No. 24-ICA-67

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Hull Property Group, LLC and Charles WV Mall, LLC,
Defendants Below, Petitioners,

v.

Quarrier ST, LLC,
Plaintiff Below, Respondent,

and

US Bank National Association, successor by merger to LaSalle Bank National Association, as Trustee for Bear Sterns Commercial Mortgage Securities, Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-TOP28, and C-III Asset Management, LLC, f/k/a Centerline Servicing, Inc., incorrectly designated as d/b/a Greystone Special Servicing
Corporation Service Company,
Defendants Below, Respondents

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PETITIONERS' AMENDED BRIEF

Submitted by:

Timothy M. Miller (WVSB ID No. 2564)
Robert M. Stonestreet (WVSB ID No. 9370)
Austin D. Rogers (WVSB ID No. 13919)
BABST, CALLAND, CLEMENTS & ZOMNIR, P.C.
300 Summers Street, Suite 1000
Charleston WV 25301
681-205-8888
681-205-8814 (fax)
tmiller@babstcalland.com
rstonestreet@babstcalland.com
arogers@babstcalland.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. Assignments of Error.[1]

Assignment of Error No. 1: The Trial Court[2] erred by concluding that no rational jury could find in favor of Petitioners, Charles WV Mall, LLC, and Hull Property Group, LLC, concerning whether they lacked knowledge of an unrecorded, undisclosed private contract with an adjacent property owner governing demolition of a former Sears department store building attached to the Charleston Town Center Mall ("Demolition Agreement").

Assignment of Error No. 2: The Trial Court erred by concluding that no rational jury could find in favor of Petitioners, Charles WV Mall, LLC, and Hull Property Group, LLC, concerning whether the prior owner of the Charleston Town Center Mall had an obligation to disclose (and failed to disclose) the existence of the Demolition Agreement.

Assignment of Error No. 3: The Trial Court erred by concluding that no rational jury could find in favor of Petitioner Charles WV Mall, LLC concerning whether it agreed to accept, and the seller of the Charleston Town Center Mall agreed to convey, an assignment of the Demolition Agreement as part of the sale of the mall.

II. Statement of the Case.

A. General overview.

Petitioners/Defendants below Charles WV Mall, LLC ("Charles WV") and Hull Property Group, LLC ("Hull") seek reversal of an order entered by the Trial Court granting partial summary judgment on a key issue in the underlying civil action: whether the prior owner of the Charleston Town Center Mall ("Mall Property") agreed to convey, and Charles WV agreed to accept, an assignment of an unrecorded, undisclosed private contract with an adjacent property owner dated

---

[1] Petitioners have re-ordered and re-worded the three assignments of error set forth in the Notice of Appeal.
[2] Judge Maryclaire Akers presided over the underlying Civil Action.

August 13, 2020, that addresses demolition of a former Sears department store building attached to the Mall Property ("Demolition Agreement"). The Trial Court initially concluded that genuine issues of material fact precluded the entry of summary judgment on that issue, and then erroneously changed its mind on the eve of trial.

The civil action arose from a dispute over the demolition of the former Sears building that was once attached to the Mall Property and, more importantly, of the common wall between the two. Respondent/Plaintiff below, Quarrier ST LLC ("Quarrier"), purchased the property on which the former Sears building sat in April, 2018 (the "Sears Parcel").[3] Charles WV purchased the Mall Property in May, 2021.[4] Hull is an affiliate of Charles WV and has a contract with Charles WV to operate and manage the Mall Property.[5] Hull is not a purchaser or owner of the Mall Property.[6]

The Sears Parcel and the location of other "anchor stores" such as JC Penney and the former Macy's are separate parcels of real estate from the Mall Property but are physically attached to the Mall Property. All of the properties that consist of the shopping center complex generally perceived as the Charleston Town Center Mall are governed by a set of restrictive covenants discussed in section I.B. below (commonly referenced as the "COREA").[7]

The former Sears building and the Mall Property shared a common wall that separated the interior of the former Sears building from the service/emergency exit hallways and shop spaces of the Mall Property ("Common Wall").[8] Quarrier reached an agreement on August 13, 2020, with

---

[3] JA 00082 (Quarrier's Compl. at ¶ 31).
[4] JA 00152–153 (Answer of Hull Property Group, LLC and Charles WV Mall, LLC at ¶ 17).
[5] JA 01001 (Tr. of Patrick Muller at 28–29).
[6] JA 01001 (Tr. of Patrick Muller at 28–29).
[7] JA 00994–998 (Construction Operation and Reciprocal Easement Agreement).
[8] JA 00966; 00974 (Demolition Agreement).

the Trust Defendants[9] to raze the former Sears building (including the Common Wall) and to build a new wall in its place (the "Demolition Agreement").[10] Quarrier did not commence the demolition of the former Sears building in the period from its August 13, 2020 execution of the Demolition Agreement through Charles WV's purchase of the Mall Property in May, 2021. When advised of the Demolition Agreement after purchasing the Mall Parcel, Charles WV objected, and over the objection of Charles WV and Hull, Quarrier commenced demolition of the former Sears building in August, 2022, and completed most of the demolition by early 2023.[11] As part of the demolition, Quarrier tore down the Common Wall and constructed a new wall in its place ("Replacement Wall").[12] The Replacement Wall now serves as an exterior wall of the Mall Property.[13]

The parties disputed whether the Trust Defendants or Quarrier disclosed the existence of the Demolition Agreement to Charles WV or Hull prior to closing, and whether such disclosure was required.[14] The parties also disputed whether the Demolition Agreement was assigned to Charles WV as part of the transaction by which Charles WV acquired the Mall Property from the Trust Defendants.[15] Despite its claims of outside delay, Quarrier still has not commenced construction on the Sears Parcel, and the Sears Parcel remains a vacant lot.

Quarrier asserted various claims against Charles WV and Hull seeking to recover damages associated with an alleged delay in Quarrier's ability to demolish the Sears building and commence

---

[9] US Bank National Association, successor by merger to LaSalle Bank National Association, as Trustee for Bear Sterns Commercial Mortgage Securities, Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-TOP28 ("US Bank Trust"). US Bank Trust together with C-III Asset Management, LLC, f/k/a Centerline Servicing, Inc., incorrectly designated as d/b/a Greystone Special Servicing Corporation Service Company are collectively referred to herein as the "Trust Defendants."
[10] JA 00966; 00974 (Demolition Agreement).
[11] JA 01035 (Tr. of Aug. 29, 2023 Depo. of Anil Patel).
[12] JA 00966; 00974 (Demolition agreement).
[13] JA 00966; 00974 (Demolition agreement).
[14] *See generally*, JA 00930–1404 (Parties Motions for Summary Judgment).
[15] *See generally*, JA 00930–1404 (Parties Motions for Summary Judgment).

construction of a new hotel building.[16] Quarrier claimed that the delay was caused by the refusal of Charles WV and Hull to consent to issuance of a demolition permit by the City of Charleston.[17] Quarrier also asserted various claims against the Trust Defendants alleging a failure to ensure the Demolition Agreement was assigned to Charles WV as a purchaser of the Mall Property.[18] Charles WV and Hull asserted multiple counterclaims against Quarrier arising from the demolition of the Common Wall and negligent construction of the Replacement Wall.[19] Whether the Demolition Agreement is binding on Charles WV is a key issue that impacts most, if not all, of the claims asserted between the parties.

Quarrier moved for partial summary judgment in November, 2022, on their breach of contract claim asserted against Charles WV and Hull seeking a ruling that, based on the documents executed in connection with the sale of the Mall Property, the Demolition Agreement was assigned to Charles WV as a matter of law.[20] In September, 2023, the Trust Defendants moved for summary judgment on Quarrier's breach of contract claim against them alleging a failure to ensure the Demolition Agreement was assigned to Charles WV in connection with the sale of the Mall Property.[21] The Trust Defendants also argued that the Demolition Agreement was assigned to Charles WV as a matter of law via the same documents.[22]

By Order entered on December 11, 2023, the Trial Court denied Quarrier's motion, but did not rule on the Trust Defendant's motion.[23] The Trial Court concluded that a genuine issue of

---

[16] *See generally,* JA 00075–143 (Quarrier's Compl.).
[17] JA 0092; 00108 (Quarrier's Compl. at ¶ 103–104 and *ad damnum* clause).
[18] *See generally*, JA 00075–143 (Quarrier's Compl.).
[19] *See generally*, JA 01210–1221 (Third Amended Answer and Counterclaims of Defendants Hull Property Group, LLC and Charles WV Mall, LLC).
[20] JA 00461–479 (Plaintiff's Motion for Partial Summary Judgment).
[21] JA 01238–1241 (Trust Defendant's Motion for Summary Judgment).
[22] JA 01238–1241 (Trust Defendant's Motion for Summary Judgment).
[23] JA 01897–1904 (Entered Order Denying Plaintiff's Motion for Partial Summary Judgment).

material fact existed as to whether the Trust Defendants intended to convey, and Charles WV intended to accept, assignment of the Demolition Agreement.[24] The Trust Defendants served a "notice of supplemental evidence" on December 14, 2023, and filed an untimely brief arguing that the Trial Court failed to consider certain evidence that supported entry of summary judgment on the issue of assignment of the Demolition Agreement.[25] Following a December 21, 2023 hearing on the Trust Defendants' motion, the Trial Court solicited, and the parties submitted, proposed orders reflecting their respective views on the appropriate findings of fact and conclusions of law.[26]

On January 16, 2024, the Trial Court entered the Trust Defendants' proposed order, without change, which states that the Demolition Agreement was assigned to Charles WV as a matter of law, and that the genuine issues of material fact identified in the December 11, 2023 Order no longer existed.[27] The specific findings set forth in both the December 11, 2023 Order and the January 16, 2024 Order are discussed in section II.E. below.

