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' REPLY BRIEF

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I. Introduction.

Petitioners Charles WV Mall, LLC ("Charles WV") and Hull Property Group, LLC ("Hull")[1] reply to the Respondents response briefs as follows:

Neither of the briefs filed by Respondent Quarrier ST, LLC or Respondents the "Trust Defendants" provide this Court with any meritorious grounds to uphold the Trial Court's January 16, 2024 Order granting partial summary judgment to the Trust Defendants. First, a glaring omission from both Response briefs serves as grounds for this Court to summarily reverse the subject order: neither Respondent defends the Trial Court's failure to acknowledge the continued existence of a genuine issue of material fact with respect to whether the Demolition Agreement is supported by consideration, and thus qualifies as a contract that could be assigned. The Trial Court found that genuine issue of fact existed in its December 11, 2023 Order and did not change that finding in the January 16, 2024 Order.

Second, the Trust Defendants double-down on the error committed by the Trial Court by resorting to parol evidence to support the Trial Court's about-face finding that the language of the Assignment is no longer ambiguous (as the Trial Court found on December 11, 2023).

Third, Quarrier's argument that the Demolition Agreement qualifies as a "Contract" or a "Lease" as defined in the Assignment fails under the "associated words" cannon of construction in light of the nature of the Demolition Agreement and its express terms.

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[1] Quarrier's Response collectively identifies Charles WV and Hull as the "Hull Group" and continuously refers to both entities as if they are one and the same. Quarrier's Response at 2. Charles WV and Hull are distinct legal entities, and more importantly, have distinctly different roles with the respect to the circumstances at issue. As explained in the Petitioners' opening brief, Charles WV alone had a contract with the Trust Defendants to acquire the Mall Property and did acquire the Mall Property. Hull was not a party to that contract, and is not a party to the Assignment executed pursuant to that contract and did not purchase or receive assignment of anything. There is no evidence that Hull owns anything in Kanawha County. Rather, Hull has a contract with Charles WV to manage and operate the Mall Property after Charles WV acquired the property from the Trust Defendants.

Fourth, Respondents "assumption of risk" argument is contrary to the terms of both the Assignment and the larger purchase agreement pursuant to which the parties executed the Assignment.

Fifth, both Respondents miss the point of this Court's decision in *IPI Inc. v. Axiall Corporation*,[2] which acknowledges that the phrase "relating to" is not all encompassing. In finding, based on parol evidence, that the Demolition Agreement is an agreement "relating to the upkeep, repair, maintenance or operation" of the Mall Property (the definition of "Contracts" conveyed by the Assignment), the Trial Court applied an unreasonable interpretation of that phrase.

Finally, Quarrier's Response improperly seeks appellate review of an interlocutory order denying its motion for partial summary judgment that has not been appealed.

II. Respondents' Arguments Lack Merit.

A. Neither Respondent disputes the absence of any finding to support the existence of consideration for the Demolition Agreement.

As noted in Petitioners' opening brief, the Trial Court's January 16, 2024 Order fails to address one of the genuine issues of material fact identified in its December 11, 2023 Order: whether there was legal consideration for the Demolition Agreement, which goes to its validity and thus assignability.[3] Lack of consideration is a specific affirmative defense raised by Charles WV and Hull in their answer to Quarrier's complaint.[4] 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

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[2] 249, W. Va. 544, 897 S.E.2d 572, 579 (W. Va. Int. Ct. App. 2024).
[3] Petitioners Revised Opening Brief at 39 – 40.
[4] JA 01201 (Third Amended Answer and Counterclaims of Defendants Hull Property Group, LLC and Charles WV Mall, LLC at Fifteenth Defense).

parties are not in agreement with the essential elements or contract fundamentals which include competent parties, legal subject matter, valuable consideration and mutual assent."[5] 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.

In their Response, the Trust Defendants oddly argue that the Trial Court found that the Assignment was supported by consideration.[6] No one has challenged whether the Assignment is supported by consideration. Rather, Charles WV and Hull specifically challenged the existence of consideration to support the Demolition Agreement. Quarrier's Response is completely silent on this issue.

Respondents' failure to address this issue cannot be ascribed to a lack of opportunity to do so. Quarrier's Response is 27 pages long and the Trust Defendants' response is 25 pages. Under Rule 38, both Respondents could submit briefs up to 40 pages long. Respondents apparently made a conscious decision to ignore the issue — likely because they have no good faith argument in opposition. Since neither Respondent has offered any argument addressing why genuine issues of material fact do not exist with respect to the existence of consideration for the Demolition Agreement, this Court should assume that neither Respondent disputes this error. This alone constitutes grounds to reverse the Trial Court's order.

