

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 24-ICA-67

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**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**

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**RESPONDENT QUARRIER ST LLC'S RESPONSE  
BRIEF AND CROSS-ASSIGNMENTS OF ERROR**

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## TABLE OF CONTENTS

<b>INTRODUCTION .....</b>	<b>1</b>
<b>CROSS ASSIGNMENTS OF ERROR .....</b>	<b>3</b>
<b>STATEMENT OF THE CASE .....</b>	<b>3</b>
I. Quarrier Purchased the Sears Parcel in order to demolish the former Sears Building and construct a hotel. ....	3
II. Quarrier spent nearly two years negotiating terms with the Trust Defendants and finalizing the Demolition Agreement.....	4
III. The Hull Group purchases the Mall Property but refuses to honor the Demolition Agreement. ....	5
A. Of Hull Group's competing offers to purchase the Mall Property, the Trust Defendants choose one omitting a due diligence period.....	6
B. As part of the sale, the Trust Defendants assign leases and contracts, including the Demolition Agreement.....	7
C. The Hull Group refuses to honor the Demolition Agreement and prevents Quarrier from demolishing the former Sears Building.....	8
IV. Quarrier files suit for breach of contract seeking to enforce the Demolition Agreement and demolish the former Sears Building. ....	8
<b>SUMMARY OF ARGUMENT .....</b>	<b>13</b>
<b>STATEMENT REGARDING ORAL ARGUMENT .....</b>	<b>13</b>
<b>ARGUMENT.....</b>	<b>14</b>
I. The Circuit Court's grant of summary judgment to the Trust Defendants and denial of Quarrier's partial motion for summary judgment was legal error because the Assignment Agreement unambiguously assigns the Demolition Agreement to the Hull Group. ....	14
A. The Assignment Agreement is unambiguous. ....	16
1. The Demolition Agreement is a "Contract" under the unambiguous language of the Assignment Agreement.....	17
2. The Demolition Agreement is a "Lease" under the unambiguous language of the Assignment Agreement.....	20

B. Hull Group’s “lack of knowledge” or “intent” is an irrelevant risk it assumed in executing the Assignment Agreement. ....	22
1. Without ambiguity, the Court cannot look outside the four corners of the Assignment Agreement.....	22
2. Even if ambiguous, parol evidence demonstrates that the Demolition Agreement was assigned to Hull Group.....	23
II. The Trust Defendants remain bound to the Demolition Agreement regardless of whether it was assigned to the Hull Group. ....	25
<b>CONCLUSION .....</b>	<b>27</b>

## TABLE OF AUTHORITIES

### CASES

<i>Arnold v. Palmer</i> , 224 W. Va. 495, 686 S.E.2d 725 (2009) .....	15
<i>Bethlehem Mines Corp. v. Haden</i> , 153 W. Va. 721, 172 S.E.2d 126 (1969) .....	16
<i>Boarman v. Boarman</i> , 210 W. Va. 155, 556 S.E.2d 800 (2001).....	26
<i>Carter v. Lee</i> , 283 F.3d 240 (4th Cir. 2002) .....	15
<i>Cotiga Dev'l Co. v. United Fuel Gas Co.</i> , 147 W. Va. 484, 128 S.E.2d 626 (1963).....	16
<i>Cranes Nest Coal &amp; Coke Co. v. Virginia Iron, Coal &amp; Coke Co.</i> , 105 Va. 785, 54 S.E. 884 (1906) .....	23
<i>Elk Run Coal Co. v. Canopus U.S. Ins., Inc.</i> , 235 W. Va. 513, 775 S.E.2d 65 (2015) .....	14
<i>Faith United Methodist Church &amp; Cemetery of Terra Alta v. Morgan</i> , 231 W. Va. 423, 745 S.E.2d 461 (2013) .....	22, 23
<i>FOP, Lodge No. 69 v. City of Fairmont</i> , 196 W. Va. 97, 468 S.E.2d 712 (1996) ..	16, 23
<i>Haynes v. DaimlerChrysler Corp.</i> , 228 W. Va. 441, 720 S.E.2d 564, (2011).....	16
<i>Hays and Co. v. Ancro Oil &amp; Gas, Inc.</i> , 186 W. Va. 153, 411 S.E.2d 478 (1991). 14,	23
<i>IPI, Inc. v. Axiall Corp.</i> , 249 W. Va. 544, 897 S.E. 2d 572 (2024) .....	20
<i>Smith v. Buege</i> , 182 W. Va. 204, 387 S.E.2d 109 (1989).....	26
<i>State v. Day</i> , 225 W. Va. 794, 696 S.E.2d 310 (2010).....	15
<i>Triple 7 Commodities, Inc. v. High Country Mining, Inc.</i> , 245 W. Va. 63, 857 S.E.2d 403 (2021) .....	26
<i>Waddy v. Riggleman</i> , 216 W. Va. 250, 606 S.E.2d 222 (2004) .....	26



<i>Wingett v. Challa</i> , 249 W. Va. 252, 895 S.E. 2d 107 (2023).....	18
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## **RULES**

W. Va. R. App. P. 19 .....	13
----------------------------	----

W. Va. R. Civ. P. 56 .....	14
----------------------------	----

## **TREATISES**

<i>Black’s Law Dictionary</i> (9th ed. 2009).....	18
---	----

Restatement (Second) of Contracts § 316, (1981) .....	25
---	----

Restatement (Second) of Contracts § 318 (1981) .....	2, 26
--	-------

Restatement (Second) of Contracts § 323, (1981) .....	25
---	----

## INTRODUCTION

In May of 2018, Respondent, Quarrier St LLC (“Quarrier”) purchased the former Sears building with hopes of demolishing the vacant box-store and constructing a new hotel. But the former and current owners of the adjoining Charleston Town Center Mall (“Mall Property”) had other plans. Quarrier spent two years negotiating the terms and conditions of a Demolition Agreement with the Trust Defendants.<sup>1</sup> In addition to detailing how demolition would occur, the Demolition Agreement contains language requiring successors in interest to be bound to the rights and obligations contained therein. Before Quarrier could begin demolition, the Mall Property was put up for sale.