By Order entered on January 26, 2024, the Trial Court acted pursuant to Civil Rule 54(b) to certify for immediate appeal the January 16, 2024 Order and stayed the rest of the case pending resolution of an appeal.[28] As stated in the January 26, 2024, certification order, the issue of whether the Demolition Agreement was assigned to Charles WV "is central to most, if not all, the issues in this case."[29]

---

[24] JA 01903 (Entered Order Denying Plaintiff's Motion for Partial Summary Judgment at ¶ 20).
[25] *See* JA 01905–1953 (Trust Defendants' Notice of Supplemental Evidence).
[26] JA 01995–2016 (Hearing Transcript from Argument on Trust Defendants' Motion for Summary Judgment).
[27] JA 00007 (Entered Order Granting Partial Motion for Summary Judgment at ¶ 19).
[28] JA 00015–16 (Entered Certification Order as Final for Immediate Appeal).
[29] JA 00016 (Entered Certification Order as Final for Immediate Appeal).

B. Agreements governing the Mall Property and Sears Parcel.

1. Demolition Agreement.

As noted above, Quarrier acquired the Sears Parcel in April, 2018, with a stated goal of demolishing the former Sears building and constructing a new hotel in its place.[30] Well over two years went by before Quarrier obtained consent from the Trust Defendants to demolish the building via the August 13, 2020 Demolition Agreement, which lays out the purported arrangements governing Quarrier's demolition of the former Sears building, including the Common Wall.[31] Quarrier signed the agreement through its manager, Mayur Patel.[32] Laura Thorp signed the agreement on behalf of the Trust Defendants.[33]

The Demolition Agreement defines the term "Common Wall Work" as demolition of the Common Wall, which is located on the Sears parcel and serves as the exterior wall of the Mall Property.[34] The term "Planned Work" means demolition of the former Sears building "exclusive of the Common Wall Work."[35] The Demolition Agreement also separately defines "Mall Property" consistent with the Assignment — meaning the portions of the Town Center Mall that do not include the anchor stores such as the Sears parcel.[36] As explained below, the provisions of the Demolition Agreement relate to activities on the Sears Parcel — not the Mall Property — and do not authorize Quarrier to engage in activities on the Mall Property.

> *Performing work at commercially reasonable times, using commercially reasonable methods. Demolition Agreement ¶4.*

---

[30] JA 00077; 00082 (Quarrier's Compl. at ¶¶ 1, 31).
[31] *See* JA 00964–993 (Demolition Agreement).
[32] JA 00971 (Demolition Agreement).
[33] JA 00970 (Demolition Agreement).
[34] JA 00966 (Demolition Agreement).
[35] JA 00964 (Demolition Agreement).
[36] JA 00964 (Demolition Agreement).

Paragraph 4 governs timing and methods of the "Planned Work" defined above.[37] Paragraph 4 does not even mention the "Mall Property," and does not grant rights for Quarrier to occupy or use the Mall Property or engage in activities on the Mall Property.

Scheduling deliveries to minimize impacts. Demolition Agreement ¶5.

Paragraph 5 governs deliveries to the Sears parcel associated with the "Planned Work" — i.e. the demolition of the former Sears building. Nothing in Paragraph 5 authorizes Quarrier to use or occupy the Mall Property for deliveries or other purposes.

Common Wall Work. Demolition Agreement ¶6.

Paragraph 6 applies to work associated with the Common Wall and construction of the Replacement Wall pursuant to the plans approved by the Trust Defendants. There is no dispute that the Common Wall is located exclusively on the Sears parcel.

Constructing a temporary dust control barrier. Demolition Agreement ¶7.

This provision requires Quarrier to implement dust suppression methods and weather proofing as set forth in a "Dust Control Plan" included as Exhibit E to the Demolition Agreement.[38] That plan does not authorize any use or occupation of the Mall Property or upkeep, repair, maintenance, or operation of the Mall Property. Rather, the plan requires Quarrier to "construct, or cause to be constructed, a temporary construction barrier on the CTC side on the Common Wall."[39] It is undisputed that Quarrier's property extends beyond the edge of the Common Wall on the "CTC side" — meaning the Mall Property side. Nothing in the Dust Control Plans authorizes construction of anything on the Mall Property. The "weather proofing" is to take place on the Sears Parcel.

---

[37] JA 00965 (Demolition Agreement).
[38] JA 00986 (Demolition Agreement).
[39] JA 00986 (Demolition Agreement).

Relocating ancillary systems inside the Mall Property. Demolition Agreement ¶8.

Paragraph 8 refers to actions by the (previous) *Mall Owner* — not Quarrier — to relocate certain "ancillary systems" — i.e. utility lines — that would be impacted by demolition of the Common Wall.

> Mall Owner has engaged Nitro Mechanical to perform such work pursuant to the letter of quotation dated February 26, 2020 attached hereto as Exhibit "F-1" (the "Nitro Letter") and has engaged ZMM Architects and Engineers ("ZMM") to provide construction administrative services for the work to be performed by Nitro as evidenced by Exhibit "F-2" hereto (the "ZMM Letter")."[40]

Paragraph 8 also calls for Quarrier to pay for these services and provide access to the Sears parcel to perform the services.

> Quarrier agrees to reimburse Mall Owner for the cost of the work set forth in the Nitro Letter promptly after delivery to Quarrier of a receipt or other evidence of payment by Mall Owner reasonably acceptable to Quarrier. Quarrier further agrees to provide reasonable access to ZMM so that it can perform the construction administrative services described in the ZMM Letter[.]

Nothing in Paragraph 8 authorizes Quarrier to use or occupy the Mall Property in connection with relocating the utility lines, or engage in upkeep, repair, maintenance, or operation of the Mall Property. If anything, Paragraph 8 authorizes the Mall Owner to access the Sears parcel to perform that work.

> *Coordinating roof work with the manufacturer/installer so as to preserve the existing warranty and minimize the risk of future upkeep, maintenance, or repairs. Demolition Agreement ¶9.*

Paragraph 9 requires Quarrier to coordinate with the manufacturer/installer of the roof on the Mall Property before commencing the Common Wall Work to preserve existing warranties for roof in connection with the demolition of the Common Wall. Nothing in Paragraph 9 authorizes

---

[40] JA 00967 (Demolition Agreement).

Quarrier to use or occupy the Mall Property or engage in activities on the Mall Property. In short, the Demolition Agreement relates to activities on the Sears Parcel — not the Mall Property.

2. Restrictive Real Estate Covenants ("COREA").

The Sears Parcel and the Mall Property are both governed by a set of easements and covenants recorded in the Kanawha County land records known as the Construction, Operation and Reciprocal Easement Agreement dated April 20, 1981 ("COREA").[41] The COREA creates rights, obligations, and restrictions governing the properties that are connected to the Mall Property or the Sears Parcel, such as parking garages and anchor store parcels (i.e. the Sears parcel). For example, the COREA grants mutual rights to owners of properties governed by the COREA to access and use designated "common areas" within the properties.[42] Similarly, the COREA requires notice and consent of property owners before other parties to the COREA can perform construction or destructive activities in "common areas."[43] The COREA also creates easements in favor of the property owners for use of certain aspects of all the structures.[44] In their counterclaims against Quarrier, Charles WV and Hull allege that Quarrier violated the COREA in multiple ways, including demolition of the Common Wall without consent of the Mall Property owner.[45]

3. Purchase and Sale Agreement for Mall Property.

Representatives of Charles WV and Hull learned that the Mall Property was up for sale through a listing provided a commercial real estate broker.[46] After signing a confidentiality agreement, Charles WV and Hull representatives began evaluating a potential acquisition of the

---

[41] JA 00998 (Excerpt from Construction Operation and Reciprocal Easement Agreement at § 2.2(e)).
[42] JA 00996 (Excerpt from Construction Operation and Reciprocal Easement Agreement at § 2.2)
[43] JA 01616 (Construction Operation and Reciprocal Easement Agreement at § 2.4(b)).
[44] JA 01227 (Construction Operation and Reciprocal Easement Agreement at § 25.15).
[45] JA 01210–1217 (Third Amended Answer and Counterclaims of Defendants Hull Property Group, LLC and Charles WV Mall, LLC at Counterclaims 2, 4, 5).
[46] JA 01002 (Deposition Transcript of Patrick Muller at 38).

Mall Property. This included reviewing various due diligence documents provided by the Trust Defendants in an electronic "vault," such as a rent roll, financial information, tenant leases, property condition reports, and various schedules.[47] A corporate designee of the Trust Defendants, Laura Thorp, admitted during deposition testimony that the Demolition Agreement was not included in the due diligence materials provided to Charles WV and Hull due to an "oversight."[48]

> Q. Do you know if the Demolition Agreement was included in these documents?
> A. I don't believe so. In looking back through the vault, it appears that it was not included.
> Q. So they didn't -- the demolition – and that's in both the due diligence and the closing process, the Demolition Agreement was not turned over to Hull?
> A. I think that's correct.[49]

Ms. Thorp also admitted that she "would have liked for that Demolition Agreement to have been in the vault" of documents provided to Charles WV and Hull.[50]

After review and evaluation of the materials provided by the Trust Defendants,[51] and at least one site visit to the Mall Property,[52] Charles WV representative, Caroline Hatcher, submitted via email on March 23, 2021, two alternative offers to purchase the Mall Property. Offer No. 1 reflected a $7,500,000 purchase price, "no due diligence[,]" and "no contingencies except for clean environmental and marketable title[.]"[53] Offer No. 2 reflected a $8,100,000 purchase price and "15 day due diligence[.]"[54] Both offers included a 30-day period to close the transaction.[55]

---

[47] JA 01002 (Deposition Tr. of Patrick Muller at 39).
[48] JA 01010–1011 (June 13, 2023 Deposition Tr. of Laura Thorp at 33; 37–38).
[49] JA 01010 (June 13, 2023 Deposition Tr. of Laura Thorp at 33).
[50] JA 01011 (June 13, 2023 Deposition Tr. of Laura Thorp at 37–38).
[51] JA 01002 (Deposition Tr. of Patrick Muller at 41).
[52] JA 01329 (Deposition Tr. of Patrick Muller at 281).
[53] JA 01950–1951 (March 23, 2021 Emails between Lisa Papes and Lindsey Wright re best and final offer matrix).
[54] JA 01950–1951 (March 23, 2021 Emails between Lisa Papes and Lindsey Wright re best and final offer matrix).
[55] JA 01950–1951 (March 23, 2021 Emails between Lisa Papes and Lindsey Wright re best and final offer matrix).

