IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

SARAH L. BIRCHFIELD,

Petitioner,

v. **Docket No. 20-0075**
Circuit Court Case No. 15-C-733

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

Respondents.

BRIEF OF THE RESPONDENT, KENNETH W. McBRIDE, JR.

KENNETH W. McBRIDE, JR.
BY COUNSEL

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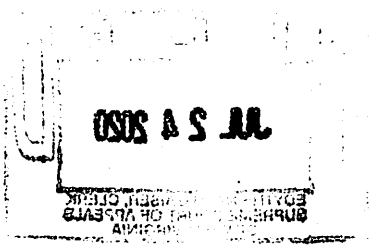
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STATEMENT OF THE CASE

This appeal involves a party wall agreement that existed between the owners of Lot No. 4 and Lot No. 5 of the Beckley Block, as those two lots appear on a certain map entitled "Map of Beckley Block, Beckley, W.Va., 1913," a copy of which is recorded in the Office of the Clerk of the County Commission for Raleigh County, West Virginia at Deed Book 56, Page 247. (See p. 118.) The respondent, Kenneth W. McBride, Jr., acquired Lot No. 5 from William D. Kinder and Rhonda A. Kinder, his wife, by Deed dated March 5, 1992. (See pp. 123-24.) On June 15, 2007, the petitioner, Sarah L. Birchfield, purchased Lot No. 4, which is adjacent and contiguous to Lot No. 5, from Hylton Realty & Investments, LLC. (See pp. 120-21.) The petitioner purchased the building located on Lot No. 4 with the intention of remodeling the inside of the building for the operation of a coffee shop at the location. (See p. 111.) At the time the petitioner purchased Lot No. 4, Mr. McBride was operating a Xerox dealership out of the building located on Lot No. 5. (See id.)

On June 12, 1919, a party wall agreement was consummated with respect to Lot No. 4 and Lot No. 5 between Mable L. Ross and Charles T. Ross, who then owned Lot No. 5, and Peter Lipari, who then owned Lot No. 4. (See p. 6.) The party wall agreement, which was recorded in the Raleigh County Clerk's Office at Deed Book 69, Page 352, provided, in relevant part, the following:

> "**THIS AGREEMENT,** Made this 12th day of June 1919, by and between Peter Lipari, party of the first part, and Mable L. Ross, party of the second part, all of Raleigh County, West Virginia.
>
> **WHEREAS,** The parties hereto are owners of adjoining lots in said County and State in the City of Beckley, and the said first party owning lot No. 4 in Beckley Block and said party of second part owning the adjoining lot No. 5 in Beckley Block, and,
>
> **WHEREAS,** The said party of first part is erecting a two story building the wall on the line between said lots, which wall is being bulint on the said lot No. 4, the Northwest edge of which is at the line between said lots, by Charles Pellini,

under contract with said first part, and the said second party is willing to pay one-half the cost of said wall, Seven Hundred and Ninety Three ($793.00) Dollars and Seventy Five (75.00) Dollars for the Nine inches of land from street to alley of said lot, on which strip of land one-half of the said 18 inch wall is built, making a total of $868.00, and said first party is willing to accept said amount for a one-half interest in said wall and the Nine inches of land, on which strip the said wall is built.

Now therefore, **THIS AGREEMENT AND AND** (sic) **INDENTURE, W I T N E S S E T H,** That for and in consideration of the sum of One Dollar cash in hand paid and the premises, and the further consideration that said Mable L. Ross, party of the second part shall pay to Peter Lipari, party of the first part, the sum of $868.00, one-half of which is to be paid when said wall is completed to top of the first story, and the balance when said wall is completed, the said first party does hereby Give, grant and sell unto the 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 to said wall and to the use of said wall as a party wall.

Mable L. Ross is to build front pier on her side of the division line to support front of building. The said wall is 74 feet long, 18 inches thick to top of first story, which is to be high enough so that store room on first floor will be 14 feet from floor to ceiling, to be built of stone, of good workmanship and a good substantial wall; and the second story or remainder of said wall is to be brick 13 inches thick, and built on center line and high enough so that rooms on second floor of said building will be 9 feet from floor to ceiling, with proper height (sic) above the roof.

The wall to be a party wall and as such to be part of each building (when building is erected on lot 5) and the title to which shall pass by deed to each of said lots."

(p. 118.) The party wall agreement has never been terminated by the owners of the respective lots and remains in effect. (See p. 397.)