After entering into a confidentiality agreement, conducting multiple site inspections, and executing a number of independent contracts, Charles WV Mall, LLC (collectively with Hull Property Group, LLC the “Hull Group”) purchased the Mall Property from the Trust Defendants. One of the contracts executed by the Hull Group and the Trust Defendants was an Assignment and Assumption of Leases and Contracts. This document assigned “Leases” and “Contracts” to Hull Group. One such contract and lease was the Demolition Agreement. Yet when Quarrier attempted to begin demolition, the Hull Group interfered. For its part, the Hull

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<sup>1</sup> The former mall owners, (the “Trust Defendants,”) are U.S. 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., d/b/a Greystone Special Servicing Corporation Service Company, Commercial Mortgage Securities, Inc., Commercial Mortgage Pass-through Certificates, Series 2007-TOP28; and C-III Asset Management LLC, f/k/a Centerline Servicing, Inc., d/b/a Greystone Special Servicing Corporation Service Company.

Group claims it had no prior knowledge of the Demolition Agreement and therefore is not bound by that contract. Meanwhile, the former mall owner, identified herein as the Trust Defendants, claims they had no obligation to act at all.

In arguing over whether the Demolition Agreement was assigned, the current and former mall owners have continuously fought over knowledge and intent. But they have ignored the most important fact: the Assignment Agreement is unambiguous. Based on the unambiguous language of the Assignment Agreement, the Demolition Agreement constitutes both a contract and a lease. Thus, it was properly assigned by the Trust Defendants to the Hull Group. While this certainly entitles Quarrier to partial summary judgment on its breach of contract claim against the Hull Group, it does not negate Quarrier's breach of contract claim against the Trust Defendants.

Although a party can assign its rights under a contract, it remains obligated under that same contract. This is demonstrated by the Restatement's illustrations:

A contracts with B to cut the grass on B's meadow. A delegates performance to C, who contracts with A to assume A's duty and perform the work. C begins performance with B's assent, but later breaks the contract. C is liable to B, but A is not discharged.

Restatement (Second) of Contracts § 318 (1981). Therefore, despite assigning the Demolition Agreement to Hull Group, the Trust Defendants have not been relieved of the obligations owed to Quarrier. Based upon these clear contract principles, Quarrier asks this Court to vacate the award of summary judgment to the Trust Defendants on Count I (breach of contract) of Quarrier's complaint; reverse the

denial of Quarrier’s motion for partial summary judgment against the Hull Group on Count II (breach of contract), affirm the Circuit Court’s conclusion that the Hull Group is bound by the Demolition Agreement, and remand this case to the Circuit Court for trial.

### **CROSS ASSIGNMENTS OF ERROR**

1. West Virginia law requires that unambiguous terms of a contract be applied and not construed. The Assignment Agreement unambiguously conveys contracts relating to upkeep, repair, maintenance and operation of the Mall Property—including *specifically without limitation*—those provided on a separate exhibit. The Assignment Agreement also conveys to Hull Group all those written or oral agreements under which another uses or occupies a portion of the Mall Property. Where the Hull Group itself has claimed that Quarrier’s actions under the Demolition Agreement have modified corridors of the Mall Property, the Assignment Agreement unambiguously conveyed the Demolition Agreement to Hull Group. The Circuit Court erred in denying Quarrier’s motion for partial summary judgment by concluding otherwise.
2. A party can assign its rights under a contract to another; however, it remains obligated under that same contract. Where the Trust Defendants assigned the Demolition Agreement to Hull Group, they remain bound to the Demolition Agreement. The Circuit Court’s award of summary judgment on Quarrier’s breach of contract claim against the Trust Defendants must be vacated.

### **STATEMENT OF THE CASE**

#### **I. Quarrier Purchased the Sears Parcel in order to demolish the former Sears Building and construct a hotel.**

On or about May 8, 2018, Quarrier St LLC purchased the “Sears Parcel,” which is adjacent to the Mall Property and across the street from the newly-renovated Coliseum and Convention Center. Plaintiff’s plan is and has been to

demolish the existing structure, then to build and operate a hotel on the parcel.<sup>2</sup> To that end, Quarrier entered into a franchise agreement with Hilton,<sup>3</sup> retained Thrasher Engineering,<sup>4</sup> and contracted with Rodney Loftis for demolition.<sup>5</sup> But Quarrier’s demolition plans were delayed by the former mall owner, the Trust Defendants.

## **II. Quarrier spent nearly two years negotiating terms with the Trust Defendants and finalizing the Demolition Agreement.**

The Trust Defendants voiced concern over Quarrier’s demolition of the entire Sears building because an exterior wall of the Sears building served as a dividing wall between Sears and the Mall Property (the “common wall”). The wall was Quarrier’s property and was located wholly on Quarrier’s real property.<sup>6</sup> Yet the Trust Defendants delayed providing their approval on Quarrier’s demolition plans.<sup>7</sup> In an effort to avoid litigation, Quarrier negotiated with the Trust Defendants to reach an agreement on how Quarrier would demolish the then-existing common wall.

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<sup>2</sup> JA01759 (Quarrier balance sheet showing payment of Franchise fees).

<sup>3</sup> *Id.*

<sup>4</sup> JA01760-61 (Email attaching meeting notes between CBRE—on behalf of the Trust Defendants as the Mall Owner—and Quarrier).

<sup>5</sup> JA00194, 202 (Transcript from July 12, 2022 Preliminary Injunction Hearing).

<sup>6</sup> JA0363.

