

IN THE
INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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Case No. 24-ICA-398

**U.S. BANK TRUST NATIONAL ASSOCIATION AS TRUSTEE OF LB-
RANCH SERIES V TRUST**

Plaintiff Below, Petitioner,

v.

DUNCAN HOMES, LLC

*Defendant/Third Party Plaintiff
Below, Respondent*

AND

CONRAD LEGAL CORPORATION

*Third Party Defendant Below,
Respondent*

Appeal from the Circuit Court of Berkeley County, West Virginia

**BRIEF OF RESPONDENT
CONRAD LEGAL CORPORATION**

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STATEMENT OF ISSUES

1. Whether Petitioner has standing to appeal the Circuit Court's Order entering judgment in favor of Conrad Legal since Petitioner does not have any direct claims against Conrad Legal.

2. Whether the Circuit Court correctly entered judgment in favor of Conrad Legal on the Third-Party Complaint for legal malpractice and breach of contract, based on the finding that Bayview and its successors, including Plaintiff-Petitioner U.S. Bank, had no ownership interest in the Property and therefore were not entitled to notice of a 2019 tax sale.

3. Whether the Circuit Court correctly considered public real property records, equally accessible to all parties, in granting summary judgment in favor of Conrad Legal.

4. Whether the Circuit Court's entry of judgment in favor of Conrad Legal on the independent basis that Third-Party Plaintiff-Respondent Duncan Homes failed to identify an expert to support its legal malpractice and breach of contract claims requires this Court to affirm the judgment.

STATEMENT OF THE CASE

I. Statement of Facts

In June 2000, Richard S. Palmer owned real property located at 264 Dale Earnhardt Lane, Martinsburg, Berkeley County, West Virginia, 25404 (the "Property"). A.R. Vol. 1, p. 18-19. At that time, Mr. Palmer, as the Property owner, obtained a loan from Associates Financial Services of America, Inc., ("Associates Financial"), secured by a Deed of Trust against the Property. A.R. Vol. 1, p. 18. The Deed of Trust identified the address of record for Associates Financial as 411 E South Street, Front Royal, Virginia 22630. A.R. Vol. 1, p. 18. The June 21, 2000, Deed of Trust was later recorded in the Deed of Trust Book 881, at page 404, creating what is referred to herein as the first "line of marketable title." A.R. Vol. 1, p. 19.

Throughout the following years, taxes on the Property were not paid and resulted in a tax sale on or about November 14, 2012 (the "2012 Tax Sale"). A.R. Vol. 1, p. 239, ¶10. RAI Custodian

WV TL, LLC purchased the Property at the 2012 Tax Sale. A.R. Vol. 1, p. 239, ¶10; A.R. Vol. 1, p. 305. Notice of the 2012 Tax Sale was given to Associates Financial by certified mail and regular mail to the address of record listed on the June 21, 2000, Deed of Trust, as well as by publication. A.R. Vol. 1, p. 316; A.R. Vol. 1, p. 306-314. The Notice provided that Associates Financial “may redeem at any time before March 31, 2014, by paying the above total less any unearned interest.” A.R. Vol. 1, p. 314. Despite the Notice, Associates Financial failed to redeem the Property prior to March 31, 2014, thereby vesting title in RAI as the sole and rightful owner of the Property, and divesting Associates Financial of any interest in the Property. A.R. Vol. 1, p. 305.

Once title vested in RAI, RAI assigned its interest in and to the tax certificate to American Pride Properties, LLC (“American Pride”) on March 26, 2014. A.R. Vol. 2, p. 443. The same was recorded on March 27, 2014. A.R. Vol. 2, p. 443. Nonetheless, the “West Virginia State Auditor, on behalf of the Berkeley County Clerk, “failed to recognize the assignment and issued the tax deed to RAI Custodian WV TL LLC instead of American Pride Properties, LLC.” A.R. Vol. 2, p. 443. RAI and American Pride wished to correct that error, and RAI recorded a Quitclaim Deed re-conveying its interest to American Pride. A.R. Vol. 2, p. 444-445. American Pride recorded its Deed on June 30, 2014. A.R. Vol. 1, p. 317. American Pride then deeded the Property back to Mr. Palmer in or around July of 2016. A.R. Vol. 1, p. 318.

Then, on September 22, 2016, despite having its interest in the Property extinguished by failing to redeem after receiving notice of the 2012 Tax Sale, Associates Financial assigned its invalid Deed of Trust to CitiFinancial, Inc. (“CitiFinancial”). A.R. Vol. 1, p. 320. In doing so, Associates Financial created a second “line of non-marketable title.” A.R. Vol. 1, p. 320. On that same day, CitiFinancial assigned its invalid Deed of Trust to Bayview. A.R. Vol. 1, p. 322. Both

the invalid assignment to CitiFinancial and the invalid assignment to Bayview were recorded at the Records Office on October 4, 2016. A.R. Vol. 1, p. 322.