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[5] *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 775–76, 613 S.E.2d 914, 923–24 (2005) (cleaned up).
[6] Trust Defendants' Response at 23 – 24.

B. An ambiguity exists as to whether the parties to the Assignment intended to convey, and intended to accept, a transfer of the Demolition Agreement.[7]

Both Quarrier and the Trust Defendants primarily argue that the Assignment unambiguously reflects the intent of the Trust Defendants to convey, and Charles WV to accept, a transfer of the Demolition Agreement. They make this argument notwithstanding the absence of any reference to the Demolition Agreement in the Assignment or the PSA pursuant to which the Assignment was executed, and the hotly contested factual issue of whether Charles WV had knowledge of the Demolition Agreement prior to closing. There are at least three problems with Respondents' position. First, the Circuit Court previously ruled that the Assignment was ambiguous, and then resorted to parol evidence to find otherwise. Second, the Trust Defendants commit the same error. In their effort to demonstrate that lack of ambiguity, the Trust Defendants resort to parol evidence, which actually disproves the very point they are trying to make. Third, the Demolition Agreement does not qualify as a "Contract" or a "Lease" to be conveyed as those terms are defined in the Assignment. At best, there are genuine issues of material fact to be resolved to make that determination.

1. The Circuit Court correctly ruled that the Assignment is ambiguous and then resorted to parol evidence to rule it was not ambiguous.

In its December 11, 2023 Order Denying Plaintiffs Motion for Partial Summary Judgment, the Trial Court expressly held "the lack of reference to the Demolition Agreement in the

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[7] Both Respondents half-heartedly argue that Petitioners waived the argument that the language of the Assignment is ambiguous by omitting from their brief citations to the well-recognized principle that unambiguous language should be applied as written. Quarrier Response at 15; Trust Defendants Response at 18. There was no need to include a citation to that principle for two reasons. First, that law is recited in the Trial Court's January 16, 2024 Order being appealed. JA 00008 – 00009. Second, Petitioners' main argument is that the Assignment language is ambiguous, and the Trial Court erred in resorting to parol evidence and deciding genuine issues of material fact to resolve that ambiguity and grant summary judgment to Respondents. Petitioners do not argue in their brief that the Assignment language is *un*ambiguous.

Assignment and Assumption of Leases and Contracts creates an ambiguity."[8] The Trial Court cited *Hays and Co. v. Ancro Oil & Gas, Inc.* as support for its decision.[9] *Hays* was an appeal from a circuit court order granting summary judgment. The issue in that appeal was "whether the assignors of an oil and gas lease are entitled to sale proceeds accrued, but held in escrow, prior to the assignment."[10] The Supreme Court specifically found that the lack of reference to the escrow account in the assignment created an ambiguity.[11] Further, the Supreme Court came to this conclusion "even though both the assignees and assignors were aware [of the escrow funds] when the leases were assigned."[12]

In its December 11, 2023 Order denying Quarrier's motion for partial summary judgment, the Trial Court correctly analogized the instant case to *Hays*, reasoning that the absence of any express reference to the Demolition Agreement in the Assignment created an ambiguity as to whether the Demolition Agreement was intended to be transferred. The Trial Court also found the exclusion of the Demolition Agreement from relevant provisions of the Agreement of Purchase and Sale ("PSA"), pursuant to which the Assignment was executed, also created an ambiguity.[13] The Circuit Court even took it a step further, specifically holding that 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 and Hull] intended to accept a conveyance of the Demolition Agreement."[14]

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[8] JA 01903 (December 11, 2023 Order Denying Plaintiffs Motion for Partial Summary Judgment).
[9] 186 W. Va. 153, 155, 411 S.E.2d 478, 480 (1991).
[10] *Id.* at 154, 479.
[11] *Id.* at 155, 480.
[12] *Id.*
[13] JA 01903 (December 11, 2023 Order Denying Plaintiffs Motion for Partial Summary Judgment).
[14] JA 01903 (December 11, 2023 Order Denying Plaintiffs Motion for Partial Summary Judgment).