<sup>7</sup> Through an internal memorandum produced during discovery in the underlying case, the Trust Defendants’ rights regarding demolition of the Sears building are discussed. And it is noted that “[t]here is nothing in the [COREA] that requires the owner of the former Sears site to leave its wall in place following demolition. There may be equitable arguments which could be used *as leverage against the property owner which could cause delay* in seeking site plan or other approvals to construct the planned hotel.” JA01762-65 (emphasis supplied).

These negotiations with the Trust Defendants over the planned demolition of the Sears Building took nearly two years<sup>8</sup> and involved attorneys on both sides;<sup>9</sup> engineers from both sides;<sup>10</sup> and numerous concessions by Quarrier. And on August 13, 2020, Quarrier and the Trust Defendants entered into a demolition agreement (“Demolition Agreement”).<sup>11</sup> The Demolition Agreement governs the demolition of the former Sears building, and contains detailed provisions as to “Common Wall Work.”<sup>12</sup> The common wall, as explained above, was located wholly on the Sears property. Under the Demolition Agreement, the single largest expense Quarrier would incur is a new replacement wall that would be—and now is—solely for the benefit of the Mall Property.

The Demolition Agreement also contains a successors-in-interest clause which states, “This Agreement shall be binding upon and inure to the benefit of each of the parties hereto, and their respective heirs, successors, assigns, beneficiaries, personal representatives, subsidiaries, parties, and affiliated or related legal entities, as applicable.”<sup>13</sup>

### **III. The Hull Group purchases the Mall Property but refuses to honor the Demolition Agreement.**

Before Quarrier could begin demolition, it learned that the Trust Defendants were marketing the Mall Property for sale. In fact, by February 5, 2021, the Trust

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<sup>8</sup> JA01719.

<sup>9</sup> JA00140, 184-85, 1070, 1184.

<sup>10</sup> JA01760-61.

<sup>11</sup> JA00111-140, 116.

<sup>12</sup> *Id.* at 113.

<sup>13</sup> *Id.* at 116.

Defendants were aware of Hull Property Group, LLC (collectively with Charles WV Mall, LLC “Hull Group”)’s interest in acquiring the Mall Property as Hull Group had executed a confidentiality agreement.<sup>14</sup> And by February 19, 2021, at least 45 confidentiality agreements had been executed by interested purchasers—including Hull Group.<sup>15</sup> On March 22, 2021, Hull Group conducted an on-site visit of the Mall Property.<sup>16</sup> The next day, Hull Group made alternative offers on the Mall Property: (1) \$7.5 million with “[n]o due diligence” and “[n]o contingencies except for clean environmental and marketable title”, or (2) \$8.1 million with a 15-day due diligence period.<sup>17</sup>

**A. Of Hull Group’s competing offers to purchase the Mall Property, the Trust Defendants choose one omitting a due diligence period.**

The Trust Defendants accepted Hull Group’s \$7,500,000 offer.<sup>18</sup> The Trust Defendants accepted this offer—which was lower than Hull Group’s alternative offer and lower than offers made by others for purchase of the Mall Property—because it included a \$1,000,000 non-refundable payment and *no due diligence*. And on April 9, 2021, the Trust Defendants entered into an Agreement of Purchase and Sale which resulted in Hull Group’s acquisition of the Mall Property.<sup>19</sup>

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<sup>14</sup> See JA01002 (Deposition of the Hull Group’s 30(b)(7) designee, Patrick Muller); see also, JA01011 (Deposition of Laura Thorp).

<sup>15</sup> JA01861 (Deposition of the Trust Defendants’ 30(b)(7) designee, Laura Thorp).

<sup>16</sup> JA01645-49 (Patrick Muller Deposition).

<sup>17</sup> JA01884-96.

<sup>18</sup> JA00591-625 (Agreement of Purchase and Sale).

<sup>19</sup> *Id.* at 616.

**B. As part of the sale, the Trust Defendants assign leases and contracts, including the Demolition Agreement.**

One of the closing conditions was execution of an Assignment and Assumption of Leases and Contracts (“Assignment Agreement”) affecting the property. The Assignment Agreement provides the “Assignor [the Trust Defendants] does hereby SELL, ASSIGN, CONVEY, TRANSFER, SET OVER, and DELIVER unto Assignee all of the Assignor’s right, title, and interest, if any, in and to the following:

- (a) 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 (collectively “**Leases**”); provided, however, that Assignor reserves and retains for itself all claims and causes of action accruing to Assignor with respect to the Leases prior to the effective date hereof, and
- (b) 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** attached hereto (collectively, “**Contracts**”), provided, however, that Assignor makes no representation or warranty with respect to the assignability of any of the Leases or Contracts.

By execution of this Assignment, Assignee assumes and agrees to perform all of the covenants, agreements and obligations under the Leases and Contracts binding on Assignor or the Real Property, Improvements, or Personal Property (such covenants, agreements and obligations being herein collectively referred to as the “**Contractual Obligations**”), as such Contractual Obligations shall arise or accrue from and after the date of this Assignment.<sup>20</sup>

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<sup>20</sup> JA000469-479 at 469 (emphasis in original).



Hull Group signed the Purchase and Sale Agreement, paid the nonrefundable \$1,000,000 deposit and, on May 10, 2021, closed on the Mall Property.<sup>21</sup>

**C. The Hull Group refuses to honor the Demolition Agreement and prevents Quarrier from demolishing the former Sears Building.**

When Quarrier's demolition contractor, Rodney Loftis, applied for a demolition permit in May of 2021, the City of Charleston reached out to Hull Group to see if Hull Group would consent to the permit.<sup>22</sup> In a letter to the City of Charleston, Hull Group withheld its consent and falsely claimed that it was not bound by the Demolition Agreement.<sup>23</sup> Based on the Hull Group's false representations, the City of Charleston refused to issue a demolition permit to Quarrier.