The evidence presented to the Trial Court does not include any response email or other evidence that the Trust Defendants communicated an acceptance of either of these offers. Neither "offer" was signed by anyone — as is required in the case of a contract for the sale of real property — and neither offer constituted a contract. Instead, 17 days later, Charles WV and one of the Trust Defendants executed a detailed "Agreement of Purchase and Sale" dated April 9, 2021 — not the email (the "PSA").[56] The PSA consists of 26 pages of terms and conditions that go well beyond the handful of terms set forth in Ms. Hatcher's email dated March 23, 2021. While the PSA lists a purchase price of $7,500,000, the PSA does not state that Charles WV waives the right to perform due diligence. The PSA also establishes a number of conditions (i.e. contingencies) that must be satisfied before Charles WV has an obligation to close the transaction.[57] Notably, the PSA includes an "Entire Agreement" clause stating that the terms of the PSA reflect "the entire agreement between Seller and Purchaser and **fully supersedes all prior agreements and understandings between the parties.**"[58]

In addition to the 26 pages of terms and conditions, the PSA also includes various ancillary documents to be executed as part of the transaction, which consist of another 47 pages (for a total of 73 pages).[59] This includes an Assignment and Assumption of Leases and Contracts to transfer designated "Leases" and "Contracts" for the Mall Property ("Assignment").[60] Section 1.E. of the PSA defines the parties' understanding of "Leases":

> E. All of Seller's interest, as landlord, in the written leases and tenancies granting any leasehold interest in the Real Property (including all amendments,

---

[56] JA 01041–1067 (Agreement of Purchase and Sale (without exhibits)).
[57] JA 01050 (Agreement of Purchase and Sale (without exhibits) at § 6).
[58] JA 01057 (Agreement of Purchase and Sale (without exhibits) at § 11 (emphasis added)).
[59] JA 00618–662 (Agreement of Purchase and Sale (with exhibits)).
[60] JA 01124–1127 (Unexecuted Assignment Agreement between Charles WV Mall, LLC and US Bank Trust included in PSA).

> supplements, guaranties) if any (collectively, the "**Leases**"), together with all security deposits and letters of credit in Seller's or Seller's representatives' possession or control due to the tenants at the Real Property, if any ("**Security Deposits**"), all general ledger(s), accounting records and tenant files in Seller's possession or control, with respect to or relating to the Real Property or the Personal Property (the "**Records**");[61]

In other words, "Leases" are the agreements governing the rented tenant spaces in the Mall Property. The Demolition Agreement is not a "Lease" because it does not govern rented tenant spaces in the Mall Property. Rather, the Demolition Agreement governs the demolition of the former Sears building and does not give Quarrier any rights to occupy the Mall Property.

Section 1.H. of the PSA defines the parties' understanding of "Contracts":

> H. The assignable service and maintenance contracts and equipment leases relating to the Real Property that are in Seller's or Seller's representatives' possession and which Buyer advises Seller it desires to acquire ("**Contracts**") (all other service and maintenance contracts and equipment leases shall be terminated by Seller at or before Closing at Seller's expense).[62]

Stated differently, "Contracts" are the service and maintenance contracts for the Mall Property that Charles WV expressly identified as contracts to be assigned as part of the transaction. There is no dispute that Charles WV did not identify the Demolition Agreement as an agreement that it wished to acquire along with the Mall Property. Charles WV only identified four specific contracts it wished to acquire: (1) water treatment contract for the air conditioning system; (2) landscaping contract; (3) Suddenlink internet contract; and (4) telephone contract.[63] Each of these contracts govern services provided to the Mall Property. Thus, the Demolition Agreement is not a "Contract" governed by the PSA because it is not (1) a service and maintenance contract for the

---

[61] JA 01042 (Agreement of Purchase and Sale (without exhibits) at § 1.E).
[62] JA 01043 (Agreement of Purchase and Sale (without exhibits) at § 1.H).
[63] JA 01085; 01095 (Assignment and Assumption of Leases and Contracts at ¶ 2(b); Ex. B).

Mall Property or a lease of equipment used at the Mall Property; and (2) such an agreement that Charles WV advised the seller that Charles WV wished to acquire along with the Mall Property.

The Assignment similarly defines the terms "Leases" and Contracts." Under the Assignment, "Leases" means "all oral or written agreements pursuant to which any portion of the Real Property or Improvements is used or occupied by anyone other than Assignor[.]"[64] The Assignment defines "Contracts" as follows: "the assignable contracts and agreements relating to the upkeep, repair, maintenance or operation of the Real Property, Improvements or Personal Property, including specifically, without limitation, the assignable equipment leases described on Exhibit B[.]"[65] The Demolition Agreement is not described on Exhibit B to the Assignment.[66]

Section 4 and Exhibit B of the PSA, which governs disclosure and review of Leases and Contracts, requires US Bank Trust to provide to Charles WV the following documents pertaining to the Mall Property, to the extent the documents are within US Bank Trust's custody or control: current rent roll; tenant lease files; tenant ledgers; and any and all service and maintenance contracts and equipment leases relating to the Mall Property.[67] Section 5.B.1.b of the PSA requires the seller to execute the Assignment on the form attached to the PSA as Exhibit E to assign the leases and designated service/maintenance contracts to Charles WV at closing.[68] As required by PSA Section 5.B.1.h, the Trust Defendants executed a "Seller's Affidavit" that declares, under penalty of perjury, that the seller has not "executed, or permitted anyone on its behalf to execute any conveyance, option, mortgage, lien, security agreement, financing statement **or encumbrance**

---

[64] JA 01085 (Assignment and Assumption of Leases and Contracts at ¶ 2(a)).
[65] JA 01085 (Assignment and Assumption of Leases and Contracts at ¶ 2(b)).
[66] JA 01095 (Assignment and Assumption of Leases and Contracts at Ex. B).
[67] JA 00594; 00624 (Agreement of Purchase and Sale (with exhibits) at § 5; Ex. B).
[68] JA 00594 (Agreement of Purchase and Sale (with exhibits) at § 5.B).

of or upon the subject property or any fixtures attached thereto **which is now outstanding or enforceable against the subject property** except as may be set forth in the [title] Commitment." (emphasis added).[69] There is no dispute that the Demolition Agreement is not identified in the title commitment for the Mall Property, much less anywhere else in the PSA.

C. Evidence reflecting lack of knowledge and non-disclosure of Demolition Agreement.

As noted above, the designated corporate representative for the Trust Defendants, Laura Thorp, testified that the Demolition Agreement was not included in the due diligence materials provided to Charles WV and Hull concerning the Mall Property.[70] The Trial Court did not identify a single witness or document indicating that the Demolition Agreement was otherwise provided to Charles WV or Hull prior to the May 10, 2021 closing of the transaction to convey ownership of the Mall Property to Charles WV. Instead, the Trial Court identified testimony of Greg Jordan — an employee of the vendor then-managing the Mall Property, CBRE, for the Trust Defendants,[71] had in his possession an unsigned, undated, draft version of the Demolition Agreement that he received in February, 2020, prior to the May 10, 2021, closing date.

> Q. And Exhibit 2 bears Bates number 939 through 977, and according to your counsel this was a draft agreement that was located in the paper file maintained by you. Does that sound correct?
> A. That is correct.
> Q. And this document is not dated on first page; right?
> A. That's correct.
> Q. And it's not signed on the last page of the agreement either, Hull 955?
> A. That's correct.
> Q. That means that you certainly received this agreement some time before it was signed; right?

---

[69] JA 00594 (Agreement of Purchase and Sale (with exhibits) at § 5); JA 01119 (US Bank Trust's Seller's Affidavit executed pursuant to Purchase and Sale Agreement at ¶ 3).
[70] JA 01010 (June 13, 2023 Deposition Tr. of Laura Thorp at 33).
[71] JA 01972–1994 (Feb. 26, 2020 Email Chain between John Svorcek, Frank Salucci, and Greg Jordan re negotiation of terms of proposed demolition agreement).

A. Yes.
Q. Having this document in front of you, what, if anything, can you tell me about when and how it came to be in your possession?
A. John sent it to me basically. Said here, I'll send you the agreement, but it's nothing signed or nothing's ready on it yet basically.[72]

Although Hull later hired Greg Jordan to continue managing operations at the Mall Property after Charles WV became the owner, Mr. Jordan was not an employee or representative of Charles WV or Hull at any time prior to the May 10, 2021 closing date.[73] Critically, Mr. Jordan testified that he did not learn that this draft agreement had been finalized until just before demolition commenced in August, 2022:

Q. All right. When did you learn that the agreement had been finalized and signed?
A. Actually just here recently just a while back. I can't recall the date, but when -- probably around -- well, what was that here in August, beginning of August. What was the second I think.
Q. August of this month of 2022?
A. When we started -- basically I got the word when everybody was here getting ready to get started.[74]

Mr. Jordan testified that during a site visit by Hull representative, Elizabeth Wilson, which took place prior to the May 10, 2021, closing date, he told Ms. Wilson about the "Sears deal" and of his belief that there was an agreement to demolish the former Sears building.