In February 2008, on the day the petitioner began renovating the building on Lot No. 4, Mr. McBride's Xerox dealership was destroyed by fire. (See pp. 111-13.) Shortly after the fire and prior to May 2008, the remaining debris on Lot No. 5 was removed from the property, leaving the party wall exposed. (See id.) After the debris was removed and without filing any insurance claim relating to the damage caused by the fire, the petitioner completed her renovations of the building on Lot No. 4. (See id.) The petitioner began operating a coffee shop in the building in August 2008. (See id.) On July 30, 2008, Mr. McBride sold Lot No. 5 to Uptown Properties, LLC ("Uptown Properties"). (See p. 123-24.)

Following Mr. McBride's sale of Lot No. 5, there was a substantial amount of commercial activity involving the two lots. The petitioner operated a coffee shop on Lot No. 4 from August 2008 until June 2009. (See pp. 111-13.) After the petitioner closed the coffee shop, she rented the building located on Lot No. 4 to Downtown Deli. (See id.) In August 2010, after Downtown Deli had vacated the property, The Bake Shoppe began renting the building on Lot No. 4, paying the petitioner one thousand five hundred dollars ($1,500.00) per month in rent plus certain net occupancy costs under an oral lease. (See p. 66.) The Bake Shoppe continued to rent the petitioner's building until January 2014, when The Bake Shoppe moved to another location. (See id.) According to an affidavit provided in this case by Christen Blackburn, the owner of The Bake Shoppe, the business was forced to move from the petitioner's building because of water damage, mold and various other sanitation issues, which the petitioner was made aware of but refused to correct. (See p. 398.) The building on Lot No. 4 has remained vacant since The Bake Shoppe terminated its lease. (See pp. 111-116.)

On December 13, 2012, Uptown Properties conveyed Lot No. 5 to Harper Rentals, Inc. ("Harper Rentals").[1] (See p. 456-57.) Harper Rentals subsequently conveyed the property to Zen's Property Development, LLC ("Zen's") on December 15, 2015. (See pp. 463-64.) At some point after Mr. McBride sold Lot No. 5, Uptown Properties erected an outdoor dining facility for an adjacent restaurant and bar on the lot. (See p. 166, 966.) A second fire destroyed the outdoor dining facility in 2015, which the petitioner claimed left holes in the north face of the party wall

[1] The initial Deed conveying Lot No. 5 from Uptown Properties to Harper Rentals incorrectly listed the grantee as Harper Rentals, LLC. (See p. 456.) Uptown Properties delivered a Deed of Correction, dated October 15, 2014, which correctly listed Harper Rentals, Inc. as the grantee. (See id.)

when the framing from the dining facility was removed. (See id.) After Zen's purchased the property, it excavated and paved Lot No. 5, which now serves as a parking lot. (See p. 166.)

On July 30, 2015, the petitioner filed the instant action against Matthew Bickey, Harper Rentals and Mine Power Systems, Inc. ("Mine Power Systems") in the Circuit Court of Raleigh County, West Virginia. (See pp. 1; 398.) In her complaint, the petitioner alleged that the three respondents tortiously interfered with her rental contract with The Bake Shoppe. (See id.) The petitioner also alleged that Harper Rentals caused damage to her building by breaching the party wall agreement. (See id.) After dismissing Mr. Bickey from the lawsuit, the petitioner moved to amend her complaint on December 27, 2016. (See pp. 1-11.) In her motion to amend, the petitioner sought leave to dismiss her tortious interference claim against Mine Power Systems; to add Mr. McBride, Uptown Properties and Zen's as respondents on the counts in the complaint alleging tortious interference and breach of the party wall agreement; and to add a negligence count against all respondents. (See pp. 2; 12.) By Order entered on March 6, 2017, the Circuit Court granted the petitioner's motion to amend her complaint.[2] (See pp. 13-14.)

Following a hearing on various motions to dismiss the petitioner's amended complaint, an Order Denying Motions to Dismiss was entered by the Circuit Court that dismissed the tortious interference claim against Mr. McBride. (See p. 97-100.) Beginning on August 24, 2018, each of the parties filed motions for summary judgment. (See pp. 15, 140, 260, 332.) After the various summary judgment motions were fully briefed, a hearing was held on the motions by the Circuit Court on October 10, 2018. (See p. 396.) After hearing argument, the Circuit Court granted summary judgment to all respondents on the petitioner's tortious interference claim, finding that

[2] Harper Rentals reached a settlement with the petitioner and was dismissed from this action prior to the pre-trial hearing. (See p. 972.)