Just over a month later, the Trial Court walked back that finding with only one explanation: Charles WV and Hull purportedly admitted that the Demolition Agreement fell within the scope of the Assignment.[15] The Trust Defendants concede the Trial Court changed its mind based on this extrinsic evidence:

> The reason the Circuit Court was able to come to both of these conclusions is because the Prior Order is based solely on evidence obtained prior to January 2023 (JA 00707-00737 and JA 01897-01904), and CWV's corporate representative deposition (in which CWV admitted that the Demolition Agreement relates to the operation of the Mall) did not take place until August 2023 (JA 01312-01314).[16]

On this concession alone, the Trial Court's order should be reversed. As both Respondents repeatedly point out in their Briefs, if contractual language is clear and unambiguous, extrinsic evidence should not be considered.[17] Only when an ambiguity exists should a trial court consider extrinsic evidence to ascertain the intent of the parties.[18] On December 11, 2023, the Trial Court correctly found, when looking at the four corners of the Assignment, that there *was* an ambiguity as to whether the parties intended to convey the Demolition Agreement.[19] Then, based on parol evidence, the Circuit Court later found that the same ambiguity disappeared.[20] These two findings cannot be squared. Either the language is unambiguous and therefore no parol evidence is needed, or the language is ambiguous and extrinsic evidence is necessary to ascertain its meaning. Consideration of extrinsic evidence, and resolution of disputed issues of fact, to ascertain the parties' intent was a job for the jury.

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[15] JA 00009 (January 16, 2024 Order Granting Trust Defendant's Motion for Summary Judgment).
[16] Trust Defendants' Response at 17. The reference to the "Prior Order" means the December 11, 2023 order.
[17] Quarrier Response at 14 – 15, 22 – 23; Trust Defendants' Response at 15 – 16, 21.
[18] Quarrier Response at 14 – 15, 22 – 23; Trust Defendants' Response at 15 – 16, 21.
[19] JA 01903 (December 11, 2023 Order Denying Plaintiffs Motion for Partial Summary Judgment).
[20] JA 00009 (January 16, 2024 Order Granting Trust Defendant's Motion for Summary Judgment).

The Trial Court's finding that the Assignment is unambiguous, based on its consideration of parol evidence, is contrary to well settled law. "'[W]hen a trial court's answers rest not on plain meaning but on differential findings by a trier of fact, devised from extrinsic evidence as to the parties' intent with regard to an uncertain contractual provision,' there is an issue of fact present."[21] The Trial Court's reliance on parol evidence to ascertain the meaning of the Assignment perforce means the language is ambiguous. The Trial Court's January 16, 2024 Order should therefore be reversed.

2. **The Trust Defendants rely on parol evidence to argue that the Assignment is unambiguous.**

Like the Trial Court, the Trust Defendants openly rely on parol evidence to support their arguments that the Assignment unambiguously covers the Demolition Agreement. This is not surprising since the Trust Defendants' prepared the order, which the Trial Court entered without change.[22] The Trust Defendants rely on the deposition testimony of Petitioners' corporate designee, Patrick Muller, to claim that the Demolition Agreement falls within the scope of the Assignment as stated in their Response: "[i]n January 2024, *with the benefit of having CWV's corporate representative deposition testimony*, the Circuit Court was readily able to conclude that the Demolition Agreement falls within the scope of the Assignment and Assumption Agreement."[23] Again, if the language of the Assignment unambiguously conveyed the Demolition Agreement, there would be no reason for the Trial Court to rely upon corporate designee testimony to make such a finding. Moreover, as explained below, Mr. Muller did not make the admissions that the Trust Defendants claim, and had the Trust Defendants included the actual deposition testimony

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[21] JA 01900 – 1901 (December 11, 2023 Order, quoting *Fraternal Order of Police, Lodge N. 69 v. City of Fairmont*, 468 S.E.2d 712, 715 (W. Va. 1996))
[22] JA 00013 (January 16, 2024 Order Granting Trust Defendant's Motion for Summary Judgment).
[23] Trust Defendants' Response at 16 – 17 (emphasis added).

given by Mr. Muller (as Petitioners did in their opening brief), this Court would see that fact straight away.

Rather than attempt to justify the Trial Court's decision with parol evidence, Quarrier takes a different tack and argues that the Demolition Agreement, by its own terms, qualifies as a "Contract" or a "Lease" as defined in the Assignment as the types of agreements conveyed.[24] The Trust Defendants also argue that the Demolition Agreement is a "Contract," but continue to use parol evidence — the purported admission by Mr. Muller — to prop up that an argument.[25] These arguments fall short for the reasons explained below.

3. The Demolition Agreement does not qualify as a "Contract" or a "Lease" as defined in the Assignment.

a. The Demolition Agreement is not a "Contract."