Q. Did she ever ask you any questions about the Sears building or the plans for the Sears building?
A. No.
Q. Did you ever tell her that you had had – **you and John Svorcek had had these meetings to discuss the demolition of the Sears building?**
A. Yes.
Q. Tell me about that.
A. I just -- I told her basically that the Sears deal was important and that she needed to maybe look into the Sears deal with, you know, Patel's group.
Q. Okay. What exactly do you remember telling her?
A. I don't recall exactly.[75]

---

[72] JA 01454 (Excerpts of August 31, 2022 Deposition of Greg Jordan at 25–26).
[73] JA 01177 (Excerpt of Transcript of Aug. 31, 2022 Deposition of Greg Jordan at 10).
[74] JA 01454 (Excerpts of August 31, 2022 Deposition of Greg Jordan at 26).
[75] JA 01800 (Excerpts of August 31, 2022 Deposition of Greg Jordan at 31–32 (emphasis added)).

Mr. Jordan later answered similar questions about his conversation with Ms. Wilson in 2021 concerning his knowledge of the proposal for demolition of the former Sears building:

> Q. Did you ever have any discussions with anyone else? Ms -- sorry. I called her Hull. It's Caroline Hatcher, isn't it?
> A. Yes, it is.
> Q. She is Jim Hull's daughter?
> A. I think so.
> Q. Did you ever have occasion to mention to her that there was an agreement for the Sears building?
> A. No.
> Q. When you mentioned it on that first visit, was it in front of everyone: Ms. Wilson, Latoya and Blair?
> A. No.
> Q. It was just Ms. Wilson?
> A. Yes.
> Q. Okay. So does that -- do you have a better memory I guess about where you were? You seem to know it wasn't with the whole group.
> A. As we was walking through the center.
> Q. Over by the Sears end presumably?
> A. In the common area.
> Q. Right. Do you know on the ground floor or the second floor?
> A. First floor.
> Q. First. So you stopped and you were talking about the Sears building?
> A. Didn't stop. We was just talking as we was walking.
> Q. Did you tell her that your understanding was there was an agreement to tear it down?
> A. Yes.
> Q. Okay. At the time of that visit, would you have already had Exhibit 1 and Exhibit 2 in your paper file?
> A. Yes.[76]

Exhibit 1 and 2 referenced above are the unsigned, undated, draft version of the Demolition Agreement and the email string in which Mr. Jordan received it. The third-floor mall office consists of six or seven rooms including a conference room and a manager's office.[77] Mr. Jordan had an office on the third floor, but he also had an office on the first floor. Mr. Jordan makes the distinction between his office off of the conference room on the third floor and his personal office

---

[76] JA 01946–1948 (Excerpts of August 31, 2022 Deposition of Greg Jordan at 35–37).
[77] JA 01180 (Excerpts of August 31, 2022 Deposition of Greg Jordan at 37–38).

— which is located on the first floor. Nobody asked him about the location of the filing cabinet where his files are kept, but it was located in his personal office on the first floor.

Q. And did Hull Group have sort of full access to your files and records for their due diligence?
MR. STONESTREET Object to form.
A. If they asked.
Q. Did they, in fact, come into – is your office located on the third floor?
A. Yes
Q. Were they working in and around your office that whole time?
A. Yes.
Q. Did they have people coming in and out of your office asking you questions?
A. In the main office. Not my personal office.
Q. Okay. Can you explain the layout for me?
A. Yes, there's like six or seven rooms in that office. They basically worked out of the conference room. My office is off the conference room to the right.
Q. Did Mrs. Wilson come up and knock on your door and ask you questions about various things?
A. Not to my office.
Q. Tell me how that worked.
A. I was in the conference room with them.
Q. They were asking you questions about contracts, right?
A. Yes.
Q. Who did janitorial services? Security?
A. Right.
Q. Utilities?
A. Yes.
Q. How old the roof was?
A. Yes.
Q. All these things about mall operations?
A. Yes.
Q. And if they had asked you about that agreement with Sears – with respect to the building, you had that draft Exhibit 2 sitting in your physical file in your office on that day, right?
A. Yes.
Q. Okay. Did they ask?
A. What was the question?
Q. Did anybody ask you for a copy of that agreement?
A. No.[78]

[78] JA 01180 (Excerpts of August 31, 2022 Deposition of Greg Jordan at 37–39).

Mr. Jordan testified that the files were available for review by Hull representatives "if they had asked,"[79] but he did not testify that anyone actually entered either the manager office on the third floor nor his personal office on the first floor where his filing cabinet was located, nor went through the filing cabinet, nor reviewed his files, much less the file containing the unsigned, undated draft version of the Demolition Agreement. As indicated above, Mr. Jordan could not have told Ms. Wilson about the actual Demolition Agreement in 2021 because Mr. Jordan did not learn it had been finalized until August, 2022. Any reference to an "agreement" had to be about the unsigned, undated draft agreement he received since he had no knowledge at the time that the Demolition Agreement had been finalized. There is no evidence in the court record that Ms. Wilson had any knowledge of the Demolition Agreement or recalled any mention by Mr. Jordan of plans for the Sears Parcel.

Other evidence confirms that no one disclosed the existence of the Demolition Agreement to Charles WV or Hull prior to the May 10, 2021 closing date. Charles WV and Hull representative, Patrick Muller, meticulously prepared notes reflecting a call that he and Caroline Hatcher had with Quarrier's principal, Mayur Patel, to discuss the Sears parcel and Quarrier's plans for developing that property.[80] Mr. Muller testified that Mr. Patel did not disclose the existence of any kind of demolition agreement for the Sears building.[81] In fact, Mr. Muller's testimony and contemporaneous notes, dated April 14, 2021, show Mr. Patel indicated he was at a "standstill for a year. Willing to spend $100k. Not willing to spend $800k which is what last group wanted. Cant work it out then can't get a demo permit. Not feasible 600k – 700k" and he indicated

---

[79] JA 01948 (Excerpts of August 31, 2022 Deposition of Greg Jordan at 37).
[80] JA 01000 - 01003 (Deposition Tr. of Patrick Muller at 50 - 53).
[81] JA 01002 - 01003 (Deposition Tr. of Patrick Muller at 52 - 53).

a desire to work with Charles WV and Hull concerning potential demolition if they acquired the Mall Property.[82] Mr. Patel said nothing to suggest that an agreement was already in place with the Mall Property owner to demolish the former Sears building.[83] There is no evidence in the Court record that Mr. Patel even mentioned the Demolition Agreement during any conversation with a representative of Charles WV or Hull. He did not email or otherwise transmit a copy of the Development Agreement to Hull or Charles WV before Charles WV purchased the Mall Property. For reasons unknown, Mr. Patel chose to conceal the existence of the Demolition Agreement from Charles WV and Hull.

D. Evidence reflecting lack of intent to convey or accept assignment of Demolition Agreement.

As noted above, the PSA between Charles WV and the former owner of the Mall Property (one of the Trust Defendants) calls for the transfer of "Leases" and "Contracts" pertaining to the Mall Property as those terms are defined in the PSA and an Assignment executed pursuant to the PSA. As explained above, the Demolition Agreement does not meet the definition of either term, and is not identified by name anywhere in the PSA or associated documents. The corporate designee of Charles WV and Hull, Patrick Muller, explained during deposition testimony why the Demolition Agreement does not fall within the scope of "Contracts" conveyed by the Assignment — specifically "agreements relating to the upkeep, repair, maintenance or operation of the Real Property" (i.e. the Mall Property) as set forth in Paragraph 2(b) of the Assignment:

> Q. Obviously it relates to the operation of the mall.
> A. Having an exterior wall -- yeah. And it getting torn down would affect the mall operation.
> Q. Uh-huh. And so, then, just based on that agreement, that demolition agreement falls within the scope of 2(b), right?

---

[82] JA 01003 (Deposition Tr. of Patrick Muller at 53).
[83] JA 01003 (Deposition Tr. of Patrick Muller at 53).

A. It does not fall within the scope of 2(b) because this agreement -- or this assignment is for: Assignable contracts relating to the upkeep, repair, maintenance or operation of the real property, improvements or personal property, including specifically, without limitation, the assignable equipment leases -- list -- leased -- and equipment leases described on Exhibit B.

So this agreement is to assign the --the -- the contracts listed on Exhibit B.[84]

Mr. Muller further testified that to include the Demolition Agreement within the scope of "Contracts" governed by the Assignment (marked as Deposition Exhibit 40) would be contrary to the intent of the parties to the PSA:

Q. So your position is that this Exhibit 40 is limited to those listed on Exhibit B?
A. This section (b) is talking about those items listed on Exhibit B.
Q. Okay. It does say, though, "without limitation," right?
A. It says that, but to read it the way you're talking about, anything related to the upkeep and repair is inconsistent with the intent of the parties as reflected in the purchase and sale agreement and the transaction that actually occurred.

Because in the PSA it says: We will elect to assume certain contracts and notify them, and the rest will be terminated.

Those contracts that we sent them notice of that we wanted to assume, are the ones listed on Exhibit B, and the other contracts were terminated.

To read it the way you're talking about those contracts would not have been terminated, they would have been assumed. So why do we have the Exhibit B, and why did we notify them, and why did they terminate?[85]

In other words, Mr. Muller explained that the Assignment, being executed pursuant to the PSA, should be read in the context of what the parties agreed upon in the PSA:

Q. And Charles WV Mall could have said that we will be assuming only those listed in Exhibit B, right?
A. We did say that in the PSA.
Q. You didn't say it in the assignment agreement, did you?
A. We -- the assignment language is – needs to be read in the context of the PSA. And we clearly said it in the PSA. And to read it otherwise conflicts with what actually happened.[86]

---

[84] JA 01967 (Deposition Tr. of Patrick Muller at 92–93).
[85] JA 01920–01921 (Deposition Tr. of Patrick Muller at 93–94).
[86] JA 01921–01922 (Deposition Tr. of Patrick Muller at 94–95).