Shifting back to the first and marketable line of title, after the Deed was conveyed back to the original owner in 2016, unpaid taxes again prompted a tax sale of the Property on August 29, 2019 (the “2019 Tax Sale”). A.R. Vol. 1, p. 323. At this time, Duncan Homes purchased the subject Property for \$6,000.00. A.R. Vol. 1, p. 323.

Duncan Homes hired Conrad Legal to conduct the title search in connection with the 2019 Tax Sale. A.R. Vol. 1, p. 324. Conrad Legal performed the title search and subsequently prepared the State Auditor’s Office Notice to Redeem Form that identified persons and entities that were required to receive notice of the 2019 Tax Sale and right to redeem (“Redeem Form”). A.R. Vol. 1, p. 325.

Conrad Legal accurately identified the individuals and entities up the first line of marketable title, including Mr. Palmer and Associates Financial, as well as Berkeley County Emergency Ambulance Authority, who held a judgment lien against the Property. A.R. Vol. 1, p. 325-326. Conrad Legal submitted the Redeem Form to West Virginia’s State Auditor on Duncan’s behalf and notice was then provided as required by law. A.R. Vol. 1, p. 325-326. After the Redemption Period expired without any person or entity redeeming the Property following the 2019 Tax Sale, Title to the Property vested with Duncan, and Duncan’s Deed was recorded on May 15, 2020. A.R. Vol. 1, p. 323.

Bayview, who recorded an invalid and non-marketable Assignment, was not given notice. A.R. Vol. 1, p. 298-299. At the time of the 2019 Tax Sale, Bayview did not have a legal interest in the Property and was not required or entitled to receive notice of the 2019 Tax Sale. Nonetheless, Bayview (who had changed its name to “Community Loan Servicing”) assigned its invalid and

non-marketable Deed of Trust to Nationstar Mortgage LLC (“Nationstar”) on July 14, 2022. A.R. Vol. 1, p. 327.

Petitioner U.S. Bank is the successor-in-interest to Nationstar. A.R. Vol. 1, p. 299. U.S. Bank claims an interest in the Property under the same invalid and non-marketable lien held by Nationstar, and Bayview prior to that. A.R. Vol. 1, p. 299. However, as outlined above, Bayview had no legal interest in the Property at the time of the 2019 Tax Sale and thus, U.S. Bank also has no legal interest in the Property. A.R. Vol. 1, p. 299.

II. Procedural History

On January 13, 2023, Nationstar filed a Complaint in the Circuit Court of Berkeley County, West Virginia, for declaratory judgment and injunctive relief against G. Russell Rollyson Jr. (Deputy Commissioner of Delinquent and non-entered Lands of Berkeley County) and Duncan Homes. A.R. Vol. 1, p. 10. Nationstar sought to have the 2019 Tax Sale rescinded and declared void. A.R. Vol. 1, p. 15.

In response, Duncan Homes filed a Counterclaim against Nationstar on February 17, 2023, requesting that the Court adjudge Duncan as the fee simple and sole owner of the Property. A.R. Vol. 1, p. 121, 126. Duncan later filed a Motion to Amend its Answer to assert a Third-Party Complaint. A.R. Vol. 1, p. 151. Upon the Court’s granting of that motion, Duncan Homes amended its Answer to include a Third-Party Complaint against Conrad Legal on September 28, 2023. A.R. Vol. 1, p. 157, 164. Duncan’s Third-Party Complaint asserted causes of action for legal malpractice and breach of contract based on Conrad’s alleged failure to identify Nationstar’s predecessor, Bayview, as an entity entitled to receive notice of the 2019 Tax Sale. A.R. Vol. 1, p. 164, 169. The Amended Answer reiterated and reaffirmed Duncan’s Counterclaim as to Nationstar. A.R. Vol. 1, p. 168.

Nationstar then renewed its Motion to Dismiss Duncan’s Amended Counterclaim. A.R. Vol. 1, p. 199. Shortly thereafter, Nationstar substituted itself with the current Plaintiff Petitioner, U.S. Bank Trust National Association, as Trustee of LB-Ranch Series V Trust (“U.S. Bank”). A.R. Vol. 1, p. 209. The Circuit Court then ordered the parties to brief the issues presented in Plaintiff’s Motion to Dismiss Duncan Homes’ Counterclaim by October 31, 2023. A.R. Vol. 1, p. 208.

Third-Party Defendant Conrad Legal filed its Answer to Duncan’s Third-Party Complaint on October 30, 2023. A.R. Vol. 1, p. 211. Conrad Legal identified various affirmative defenses and reserved the right to raise any and all defenses permitted under West Virginia law. A.R. Vol. 1, p. 214.

Upon review of initial dispositive motions filed by the main parties to the case, the Court advised the parties that the Motion to Dismiss would be better served as a Motion for Summary Judgment after the close of Discovery. Pet’r Br. 5.