**IV. Quarrier files suit for breach of contract seeking to enforce the Demolition Agreement and demolish the former Sears Building.**

Quarrier was left with an agreement that no one but Quarrier seemed concerned with honoring. As a result, Quarrier sued Hull Group, the Trust Defendants, and the City of Charleston.<sup>24</sup> As to Hull Group and the Trust Defendants, Quarrier alleged breach of contract and the covenant of good faith and fair dealing, tortious interference, and negligence.<sup>25</sup> As to the City of Charleston,

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<sup>21</sup> JA00153 (Hull Group's Answer to Plaintiff's Complaint)

<sup>22</sup> JA01013-17, 115; *see also*, 1753-54 (Letter from Hull Group's in-house counsel).

<sup>23</sup> *Id.*

<sup>24</sup> *See generally*, JA00075-143.

<sup>25</sup> JA00075-143 (Complaint wherein Quarrier also asserts defamation against the Hull Group and fraud—including fraud through concealment, inducement, and misrepresentations—as to the Trust Defendants).

Quarrier alleged violation of Article 3 §§ 9 and 10 of the West Virginia Constitution and sought a Writ of Mandamus for injunctive relief.<sup>26</sup>

Shortly after the lawsuit was filed, the City of Charleston issued a demolition permit and was dismissed with the consent of all parties.<sup>27</sup> The Hull Group never challenged the City’s issuance of a demolition permit. But when Quarrier—with permit in hand—attempted to begin demolition, Hull Group filed a motion for preliminary injunction.<sup>28</sup> The Circuit Court denied that motion at a hearing conducted on July 12, 2022.<sup>29</sup> After failing to obtain an injunction, Hull Group physically blocked Quarrier from moving forward under the Demolition Agreement, prompting a second hearing.<sup>30</sup> On August 9, 2022, the Court issued its order which “conclude[d] that [Quarrier] has the legal right to continue its work pursuant to the terms and conditions of the demolition permit granted to it by the City of Charleston.”<sup>31</sup> The Circuit Court went on to state that Quarrier “has a legal permit to work and until that permit is successfully challenged, if ever, [Quarrier] will do its work as described in that legal grant of rights.”<sup>32</sup> Quarrier was then able to proceed with demolition, and to pursue its claims against the Trust Defendants and the Hull Group. These claims include breach of contract with respect to both

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<sup>26</sup> JA00101-104.

<sup>27</sup> JA00216-219.

<sup>28</sup> JA000167-168 (Transcript from Hearing of July 12, 2022).

<sup>29</sup> JA00212-13.

<sup>30</sup> JA000449-451 (Order denying motion for preliminary injunction, denying temporary restraining order, and denying petition for contempt).

<sup>31</sup> JA00457.

<sup>32</sup> JA00459.

sets of Defendants (Hull Group and the Trust Defendants) for the damages caused by the construction delay.

During discovery, Quarrier learned about the existence of the Assignment Agreement. Upon the disclosure of the Assignment Agreement—which had been in the possession of the Hull Group and the Trust Defendants for over a year—Quarrier filed a motion for partial summary judgment on its breach of contract claim against the Hull Group. In its motion, Quarrier argued that the Demolition Agreement is both a “Lease” and a “Contract” as those terms are defined by the Assignment Agreement.<sup>33</sup> Quarrier also noted that application of the Assignment Agreement is a legal determination.<sup>34</sup> Despite being a *party* (specifically the Assignor) to the Assignment,<sup>35</sup> the Trust Defendants did not contend that they had properly or adequately assigned the Demolition Agreement to the Hull Group until January 26, 2023—nearly a year into litigation and two months *after* Quarrier filed its motion for partial summary judgment.<sup>36</sup> At that point, the Trust Defendants joined in Quarrier’s Motion.<sup>37</sup>

But on December 11, 2023, the Circuit Court denied Quarrier’s Motion for Partial Summary Judgment, “find[ing] that the lack of reference to the Demolition Agreement in the Assignment and Assumption of Leases and Contracts creates an

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<sup>33</sup> See JA00461-479.

<sup>34</sup> See *id.*

<sup>35</sup> *Id.* at 471.

<sup>36</sup> See JA000196-98 (the Circuit Court identifying that, even at the motion to dismiss stage, the Trust Defendants were not addressing whether the Demolition Agreement had been provided to Hull Group).

<sup>37</sup> JA00480-81 (Defendants’ response in support of, and joinder in, Plaintiff’s motion for partial summary judgment).

ambiguity. This, along with the Demolition Agreement's absence from the Review Items, Rent Roll, the Lease File, as alleged by [the Hull Group], creates a genuine issue of material fact for the jury to determine."<sup>38</sup> Just three days later, the Trust Defendants submitted a Notice of Supplemental Evidence in order to "provide notice to the Court of evidence that has been placed of record before the Court since the Parties briefed and argued *Plaintiff's Motion for Partial Summary Judgment*".<sup>39</sup> Therein, the Trust Defendants pointed to deposition testimony in support of Quarrier's prior argument: that the Demolition Agreement is a "Contract" as that term is defined within the Assignment Agreement.<sup>40</sup>

The Circuit Court ultimately agreed with the Trust Defendants.<sup>41</sup> The Circuit Court found there was no longer an issue of fact "as to whether the Trust [Defendants] disclosed the existence of the Demolition Agreement to [Hull Group] and whether [Hull Group] had any knowledge of the Demolition Agreement prior to execution of the Assignment and Assumption Agreement."<sup>42</sup> The Court also found that Hull Group's argument "that the Assignment and Assumption Agreement was ambiguous with respect to whether it includes an assignment of the Demolition Agreement . . . 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

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<sup>38</sup> JA01897-1904 at 1903.

<sup>39</sup> JA01905 (the Trust Defendants' notice of supplemental evidence) (emphasis supplied).

<sup>40</sup> JA01906-07.

<sup>41</sup> JA00001-12 (Order granting the Trust Defendants' motion for summary judgment with respect to breach of contract).