Mr. Muller's testimony is consistent with terms of the Demolition Agreement itself, which make clear that the purpose of the agreement is to address the "Common Wall Work and the Planned Work[.]"[87] As demonstrated above, none of the provisions of the Demolition Agreement authorize Quarrier to use or occupy the Mall Property; nor does it constitute a written lease or tenancy granting a leasehold interest in the Mall Property; nor does it authorize Quarrier to engage in upkeep, repair, maintenance, or operation of the Mall Property. Therefore, none of those provisions cause the Demolition Agreement to qualify as a "Lease" or a "Contract" as defined in the PSA and Assignment.

E. Trial Court correctly finds genuine issues of material fact exist — and then erroneously changes its mind shortly before trial.

On December 11, 2023, the Trial Court entered an Order denying a motion by Quarrier seeking partial summary judgment on the issue of whether the Demolition Agreement was assigned to Charles WV as a matter of law as part of the sale of the Mall Property. In doing so, the Trial Court recognized multiple genuine issues of material fact that precluded summary judgment, including:

- whether the Demolition Agreement was provided to Charles WV or Hull prior to closing;
- whether the Demolition Agreement was identified as a "Lease" or "Contact" to be assigned;
- whether Quarrier disavowed the existence of the Demolition Agreement;
- whether there was legal consideration for the Demolition Agreement; and
- whether the seller and Charles WV intended for the agreement to be conveyed to Charles WV.[88]

---

[87] JA 00963–962 (Demolition Agreement).
[88] JA 01901–1903 (Entered Order Denying Plaintiff's Motion for Partial Summary Judgment at ¶¶ 13–18).

In light of these factual disputes, the Trial Court properly denied Quarrier's request for a partial summary judgment order finding that the Demolition Agreement was assigned as a matter of law to Charles WV:

> 19. This Court finds that the lack of reference to the Demolition Agreement in the Assignment and Assumption of Leases and Contracts creates an ambiguity. This, along with the Demolition Agreement's absence from the Review Items, Rent Roll, the Lease File, as alleged by Defendant Hull and [Charles WV], creates a genuine issue of material fact for the jury to determine. The issue here is not one of the definition of "Leases" or "Contracts," but whether or not the Former Mall Owners intended to convey the Demolition Agreement, and whether or not [Charles WV] intended to accept a conveyance of the Demolition Agreement. This is a genuine issue of material fact to be determined by the jury.
>
> 20. Because there are questions of fact as to whether US Bank intended to convey the Demolition Agreement, and whether [Charles WV] intended to accept an assignment of the Demolition Agreement, summary judgment cannot be granted.[89]

Just over a month later, on January 16, 2024 (less than two weeks before trial was scheduled to commence on January 29, 2024, and without hearing any witness testimony), the Trial Court entered, without change, a proposed order prepared by counsel for the Trust Defendants that reflects a completely different conclusion concerning the existence of genuine issues of material fact.[90] The January 16, 2024 Order granted the Trust Defendants' motion for summary judgment on Quarrier's claim that the Trust Defendants breached the Demolition Agreement by failing to assign it to Charles WV. The Order concludes (contrary to the December 11, 2023 Order) that the Demolition Agreement was assigned as a matter of law to Charles WV as part of the acquisition of the Mall Property.[91] The January 16, 2024 Order attempts to reconcile this conclusion with the opposite conclusion set forth in the December 11, 2023 Order by making a number of *factual*

---

[89] JA 01903 (Entered Order Denying Plaintiff's Motion for Partial Summary Judgment at ¶¶ 19–20).
[90] JA 00001–14 (Entered Order Granting Partial Motion for Summary Judgment).
[91] JA 00011–12 (Entered Order Granting Partial Motion for Summary Judgment at ¶¶ 38–39).

findings on disputed issues based on additional evidence in the record not mentioned in the December 11, 2023 Order. Those findings include the following:

- Greg Jordan had a final version of the Demolition Agreement in his files, and Charles WV admitted that it inspected those files.[92]
- Charles WV admitted all facts to which Mr. Jordan testified, including that Greg Jordan told Elizabeth Wilson that there was an agreement in place to demolish the Sears building, by not accusing Greg Jordan of lying during his deposition testimony.[93]
- The Trust Defendants accepted an offer by Charles WV to purchase the Mall Property without conducting any due diligence review, and thus Charles WV agreed that it would not have a right to perform a due diligence review.[94]
- The Demolition Agreement relates to the operation of the Mall.[95]
- The Demolition Agreement was not the type of contract that the Trust Defendants were required to disclose under the terms of the PSA.[96]

All these factual issues were disputed and subject to conflicting evidence from which a reasonable jury could have easily reached a different conclusion. The Trial Court's own language acknowledges that it evaluated the weight and credibility of the evidence rather than just determining whether a genuine issue of material fact existed. The January 16, 2024 Order describes arguments by Charles WV and Hull, which the Trial Court previously agreed with, as being "undermined" and "undercut" by the additional evidence.[97]

---

[92] JA 00004–5; 10 (Entered Order Granting Partial Motion for Summary Judgment at ¶¶ 13.a; 13.d; 14.d, 33).
[93] JA 00004–5 (Entered Order Granting Partial Motion for Summary Judgment at ¶¶ 13.c; 14.c).
[94] JA 00005; 00010 (Entered Order Granting Partial Motion for Summary Judgment at ¶¶ 15, 33).
[95] JA 00009 (Entered Order Granting Partial Motion for Summary Judgment at ¶ 28).
[96] JA 00010 (Entered Order Granting Partial Motion for Summary Judgment at ¶ 33).
[97] JA 00006; 00010–11 (Entered Order Granting Partial Motion for Summary Judgment at ¶¶ 16, 34).

The Trial Court stated how its resolution of these factual disputes warranted the conclusion that the Demolition Agreement was assigned to Charles WV as a matter of law as part of the purchase of the Mall Property. Again, the Trial Court did not hear any witness testimony (that would be the purview of the jury at trial two weeks hence). Rather, the Trial Court reviewed the Trust Defendant's and Plaintiff's arguments and snippets of deposition testimony, including placing weight on Patrick Muller's response to a deposition question "do you think Mr. Jordan lied in his deposition?" With respect to Charles WV's and Hull's position that they lacked knowledge of the Demolition Agreement, and thus could not have agreed to accept an assignment of it, the Trial Court concluded that:

> [t]his argument no longer raises a genuine issue of material fact because [Charles WV]/Hull has admitted that (1) Greg Jordan told an officer of Hull, Elizabeth Wilson, that there was an important deal to tear down the Sears building and that it was his understanding that there was an agreement to tear it down; and (2) that Ms. Wilson reviewed Greg Jordan's files, which included a copy of the Demolition Agreement, albeit unsigned, including all of the attached engineering/demolition plans."[98]

With regard to Charles WV's position that the Trust Defendants had an obligation under the PSA to disclose the Demolition Agreement, the January 16, 2024 Order concludes that:

> [t]his argument no longer raises a genuine issue of material fact because (1) [Charles WV] has admitted that the Trust's agent, Greg Jordan, informed Hull about the existence of the agreement, (2) Hull has admitted that the Demolition Agreement is not a service or maintenance contract and is not an equipment lease; and (3) the emails between [Charles WV]/Hull representatives and the representatives of the Trust show that [Charles WV]/Hull offered to purchase the Mall with no due diligence period in exchange for a $600,000 reduction in the purchase price."[99]

---

[98] JA 00006 (Entered Order Granting Partial Motion for Summary Judgment at ¶ 17).
[99] JA 00006–7 (Entered Order Granting Partial Motion for Summary Judgment at ¶ 18).

The January 16, 2024 Order further concluded that Charles WV admitted that the Demolition Agreement fell within the scope of agreements governed by the Assignment of "Leases" and "Contracts" notwithstanding Mr. Muller's testimony to the contrary:

> 19. Finally, and most importantly, [Charles WV]/Hull argued that the Assignment and Assumption Agreement was ambiguous with respect to whether it includes an assignment of the Demolition Agreement. This argument no longer raises a genuine issue of material fact, and does not justify a finding that the language of the Assignment and Assumption Agreement is ambiguous, because [Charles WV] /Hull admitted that the Demolition Agreement relates to the operation of the Mall. The Court notes that [Charles WV]/Hull's counsel argued that the Rule 30(b)(7) representative admitted that the demolition of the common wall relates to the operation of the Mall, but did not actually admit that the Demolition Agreement relates to the operation of the Mall. The Court finds such a nuanced interpretation of the testimony to be unavailing. The witness admitted that the Demolition Agreement relates to the demolition of the common wall and then admitted that the demolition of the common wall relates to the operation of the Mall. As such, despite the arguments of counsel, the Court finds that there can be no genuine dispute over the fact that the Demolition Agreement relates to the operation of the Mall.[100]

The Court then summed up all the genuine issue of material fact that it resolved:

> 33. In short, [Charles WV]/Hull's admissions demonstrate that [Charles WV] was informed of the Demolition Agreement (by admitting that Greg Jordan testified truthfully when he testified that he told Hull officer Elizabeth Wilson about the Demolition Agreement), [Charles WV] agreed that it would not have a right to due diligence (via the emails and related documents showing the offers [Charles WV]/Hull made for the purchase of the Mall), [Charles WV] admitted that the Demolition Agreement was not the type of contract that the Trust was required to provide to [Charles WV] in advance of the closing for the sale of the Mall (via the testimony of its Rule 30(b)(7) representative), and [Charles WV] admitted that it inspected files that included an unsigned copy of the Demolition Agreement (via the testimony of its Rule 30(b)(7) representative).
>
> 34. This parol evidence undercuts [Charles WV]/Hull's arguments that there is an issue of fact as to whether (1) the Trust disclosed the Demolition Agreement to [Charles WV]/Hull, (2) the Trust was required to provide a copy of the Demolition Agreement to [Charles WV]/Hull prior to closing, and (3) [Charles WV]/Hull did in fact have the opportunity to inspect the Demolition Agreement. And this parol evidence likewise undercuts [Charles WV]/Hull's arguments that the intent of the