Plaintiff’s expert disclosure deadline was January 5, 2024. A.R. Vol. 1, p. 197. Defendants were required to disclose their witnesses, if any, on or before February 5, 2024. A.R. Vol. 1, p. 197. Duncan Homes, as the Third-Party Plaintiff, did not identify an expert to support its legal malpractice case against Conrad Legal. A.R. Vol. 1, p. 283-284. Discovery closed on March 22, 2024. A.R. Vol. 1, p. 197. After the close of discovery, the parties filed their respective cross motions for summary judgment. A.R. Vol. 1, p. 236, 283; A.R. Vol. 2, p. 335.

Following Plaintiff-Petitioner’s receipt of the cross motions for summary judgment, Petitioner filed Motions *in Limine* to exclude the Defendant and Third-Party Defendant’s theories of the case that utilized public information. Petitioner argued such evidence was prejudicial and deprived Petitioner of its ability to use discovery to vitiate any contradictory claims. A.R. Vol. 2, p. 559; Pet’r Br. 6. Plaintiff-Petitioner U.S. Bank never made any claim against Conrad Legal nor

did it seek discovery from Conrad in any fashion during the underlying proceedings. A.R. Vol. 2, p. 635-636, 638.

On May 17, 2024, the Circuit Court heard oral arguments from all parties on their cross motions for summary judgment. The Court heard specific arguments related to the title history and the need for expert testimony. A.R. Vol. 2, p. 654. Finding that an additional hearing was necessary, the Court set an additional hearing date for May 30, 2024. At the May 30th hearing, the Circuit Court advised the parties that it would be denying Petitioner's Motion for Summary Judgment. Plaintiff's Motions *in Limine* and Motion to Strike were not argued orally, and the Circuit Court Docket shows that the same were considered moot by the Court and disposed of by separate order. A.R. Vol. 1, p. 8.

On August 23, 2024, the Circuit Court entered an Order granting Third-Party Defendant Conrad Legal's Motion for Summary Judgment on the Third-Party Complaint, granting Defendant Duncan Homes' Motion for Summary Judgment on its Counterclaim, and denying Plaintiff's Motion for Summary Judgment. A.R. Vol. 2, p. 650. In its Order, the Circuit Court found that Plaintiff-Petitioner, as the successor to Associates Financial and Bayview through various assignments in the line of non-marketable title, failed to redeem the underlying Property and "is precluded as a matter of law from contesting the validity of the 2012 Tax Sale and notice to Associates Financial." A.R. Vol. 2, p. 655.

SUMMARY OF ARGUMENT

Petitioner U.S. Bank advances two general arguments in its attempt to reverse the judgment of the Berkely County Circuit Court in favor of Conrad Legal.

Before addressing Petitioner's arguments, however, this Court should affirm the judgment in favor of Respondent Conrad Legal because Petitioner lacks standing to appeal the judgment in favor of Conrad on the Third-Party Complaint.

Regarding Petitioner's arguments, U.S. Bank first argues that undisputed facts exist showing that "Respondent Duncan Homes failed to uphold its statutory constitutional duties as a tax sale purchaser to provide notice to Petitioner's predecessor in title, an interested party of record, at all relevant times, entitled to notice of the tax sale and of its right to redeem." Pet'r Br. 6.

Petitioner, however, is simply wrong as a matter of fact and law. The evidence and statutory authority in West Virginia show the opposite to be true: that Petitioner's predecessor lost any legal interest in the Property when it failed to redeem after notice of a 2012 Tax Sale, thereby extinguishing any entitlement to notice of the 2019 Tax Sale.

In a similar vein, Petitioner next argues that the Circuit Court abused its discretion "regarding admissibility of evidence by permitting Respondents to introduce incurable and highly prejudicial evidence after the close of a 15-month discovery period, despite Petitioner's opposition, which clearly created a genuine issue of material fact and deprived Petitioner of its ability to utilize the discovery period to vitiate any contradictory claims." Pet'r Br. 7.

Once again, Petitioner is mistaken. The simple fact that evidence is averse does not render the material improperly prejudicial. The chain of title documents that support the underlying judgment are public and properly considered by a court at any point in the litigation, whether on a motion for summary judgment or even on a motion to dismiss. Petitioner should have and could have performed a reasonable investigation into the Subject Property's title history at various points in this case. Petitioner also failed to issue any discovery to Conrad Legal during the entirety of the litigation. Now, Petitioner attempts to disguise their failure to undertake a diligent investigation as an underhanded, eleventh-hour submission by Respondents. Such a contention badly misconstrues the facts and does not call into question the Circuit Court's order entering judgment in favor of Conrad Legal.

Finally, Petitioner does not address the other, independent, basis that compelled the Circuit Court to grant judgment in favor of Conrad Legal; the failure of Respondent Duncan Homes to identify an expert to support its legal malpractice and breach of contract claims. This independent basis in support of the judgment in favor of Conrad Legal requires this Court to affirm that judgment.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

If this Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision. Conrad Legal welcomes the opportunity for oral argument.

