, neither of these issues has any bearing on the ultimate issue on appeal, i.e. the duties of parties under a valid Party Wall Agreement.

As to the structural versus non-structural ruling, the Respondent is perplexed as to where the

Petitioner has found any such ruling. A thorough and extensive review of the Order by the lower Court at issue before this Court does not reveal any ruling, direct or indirect, that suggests that the subject party wall was not "structural." While the Cameron case cited by the lower Court pertains to an arguably non-structural party wall, the rules adopted by the lower Court do not make any distinction between a party wall being structural or non-structural. The rules the lower Court crafted with consideration of the Cameron case is as follows: Defendants did not owe the Plaintiff a duty to not owe the Plaintiff a duty to 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 wall of the Plaintiff's building. (A.R. at pg. 950). Simply put, this portion of Petitioner's Assignment of Error incorrectly states the lower Court's holding, is wholly irrelevant to the issues on appeal, and, as such, 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 in light of the ruling of the lower Court. Petitioner acknowledges the same in her Brief, but the same warrants some limited discussion. (Pet.'s Brief at pg. 32). First, the lower Court's rules of law specifically ignore the distinction which Petitioner now presents to this Court. The rule of law crafted from the Lambert case pertaining to a removal of a building with a shared party wall makes no such distinction. Further, 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. (A.R. at pg. 950). As such, this portion of Petitioner's Assignment of Error likewise incorrectly states the lower Court's holding, is wholly irrelevant to the issues on appeal, and, as such, does not warrant further discussion by this Court.

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

In her ninth Assignment of Error, 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 Six (6) through Nine (9) into one brief, summation of prior arguments. In short, Petitioner maintains that, even if the Court were to apply the new rules of law, the facts of the case warranted the denial of summary judgment in her favor. The Respondents respectfully disagree 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 maintain 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., pgs. 948-949). 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 cleared. (Pet.'s Brief, pg. 11; *e.g.* A.R. at pg. 512). Thus, this Respondent could not have provided notice prior to 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 for this Respondent.

The second rule of law adopted by the lower Court, which the Respondent maintains is

appropriate, announces that this Respondent owes Petitioner 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. In support of her Assignment of Error, the Petitioner points solely to the opinions of her expert, Daniel Shorts. (Pet.'s Brief, pg. 25) Namely, Petitioner relies on Mr. Shorts' opinions and summarizes the same to mean that all Respondents, not just this Respondent, failed to protect the structural integrity of the wall and failed to avoid damage to the wall. Id.

However, what is absent from the summation of these opinions, or the actual opinions themselves, is what actions of the Respondent added to the "unstable condition" of the party wall or harmed the wall of the Petitioner's building. This is because, 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.

Specifically, Petitioner herself states that she first experienced water in the basement of her building during the winter of 2008 and leading into early 2009. (A.R. pg. 878). The Petitioner would later state that she has had standing water in her basement since 2014, which is prior to this Respondent's ownership of the adjacent Lot 5. (A.R. 879). Further, Petitioner's own expert fails to tie any direct of this Respondent to the damaged claimed to the party wall in either his report of his deposition. (A.R. at pgs. 880- 897). Finally, an undisputed report of a prior expert clearly indicates that the Petitioner noticed actual damage to the party wall in 2013 and that the water intrusion did not begin until ledger boards were removed in 2013, both of which pre-date this Respondent's ownership of the subject adjacent lot. (A.R. 898-899).

There was, and is, no evidence before the lower Court that the water intrusion is worse now and, to the extent it may be implied, nothing to show how this Respondent made it worse. Further,

there is simply nothing in the record that the Petitioner can point to in an effort to demonstrate that this Respondent actually caused direct harm to the subject wall. Therefore, even adopting and applying the new rules of law adopted by the lower Court, this Respondent would be entitled to summary judgment and the lower Court's ruling should be affirmed.

CONCLUSION AND PRAYER FOR RELIEF

Based upon the foregoing, Respondent, Zen's Development, LLC, respectfully requests that the Court **DENY** the Petitioner's Petition for Appeal.

Respectfully submitted,

ZEN'S DEVELOPMENT, LLC

Respondents and Defendants below,

By Counsel,

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CERTIFICATE OF SERVICE

The undersigned, counsel of record for Respondent Zen's Development, LLC, does hereby certify on this 27 day of July, 2020, that a true copy of the foregoing **"RESPONDENT ZEN'S DEVELOPMENT LLC'S RESPONSE TO PETITIONER SARAH L. BIRHCFIELD'S PETITION FOR APPEAL"** 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:

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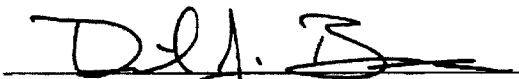

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