<sup>42</sup> JA00006.

ambiguous.”<sup>43</sup> The Court went on to state “that [Hull Group] is bound by the Demolition Agreement because, as a result of the Assignment and Assumption Agreement, the Trust [Defendants] assigned, and [Hull Group] assumed, the Demolition Agreement.”<sup>44</sup> But instead of reversing the denial of Quarrier’s Motion for Partial Summary Judgment, the Circuit Court Granted the Trust Defendants’ motion for summary judgment on Quarrier’s breach of contract claim.<sup>45</sup>

In doing so, the Court found that because Hull Group “is bound by the Demolition Agreement . . . the Court must find that the Trust Defendants are entitled to summary judgment with respect to Count I of the Complaint – which alleges breach of contract.”<sup>46</sup>

Specifically, the Court finds that Plaintiff’s breach of contract cause of action is premised upon the allegations that (1) the Trust Defendants failed to bind [Hull Group] to the Demolition Agreement, and (2) paragraph 17 of the Demolition Agreement required the Trust [Defendants to] bind [Hull Group], the Trust [Defendants’] successor in interest, to the Demolition Agreement.<sup>47</sup>

But this conclusion is contrary to West Virginia law. Even if the Demolition Agreement was assigned to Hull Group (it was), the Trust Defendants are not relieved of their contractual obligations. Accordingly, Quarrier is entitled to proceed with its breach of contract claims against all Defendants.

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<sup>43</sup> JA00007.

<sup>44</sup> JA00010.

<sup>45</sup> JA00001-12.

<sup>46</sup> *Id.* at 11.

<sup>47</sup> JA000469-479 at 469.

## **SUMMARY OF ARGUMENT**

Quarrier is entitled to proceed to trial on its breach of contract claims against both Hull Group and the Trust Defendants. The Hull Group, in purchasing the Mall Property from the Trust Defendants, executed an Assignment Agreement. Based upon the unambiguous language of that Assignment Agreement, the Demolition Agreement was assigned to Hull Group as both a “Lease” and a “Contract.” To conclude otherwise would render language of the Assignment Agreement superfluous and require this Court to rewrite the contract. Therefore, Hull Group is bound by the Demolition Agreement—and has been since May of 2021.

While the Demolition Agreement was assigned to the Hull Group, the Trust Defendants have never been relieved of their obligations under that contract. Absent some release, consent, or novation, the original party to the contract—here the Trust Defendants—remain obligated and liable. Therefore, this Court should reverse the denial of Quarrier’s motion for partial summary judgment and vacate the grant of summary judgment to the Trust Defendants. This case should be remanded to the Circuit Court for further proceedings.

## **STATEMENT REGARDING ORAL ARGUMENT**

Oral argument will assist this Court in the clarification of issues concerning contract interpretation. Oral argument is appropriate under Rule 19 because this appeal involves assignments of error in the application of settled law and presents narrow issues of law for decision. W. Va. R. App. P. 19. For these same reasons, a memorandum decision is not appropriate in this matter.

## ARGUMENT

In less than two months, the Circuit Court concluded that the same provision of the Assignment Agreement was both ambiguous and unambiguous. In December of 2023, Quarrier’s motion for partial summary judgment was denied based upon ambiguity within the Assignment Agreement. Less than a month later, the Circuit Court reversed course granting the Trust Defendants’ motion for partial summary judgment finding *the same provision* of the Assignment Agreement unambiguous. *See* W. Va. R. Civ. P. 56(c). Because the Assignment is unambiguous, the Circuit Court correctly concluded that the Hull Group was bound to the Demolition Agreement. However, the Circuit Court erred by denying partial summary judgment to Quarrier. It also erred by granting summary judgment to the Trust Defendants on Count I—breach of contract and the covenant of good faith and fair dealing—as the Trust Defendants assignment of the Demolition Agreement does not relieve them of their contractual obligations. This Court reviews the order *de novo*. *See Elk Run Coal Co. v. Canopus U.S. Ins., Inc.*, 235 W. Va. 513, 517, 775 S.E.2d 65, 69 (2015).

**I. The Circuit Court’s grant of summary judgment to the Trust Defendants and denial of Quarrier’s partial motion for summary judgment was legal error because the Assignment Agreement unambiguously assigns the Demolition Agreement to the Hull Group.**

“An assignment does not differ in its essential elements from any other contract.” *Hays and Co. v. Ancro Oil & Gas, Inc.*, 186 W. Va. 153, 155, 411 S.E.2d 478, 480 (1991) (quotation marks and citation omitted). It is a well-settled principle of contract law that, where a written instrument is unambiguous, the Court need

look no further than the four corners of the document. *See* Syl. pt 9 *Arnold v. Palmer*, 224 W. Va. 495, 686 S.E.2d 725 (2009).

In over 40 pages of briefing, not once does the Hull Group claim the Assignment Agreement is ambiguous. Therefore, the argument has been waived. *See State v. Day*, 225 W. Va. 794, 806 n.21, 696 S.E.2d 310 (2010) (“Furthermore, this Court has adhered to the rule that although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.”) (internal quotation, alteration and emphasis omitted); *see also, Carter v. Lee*, 283 F.3d 240, 252 n.11 (4th Cir. 2002) (“[T]his Court normally views contentions not raised in an opening brief to be waived.”).

In the absence of an ambiguity, this Court must only look to the plain language of the Assignment Agreement which assigns to the Hull Group those “contracts and agreements relating to the upkeep, repair, maintenance or operation of the Real Property, Improvements, or Personal Property” as well as “all oral or written agreements pursuant to which any portion of the [Mall] Property or Improvements is used or occupied by anyone other than Assignor.”<sup>48</sup> As the Demolition Agreement relates to the operation of the Mall Property and provides for third-party use and occupancy of the Mall Property, it was assigned to Hull Group.

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<sup>48</sup> JA00469.