The Bake Shoppe terminated its lease with the petitioner because of the condition of the petitioner's building rather than because of any interference by the respondents. (See pp. 396-411.) The Circuit Court also granted summary judgment to all of the respondents except Zen's on the petitioner's negligence claim, holding that the petitioner had failed to assert her negligence claim against Mr. McBride, Uptown Properties and Harper Rentals within the two-year statute of limitation. (See id.) As to the petitioner's claim that the respondents breached the party wall agreement, the Circuit Court denied each parties' summary judgment motion and found that there were "various material issues related to the liability of one or more of the Respondents and that these issues are to be left to the province of the jury." (p. 408.)

After this case was assigned to a new Circuit Judge, the Circuit Court set the matter for trial on January 27, 2020 and ordered that any additional dispositive motions be filed two weeks prior to a pre-trial hearing scheduled for November 20, 2019. (See pp.414-416.) As the trial approached, each of the parties renewed their motions for summary judgment relating to liability for the respondents' alleged breach of the party wall agreement. (See pp. 417, 494, 762, 814.) Following a pre-trial hearing on November 20, 2019, the Circuit Court issued its Order Pertaining to Pretrial Motions and Motions for Summary Judgments, from which the petitioner now appeals, on December 13, 2019.[3] (See p. 946-953.)

In its Order Pertaining to Pretrial Motions and Motions for Summary Judgments, the Circuit Court noted 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. (See p. 947.) In order to resolve the various motions for summary judgment, the Circuit Court relied on Lambert v. City

[3] The Circuit Court issued its Order Pertaining to Pretrial Motions and Motions for Summary Judgments on December 13, 2019 but, for clerical reasons, the Order was apparently not sent to the parties until December 23, 2019. (See pp. 961-962.)

of Emporia, 5 Kan.App.2d 343, 616 P.2d 1080 (1980) and Cameron v. Perkins, 76 Wn.2d 7, 454 P.2d 834 (1969), two factually similar cases decided by appellate courts that had surveyed the law of numerous other states to reach their decision. (See pp. 947-951.) Relying on Lambert and Cameron, the Circuit Court held Mr. McBride had a right to remove his building from its attachment to the party wall without liability to the petitioner so long as he gave reasonable notice, used reasonable care to protect the structural integrity of the party wall, and avoided causing damage to the petitioner's building as a result of the removal. (See pp. 947-951.) No liability could be imposed upon Mr. McBride, the Circuit Court held, based merely on the fact that the removal of debris from Lot No. 5 left the party wall exposed to outside elements. (See id.)

Applying these legal conclusions to the facts presented by the parties in their motions for summary judgment, the Circuit Court noted that Mr. McBride's building was destroyed by fire, leaving debris that had to be removed from Lot No. 5 after the fire. (See pp. 947-951.) Although Mr. McBride could not give notice that fire would destroy his building and cause its detachment from the party wall, the Circuit Court noted that the petitioner had not alleged that she was damaged by Mr. McBride's failure to give notice of the fire or the removal of the debris after the fire. (See id.) The Circuit Court continued that the only "evidence relied upon by the Petitioner for the claim against Mr. McBride comes entirely from her expert and his opinion that Mr. McBride failed to take steps to protect the party wall from the elements." (p. 952.) The petitioner filed to provide any evidence to the Circuit Court that Mr. McBride committed any act or caused anyone to commit any act that damaged the party wall or that Mr. McBride directly caused any damage to the petitioner's building. (See p. 951.) Based upon this lack of evidence, the Circuit Court granted Mr. McBride's renewed motion for summary judgment on the issue of the breach of the party wall agreement and dismissed Mr. McBride from the underlying case. (See p. 952.)

In her appeal from the Circuit Court's Order Pertaining to Pretrial Motions and Motions for Summary Judgments, the petitioner asserts that her "liability claims against Respondents are not based on contract but they sound in tort duties in negligence and arising from their party wall relationship." (Pet.'s Brief, p. 7.) The petitioner's asserts eleven different assignments of error to support her claim that the Circuit Court improperly granted summary judgment to the respondents. (See id. at pp. 4-5.) While the petitioner's brief includes an unusually high number of assigned errors, it does not assert that the Circuit Court erred when it concluded that the petitioner's negligence claim against all of the respondents except Zen's are barred by an appropriate statute of limitations. (See pp. 396-411.) Because the Circuit Court properly decided the factual and legal issues raised in this appeal and because all of the petitioner's claims against Mr. McBride are time-barred, the Circuit Court's Order Pertaining to Pretrial Motions and Motions for Summary Judgments must be affirmed.