STANDARD OF REVIEW

Petitioner asks the Intermediate Court of Appeals of West Virginia to review and reverse the Berkeley County Circuit Court's proper grant of summary judgment in favor of Respondents Duncan Homes and Conrad Legal. Petitioner further avers that the Circuit Court erred in denying Petitioner Plaintiff's summary judgment motion.

In West Virginia, a circuit court's entry of summary judgment is reviewed *de novo*. *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). Accordingly, West Virginia's Intermediate Court of Appeals shall apply the same standard as the circuit court when evaluating summary judgment motions. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995); *see Helm v. W. Maryland Ry. Co.*, 838 F.2d 729, 734 (4th Cir. 1988) ("[t]he appellate court, therefore, must reverse the grant of summary judgment if it appears from the record that there is an unresolved issue of material fact). Accordingly, when conducting a *de novo* review, this Court will apply the same "standard for granting summary judgment that a circuit court must apply," and that standard states, "[a] motion for summary judgment should be granted only when

it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” *Whaley v. Hoyer, Hoyer, & Smith, PLLC*, No. 24-ICA-189, 2024 WL 5002535, at *5 (W. Va. Ct. App. Dec. 6, 2024) (citing *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 383, 624 S.E.2d 815, 820 (2005)).

Rule 56(c) of the West Virginia Rules of Civil Procedure outlines the summary judgment standard employed by courts of this state:

(c) Motion and proceedings thereon. - The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

West Virginia’s Supreme Court of Appeals has routinely lauded West Virginia’s Rule 56 of Civil Procedure, noting its “important role in litigation in this State” that is “‘designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,’ if there essentially ‘is no real dispute as to salient facts’ or if it only involves a question of law.” *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995).

Thus, it is appropriate for a circuit court to grant summary judgment where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Painter v. Peavy*, 192 W. Va. 189, 190, 459 S.E.2d 755, 756 (1994). Although “the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must proffer some ‘concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . [its] favor’ or other “significant probative

evidence tending to support the complaint.” *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60, 459 S.E.2d 329, 337 (1995) (inner quotations omitted).

Petitioner also asks the Intermediate Court of Appeals of West Virginia to review and reverse the Berkeley County Circuit Court’s alleged failure to rule on Petitioner’s Motions *in Limine* and Motions to Strike. West Virginia’s Supreme Court of Appeals has repeatedly indicated that “[r]ulings on motions *in limine* lie within the trial court’s discretion.” *McKenzie v. Carroll Int’l Corp.*, 216 W. Va. 686, 692, 610 S.E.2d 341, 347 (2004). The Court’s “function on ... appeal is limited to the inquiry as to whether the trial court acted in a way that was so arbitrary and irrational that it can be said to have abused its discretion.” *Id.* (citing *State v. McGinnis*, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994)).

ARGUMENT

This case arises out of a complicated title history, a 2012 Tax Sale, a 2019 Tax Sale, and two competing lines of title related to residential property located at 264 Dale Earnhardt Lane, Martinsburg, Berkeley County, West Virginia, 25404 (the “Property”). Plaintiff-Petitioner originally filed a Complaint for declaratory judgment and injunctive relief against G. Russell Rollyson Jr. (Deputy Commissioner of Delinquent and non-entered Lands of Berkeley County, West Virginia) and Duncan Homes, LLC. In response, Duncan Homes, LLC (“Duncan Homes” or “Duncan”) filed a Counterclaim against Plaintiff-Respondent requesting that the Court adjudge Duncan as the fee simple and sole owner of the Property. Duncan Homes later filed a Third-Party Complaint against Respondent Conrad Legal asserting legal malpractice and breach of contract for failing to identify Petitioner’s predecessor, Bayview Loan Servicing, LLC (“Bayview”), as an entity entitled to receive notice of the 2019 Tax Sale.

The Circuit Court correctly entered judgment in favor of Respondent Conrad Legal Corporation (“Conrad Legal” or “Conrad”) based on two independent bases for entry of judgment.

First, the Circuit Court held that Conrad did not owe Duncan, nor did they breach, any duty to identify U.S. Bank's predecessor, Bayview, since Bayview was not legally entitled to receive notice of the 2019 Tax Sale. Second, the Circuit Court correctly entered judgment in favor of Conrad Legal based on the need for—and Duncan's failure to provide—expert testimony satisfying Duncan's burden of proof regarding the legal malpractice elements of duty and causation in a case involving complex title histories. West Virginia's Intermediate Court of Appeals should affirm the judgment of the Berkeley County Circuit Court.

I. Petitioner lacks standing to appeal the Circuit Court's Order entering judgment in favor of Conrad Legal, the third-party defendant in the underlying action.