**A. The Assignment Agreement is unambiguous.**

The Supreme Court of Appeals of West Virginia “has held on numerous occasions that ‘[w]here the terms of a contract are clear and unambiguous, they must be applied and not construed.’” *Haynes v. DaimlerChrysler Corp.*, 228 W. Va. 441, 445, 720 S.E.2d 564, 569 (2011) (quoting Syl. pt. 2, *Bethlehem Mines Corp. v. Haden*, 153 W. Va. 721, 172 S.E.2d 126 (1969)) (alteration in original). It is “not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.” Syl. pt. 3, *Cotiga Dev’l Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1963). And “[t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous.” Syl pt. 3 *FOP, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 468 S.E.2d 712 (1996) (citation omitted). Rather, a contract is only ambiguous if it is susceptible to more than one *reasonable* interpretation. *Id.* at 101, 716 (emphasis supplied).

Here, in determining whether the Demolition Agreement is a “Lease” or “Contract,” the Hull Group claims that the Assignment Agreement must be read in combination with the PS&A. Not so. The Assignment Agreement is a separate document; executed as a separate contract; signed and entered on a separate date; and contains no language incorporating—or otherwise referencing—the PS&A.<sup>49</sup> Had Hull Group intended for the Assignment Agreement to incorporate portions of the PS&A, or to be read as part of the same document, it could have done so. It did

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<sup>49</sup> See JA00469-79.

not. And as a stand-alone contract, the Assignment Agreement clearly and unambiguously defines the terms “Leases” and “Contracts.” As written, the Demolition Agreement constitutes both a “Contract” and a “Lease”.

**1. The Demolition Agreement is a “contract” under the unambiguous language of the Assignment Agreement.**

The Assignment Agreement clearly and unambiguously states that the Trust Defendants have assigned to Hull Group “the assignable contracts and agreements relating to the upkeep, repair, maintenance or operation of the Real Property [the Mall], Improvements or Personal Property, including specifically, without limitation, the assignable equipment leases described on **Exhibit B** attached hereto (collectively, “**Contracts**”).”<sup>50</sup> Despite the clear language, the Hull Group claims the Assignment Agreement solely assigns four contracts specifically identified in Exhibit B.<sup>51</sup>

Hull Group’s unreasonable reading would require the Court to ignore the plain language of the document, including the words “without limitation.” “[S]pecific words or clauses of an agreement are not to be treated as meaningless, or to be discarded, if any reasonable meaning can be given them consistent with the whole contract.” Syl. pt. 3 *Dunbar Fraternal Order of Police, Lodge No. 119 v. City of Dunbar*, 218 W. Va. 239, 624 S.E.2d 586 (2005) (internal quotation marks omitted). Therefore, the Court must give meaning to the phrase “without limitation.”

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<sup>50</sup> *Id.* at 469.

<sup>51</sup> *See* Opening Br. at pp. 35-36.

The Supreme Court has “observed that the term ‘including’ in a statute is to be dealt with as a word of enlargement and indicative of a partial list.” *Wingett v. Challa*, 249 W. Va. 252, 895 S.E. 2d 107, 113 (2023) (internal quotation marks, citation, and alterations omitted). However, “some drafters use phrases such as *including without limitation* and including but not limited to” which mean the same as include. *Black’s Law Dictionary* (9th ed. 2009). Had the Hull Group intended to assume only those contracts listed on Exhibit B to the Assignment Agreement, it could have done so. It did not. Instead, the Assignment Agreement assigns contracts which “*includ[e]* specifically, *without limitation*, the assignable equipment leases described on **Exhibit B**.”<sup>52</sup> (third emphasis in original).

Under the Hull Group’s interpretation of the Assignment Agreement, the Court would need to take a pencil and strike through portions of the contract, effectively rewriting the agreement. This is contrary to the law and ignores the purpose of including language concerning the allocation of risk. The inclusion of words or phrasing such as “without limitation” is an allocation of risk which the Hull Group bears. This was a large commercial transaction entered into between two sophisticated parties. And by the language of the Assignment Agreement, Hull Group is bearing the risk that some unknown or unlisted contract exists. If the Hull Group did not want to bear that risk, it could have written a different contract.

The only other question is whether the Demolition Agreement is a “contract” under the plain language of the Assignment Agreement. It plainly is. The stated

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<sup>52</sup> JA000469.

purpose of the Demolition Agreement is to “set forth in writing [the parties’] agreement concerning the Common Wall Work and the Planned Work and their impact and effect on the Mall Property, and the minimizing of any such impact and effect.”<sup>53</sup> Nearly every provision of the Demolition Agreement describes Quarrier’s use and occupation of parts of the Mall Property, and relates to the upkeep, repair, maintenance, or operation of the Mall Property. *See* JA00111-116.

In fact, in the underlying case, the Hull Group itself went so far as to claim that the “Mall w[ould] incur physical damage during demolition” if Quarrier were permitted to proceed under the Demolition Agreement.<sup>54</sup> The Hull Group has also asserted counterclaims alleging that Quarrier “has modified the emergency exit hallways” which are located on the Mall Property.<sup>55</sup> To now come before the Court—after discovery revealed the Assignment Agreement—and claim that the Demolition Agreement will not relate to the upkeep, repair, maintenance, or operation of the Mall is a complete about face. And is inconsistent with separate arguments advanced by Hull Group in *this* appeal.<sup>56</sup>

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<sup>53</sup> JA00111.

<sup>54</sup> JA00447 (Order denying motion for preliminary injunction). *See also*, JA00717 (Hull Group claimed “that tearing down the [common] wall is going to damage the roof of the mall building . . . result in an unlawful condition in [the Mall] building . . . cause egress corridors to be too narrow . . . [and] leave the interior [corridor of the Mall] exposed to the weather”).

<sup>55</sup> *See* JA01211.

<sup>56</sup> In its opening brief, Hull Group states that the Circuit Court’s “ruling substantially affects the counterclaims by [Hull Group] that Quarrier engaged in demolition and construction activities in the ‘common areas’ governed by the COREA without the required consent of the Mall Property owner.” Opening Br. 26. Hull Group then alleges harm to the Mall Property, including modification to the Mall’s exit hallways. *See* JA01211. Thus, Hull Group once more concedes the Demolition Agreement relates to the upkeep, repair, maintenance, and operation of the Mall Property—as evidenced by their own counterclaims. *See* JA01202-222.