SUMMARY OF ARGUMENT

Despite the fact that her brief asserts eleven separate assignments of error, the petitioner does not allege that the Circuit Court's decision to grant summary judgment to Mr. McBride or Uptown properties on the petitioner's negligence claim based upon the fact that the claim was barred by the two-year statute of limitations for negligence claims. By failing to assign error to that conclusion, the petitioner has waived any alleged error by the Circuit Court in that ruling. Because the petitioner's negligence claim is time-barred, any errors committed by the Circuit Court in relation to the petitioner's negligence claim are harmless as a matter of law.

Likewise, as the petitioner concedes that her party wall claim against Mr. McBride is a tort claim and not a breach of contract claim, the petitioner's party wall claim is likewise barred by the two-year statute of limitations set forth in West Virginia Code § 52-2-12(a). The petitioner was

aware of her claim against Mr. McBride at the time he sold Lot No. 5 in 2008. The petitioner's failed to file the underlying lawsuit until July 2015 and failed to assert any claims against Mr. McBride until 2017. Given that over seven years passed before the petitioner filed the underlying lawsuit, her claims against Mr. McBride are time-barred and were properly dismissed by the Circuit Court. To the extent that the Circuit Court addressed the substance of the petitioner's claims in granting summary judgment to Mr. McBride, the Circuit Court adopted the appropriate legal standard to govern the resolution of those claims and applied that legal standard correctly to the facts before it. For all of these reasons, the Circuit Court's Order Pertaining to Pretrial Motions and Motions for Summary Judgments should be affirmed and the petitioner's appeal should be denied.

STATEMENT OF ORAL ARGUMENT AND DECISION

Mr. McBride does not believe oral argument of this appeal is necessary because the facts and legal arguments have been adequately presented by the parties. See W.Va. R.App.P. 18(a)(4). To the extent such oral argument is necessary, Mr. McBride believes that such oral argument should be held under Rule 19 of the West Virginia Rules of Appellate Procedure because the petitioner's appeal presents a narrow issue of law. See W.Va. R.App.P. 19(a)(4). Mr. McBride believes this appeal is appropriate for resolution by memorandum decision.

ARGUMENT

I. Standard of review.

A circuit court's grant of summary judgment is reviewed de novo. See syl. pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

II. The petitioner's failure to assign the Circuit Court's application of the statute of limitations to bar the petitioner's negligence claims against Mr. McBride and Uptown Properties waives that issue for the purposes of this appeal. As a result, any error asserted by the petitioner in relation to her negligence claim is harmless as a matter of law.

The numerosity of the petitioner's assignments of error make it necessary for Mr. McBride to group the related assignments of error together for the purpose of discussion. The manner in which those assignments of error jump back and forth among the various counts of the petitioner's amended complaint make it necessary for Mr. McBride to restate the petitioner's assignments of error in a more logical, coherent manner. Assuming *arguendo* that the Court agrees with the petitioner on one or more of the errors assigned in the petitioner's brief, the fact that the application of the appropriate statute of limitation to the petitioner's claims against Mr. McBride renders all of the errors assigned harmless as a matter of law makes it necessary for Mr. McBride to address the substance of those assigned errors last.

On October 26, 2018, the Circuit Court entered its Order on Motions for Summary Judgment. In that Order, the Circuit Court dismissed the petitioner's negligence claims against Mr. McBride, Uptown Properties and Harper Rentals, concluding that the petitioner's negligence claim was barred by the applicable statute of limitations:

> "The 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 McBride, Defendant Uptown Properties, LLC and Defendant Harper Rentals, Inc.
>
> The Court finds that each Defendant, other than Zen Development, LLC, is hereby DISMISSED as to the negligence allegation in the Plaintiff's Complaint and Amended Complaint."

Although the petitioner assigns eleven separate errors in her brief, including three (Assignments of Error No. VII, X and XI) that deal specifically with the petitioner's negligence claim, the

petitioner does not assert that the Circuit Court erred by finding that her negligence claim against Mr. McBride and Uptown Properties was barred by the two-year statute of limitation for negligence claims. By failing to assert that the Circuit Court erred in deeming her negligence claims against Mr. McBride and Uptown Properties to be time-barred, the petitioner has waived any objection to that ruling by the Circuit Court. See syl. pt. 6, Addair v. Bryant, 168 W.Va. 306, 284 S.E.2d 374 (1981).