The Assignment defines "Contracts" as "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[.]"[26] This is similar to the definition of "Contracts" set forth in the PSA: "[t]he 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[.]"[27] The Demolition Agreement is not described on Exhibit B to the Assignment, and is obviously not an equipment lease.[28] Nor was the Demolition Agreement identified in the PSA as a contract that Charles WV identified as one it wished to acquire.[29] In fact, the Demolition

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[24] Quarrier Response at 16 – 22.
[25] Trust Defendants' Response at 16 – 17.
[26] JA 01085 (Assignment and Assumption of Leases and Contracts at ¶ 2(b)).
[27] JA 01043 (Agreement of Purchase and Sale (without exhibits) at § 1.H).
[28] JA 01095 (Assignment and Assumption of Leases and Contracts at Ex. B).
[29] JA 01085; 01095 (Assignment and Assumption of Leases and Contracts at ¶ 2(b); Ex. B).

Agreement is nothing like the documents described on Exhibit B of the Assignment, which consist of the following: (1) water treatment contract for the air conditioning system; (2) landscaping contract; (3) Suddenlink internet contract; and (4) telephone contract.[30] All of these contracts govern services provided to the Mall Property.

Both Respondents argue that the Demolition Agreement relates to "the upkeep, repair, maintenance or operation" of the Mall Property, and thus qualifies as a "Contract" conveyed by the Assignment.[31] This argument is primarily based on purported testimony by Petitioner's corporate designee, Patrick Muller, who Respondents claim to have admitted that the Demolition Agreement relates to "the upkeep, repair, maintenance or operation" of the Mall Property.[32] In the actual testimony by Mr. Muller cited in Petitioners' opening brief — and notably absent from either Respondent's brief — he made no such admission:

> 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.[33]

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

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[30] JA 01095 (Assignment and Assumption of Leases and Contracts at ¶ 2(b); Ex. B).
[31] Quarrier Response at 17 – 20; Trust Defendants' Response at 16 – 17.
[32] Quarrier Response at 17 – 20; Trust Defendants' Response at 16 – 17.
[33] JA 01967 (Deposition Tr. of Patrick Muller at 92–93).

the intent of the parties to the PSA, which is the agreement pursuant to which the Assignment was executed:

> 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?[34]

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.[35]

Quarrier's argument that the Assignment should not be read in context with the PSA[36] ignores the undisputed terms of the PSA stating that execution of the Assignment is required by the PSA.[37] That means the Assignment is part of the PSA — an ancillary agreement intended to

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[34] JA 01920–01921 (Deposition Tr. of Patrick Muller at 93–94).
[35] JA 01921–01922 (Deposition Tr. of Patrick Muller at 94–95).
[36] Quarrier Response at 16.
[37] JA 00488 (Agreement of purchase and Sale).

implement the terms of the PSA (conveyance of the Mall Property and certain contracts to Charles WV).

Mr. Muller's testimony is consistent with terms of the Demolition Agreement itself that make clear that the purpose of the agreement is to address the "Common Wall Work and the Planned Work[.]"[38] As explained in Petitioners' opening brief, the Demolition Agreement defines the term "Common Wall Work" as demolition of the Common Wall located on the Sears parcel and which serves as the exterior wall of the Mall Property.[39] The term "Planned Work" means demolition of the former Sears building "exclusive of the Common Wall Work."[40] 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.[41] All 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.[42]

Respondents' argument that Petitioners are ignoring the "including without limitation" language of the Assignment is inconsistent with the canon of construction known as *noscitur a sociis* (associated words bear on one another's meaning) discussed in Petitioners' opening brief.

> 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.[43]

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[38] JA 00963 – 962 (Demolition Agreement).
[39] JA 00966 (Demolition Agreement).
[40] JA 00964 (Demolition Agreement).
[41] JA 00964 (Demolition Agreement).
[42] See Petitioners Revised Opening Brief at 6 – 9.
[43] Syl. Pt. 3, *Bradford v. W. Va. Solid Waste Mgmt. Bd.*, 246 W. Va. 17, 866 S.E.2d 82 (2021).

Neither Respondent offered any response to Petitioners' argument under the "associated words" cannon of construction. That is: the Demolition Agreement is not same the type of agreement identified in the Assignment and PSA (service contracts for the Mall Property) and thus does not fall within the scope of agreements conveyed to Charles WV. A brief review of *Bradford* further illustrates this point.