As a threshold matter, Respondent Conrad Legal was solely a third-party defendant in the underlying matter. A.R. vol. 1, p. 169-172. The Third-Party Complaint alleged legal malpractice and breach of contract. A.R. vol. 1, p. 169-172. Petitioner U.S. Bank never named Conrad Legal in its Complaint. A.R. vol. 1, p. 10-16. Nor did Petitioner ever file a crossclaim against Conrad Legal. A.R. vol. 1, p. 10-16. There is and never has been a case or controversy between Petitioner and Conrad Legal.

The judgment in favor of Conrad Legal was entered upon Conrad's motion for summary judgment on the third-party complaint. A.R. vol. 1, p. 283. And in its Final Order of Dismissal, the Court cited two independent bases for entering judgment in favor of Conrad Legal. A.R. Vol. 2, p. 650. Duncan Homes has not appealed (either directly or via a cross-appeal) the judgment in favor of Conrad Legal. As such the judgment in favor of Conrad Legal should be considered final.

“Generally, standing is defined as ‘[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.’” *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 94, 576 S.E.2d 807, 821 (2002) (quoting *Black's Law Dictionary* 1413 (7th ed. 1999)). West Virginia’s “standing inquiry focuses on the appropriateness of a party bringing the questioned controversy to

the court.” *Id.* at 95. The West Virginia Supreme Court of Appeals has frequently and duly upheld the well-recognized premise that:

[s]tanding ... is comprised of three elements: First, the party ... [attempting to establish standing] must have suffered an “injury-in-fact”—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection [between] the injury and the conduct forming the basis of the lawsuit. Third, *it must be likely that the injury will be redressed through a favorable decision of the court.*

Findley v. State Farm Mut. Auto. Ins. Co., 213 W.Va. 80, 94, 576 S.E.2d 807, 821 (2002) (emphasis in original). Here, Petitioner cannot show that Conrad Legal invaded any protected interest that is both concrete and particularized, in addition to actual or imminent. Similarly, there is no causal link between Petitioner’s alleged injury and Conrad Legal’s conduct, *i.e.* the provision of legal services to Defendant-Respondent Duncan Homes. As noted above, Petitioner never filed suit against Conrad Legal nor did it file any crossclaims against Conrad Legal.

Federal courts that have considered whether a plaintiff has standing to appeal the judgment in favor of a third-party defendant have found that no such standing exists. *See Westfield Ins. Co. v. Sistersville Tank Works, Inc.*, No. 20-2052, 2022 WL 16934688, at *1 (4th Cir. Nov. 14, 2022) (Citing authorities and dismissing a plaintiff’s appeal in favor of a third party defendant, stating “This court has yet to address whether a party has standing to appeal part of a judgment to which it is not a party, but other Circuits have found that such standing does not exist. . . .”). This Court should do the same and affirm the judgment in favor of Conrad Legal because Petitioner U.S. Bank lacks standing to appeal the judgment in favor of Conrad on the third-party complaint.

II. The Circuit Court properly entered judgment in favor of Conrad Legal on the third-party claim for legal malpractice and breach of contract because U.S. Bank and its predecessors had no ownership interest in the Property and no right to notice of the 2019 tax sale.

In West Virginia, the essence of the summary judgment inquiry “the court must make is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995). In other words, the circuit court’s function at the summary judgment stage is not “to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249).

The Circuit Court’s analysis regarding chain of title showed no genuine dispute of material fact and yielded only one outcome regarding ownership of the Property and entitlement to notice of the 2019 tax sale in question. Petitioner’s predecessor lost any rights or interest in the Property by failing to redeem after a 2012 tax sale, and therefore had no right to notice of the later 2019 tax sale. This conclusion compelled the Circuit Court to enter judgment in favor of Conrad Legal on the third-party claim for legal malpractice and breach of contract.

a. There was, and still is, no genuine dispute of material fact that Petitioner’s predecessor was not entitled to notice of the 2019 tax sale.

At the time of the 2019 Tax Sale, West Virginia Code Section 11A-3-19, *et seq.*, governed the notice requirements imposed upon buyers purchasing property at a tax sale. A purchaser must, among other things, prepare a list of persons to be served with a notice to redeem the property. This requires a title examination to identify all individuals or entities of record that have an interest in the property. In *Rollyson v. Jordan*, 205 W. Va. 368, 374–75, 518 S.E.2d 372, 378–79 (1999), the West Virginia Supreme Court of Appeals held that:

the persons entitled to notice to redeem in conjunction with a purchaser's application for a tax deed, pursuant to W. Va. Code § 11A-3-19(a)(1) ... are those persons who are permitted to redeem the real property subject to a tax lien or liens, as contemplated by W. Va. Code § 11A-3-23(a) ..., which persons include the owner of such property and any other person who was entitled to pay the taxes thereon.