The petitioner claims, in Assignment of Error No. VIII, that the Circuit Court erred when it granted Mr. McBride summary judgment on the petitioner's negligence claim by finding that Mr. McBride had no duty to protect his half of the party wall from the elements. The petitioner claims, in Assignment of Error No. X, that the Circuit Court erred by failing to find a *prima facie* case of negligence against Mr. McBride based on his alleged violation of Ordinances issued by the City of Beckley. Finally, the petitioner claims, in Assignment of Error No. XI, that the Circuit Court erred in granting Mr. McBride summary judgment on the issue of whether he acted reasonably in directing or permitting surface water to flow into the petitioner's building. Even if this Court agreed with the petitioner as to each of those alleged errors, the petitioner could still not prevail on her negligence claim against Mr. McBride because the Circuit Court has already ruled that the negligence claim is time barred and the petitioner chose not to appeal that ruling. Because the errors alleged in Assignments of Error No. VII, X and XI of the petitioner's brief would not, if corrected by this Court, alter the outcome of the litigation of the petitioner's negligence claim, any such errors are harmless. See syl. pt. 4, State v. Baker, 169 W.Va. 357, 287 S.E.2d 497 (1982)(an error which does not affect the outcome of the case will be regarded as harmless error).

III. The petitioner's remaining tort claim, alleging that Mr. McBride breached duties owed to the petitioner as a result of the party wall agreement, is likewise time-barred.

Throughout the underlying litigation, the constant mutation of the petitioner's party wall claim has made the exact nature of that claim both difficult to define and to defend. The petitioner's remaining assignments of error (Assignments of Error Nos. I, II, III, IV, V, VI, VII and IX) are more logically grouped into a single assignment of error and more concisely stated to allege that the Circuit Court utilized an incorrect legal standard to resolve the petitioner's party wall claim and then improperly applied that legal standard to the facts developed during discovery. In her petition for appeal, the petitioner essentially claims that the Circuit Court misunderstood the nature of her party wall claim, which is really a tort claim that involves the respondents' breach of duties related to the maintenance of the party wall, imposed upon the respondents by virtue of their ownership of Lot No. 5. Essentially, the petitioner asserts, the respondents owed her a duty to keep their side of the party wall in good condition so that it didn't cause damage to the petitioner's building. Their breach of that duty allows the petitioner to recover in tort for the damages to the building on Lot No. 4.

Like the petitioner's negligence claim, however, any tort claim that the petitioner might assert against Mr. McBride is subject to a two-year statute of limitation. West Virginia Code § 55-2-12 is the statute of limitations for all tort claims and provides the following:

> "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;
>
> (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and
>
> (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative."

W.Va. Code § 55-2-12 (1959); see also Wilt v. State Auto. Mut. Ins. Co., 203 W.Va. 165, 168, 506 S.E.2d 608, 611 (1998). The petitioner acknowledges that her party wall claim sounds in tort and is for damage to property. Accordingly, the petitioner's party wall claim against Mr. McBride is subject to a two-year statute of limitation under West Virginia Code § 55-2-12(a).

The petitioner owned Lot No. 4 at the time that Mr. McBride's Xerox dealership was destroyed by fire and the debris left after the fire was removed from Lot No. 5. She was renovating the building on Lot No. 4 when Mr. McBride sold Lot No. 5 in July 2008. The petitioner operated a business in her building and acted as a commercial landlord after her business was closed, claiming that she has dealt with the effects of the exposed party wall from the time of the fire through the present. Under West Virginia Code § 55-2-12(a), any tort claim for property damage claim that the petitioner had against Mr. McBride was barred if not asserted within two years. Given that Mr. McBride sold the property in July 2008, any tort claim against Mr. McBride related to the party wall was time-barred after July 2010 at the latest. The petitioner filed the underlying lawsuit in July 2015 and did not assert any claim against Mr. McBride until 2017. Under West Virginia Code § 55-2-12(a), the petitioner's tort claim against Mr. McBride, for breach of duties associated with the party wall, is time-barred. As a result, any error alleged by the petitioner related to her party wall claims against Mr. McBride is harmless as a matter of law.