---

[100] JA 00007 (Entered Order Granting Partial Motion for Summary Judgment at ¶ 19)

> Assignment and Assumption Agreement was to only convey the "Contracts" identified in Exhibit B of the Agreement.[101]

After having *resolved* all these genuine issues of material fact, the Court concluded that the Demolition Agreement was assigned to Charles WV as a matter of law as part of the sale of the Mall Property.[102] Consequently, the Court granted partial summary judgment in favor of the Trust Defendants on Quarrier's claim that the Trust Defendants failed to assign the Demolition Agreement as part of the sale of the Mall Property.[103]

Although the January 16, 2024 Order does not address a specific cause of action asserted between Quarrier and Charles WV/Hull, the finding that the Demolition Agreement was assigned as a matter of law directly impacts Quarrier's breach of contract claim against Charles WV and Hull. It also directly impacts the defense by Charles WV and Hull that neither are bound by the Demolition Agreement. The ruling also substantially affects the counterclaims by Charles WV and Hull that Quarrier engaged in demolition and construction activities in "common areas" governed by the COREA without the required consent of the Mall Property owner. In light of the effect of the January 16, 2024 Order, Charles WV and Hull asked the Trial Court to certify the Order for immediate appeal. The Trial Court did so by order entered on January 26, 2024, which states that the ruling "that the Demolition Agreement was assigned to Charles WV as part of the purchase of the Mall is central to most, if not all, the issues in this case."[104] The Court also stayed the remaining claims pending a resolution of an appeal.

---

[101] JA 00010–11 (Entered Order Granting Partial Motion for Summary Judgment at ¶¶ 33–34).
[102] JA 00009–10 (Entered Order Granting Partial Motion for Summary Judgment at ¶ 30).
[103] JA 00012 (Entered Order Granting Partial Motion for Summary Judgment at ¶ 39).
[104] JA 00016 (Entered Certification Order as Final for Immediate Appeal).

III. Summary of Argument.

The Trial Court erred by entering partial summary judgment in favor of the Trust Defendants after resolving multiple genuine issues of material fact in favor of the moving party that were the subject of conflicting evidence in the record. By doing so, the Trial Court invaded the province of jury and acted contrary to black-letter law that evidence must be viewed in the light most favorable to non-moving parties when addressing a summary judgment motion and genuine issues of material fact are to be resolved by a jury.

IV. Statement Regarding Oral Argument.

Charles WV and Hull request oral argument under Rule 19. The assignments of error involve the application of settled law — i.e. whether the Trial Court failed to view the evidence in the light most favorable to the non-moving parties and improperly resolved a number of genuine issues of material fact rather than deferring to a jury to make those findings. The case is not appropriate for a memorandum decision.

V. Argument.

A. Standard of Review.

"Appellate review of a partial summary judgment order is the same as that of a summary judgment order, which is de novo."[105] "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law."[106] Summary judgment should only be granted if the record evidence "could not lead a rational trier of fact to find for the nonmoving party, such

---

[105] Syl. Pt. 1, *W. Va. Dep't of Transp. v. Robertson*, 217 W. Va. 497, 618 S.E.2d 506 (2005).
[106] *Robertson,* at 501, 510 (*quoting* Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)).

as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove."[107] When deciding whether to grant a party summary judgment, the trial court's role "'is to decide whether a genuine issue of material fact exists,' not to weigh the evidence or to decide the issue of fact."[108] In other words, the court's role "is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial."[109] "The question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined."[110] "In reviewing motions for summary judgment any permissible inferences must be drawn in the light most favorable to the nonmoving party."[111]

As explained below, the Trial Court erred by improperly weighing evidence and resolving genuine issues of material fact rather than allowing a jury to do so.

B. Assignment of Error No. 1: a rational jury could find that Charles WV had no knowledge of the Demolition Agreement prior to purchasing the Mall Property.

Whether Charles WV or Hull had knowledge of the Demolition Agreement is germane to the key factual issue of whether the Trust Defendants intended to convey, and Charles WV intended to accept, an assignment of the Demolition Agreement in connection with the sale of the Mall Property. The Trial Court concluded that no genuine issue of material fact exists concerning Hull's knowledge of the Demolition Agreement prior to closing based on the following findings:

> [Charles WV]/Hull has admitted that (1) Greg Jordan told an officer of Hull, Elizabeth Wilson, that there was an important deal to tear down the Sears building and that it was his understanding that there was an agreement to tear it down; and (2) that Ms. Wilson reviewed Greg Jordan's files, which included a copy of the

---

[107] Syl. Pt. 2, in part, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).
[108] *State ex rel. Berg v. Ryan*, No. 22-853 2024 W. Va. LEXIS 142,*15 (March 26, 2024) (quoting *Goodwin v. Shaffer*, 246 W. Va. 354, 359–60, 873 S.E.2d 885, 890–91 (2022)).
[109] *Williams*, at 59, 336 (internal quotation marks omitted).
[110] Syl. Pt. 5, *Aetna Cas. & Sur. Co.*, 148 W. Va. 160, 133 S.E.2d 770.
[111] *IPI, Inc. v. Axiall Corp.*, ___, W. Va. ___, 897 S.E.2d 572, 580 (W. Va. Int. Ct. App. 2024).

> Demolition Agreement, albeit unsigned, including all of the attached engineering/demolition plans.[112]

In making these two findings, the Trial Court not only failed to view the evidence in the light most favorable to the non-movants (Charles WV and Hull), but actually viewed the evidence in the light most favorable to the movant (Trust Defendants). With respect to the first finding, Greg Jordan testified that he received an undated, unsigned, draft version of the Demolition Agreement in February, 2020, and did not learn that it had been finalized until August, 2022.[113] When he told Elizabeth Wilson in the spring of 2021 about a "deal" concerning demolition of the former Sears building, a rational jury could easily conclude that he was referring to the undated, unsigned, draft document in his file — not an actual signed and effective written agreement that he had no idea existed at that time.

As to the second finding, there is no testimony in the record by Ms. Wilson that she actually reviewed Greg Jordan's files. Mr. Jordan testified that the files were available for review by Hull representatives "if they had asked,"[114] but he did not testify that anyone actually went into his personal office on the first floor where the file cabinet was located and the files were kept or went through his filing cabinet or reviewed his files, much less the file containing the unsigned, undated draft version of the Demolition Agreement. Mr. Muller testified that Ms. Wilson must have reviewed some of Mr. Jordan's files because she had some service contracts or other contracts that were not in the due diligence "vault" provided by the Trust Defendants.[115] Mr. Muller did not

---

[112] JA 00006 (Entered Order Granting Partial Motion for Summary Judgment at ¶ 17).
[113] JA 01799 (Excerpt of August 31, 2022 Deposition of Greg Jordan at 25–26).
[114] JA 01948 (Excerpt of August 31, 2022 Deposition of Greg Jordan at 37).
[115] JA 01926 (Deposition Tr. of Patrick Muller at 283).

testify that Ms. Wilson actually reviewed the files containing the undated, unsigned version of the Demolition Agreement. The Trial Court simply speculates that Ms. Wilson did so.

The supposed "admission" by Charles WV refers to testimony by Mr. Muller as a corporate designee of Charles WV and Hull that he had no basis to believe Mr. Jordan testified falsely during his deposition testimony.[116]

> Q. -- if Greg Jordan testified that he told Elizabeth Wilson about the meeting and the plans to demolish it, is it the position of Charles WV Mall and the Hull Group that Mr. Jordan was lying at his deposition?
> MR. STONESTREET: Object to form.
> THE WITNESS: No. Our position is not that he's lying.
> BY MR. FORMAN:
> Q. So you believe that Greg told the truth?
> A. That he told Elizabeth that the Sears is important, I believe –
> Q. I asked him --
> A. -- that he told the truth when he was in the deposition.
> Q. When he said that he had told her about the meeting and the plans to demolish it. Answer: Yes. You believe that's a truthful answer?
> A. Yes.
> Q. Okay.
> A. But that doesn't mean that there's an agreement. There's all sorts of plans.[117]

Not accusing a witness of perjury does not amount to an admission to the accuracy of a witness' testimony nor of a particular understanding of that testimony. Any witness can testify truthfully to be the best of their belief and still be wrong about the accuracy of that belief, and any other witness can have a different understanding of the testimony — still not a perjury claim nor an endorsement of the other parties' attorneys' unstated understanding of that testimony.

The record contains additional evidence, completely ignored by the Trial Court, that would allow a rational jury to conclude that Charles WV and Hull did not know about the Demolition Agreement and therefore did not agree to accept an assignment of it. As noted above, the Trust

---

[116] JA 00004 (Entered Order Granting Partial Motion for Summary Judgment at ¶ 13.c).
[117] JA 01308–01309 (Deposition Tr. of Patrick Muller at 74–75).