Individuals or entities that do not have valid title to property at the time of the tax sale are not within the scope of persons entitled to receive notice of the sale. *Harper v. Smith*, 232 W. Va. 655, 659, 753 S.E.2d 612, 616 (2012) (holding that plaintiffs who did not hold title to the property at the time of the tax sale are not within the notice requirements and lacked standing to challenge the tax sale). At the time of the 2019 tax sale, Petitioner's predecessor, Bayview did not have any ownership interest in the Property because its own predecessor, Associates Financial, failed to redeem in connection with 2012 Tax Sale. A.R. vol. 1, p. 305. By failing to redeem within the statutory period, Associates Financial had its lien interest in the Subject Property extinguished as a matter of law. A.R. vol. 1, p. 305.

The next relevant inquiry into whether one is entitled to notice to redeem is centered around one's entitlement to pay taxes on a property. West Virginia Code § 11A-1-9 governs who is entitled to pay taxes on real estate. The statute provides, in pertinent part,

Any owner of real estate whose interest is not subject to separate assessment, or any person having a lien on the land, or on an undivided interest therein, or any other person having an interest in the land, or in an undivided interest therein, which he desires to protect, shall be allowed to pay the whole, but not a part, of the taxes assessed thereon. Any co-owner of real estate whose interest is subject to separate assessment shall be allowed at his election to pay the taxes either on his own interest alone or in addition thereto upon the interest of any or all of his co-owners.

Cogar v. Lafferty, 219 W. Va. 743, 746, 639 S.E.2d 835, 838 (2006). No provision in West Virginia Code § 11A-1-9 applies to Bayview, or Plaintiff-Petitioner U.S. Bank as successor to Bayview, because it did not have any interest in the land. Bayview was not entitled to pay the taxes on the

Property at the time of the 2019 Tax Sale because any former interest or lien on the land that Bayview, through Associates Financial, may have had in the property was extinguished.¹

It is of no consequence that Petitioner's predecessor, Bayview, had purportedly received an assignment and recorded a lien. This was a non-marketable chain of title. West Virginia's Court of Intermediate Appeals has held that, "[a]llowing a tax-delinquent owner to convey their property out from under a tax lien purchaser would only serve to frustrate that system, potentially interjecting a conveyance-receiving interloper into what was otherwise a matter between the property owner, the purchaser, and the state." *Folse v. Rollyson*, 249 W. Va. 389, 396, 895 S.E.2d 244, 251 (Ct. App. 2023). Bayview was, for all intents and purposes, a mere conveyance-receiving interloper who did not obtain legal, marketable title to the Property.

It is important to put this back into perspective regarding the Third-Party Claim. Conrad Legal did not and could not have owed its client, Duncan Homes, a duty to identify Bayview as a party to receive notice of the 2019 tax sale because Bayview was not legally entitled to receive notice. To the same extent, all the entities in the "line of non-marketable title," which includes Associates Financial, CitiFinancial, Bayview, Nationstar, and Petitioner U.S. Bank, lack any enforceable interest in the Property. Conrad Legal, therefore, did not breach a duty or proximately cause any damages.

Conrad Legal accurately identified every individual and entity that was entitled to receive notice of the 2019 Tax Sale. Bayview did not, and never did, have a valid interest in the Property because the interest of its predecessor Associates Financial was extinguished when it failed to

¹ Regarding taxes, Footnote 14 of Petitioner's Brief asks the Court to "take notice" of certain tax payments and that the payments were being applied to the wrong property. *See* Pet'r Br. 14, n.14. This argument, however, is unsupported by any citation to the appendix record on appeal or to relevant case law. Because this argument is devoid of "appropriate and specific citations as contemplated by [rules of appellate procedure]," it should not be considered. *Hupp v. W. Virginia Consol. Pub. Ret. Bd.*, No. 13-0811, 2014 WL 2682677, at *5 (W. Va. June 13, 2014).

redeem after receiving notice of the 2012 Tax Sale. The multiple assignments of Bayview's invalid, non-marketable, "deed" does not regenerate a property interest where none existed.

For these reasons, the Circuit Court properly granted Conrad Legal's Motion for Summary Judgment on the Third-Party Complaint. This Court should affirm.

b. The 2016 Quitclaim Deed from American Pride Properties back to the Property's original owner did not "effectively" rescind the 2012 Tax Sale.

Petitioner argues, but without any support, that a 2016 Quitclaim Deed from American Pride Properties back to Mr. Palmer "effectively" permitted Mr. Palmer to redeem the Property in accordance with the 2012 redemption period. Petitioner also fails to provide any support for its claims that this "effectively" rescinded the 2012 Tax Sale and reinstated the Deed of Trust as a first-lien Deed of Trust. Petitioner is merely manufacturing a narrative with no underlying legal support. West Virginia's Supreme Court of Appeals has held that "[u]nsupported speculation is not sufficient to defeat a summary judgment motion." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995). All the entities in the "line of non-marketable title," to include Associates Financial, CitiFinancial, Bayview, Nationstar, and Plaintiff-Petitioner U.S. Bank, lack any enforceable interest in the Property. Such interest was extinguished, as a simple matter of law, by failure to redeem after the 2012 tax sale. There is no savings provision under West Virginia statutory or case law that changes this legal reality in the manner advanced by Petitioner. In fact, Petitioner's argument ignores and would eviscerate the applicable West Virginia statutory scheme governing tax sales.