In *Bradford*, the Supreme Court addressed a statute authorizing county solid waste authorities to enter into contracts "with ***any*** persons, firms or corporations for the operation and management of the solid waste facilities[.]"[44] The Nicholas County Solid Waste Authority ("Authority") entered into a five-year fixed term management contract with an existing employee of the Authority, Mr. Larry Bradford, which contained a liquidated damages provision in the event of an early termination of the agreement.[45] The state agency overseeing county solid waste authorities, the West Virginia Solid Waste Management Board, cancelled the contact with Mr. Bradford shortly after it was effective, which prompted Mr. Bradford to file suit alleging breach of contract and violations of the West Virginia Wage Payment and Collection Act.

At the request of the parties, the circuit court certified multiple questions of law to the West Virginia Supreme Court, including the question of whether a fixed-term employment contract between a non-civil service employee and a county solid waste authority is enforceable as a matter of law.[46] In support of his claims, Mr. Bradford argued that the Authority had the statutory power to enter into his management contract because he is a "person" and the statute grants power to the

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[44] *Id.* at 22, 87 (emphasis added).
[45] *Id.* at 21, 86.
[46] *Id.* at 22, 87.

Authority to enter into management contracts "with ***any*** persons, firms or corporations for the operation and management of the solid waste facilities[.]"[47]

Applying the "associated words" cannon of construction, the Supreme Court disagreed. In finding that an existing employee of an Authority did not qualify as a "person," the high court observed the following:

> Here, the term "persons" is associated with "firms or corporations." Plainly, "firms or corporations" cannot refer to an employee. Thus, it is unlikely that the Legislature intended "persons" to include employees. Finding no evidence that the Legislature intended to include "employees" among the persons with whom the board of a county solid waste authority may contract, we decline to add employees to the statute.[48]

Returning to the instant 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). Thus, it is unlikely that the parties to the Assignment and PSA intended to convey an agreement governing activities on the Sears Parcel as part of the sale of the Mall Property.

Further, the Trial Court's finding did not give any meaning to the words in Section 13.B. of the PSA stating that:

> [a]t Purchaser's written request delivered to Seller at least ten (10) days before Closing and specifying the service and maintenance contracts and equipment leases relating to the Real Property to be cancelled, Seller will give notice of termination at Closing for all of the service and maintenance contracts and equipment leases

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[47] *Id.* at 22, 87 (emphasis added).
[48] *Id.* at 23, 88.

> relating to the Real Property specified in Purchaser's request, and Seller shall terminate those contracts at Seller's expense.[49]

Pursuant to this provision, Charles WV notified the Trust Defendants via letter dated and emailed and mailed on April 29, 2021 — 12 days before the May 10, 2021, closing date, to "terminate all service contracts at the Charleston Town Center EXCEPT FOR the following contracts (the Buyer will be retaining the services of the contractors listed below) . . . Please terminate the contracts of all other vendors."[50] The list of retained contracts does not include Quarrier ST, LLC, nor the Demolition Agreement.[51]

In short, the Demolition Agreement does not relate to "the upkeep, repair, maintenance or operation" of the Mall Property, and Mr. Muller did not admit otherwise. The Demolition Agreement does not involve services provided to the Mall Property. Thus, applying the "associated words" cannon of construction, the Demolition Agreement does not qualify as a "Contract" as defined in the Assignment. Even if it did, the Trust Defendants were contractually bound to terminate it – not assign it. The Trial Court erred in concluding otherwise.

b. The Demolition Agreement is not a "Lease."

Quarrier also argues that the Demolition Agreement qualifies as a "Lease," which the Assignment defines to mean "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[.]"[52] Section 1.E. of the PSA similarly defines the tern "Leases" as follows:

> 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, supplements, guaranties) if any (collectively, the "**Leases**"), together with all

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[49] JA 00501 (Agreement of Purchase and Sale).
[50] JA 01097 – 01099 (email and Letter from Caroline Hatcher to Don Edwards re Notice to Terminate Service Contracts).
[51] JA 01099 (Letter from Caroline Hatcher to Don Edwards re Notice to Terminate Service Contracts).
[52] JA 01085 (Assignment and Assumption of Leases and Contracts at ¶ 2(a)).

> 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**");[53]

In other words, "Leases" are defined in the way property leases are commonly understood — agreements governing 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.