Defendants' corporate designee, Ms. Thorp, admitted that they failed to include the Demolition Agreement in the "due diligence" materials provided to Charles WV and Hull pertaining the Mall Property.[118] Mr. Jordan was employed by company's property management company, CBRE, at all relevant times prior to the closing of the purchase by Charles WV. Charles WV representative, Patrick Muller, testified that Quarrier's principal, Mayur Patel, never mentioned the Demolition Agreement during their conversation about Quarrier's plans for the Sears parcel..[119] As detailed above, Mayur Patel denied the existence of an agreement with the then current mall owner and expressed his desire to move forward with plans for a hotel and hoped to work with Charles WV and Hull should they acquire the Mall Property.[120] Mr. Patel never mentioned that he (personally as Manager of Quarrier ST, LLC) had already signed an agreement with the existing owner to demolish the former Sears building.[121] Worse yet, Mr. Patel gave the impression that he needed the cooperation of the new owners to proceed with demolition of the former Sears building.[122] The Trial Court did not identify a single witness who testified to providing a final signed version of the Demolition Agreement to any Charles WV or Hull representative prior to closing. And as the Trial Court previously recognized, the Demolition Agreement is not identified by name in the PSA or any of its exhibits.[123]

When all this evidence is viewed in the light most favorable to Charles WV and Hull, a rational jury could have easily concluded that Charles WV and Hull lacked knowledge of the Demolition Agreement prior to closing, which bears directly on whether they intended to accept

---

[118] JA 01010 (June 13, 2023 Deposition Tr. of Laura Thorp at 33).
[119] JA 01002 - 01003 (Deposition Tr. of Patrick Muller at 52 - 53).
[120] JA 01003 (Deposition Tr. of Patrick Muller at 53).
[121] JA 01002 - 01003 (Deposition Tr. of Patrick Muller at 52 - 53).
[122] JA 01003 (Deposition Tr. of Patrick Muller at 53).
[123] JA 01902–1903 (Entered Order Denying Plaintiff's Motion for Partial Summary Judgment at ¶ 17).

assignment of the Demolition Agreement when purchasing the Mall Property. The Trial Court therefore erred in finding that no genuine issue of material fact existed on this issue.

C. Assignment of Error No. 2: a rational jury could find that the Trust Defendants were obligated to disclose the Demolition Agreement to Charles WV, and failed to do so.

Whether the Trust Defendants disclosed the Demolition Agreement to Charles WV or Hull, and whether they were obligated to do so, is also germane to the key factual issue of whether the Trust Defendants intended to convey, and Charles WV intended to accept, an assignment of the Demolition Agreement in connection with the sale of the Mall Property. As explained above, the PSA very specifically defines the agreements that are to be assigned to Charles WV and what agreements must be disclosed by the Trust Defendants. In concluding that no genuine issue of material fact exists on this issue, the Trial Court made three findings:

> (1) [Charles WV] has admitted that the Trust's agent, Greg Jordan, informed Hull about the existence of the agreement, (2) [Charles WV]/Hull has admitted that the Demolition Agreement is not a service or maintenance contract and is not an equipment lease; and (3) the emails between [Charles WV]/Hull representatives and the representatives of the Trust show that [Charles WV]/Hull offered to purchase the Mall with no due diligence period in exchange for a $600,000 reduction in the purchase price.[124]

None of these three findings warrant entry of partial summary judgment. First, as explained above, Mr. Jordan told Ms. Wilson about an unsigned, undated, draft version of the Demolition Agreement. There is no evidence that any version of the Demolition Agreement, much less the signed and dated version of the Demolition Agreement, was provided to Charles WV or Hull prior to closing. Second, the admission that the Demolition Agreement is not a service or maintenance contract or equipment lease means that it was not assigned pursuant to the PSA which only assigned specified contracts identified by Charles WV as being accepted. Third, the offer to

---

[124] JA 00006–7 (Entered Order Granting Partial Motion for Summary Judgment at ¶ 18).

purchase the Mall Property with no "due diligence" is completely irrelevant, and the order offers no explanation of why it is relevant. There is no evidence in the record that the Trust Defendants actually accepted that offer. To the contrary, the signed PSA does not waive the right to conduct due diligence and the entire agreement provision in the PSA renders the email meaningless. Additionally, both before and after the execution of the PSA, Charles WV and Hull engaged in a review of the "due diligence" documents provided by the Trust Defendants.

The Trial Court completely ignores two very important pieces of evidence from which a rational jury could reach the conclusion that the Trust Defendants were obligated to disclose the Demolition Agreement to Charles WV or Hull and failed to do so. The first piece of evidence is the "Seller's Affidavit" executed on behalf of the Trust Defendants pursuant to the PSA that declares, under penalty of perjury, that the seller(s) of the Mall Property has not

> executed, or permitted anyone on its behalf to execute any conveyance, option, mortgage, lien, security agreement, financing statement **or encumbrance of or upon the subject property** or any fixtures attached thereto **which is now outstanding or enforceable against the subject property** except as may be set forth in the [title] Commitment.[125]

There is no dispute that the Demolition Agreement is not identified in the title commitment for the Mall Property much less anywhere else in the PSA. Both Quarrier and the Trust Defendants vehemently argued that the Demolition Agreement is enforceable against the Mall Property. A rational jury could easily conclude that the Trust Defendants had an obligation to disclose the Demolition Agreement pursuant to the Seller's Affidavit.

The second piece of evidence ignored by the Trial Court is the undisputed testimony by the Trust Defendants corporate designee, Laura Thorp, that the Demolition Agreement was not

---

[125] JA 00594 (Agreement of Purchase and Sale (with exhibits) at § 5); JA 01119–1123 (US Bank Trust's Seller's Affidavit executed pursuant to Purchase and Sale Agreement (emphasis added)).

included in the "due diligence" materials provided to Charles WV or Hull.[126] Ms. Thorp further testified that she "would have liked for that Demolition Agreement to have been in the vault" of documents provided even though she believed there was not a legal obligation to do so.[127] No other witness contradicted this admission by Ms. Thorp. A rational jury could conclude that Ms. Thorp essentially admitted that the Demolition Agreement should have been disclosed, and her admission discredits her belief that there was no legal obligation to disclose it based on the language of the Seller's Affidavit that required such disclosure.

These two pieces of evidence alone, which are not addressed in the Trial Court's Order prepared by counsel for the Trust Defendants, are more than sufficient to allow a rational jury to conclude that the Trust Defendants were obligated, and failed, to disclose the Demolition Agreement. This, with the additional evidence concerning the lack of knowledge by Charles WV and Hull about the Demolition Agreement, the Trial Court actually weighed evidence (or snippets of evidence) in the place of the jury and erred in finding no genuine issue of material fact existed.

D. Assignment of Error No. 3: a rational jury could find that the Trust Defendants did not intend to convey, or Charles WV did not intend to accept, an assignment of the Demolition Agreement.

The Trial Court completely, and unjustifiably, changed its prior conclusion on whether a genuine issue of fact existed concerning whether the Trust Defendants intended to convey, and Charles WV intended to accept, an assignment of the Demolition Agreement. In the December 11, 2023 Order, the Trial Court determined that "whether or not [Charles WV] intended to accept a conveyance of the Demolition Agreement . . . is a genuine issue of material fact to be determined

---

[126] JA 01010 (June 13, 2023 Deposition Tr. of Laura Thorp at 33).
[127] JA 01011 (June 13, 2023 Deposition Tr. of Laura Thorp at 37–38).

by the jury."[128] In the January 16, 2024 Order, the Trial Court found that a genuine issue of material fact no longer existed "because [Charles WV] Hull admitted that the demolition of the common wall relates to the operation of the Mall[.]"[129] Although not explained in the order, this conclusion is apparently based on the language in paragraph 2(b) of the Assignment executed pursuant to the PSA to assign to Charles WV "the assignable contracts and agreements relating to the upkeep, repair, maintenance or operation of the Real Property, Improvements or Personal Property, including specifically, without limitation, the assignable equipment leases described on Exhibit B[.]"[130] This conclusion is improper and unwarranted for several reasons.

First, the Trial Court mischaracterizes the testimony by Patrick Muller as the corporate designee of Charles WV and Hull. Mr. Muller actually testified that demolition of the Common Wall *affects* the operation of the Mall Property since the Common Wall serves as an exterior wall of the mall structure, but was not an agreement that fell within the scope of the Assignment:

> Q. Obviously it relates to the operation of the mall.
> A. Having an exterior wall -- yeah. And it getting torn down would affect the mall operation.
> Q. Uh-huh. And so, then, just based on that agreement, that demolition agreement falls within the scope of 2(b), right?
> A. It does not fall within the scope of 2(b) because this agreement -- or this assignment is for: Assignable contracts relating to the upkeep, repair, maintenance or operation of the real property, improvements or personal property, including specifically, without limitation, the assignable equipment leases -- list -- leased -- and equipment leases described on Exhibit B.
>
> So this agreement is to assign the --the -- the contracts listed on Exhibit B.[131]

Many things can *affect* the operation of the Mall Property. Events like high school basketball tournaments or concerts at the adjacent Coliseum and Civic Center, or conferences at

---

[128] JA 01903 (Entered Order Denying Plaintiff's Motion for Partial Summary Judgment at ¶ 19).
[129] JA 00007 (Entered Order Granting Partial Motion for Summary Judgment at ¶ 19).
[130] JA 01085 (Assignment and Assumption of Leases and Contracts at ¶ 2(b)).
[131] JA 01085 (Assignment and Assumption of Leases and Contracts at ¶ 2(b)).

nearby hotels, can affect the operation of the Mall Property by increasing foot traffic in or around the property which can increase the number of potential customers visiting the mall — particularly the food court area. Similarly, government plans to demolish another former anchor store and construct a new sports complex can certainly affect the operation of the Mall Property. That does not mean that contracts governing those activities "relate to" operation of the Mall.

Second, the Demolition Agreement — by its own terms — is not a contract "relating to the upkeep, repair, maintenance or operation" of the Mall Property. As explained above in section II.B.1, the Demolition Agreement governs activities taking place on the Sears Parcel — not the Mall Property.