Petitioner's predecessor, Bayview, never had a valid interest in the Property because the interest of its predecessor Associates Financial was extinguished when it failed to redeem after receiving notice of the 2012 Tax Sale. The multiple assignments of Bayview's invalid, non-

marketable, “deed of trust” does not regenerate a property interest where none existed. Petitioner U.S. Bank has the same rights in the Property that Bayview did – *none*.

c. Publicly accessible real property records can be considered at any point in litigation. The Circuit Court’s reliance on these documents was therefore proper.

Petitioner argues the Circuit Court abused its discretion by not granting its underlying Motions *in Limine* that sought to exclude all evidence not previously produced in Discovery as unduly prejudicial. Pet’r Br. 17-19. Petitioner further argues the Circuit Court erred in granting Respondents’ respective summary judgment motions based on public real estate records. *Id.* These arguments lack merit for several reasons.

First and foremost, West Virginia’s Supreme Court of Appeals has “said on numerous occasions, [that] all relevant evidence has some prejudicial effect, but Rule 403 grants relief to a party only when unfair prejudice is demonstrated.” *Reed v. Wimmer*, 195 W. Va. 199, 207, 465 S.E.2d 199, 207 (1995). The fact that evidence is adverse to one party’s interests does not automatically render the material prejudicial. Chain of title documents for real property are public records and readily accessible in West Virginia. The documents referenced by Petitioner as “prejudicial” are deeds and assignments of deeds that are public records maintained by the Berkeley County, West Virginia records office. It is well settled in West Virginia that public records may be considered at any stage of the litigation. *E.g. Forshey v. Jackson*, 222 W. Va. 743, 748, 671 S.E.2d 748, 753 (2008).

Second, the West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure “allocate significant discretion to the trial court in making evidentiary and procedural rulings.” *Graham v. Wallace*, 214 W. Va. 178, 183, 588 S.E.2d 167 (2003). Here, the Circuit Court exercised its discretion to consider public documents to rule on the respective summary judgment

motions. The Circuit Court was compelled and constrained by West Virginia laws to hold that there was only one valid, marketable chain of title, which dictated the entities and/or individuals who were entitled to Notice of the 2019 tax sale. Accordingly, the grant of summary judgment was proper since no genuine issue existed for trial.

Third, Conrad Legal timely filed its Pretrial Disclosures in accordance with the Circuit Court's September 29, 2023, Amended Scheduling Order. The Order required parties to file their "Pretrial Disclosures, Voir Dire, Jury Instructions, Witness List, Verdict Form and Motions in Limine on or before May 3, 2024." A.R. vol. 1, p. 197. Conrad timely filed the same on May 3, 2024. A.R. Vol. 2, p. 549. Any representation by the Petitioner that the use of the 2012 Tax Sale records amounted to an "ambush technique" is not credible or realistic. Pet'r Br. 18. Conrad Legal timely filed an Answer to Duncan Homes' Third-Party Complaint, listed its defenses therein, and expressly reserved the right to raise any additional defense in the future. A.R. Vol. 1, p. 214. When it was time to file Pretrial Disclosures, Conrad Legal clearly outlined its intended exhibits. Petitioner was well-aware of the 2012 Tax Sale. Petitioner had the same access to public records that Conrad Legal had. Conrad Legal identified these documents through Pretrial Disclosures, the Joint Pre-Trial Statement, and various instances of motion practice and the responses thereto. A.R. Vol. 2, p. 584, 588-589. Further, a diligent inquiry into title history via a title search would have alerted Petitioner to the same information. It is also critical to note that neither Petitioner nor Respondent Duncan Homes *ever issued any discovery to Conrad Legal* in the underlying proceedings before the Trial Court. A.R. Vol. 2, p. 635-636, 638. As such, the only time Petitioner would have learned of the evidence Conrad Legal intended to use at trial or in support of summary judgment was in Conrad's respective pretrial disclosures and or motion for summary judgment.

Lastly, based on the Circuit Court’s grant of summary judgment in favor of Conrad Legal, Petitioner’s motions *in limine* and motions to strike were moot. A.R. Vol. 1, p. 8. There was nothing “so arbitrary and irrational” about this finding that the Court “can be said to have abused its discretion.” *McKenzie v. Carroll Int’l Corp.*, 216 W. Va. 686, 692, 610 S.E.2d 341, 347 (2004) (citing *State v. McGinnis*, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994)). This Court should accordingly affirm the judgment of the Circuit Court in favor of Conrad Legal.