In a last-ditch effort to undermine the clear language of the Assignment Agreement, Hull Group claims this Court’s recent opinion in *IPI, Inc. v. Axiall Corp.*, 249 W. Va. 544, 897 S.E. 2d 572 (W. Va. Ct. App. 2024), “cast significant doubt on an interpretation of the phrase ‘related to.’” Opening Br. at 39-40. But *IPI* does nothing of the sort. Instead, through application of *Pennsylvania* law, this Court evaluated multiple contracts between a contractor and the owner of a chemical plant where the contractor was providing services. At issue were two separate and inconsistent *indemnity* agreements: a “Terms and Conditions” and an “AOS.” *IPI, Inc.*, 249 W. Va. 544. The Terms and Conditions contained language providing indemnity for claims “rising or allegedly arising from or *related to* the subject matter of this Purchase Order,” while the AOS did not. *Id.* This Court then concluded that the indemnity language of the AOS, not the Terms and Conditions, applied. The Court did not provide any further evaluation of the “related to” language. And nothing within this Court’s opinion changes the fact that the Demolition Agreement *relates to* the upkeep, repair, maintenance, or operation of the Mall Property—as Hull Group has itself repeatedly admitted.

**2. The Demolition Agreement is a “Lease” under the unambiguous language of the Assignment Agreement.**

Because the Demolition Agreement describes the terms on which Quarrier will use and occupy portions of the Mall Property, it is a “Lease” as defined by the Assignment Agreement. The Assignment Agreement clearly—and unambiguously—states that the Trust Defendants have assigned to Hull Group “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 (collectively “**Leases**”).”<sup>57</sup>

As stated above, the purpose of the Demolition Agreement is to “set forth in writing [the parties’] agreements concerning the Common Wall Work and the Planned Work and their impact and effect on the Mall Property, and the minimizing of any such impact and effect.”<sup>58</sup> Nearly every provision of the Demolition Agreement describes Quarrier’s use and occupation of parts of the Mall Property. The clearest examples are the work by Nitro Mechanical in relocating HVAC lines and ventilation during demolition of the common wall,<sup>59</sup> and work to be performed on the roof the Mall Property itself.<sup>60</sup> The Demolition Agreement provides that Nitro Mechanical will affix the ventilation and lines to the former Chop House—a part of the Mall Property.<sup>61</sup>

As if this were not enough to demonstrate use and/or occupancy of a portion of the Mall Property, the Hull Group itself went so far as to claim that the “Mall w[ould] incur physical damage during demolition” if Quarrier were permitted to proceed under the Demolition Agreement.<sup>62</sup> The reason, that Quarrier would be utilizing the *common areas* of the Mall Property; modifying exit corridors of the Mall Property; and conducting roof work on the Mall Property. Each of these actions

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<sup>57</sup> JA000469-479 at 469.

<sup>58</sup> JA000111.

<sup>59</sup> JA000114, 138.

<sup>60</sup> JA000114.

<sup>61</sup> JA000135.

<sup>62</sup> JA00447 (Order denying motion for preliminary injunction).

requires use and/or occupancy of the Mall Property by someone “other than Assignor”.<sup>63</sup>

**B. Hull Group’s “lack of knowledge” or “intent” is an irrelevant risk it assumed in executing the Assignment Agreement.**

In three separate assignments of error,<sup>64</sup> Hull Group presses a single argument: that it had no knowledge of—and therefore no intent to assume—the Demolition Agreement. This argument fails for two independent reasons. First, and as briefed above, because the Assignment Agreement is unambiguous the Court need not evaluate parol evidence. *See Faith United Methodist Church & Cemetery of Terra Alta v. Morgan*, 231 W. Va. 423, 745 S.E.2d 461, 481 (2013) (“Extrinsic evidence will not be admitted to explain or alter the terms of a written contract which is clear and unambiguous.”) (internal quotation marks omitted). But even if the Assignment Agreement were ambiguous (it is not) viewing all facts in Hull Group’s favor, the Court must still conclude that Hull Group is bound by the Demolition Agreement.

**1. Without ambiguity, the Court cannot look outside the four corners of the Assignment Agreement.**

“The function of judicial construction of a written instrument is confined to the realm of ambiguity and there is no occasion for its exercise outside the limits of

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<sup>63</sup> JA00469.

<sup>64</sup> In their first assignment of error, Hull Group claims a rational jury could find it had no knowledge of the Demolition Agreement. In their second assignment of error, Hull Group asserts that a rational jury could find the Trust Defendants were obligated to disclose the Demolition Agreement—and failed to do so. *See* Opening Br. at 32-34. And in their third assignment of error, Hull Group asserts that a rational jury could find that the Trust Defendants did not intend to convey the Demolition Agreement.

that sphere of inquiry.” *Kanawha Banking & Tr. Co. v. Gilbert*, 131 W. Va. 88, 109, 46 S.E.2d 225, 237 (1947). Where “a written contract expresses the intent of the parties in clear and unambiguous language, the courts will not resort to construction but will give force and effect to the instrument according to its provisions.” *Id.* (citation omitted). For “[i]t is not the province of the court to alter, pervert or destroy the clear meaning and intent of the parties as plainly expressed in the written contract, or to make a new contract for them, by judicial construction of the instrument.” *Id.* “When a written contract is unambiguous its meaning must be determined solely from its contents”. *Id.* (citing *Cranes Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co.*, 105 Va. 785, 54 S.E. 884 (1906)). A contract is only ambiguous if it is susceptible to more than one *reasonable* interpretation. *FOP, Lodge No. 69*, 196 W. Va. at 101. Therefore, unless this Court finds the Assignment Agreement ambiguous, it cannot consider parol evidence.