Third, the Trial Court's finding is inconsistent with the four agreements expressly identified in the letter from Charles WV to the Trust Defendants dated April 29, 2021, identifying the agreements to be assigned and listed in the Assignment. Those are (1) water treatment contract for the air conditioning system; (2) landscaping contract; (3) Suddenlink internet contract; and (4) telephone contract.[132] Under the canon of construction known as *noscitur a sociis* (associated words bear on one another's meaning), the stark contrast between these four contracts and the Demolition Agreement indicates an absence of intent to assign the Demolition Agreement.

> It is a fundamental rule of construction that, in accordance with the maxim *noscitur a sociis*, the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated. Language, although apparently general, may be limited in its operation or effect where it may be gathered from the intent and purpose of the statute that it was designed to apply only to certain persons or things, or was to operate only under certain conditions.

Syl. Pt. 3, *Bradford v. W. Va. Solid Waste Mgmt. Bd.*, 866 S.E.2d 82, 84 (W. Va. 2021). In *Bradford*, the Supreme Court interpreted the word "persons" in a statute governing the authority of the West

---

[132] JA 01085 (Ex. N, Assignment and Assumption of Leases and Contracts at ¶ 2(b)).

Virginia Solid Waste Management Board to enter into contracts for the operation and management of solid waste disposal facilities. The Court held that "persons" did not include an employee because the statute identified those who may contract with the Board as "persons, firms or corporations." "Here, the term 'persons' is associated with 'firms or corporations.' Plainly, 'firms or corporations' cannot refer to an employee." *Id.* at 88.

In this case, the types of agreements expressly identified in the PSA and Exhibit B to the Assignment (the four contracts that Charles WV agreed to accept) clearly govern services provided to the Mall Property. Under the "associated words" canon of construction, the Demolition Agreement would have to relate to services provided *to the Mall Property* to fall within the scope of the Assignment. It does not. The Demolition Agreement governs activities on the Sears Parcel (as explained above).

Fourth, as discussed above, there is a plethora of evidence in the record to support a jury finding that Charles WV and Hull had no knowledge of the Demolition Agreement, the Trust Defendants had an obligation to disclose it, but never did so, and thus there was a lack of intent between the parties as to an assignment of the Demolition Agreement. By describing various arguments that the Trial Court previously agreed with in its December 11, 2023 Order as having been "undermined" and "undercut" by additional evidence, the Trial Court was clearly weighing the evidence rather than simply identifying whether a genuine issue of material fact existed for the jury to resolve. This is improper. The Trial Court's role "is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial."[133]

All of this evidence (Mr. Muller's testimony; the terms of the Demolition Agreement; the types of contracts specifically identified for assignment; and testimony regarding lack of

---

[133] *Williams* at 59, 336 (internal quotation marks omitted).

knowledge and disclosure) provides ample grounds for a rational jury to conclude that the Trust Defendants and Charles WV did not agree to convey and accept an assignment of the Demolition Agreement. But there's more.

The language of Assignment conveying contracts "relating to the upkeep, repair, maintenance or operation" of the Mall Property is not all encompassing.[134] On January 30, 2024, this Court published an opinion in *IPI, Inc. v. Axiall Corp.*[135] that addressed the language of a contract governing painting and power-washing services provided by a contractor, IPI, to a large chemical plant in Natrium, Marshall County, West Virginia owned by Eagle Natrium, LLC. While IPI was on-site at the plant performing cleaning services on a large tank, a leak occurred in a completely different part of the plant during operations to load chlorine into a railcar.[136] As this Court observed "[t]his loading was not related to, part of, or required for IPI to perform its work. There is no dispute that IPI had no control over the area where the railcar was being loaded, that none of its employees were involved in the loading, and that it had no involvement in the maintenance or usage of the railcar."[137] The chlorine leak caused physical damage to IPI's equipment and resulted in personal injuries to IPI's President, Matthew Taylor.[138] IPI and Mr. Taylor later filed suit against Eagle Natrium asserting claims for property damage and personal injury.[139] In response, Eagle Natrium filed a counterclaim against IPI alleging that IPI must defend and hold Eagle Natrium harmless from those claims pursuant to an indemnity provision in the parties' contract.[140] That contract stated in relevant part that IPI would indemnify Eagle Natrium

---

[134] JA 01085 (Assignment and Assumption of Leases and Contracts at ¶ 2(b)).
[135] *IPI*, ___, W. Va. ___, 897 S.E.2d 572 (W. Va. Int. Ct. App. 2024).
[136] *IPI*, at 577.
[137] *IPI*, at 577.
[138] *IPI*, at 577.
[139] *IPI*, at 579
[140] *IPI*, at 579.

for all claims "arising or allegedly arising from **or related to** the subject matter of this Purchase Order[.]"[141] The trial court later granted partial summary judgment in favor of Eagle Natrium on its counterclaim on the basis that IPI's claims arising from the railcar leak "related to" IPI's work at the plant, and thus IPI had an obligation to indemnify and hold harmless Eagle Natrium for IPI's own claims.[142] On appeal, this Court ruled that the trial court failed to sufficiently articulate its reasoning for granting partial summary judgment in favor of Eagle Natrium on the counterclaim for indemnity.[143] Although this Court did not decide the issue, it remarked that "it is difficult for this Court, given the record currently before it, to imagine that IPI intended to be an insurer for claims arising from causes completely unrelated to the work it was hired to perform, and over which it had no control."[144] In other words, this Court cast significant doubt on an interpretation of the phrase "related to" to encompass anything that occurred at the plant because IPI was performing work at the plant regardless of IPI's involvement in the activities giving rise to a claim.

In this case, the Demolition Agreement has nothing to do with services and maintenance on the Mall Property and is dramatically different from the specific agreements identified in the Assignment for transfer. A rational jury could certainly conclude that the Demolition Agreement is not a contract "relating to the upkeep, repair, maintenance or operation" of the Mall Property, and thus the Trust Defendants and Charles WV did not mutually agree to its assignment.

The January 16, 2024 Order also fails to address one of the genuine issues of material fact identified in the December 11, 2023 Order: whether there was legal consideration for the

---

[141] *IPI*, at 579 (emphasis added).
[142] *IPI*, at 579.
[143] *IPI*, at 591.
[144] *IPI*, at 586.

Demolition Agreement,[145] which goes to its enforceability. This is a specific affirmative defense raised by Charles WV and Hull in their answer to Quarrier's complaint.[146] If the Demolition Agreement lacks consideration, it ceases to be a valid contract, and thus could not have been assigned. "It is well-established under contract law in West Virginia that no legal contract exists if the minds of the parties are not in agreement with the essential elements or contract fundamentals which include competent parties, legal subject matter, valuable consideration and mutual assent."[147] The Trial Court found on December 11, 2023 that a genuine issue of material fact existed with respect to consideration and did not change that conclusion in the January 16, 2024 Order. Instead, the Trial Court acted as if that issue did not exist. Since the Trial Court offered no explanation for why a genuine issue of material fact no longer existed with respect to whether the Demolition Agreement is supported by consideration, that issue still existed. The Trial Court therefore erred in granting partial summary judgment.

VI. Conclusion.

For all the reasons stated above, Charles WV and Hull ask this Court to vacate the January 16, 2024 Order and remand this matter for further proceedings before the Trial Court.

Charles WV Mall, LLC and Hull Property Group, LLC

By Counsel

/s/ Robert M. Stonestreet
Timothy M. Miller (WVSB ID No. 2564)
Robert M. Stonestreet (WVSB ID No. 9370)
Austin D. Rogers (WVSB ID No. 13919)
BABST, CALLAND, CLEMENTS & ZOMNIR, P.C.

---

[145] *See* JA 00001–14 (Entered Order Granting Partial Motion for Summary Judgment).
[146] JA 01201 (Third Amended Answer and Counterclaims of Defendants Hull Property Group, LLC and Charles WV Mall, LLC at Fifteenth Defense).
[147] *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 775–76, 613 S.E.2d 914, 923–24 (2005) (cleaned up).

300 Summers Street, Suite 1000
Charleston WV 25301
681-205-8888
tmiller@babstcalland.com
rstonestreet@babstcalland.com
arogers@babstcalland.com

No. 24-ICA-67

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Hull Property Group, LLC and Charles WV Mall, LLC,
Defendants Below, Petitioners,

v.

Quarrier ST, LLC,
Plaintiff Below, Respondent,

and

US Bank National Association, successor by merger to LaSalle Bank National Association, as Trustee for Bear Sterns Commercial Mortgage Securities, Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-TOP28, and C-III Asset Management, LLC, f/k/a Centerline Servicing, Inc., incorrectly designated as d/b/a Greystone Special Servicing
Corporation Service Company,
Defendants Below, Respondents

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2024, I electronically filed the foregoing PETITIONERS' AMENDED BRIEF via File & Serve*Xpress* which will provide electronic notification to the following counsel of record:

Isaac R. Forman, Esquire
Kayla S. Reynolds, Esquire
Hissam Forman Donovan Ritchie, PLLC
PO Box 3983
Charleston, WV 25339
Counsel for Quarrier ST LLC

Arie M. Spitz, Esquire
Jason L. Holliday, Esquire
Dinsmore & Shohl, LLP
PO Box 11887
Charleston, WV 25339
Counsel for US Bank National Association

/s/ Robert M. Stonestreet
Timothy M. Miller (WVSB ID No. 2564)
Robert M. Stonestreet (WVSB ID No. 9370)
Austin D. Rogers (WVSB ID No. 13919)
BABST, CALLAND, CLEMENTS & ZOMNIR, P.C.
300 Summers Street, Suite 1000
Charleston WV 25301
681-205-8888
681-205-8814 (fax)
tmiller@babstcalland.com
rstonestreet@babstcalland.com
arogers@babstcalland.com