Trying to shoehorn the Demolition Agreement into this ordinary language definition of a lease, Quarrier boldly states, without citation, that "[n]early every provision of the Demolition Agreement describes Quarrier's use and occupation of parts of the Mall Property."[54] This statement is flatly untrue. As explained above and in Petitioners' opening brief,[55] the Demolition Agreement governs work on the Sears parcel; it does not authorize Quarrier to "occupy" the Mall Property for any reason. The two purported examples cited by Quarrier (relocating HVAC lines and roof work) do not authorize Quarrier to even enter — much less "occupy" — the Mall Property. As set forth on the page of the Demolition Agreement cited in Quarrier's Response, the Demolition Agreement states that the [previous] "Mall Owner" (not Quarrier) has hired Nitro Mechanical to perform the HVAC work (see image below):[56]

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[53] JA 01042 (Agreement of Purchase and Sale (without exhibits) at § 1.E).
[54] Quarrier Response at 21.
[55] Petitioners Revised Opening Brief at 6 – 9.
[56] JA 00114 (Demolition Agreement).

8. **Systems.** Mall Owner and Quarrier acknowledge and agree that certain ancillary systems servicing the Mall Property will need to be relocated in connection with the Common Wall Work as more specifically set forth on the Common Wall Plans. 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**"). 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 provided, however, that Quarrier shall not be liable for any fees or costs payable to ZMM in connection with the ZMM Letter or otherwise.

Nothing in this paragraph authorizes Quarrier to perform that work, much less enter and "occupy" the Mall Property.

With respect to the roof work, the Demolition Agreement states that work "which shall involve or in any way impact the Mall roof system" shall be coordinated with the contractor who manufactured and/or installed the roof. Nothing authorizes Quarrier to enter upon the Mall's roof (see image below).[57]

9. **Roof; Roof Warranty**. Before commencing any Common Wall Work which shall involve or in any way impact the Mall roof system (the "Roof") or any element thereof, Quarrier shall coordinate such Common Wall Work with the manufacturer and/or installer of the Roof. Mall Owner shall provide to Quarrier contact information for such manufacturer and installer, and shall use commercially reasonable efforts to facilitate Quarrier's coordination with such manufacturer and installer. In addition to the foregoing, Quarrier shall at all times refrain from acting, or failing to act, in any way which would void, limit or in any way negatively impact any existing Roof warranty or warranties.

[57] JA 00114 (Demolition Agreement).

Quarrier also argues that the claim by Hull and Charles WV that Quarrier is improperly damaging "Common Areas" of the Mall Property means that the Demolition Agreement qualifies as a "Lease."[58] This proves nothing. The language of the Demolition Agreement does not authorize Quarrier to use any "Common Areas" of the Mall, but Quarrier did so anyway over the objection of Charles WV and Hull. Charles WV and Hull alleged that Quarrier accessed (and damaged) portions of the Mall Property in violation of the COREA and the Demolition Agreement (to the extent it applies).[59] Actions that Quarrier unilaterally undertook have no bearing on whether the Demolition Agreement authorizes Quarrier to "occupy" the Mall Property.

In short, the Demolition Agreement does not qualify as a "Lease" and thus would not be conveyed by the Assignment.

C. Respondents' "assumption of risk" argument falls short.

Both Respondents argue that Petitioners "assumed the risk" of receiving assignment of an undisclosed agreement to demolish the former Sears building, including the portion of the building serving as an interior wall of a service hallway of the Mall Property.[60] This argument fails for at least four reasons. First, the Demolition Agreement is not a "Contract" as defined in the Assignment for the reasons explained above. Second, the PSA, pursuant to which the Assignment was executed, clearly provides that Petitioners only agreed to accept assignment of specifically identified service and maintenance contracts, and the Trust Defendants were required to cancel any others.[61] Third, Charles WV instructed the Trust Defendants to terminate any "contracts" other than the four listed (which did not include the Demolition Agreement). Fourth, for the reasons

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[58] Quarrier Response at 21 – 22.
[59] JA 01210 – 0121 (Third Amended Answer and Counterclaims of Hull and Charles WV).
[60] Quarrier Response at 22; Trust Defendants Response at 18 – 19.
[61] JA 00501 (Agreement of Purchase and Sale).

explained above, there is at best a genuine issue of material fact as to whether the parties intended to convey and accept assignment of the Demolition Agreement.

D. The Trial Court improperly decided genuine issues of material fact when resolving the ambiguity in the Assignment.

Quarrier effectively concedes that the Trial Court improperly decided multiple genuine issues of material fact when resolving the ambiguity in the Assignment in favor of the Trust Defendants. Quarrier's Response devotes a single paragraph (barely 1/3 of a page) to this issue.[62] Quarrier does not discuss the substance of any of the testimony cited by the Trial Court or respond to Petitioner's explanations of why a rational jury could have reached different conclusions on the multiple factual issues decided by the Trial Court. Rather, Quarrier only says "the Circuit Court was presented these arguments and correctly concluded there was no genuine dispute."[63]