**2. Even if ambiguous, the Circuit Court correctly concluded that parol evidence demonstrates the Demolition Agreement was assigned to Hull Group**

“While the general rule is that the construction of a writing is for the court . . . where the meaning is uncertain or ambiguous, parol evidence is admissible to show the situation of the parties, the surrounding circumstances when the writing was made, and the practical construction given to the contract by the parties themselves either contemporaneously or subsequently.” *Hays and Co. v. Ancro Oil & Gas, Inc.*, 186 W. Va. 153, 155, 411 S.E.2d 478, 480 (1991) (internal citation and quotation marks omitted).



To demonstrate a purported lack of knowledge of the Demolition Agreement and/or intent to assume the Demolition Agreement, the Hull Group points to the Seller's Affidavit (Opening Br. 33-34), deposition testimony from its own corporate designee as well as the corporate representative for the Trust Defendants, and testimony from the Greg Jordan.<sup>65</sup> But the Circuit Court was presented with these arguments and correctly concluded there was no genuine dispute.

In addition to the undisputed facts, Hull Group seeks to draw similarities between Quarrier's demolition activities and other events (like concerts and sporting events) potentially affecting the operations of the Mall. But if concert venues or sports teams had "Contracts" or "Leases" with the Trust Defendants that affected the operations of the Mall, those too would have been assumed by Hull Group during the purchase of the Mall Property. Those are not the facts. Here, Quarrier had a Demolition Agreement, affecting the upkeep, repair, maintenance, and operations of the Mall—and permitting Quarrier to use and occupy portions of the Mall Property—where others did not. Finally, although the Assignment Agreement is not ambiguous, the Circuit Court correctly evaluated all available parol evidence, and its conclusion in that regard should be affirmed.

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<sup>65</sup> Hull Group makes much of the difference between Mr. Jordan's "personal" office and his office located on the third floor. *See* Opening Br. 17-28, 29-30. Nowhere in the record does Mr. Jordan state he has two separate offices at the Mall Property.

## **II. The Trust Defendants remain bound to the Demolition Agreement regardless of whether it was assigned to the Hull Group.**

In its Complaint, Quarrier alleged breach of contract and breach of the covenant of good faith and fair dealing.<sup>66</sup> Quarrier alleged it has a valid contract—the Demolition Agreement—which was executed by the Trust Defendants. Regardless of whether the Trust Defendants properly assigned the Demolition Agreement, their obligations to Quarrier remain enforceable under law. The Circuit Court’s conclusion otherwise was legal error.

### **A. Assignment does not release the assignor of its obligations.**

Although a party can assign its rights under a contract, it *remains obligated* under that same contract. “Contracts often refer to the ‘assigns’ of one or both parties. A purported promise by a promisor ‘and his assigns’ does not mean that the promisor can terminate his duty by making an assignment, nor does it of itself show an assumption of duties by any assignee.” Restatement (Second) of Contracts § 323, cmt. (b) (1981). When a person is subject to a duty under a contract they are known as an obligor. In contract law, an obligor “does not ordinarily have such a power to substitute another in his place without the consent of the obligee.” Restatement (Second) of Contracts § 316, cmt. (c) (1981). While “[d]elegation of performance may be effective to empower a substitute to perform on behalf of the obligor . . . *the obligor remains subject to the duty until it has been discharged by performance or otherwise.*” *Id.* (emphasis supplied).

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<sup>66</sup> JA00088-90.

Quarrier never consented to—or released—the Trust Defendants from the Demolition Agreement. “An obligor is discharged by the substitution of a new obligor only if the contract so provides or if the obligee makes a binding manifestation of assent, forming a novation.” *Id.* at § 318, cmt. (d). “Otherwise, the obligee retains his original right against the obligor, even though the obligor manifests an intention to substitute another obligor in his place and the other purports to assume the duty.” *Id.* So, while the Trust Defendants may have assigned the Demolition Agreement to Hull Group, they have never been released from their obligations. And where neither party would consent to permit demolition—both had breached. This is demonstrated by the Restatement’s illustrations:

A contracts with B to cut the grass on B's meadow. A delegates performance to C, who contracts with A to assume A's duty and perform the work. C begins performance with B's assent, but later breaks the contract. C is liable to B, but A is not discharged.

*Id.* at § 318. While West Virginia has not affirmatively adopted § 318, the Supreme Court often adopts or otherwise invokes the Restatement (Second) of Contracts. *See Waddy v. Riggleman*, 216 W. Va. 250, 258, 606 S.E.2d 222, 230 (2004) (adopting the Restatement (Second) of Contracts § 261); *Triple 7 Commodities, Inc. v. High Country Mining, Inc.*, 245 W. Va. 63, 75, 857 S.E.2d 403, 415 (2021) (examining factors contained within Section 241 of the Restatement (Second) of Contracts). And the Supreme Court has implicitly adopted the Restatement (Second) of Contracts §

317(1). *See Smith v. Buege*, 182 W. Va. 204, 210, 387 S.E.2d 109, 115 (1989); *see also Boarman v. Boarman*, 210 W. Va. 155, 158, 556 S.E.2d 800, 803 (2001).

Therefore, this Court can and should rely on the Restatement (Second) of Contracts and conclude that the Trust Defendants were never released from their obligations to Quarrier. Because the Trust Defendants were never released from their obligations under the Demolition Agreement, it was error for the Circuit Court to award summary judgment on Count I. The Circuit Court's judgment on Count I should be vacated and the case remanded for further proceedings.

### **CONCLUSION**

For these reasons, the Circuit Court's Judgment should be vacated in part, affirmed in part, reversed in part, and remanded for the jury to consider whether Respondents/Defendants below, the Trust Defendants, committed breach of contract and breach of the covenant of good faith and fair dealing.

### **QUARRIER ST LLC**

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 22, 2024, *Respondent Quarrier St LLC's Response Brief* was filed and served via File&ServeXpress on all counsel of record.

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