IV. Assuming *arguendo* that the petitioner's party wall claim against Mr. McBride is not barred by the statute of limitations, the Circuit Court properly applied the correct legal standard in granting summary judgment to Mr. McBride on the petitioner's party wall claim.

Although he believes the petitioner's claims are clearly time-barred, Mr. McBride will nonetheless address the substance of the petitioner's party wall claim. "A 'party wall,' in the legal sense of the term, can only exist in two ways, *i.e.* by contract or statute: the common law creates no such right." Syl. pt. 1, List v. Hornbrook, 2 W.Va. 340 (1867). West Virginia did not have a

party wall statute at the time List was decided and has not adopted one in the time since. Hence, the party wall agreement at issue in this litigation is purely a contractual creation, existing by virtue of the Agreement and Indenture entered into between Mable L. Ross and Charles T. Ross, as owners of Lot No. 5, and Peter Lipari, as owner of Lot No. 4, on June 12, 1919.

Although the petitioner's brief attempts to cover it in complexity, the party wall agreement entered into between the Rosses and Mr. Lipari was relatively straightforward. The Rosses agreed to pay half of the cost of the construction of the party wall in return for the ownership of the half of the wall on their lot and the right to attach the building that was to be constructed on Lot No. 5 to the party wall. The agreement defined the type of party wall that would be constructed – "built of stone, of good workmanship and a good substantial wall" – and set forth detailed dimensions. Although the agreement assumed that a building would be constructed on Lot No. 5, it did not require the Rosses to construct one.

The party wall agreement merely provided that the building on lot No. 5, when built, would contain a front pier on the Rosses' side of the division line to support the front of the building and that the party wall would become a part of the building on Lot No. 5 when that building was constructed. The agreement did not address the demolition of either building attached to the party wall, the maintenance of the party wall or the responsibilities of the parties if either of their buildings was destroyed by fire. The agreement remained in effect until Mr. McBride's building was destroyed by fire, the demolition of which caused the party wall to be exposed to the elements.

To the extent this Court determines that the petitioner's tort claim against Mr. McBride is not barred by West Virginia Code § 52-2-12(a), the resolution of the petitioner's party wall claim requires this Court to determine the nature of Mr. McBride's obligation to the petitioner under the party wall agreement at the time his building was destroyed by fire and had to be demolished. The

Circuit Court concluded that the party wall agreement merely required that Mr. McBride use reasonable care to protect the structural integrity of the party wall and avoid causing damage to the petitioner's building as a result of the removal. The Circuit Court further concluded that the party wall agreement did not require that Mr. McBride take steps, at the time of the demolition of his building, to protect the party wall against damage from the elements. Because the Circuit Court determined that the only evidence of damage to the petitioner's building caused by the demolition of Mr. McBride's building came as a result of the party wall's subsequent exposure to stormwater, the Circuit Court granted summary judgment to Mr. McBride on the petitioner's party wall claim.

In reaching its conclusion, the Circuit Court analyzed the obligations of the parties under the party wall agreement, treating the petitioner's party wall claim as a claim for breach of contract and analyzing the parties' obligation under the written party wall agreement. If the petitioner alleged the breach of a written contract, the petitioner's claim against Mr. McBride would be subject to a ten-year statute of limitation. W.Va. Code § 55-2-6 (1959). In her brief, however, the petitioner makes it clear that her party wall claim against Mr. McBride is not a breach of contract claim, stating that "Birchfield liability (sic) claims against Respondents are not based on contract but they sound in tort duties in negligence and arising from their party wall relationship."

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. The Circuit Court relied on Lambert and Cameron to determine that the written agreement implicitly required only that Mr. McBride give reasonable notice of his intent to detach his building from the party wall if such notice was possible, use reasonable care to protect the structural integrity of the party wall, and avoid causing damage to the petitioner's

building as a result of the removal. It did not require that Mr. McBride take steps to protect the building on Lot No. 4 from exposure to the elements or stormwater following the detachment.

Given that the party wall served as an exterior wall to the petitioner's building, both before the construction of the building on Lot No. 5 and after its destruction by fire, the Circuit Court reasoned that it was the petitioner's obligation to ensure the integrity of what became the exterior of her own building following the destruction of Mr. McBride's building. In her deposition testimony, the petitioner acknowledged that she was working with contractors to renovate her own building at the time the fire debris was removed from Lot No. 5 and made a conscious decision not to pursue any insurance claim related to the damage caused by the 2008 fire:

"Q: Did you ever talk to Mr. McBride about that subject wall?