The Trust Defendants do not put up much more resistance. They claim that the Trial Court properly determined that the Demolition Agreement fell within the scope of the Assignment based on the purported testimony of Mr. Muller that the Demolition Agreement relates to "the upkeep, repair, maintenance or operation" of the Mall Property.[64] As noted above, this argument is logically inconsistent. If the Assignment unambiguously includes the Demolition Agreement, the Trial Court would not need to rely on Mr. Muller's testimony to so find. If Mr. Muller's testimony is necessary to the Trial Court's conclusion that the Assignment is no longer ambiguous (as previously found in the December 11, 2023 Order), which the Trust Defendants admit it is, that perforce means that the Assignment is ambiguous. To reach its conclusions, the Trial Court necessarily acted as a trier of fact in place of the jury to construe snippets of deposition testimony.

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[62] Quarrier Response at 24.
[63] Quarrier Response at 24.
[64] Trust Defendants Response at 16 – 17.

Again, the Trust Defendants expressly argue that the rationale for the Trial Court changing its mind on whether the Assignment is ambiguous is reliance on additional evidence:

> The reason the Circuit Court was able to come to both of these conclusions is because the Prior Order is based solely on evidence obtained prior to January 2023 (JA 00707-00737 and JA 01897-01904), and CWV's corporate representative deposition (in which CWV admitted that the Demolition Agreement relates to the operation of the Mall) did not take place until August 2023 (JA 01312-01314).[65]

The Trust Defendants then devote most of their remaining Response to arguing why all the factual findings made by the Trial Court are each a "red herring" because they are outside the four-corners of the Assignment.[66] Yet, they were not irrelevant to the Trial Court (or the Trust Defendants, who prepared the order signed by the Trial Court). The January 16, 2024 order reflects all these factual findings made by the Trial Court in support of the award of summary judgment in favor of the Trust Defendants.[67] So the Trust Defendants offer at least token arguments for why the disputed issues of fact should be resolved in their favor, such as whether Charles WV and the Trust Defendants agreed to waive the ability to perform "due diligence,"[68] whether Mr. Muller admitted that the Demolition Agreement falls within the scope of the Assignment,[69] and whether the Trust Defendants were required to disclose the Demolition Agreement.[70] As explained in Petitioners' opening brief, these are all disputed facts that were the subject of conflicting evidence and which the Trial Court improperly resolved in favor of the moving party, the Trust Defendants,

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[65] Trust Defendants' Response at 17. The reference to the "Prior Order" means the December 11, 2023 order.
[66] Trust Defendants' Response at 18.
[67] *See generally*, JA 00001 – 00012 (January 16, 2024 Order Granting Trust Defendants' Motion for Summary Judgment).
[68] Trust Defendants' Response at 20.
[69] Trust Defendants' Response at 16 – 17.
[70] Trust Defendants' Response at 19 – 21.

rather than the non-moving parties, Petitioners.[71] The Trial Court committed the same error as the circuit did in the recently decided *Griffin v. Toland*.[72]

In *Griffin*, the West Virginia Supreme Court reversed a circuit court's order that resorted to parol evidence to resolve an ambiguity in a conveyance deed with respect to the parties' intent concerning a one-half interest in oil and gas rights.[73] The circuit court correctly determined that the pertinent deed language was ambiguous.[74] However, the circuit court erred in resolving that ambiguity by relying on parol evidence that could allow reasonable minds to reach different conclusions concerning the parties' intent:

> Reasonable minds can draw differing conclusions as to Mrs. White's intent regarding the one-half oil and gas interest in the property. **Because the evidence of record — including the deeds and the conduct of the parties and their predecessors in title — is not determinative of this issue and could lead a rational jury to find for either party, summary judgment was improper.** In granting summary judgment in favor of Respondents, **the court assessed the weight of the parties' respective evidence on disputed issues of material fact, a role entrusted solely to the jury under our law.** Thus, we conclude that the court violated this Court's longstanding mandate that genuine issues of material fact must be resolved at a trial, not on a dispositive motion. Accordingly, the court erred in granting summary judgment to Respondents.[75]

The Trial Court did the exact same thing here. Rather than allow a jury to hash out the parties' intent based on conflicting evidence, the Trial Court made its own conclusion when reasonable minds could reach a different conclusion. The Trust Defendants do not offer *any* explanation for why the conflicting evidence concerning the intent of the parties to the Assignment could only be viewed in their favor. Instead, the Trust Defendants simply repeat their self-serving conclusions without quoting to this Court the actual testimony at issue, which Petitioners did in

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[71] Petitioners Revised Opening Brief at 28 – 34.
[72] No. 22-0459, 2024 W. Va. LEXIS 231, 2024 WL 2269941 (W. Va. May 20, 2024) (mem. decision)
[73] *Id.* at *17.
[74] *Id.* at *14.
[75] *Id.* at *16 – 17 (emphasis added).

their opening brief. When all that evidence is viewed in the light most favorable to Charles WV and Hull, a rational jury could have easily concluded that the Trust Defendants did not intend to convey, and Charles WV and Hull did not intend to accept, an assignment of the Demolition Agreement when purchasing the Mall Property. The Trial Court erred in finding that a rationale jury could not reach such a conclusion.