III. This Court should affirm the judgment in favor of Conrad Legal based on the Circuit Court’s holding, not appealed, that the Third-Party Complaint required expert testimony and no experts were identified.

The Third-Party Complaint against Conrad alleged legal malpractice and breach of contract. A.R. vol. 1, p. 169-172. Under the circumstances of this case and the complex title history at issue, these claims were neither straight forward nor readily understood by ordinary persons without the assistance of an expert to identify the standard of care and evaluate whether that standard has been breached. As such, the Circuit Court granted judgment in favor of Conrad Legal because “establishing the standard of care and breach thereof requires expert testimony under the circumstances of this case . . . [and] Duncan [Homes] failed to identify any expert witnesses to support its Third Party claims against [Conrad Legal].” A.R. Vol. 2, p. 657.

This aspect of the Court’s order granting judgment in favor of Conrad is not addressed in Petitioner’s Brief and therefore is not appealed. This alone requires this Court to affirm the judgment in favor of Conrad Legal. In addition, the holding of the Circuit Court on the need for expert testimony here was undoubtedly correct.

To prove its case for legal malpractice and breach of contract against Conrad Legal, Duncan Homes was required to establish an applicable standard of care. In the case at bar, Duncan Homes was required to establish what a reasonably prudent attorney in the same position of Conrad Legal

would have done under similar circumstances. Stated another way, even if U.S. Bank's predecessor, Bayview, had a valid interest in the Property at the time of the 2019 Tax Sale, which it did not, Duncan Homes needed to show that a reasonably prudent attorney would have identified Bayview as having an interest in the Property *despite* the fact that Bayview's predecessor, Associates Financial, failed to redeem after the 2012 Tax Sale, facially extinguishing any interest in the Property under Associates Financial's lien and the subsequent assignments of that lien. Under these circumstances, the standard of care is not intuitive and requires expert testimony. West Virginia law has long recognized the "necessity of expert testimony in professional malpractice cases, and the well-settled exception to the rule that if the lack of professional skill *is obvious*, expert testimony is not needed." *Scotchel v. Fluharty*, No. 20-0635, 2022 WL 3905940, at *6 (W. Va. Aug. 30, 2022) (emphasis added) citing *First Nat'l Bank of Bluefield v. Crawford*, 182 W. Va. 107, 111 n.9 (1989).²

A December 2024 decision from the West Virginia Intermediate Court of Appeals is also instructive on the issue of expert testimony in legal malpractice claims. In *Whaley v. Hoyer, Hoyer, & Smith, PLLC*, No. 24-ICA-189, 2024 WL 5002535, at *5 (W. Va. Ct. App. Dec. 6, 2024), this Court evaluated, in part, whether the circuit court properly entered summary judgment in favor of the defendant attorneys. There, the circuit court based its summary judgment ruling in favor of the defendant attorneys "on its finding that the common knowledge exception did not apply, and that the nature of his legal malpractice claim required the opinion of an expert witness." *Id.* The *Whaley* Court found "no error in the circuit court's entry of summary judgment" and concluded that the "circuit court acted within its sound discretion when it determined that [Plaintiff Petitioner] Dr.

² See A.R. Vol. 1, p. 328-334 for a copy of *Scotchel v. Fluharty*.

Whaley was required to produce expert testimony to support his claim for legal malpractice.” *Id.* at *5-6.

The same principles applied to the legal malpractice and breach of contract claims asserted against Conrad Legal. The failure of Duncan Homes to identify an expert in support of these claims compelled the Circuit Court to grant judgment in favor of Conrad Legal. This conclusion was both correct and a fully independent basis for judgment in favor of Conrad Legal. Because this basis for the judgment is not appealed or otherwise addressed in the Petitioner’s Brief, this Court should affirm the judgment in favor of Conrad Legal.

CONCLUSION

For all the reasons stated above, the Berkeley County Circuit Court acted appropriately and within its discretion when it granted summary judgment in favor of Conrad Legal. Under the Circumstances, Respondent lacks standing to appeal the judgment in favor of Conrad Legal, and even if there is standing, this Court should affirm.

Respectfully submitted,

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IN THE
INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Case No. 24-ICA-398

**U.S. BANK TRUST NATIONAL ASSOCIATION AS TRUSTEE OF LB-
RANCH SERIES V TRUST**

Plaintiff Below, Petitioner,

v.

DUNCAN HOMES, LLC

*Defendant/Third Party Plaintiff Below,
Respondent*

AND

CONRAD LEGAL CORPORATION

*Third Party Defendant Below,
Respondent*

CERTIFICATE OF SERVICE

I, the undersigned, counsel for Conrad Legal Corporation, hereby certify that on this 23rd day of December, 2024, I caused a true and accurate copy of the foregoing **Respondent Conrad Legal Corporation's Brief** to be served on counsel of record via File and Serve Xpress, which will provide notice of the same to the following parties:

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