A: I did not.

Q: What about the damage to your building because of the fire?

A: I did not.

Q: Did you make any attempts to?

A: I did not talk to Mr. McBride at all. And I talked to my contractor and my own insurance company.

Q: Okay. Who was your insurance company at the time?

A: I believe it was Nationwide.

Q: Did you file a claim with them?

A: I did not.

Q: Is there a reason you didn't?

A: After assessing the damage, my contractor felt that he could, you know, make any necessary repairs without filing the claim. And we were just anxious to pursue our renovations. Like I said, the fire happened the day we started renovating."

(p. 113.) Although the petitioner continued to work on her building to prepare it for opening her coffee shop through the time Mr. McBride sold Lot No. 5, she apparently took no steps to protect her building against the exposure of the party wall to the elements caused by the destruction of the building on Lot No. 5. In the absence of specific language within the agreement, West Virginia law does not impose any requirement on Mr. McBride under the party wall agreement beyond that identified by the Circuit Court.

To the extent that the petitioner has undertaken a substantial and detailed legal analysis of the legal duties imposed upon adjacent landowners who attach their buildings to a party wall, this Court should not, as the petitioner has done, miss the forest for the trees. If the duties suggested by the petitioner in her brief were imposed upon Mr. McBride, the breach of which would support a tort claim against Mr. McBride, the statute of limitations on such a claim ran, at the latest, in July 2010. The petitioner did not file the underlying action until July 2015. While some might find a debate of the intricacies of the legal arguments raised by the petitioner invigorating, the resolution of those arguments in favor of the petitioner would not change the outcome of this case. Thus, any error committed by the Circuit Court in its resolution of the legal issues raised by the petitioner in her brief is harmless. The petitioner's claims against Mr. McBride are time-barred.

CONCLUSION

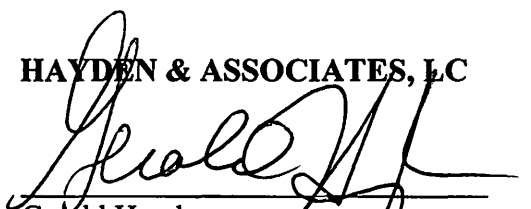
Mr. McBride's Xerox dealership burned to the ground and the debris that remained from the building he owned was removed from Lot No. 5 prior to May 2008. The petitioner was aware of the demolition of Mr. McBride's building and the resulting exposure of the party wall at the time the debris was removed because she was in the process of renovating her building on Lot No. 4. Based on her own sworn testimony, she was aware, from the time the debris was removed from Lot No. 5, of the condition of the party wall and the damage that the removal of the structure on

Lot No. 5 caused to her business. Nonetheless, the petitioner waited until July 2015 to bring the instant lawsuit for the alleged damage that she claims resulted from the breach of the party wall agreement. She did not include Mr. McBride as a defendant until 2017, nearly ten years after he had sold Lot No. 5 to Uptown Properties.

The petitioner has gotten so wrapped up inside the minutiae of her legal claims against Mr. McBride that she has failed to address the one very obvious flaw that is fatal to those claims, which the petitioner concedes "sound in tort duties". Those claims are time-barred. Given that Mr. McBride sold Lot No. 5 in July 2008, the petitioner's claims against him have been time-barred since at least July 2010. While Mr. McBride has addressed the petitioner's legal arguments and insists they are wholly without merit, this Court does not have to resolve those legal arguments in Mr. McBride's favor, or at all, for him to prevail in this appeal. This Court needs only to rely on its own well-settled jurisprudence regarding the application of statutes of limitations governing tort claims for damage to property. Based upon the petitioner's untimely assertion of her claims against Mr. McBride, as well as the other legal arguments set forth herein, the petitioner's appeal should be denied and the Circuit Court's Order Pertaining to Pretrial Motions and Motions for Summary Judgments should be affirmed.

KENNETH W. McBRIDE, JR.
By Counsel

HAYDEN & ASSOCIATES, LC



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CERTIFICATE OF SERVICE

I, Gerald Hayden, counsel for the respondent, Kenneth W. McBride, Jr., hereby certify that I have served a true and correct copy of the foregoing Brief of the respondent upon the following parties or their counsel by United States mail, first-class, postage prepaid, on this 22nd day of July, 2020 to the following:

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