E. Respondents miss the point of *IPI, Inc. v. Axiall Corp.*

Respondents both argue that this Court should ignore this decision because it involved application of Pennsylvania law and indemnity contracts. Respondents miss the point. In *IPI*, this Court recognized that the circuit court failed to articulate a rationale for why it interpreted indemnity language addressing claims "allegedly arising from or ***related to*** the subject matter of this Purchase Order" to include claims completely unrelated to the work governed by the purchase order at issue.[76] The Court 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."[77] In other words, this Court cast significant doubt on an interpretation of the phrase "related to" that would encompass anything that occurred at the plant just because IPI was performing work at the plant regardless of IPI's involvement in the activities giving rise to a claim.

Applying that case here, the Trial Court found, and Respondents continue to argue, that the Demolition Agreement is a contract "relating to the upkeep, repair, maintenance or operation" of the Mall Property (the definition of "Contracts" conveyed by the Assignment) even though that agreement has nothing to do with activities on the Mall Property. As explained above, there is an

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[76] *IPI*, 249, W. Va. 544, 897 S.E.2d 572, 579 (W. Va. Int. Ct. App. 2024).
[77] *IPI*, at 586.

ambiguity in the Assignment as to whether the parties intended to include the Demolition Agreement in the agreements being conveyed. Section 13.B. of the PSA[78] and Charles WV's April 29, 2021, letter to the Trust Defendants[79] to terminate all service contracts other than the four specified are ample evidence of Charles WV's intent that it did not intend to assume any contract other than those four listed — which does not include the Demolition Agreement. There are also disputed questions of fact as to the parties' knowledge, understandings, and intent with respect to the Demolition Agreement. Just like in *IPI*, the conclusion of the Trial Court and the arguments advanced by Respondents that the Assignment unambiguously conveys the Demolition Agreement should be "difficult for this Court, given the record currently before it, to imagine" being correct.

F. Quarrier improperly seeks appellate review of an interlocutory order denying its motion for partial summary judgment.

Quarrier's first cross-assignment of error alleges that the Circuit Court erred in denying its Motion for Partial Summary Judgment because it claims that the Assignment unambiguously conveys the Demolition Agreement to Charles WV and Hull. Quarrier is, in essence, appealing a separate interlocutory ruling that is not the subject of the instant appeal.

Quarrier is trying to use the coat tails of Charles WV's and Hull's procedurally proper appeal for an improper review of the denial of its motion. "An order denying a motion for summary judgment is merely interlocutory, leaves the case pending for trial, and is not appealable except in special instances in which an interlocutory order is appealable."[80] The denial of Quarrier's Motion for Partial Summary Judgment is interlocutory and, if Quarrier had grounds to

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[78] JA 00501 (Agreement of Purchase and Sale).
[79] JA 01097 – 01099 (email and Letter from Caroline Hatcher to Don Edwards re Notice to Terminate Service Contracts).
[80] *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, Syl. Pt. 8, 148 W. Va. 160, 133 S.E.2d 770 (1963); *Gooch v. West Virginia Dept. of Public Safety*, Syl. Pt. 1, 195 W. Va. 357, 465 S.E.2d 628 (1995).

appeal the decision, it could have done so. Instead, Quarrier uses its Response Brief to attempt to relitigate a ruling that is not appealable. Quarrier's first assignment of error should be entirely ignored because it requests procedurally improper relief.

With respect to Quarrier's Cross-Assignment of Error No. 2 (whether the Trust Defendants remain obligated to Quarrier under the Demolition Agreement assuming an assignment to Charles WV), the Demolition Agreement is not a valid contract and was not conveyed to Charles WV for all the reasons set forth above, so this cross-assignment of error is moot.

III. Conclusion.

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

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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 September 23, 2024, I electronically filed the foregoing PETITIONERS' REPLY BRIEF via File & Serve*Xpress* which will provide electronic notification to the following counsel of record:

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