

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 35438

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FREDERICK MANAGEMENT COMPANY, LLC (formerly the St. James Management Co.),  
Plaintiff Below, Appellant

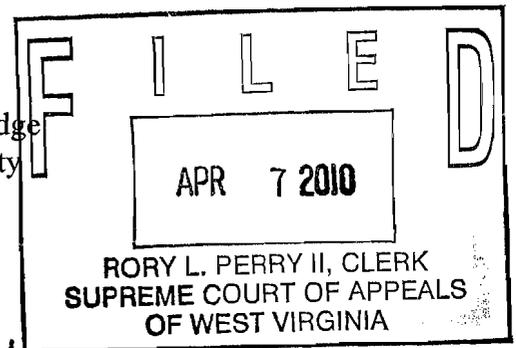
vs.

CITY NATIONAL BANK OF WEST VIRGINIA, a national banking  
association, Defendant Below, Appellee

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Honorable F. Jane Hustead, Judge  
Circuit Court of Cabell County  
Civil Action No. 04-C-323

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

The simple claim asserted by Appellant which is the subject of the appeal at bar is that City National Bank of West Virginia (hereinafter sometimes referred to as “City,” “City National,” or “Appellee”) breached a contract with Frederick Management Company, LLC<sup>1</sup> (hereinafter referred to as “St. James” or “Appellant”) which caused St. James to sustain damages and that, accordingly, St. James has the right under our system of jurisprudence to present its contract case to a jury.

The response brief of the Appellee does not refute that a meeting took place on April 25, 2000, in the Bobby Pruett Steakhouse in Huntington, West Virginia which was attended by agents of St. James and City who were vested with the authority to legally bind each of these two parties regarding City’s renewal of its lease with St. James for its banking facilities located in downtown Huntington (hereinafter sometimes referred to as the “Lease” or “Prime Lease”). Those agents were John Hankins and Fred Davis who represented St. James and Matt Call, Larry Dawson and Robert “Bob” Hardwick who represented City. The banking facilities referenced in the Prime Lease included the ground floor and Mezzanine of the “main banking facility” located on the corner of Fourth Avenue and Tenth Street and the “drive-thru banking facility” located on a nearby parcel situated close to the intersection of Fifth Avenue and Tenth Street.

Likewise, the response brief does not deny that at this dinner meeting City informed St. James that it was not renewing the Prime Lease when the time for such renewal matured by the terms of the Lease on November 1, 2000. City also announced that its non-renewal was

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<sup>1</sup> Appellee’s response brief repetitively refers to Frederick Management Company, LLC as “St. James.” The St. James Management Company is the predecessor company and named party in the underlying Frazier litigation. For the reader’s convenience, the reply brief will refer to the Appellant herein as the “St. James.”

attributable to its desire to vacate the premises specified in the Prime Lease and relocate in an alternate location. City also offered to be St. James' tenant in the drive-thru facility if St. James had no alternative tenant for the drive-thru space. St. James responded to City's proposals by accepting verbal notice of City's non-renewal and accepting City as its tenant for the drive-thru facility exclusively.

Further, the response brief does not deny that the terms of the Prime Lease between City and St. James contained a provision which required City to notify St. James in writing of any termination or non-renewal of the leasehold 60 days before the lease renewal date of November 1, 2000. Accordingly, the date for St. James' receipt of City's written notice of non-renewal was, at the latest, August 31, 2000.

The response brief also does not deny that on the night of April 25, 2000, and thereafter Frazier occupied the Mezzanine of St. James' Building for purposes of its law practice and for use by officers of the bank and their customers when facilities such as the firm's conference room were needed to conduct the bank's business. Such Mezzanine space was occupied by Frazier pursuant to a sublease with City and City did not notify St. James of the existence of such sublease anytime between the day when the contract herein was formed at the April 25th dinner meeting and the August 31, 2000 notice of termination date.

Additionally, the response brief does not deny that during this above-identified 120-day period City did nothing to notify its subtenant, Frazier, that City had noticed St. James that the Prime Lease would not be renewed.

Also, the response brief does not refute that on September 27, 2000, St. James and City memorialized the contract which was formed on April 25th by executing a written document entitled Lease Termination Agreement (hereinafter referred to as “LTA”).

Finally, the response brief does not contest the fact that City departed the ground floor of St. James’ banking building on or before October 31, 2000, and relocated its bank in an alternative location of City’s choice in another part of Huntington or that Frazier did not and has not since vacated the Mezzanine premises.

Accordingly, the response brief of Appellee neither sets forth any facts nor asserts any contentions regarding St. James’ breach of contract claim against City which refutes St. James’ claim that the LTA was lawfully formed and that such agreement contains the requisite elements for a jury to determine whether or not such contract was breached by City’s actions and, if so, to award St. James the appropriate compensation for its measurable damages.

However, Appellee’s response brief does establish, beyond question, that a plethora of contested facts exist in this matter between City and St. James which are ripe for jury deliberation. In fact, the response brief may be generally characterized as the typical defense oriented shotgun blast used to fill the air with abundant facts and case law in an attempt to confuse issues and obfuscate the outcome. In the interest of time, Appellant will not attempt to identify and refute all of the response brief’s factual representations, however, for purposes of this Introduction, two important themes which the response brief develops regarding the breach of contract claim will be briefly discussed to reveal the fact that general issues of material fact are extant and must be adjudicated under our system by the trier of fact.

The first theme which Appellee attempts to develop is the notion that City's agents, Mr. Call and Mr. Hardwick, recanted their Affidavits in their depositions and that such testimony calls into question their belief that the Mezzanine was part of the premises which City was vacating. More specifically, in footnote 5 of the response brief, Appellee contends that affidavits of two (2) critical witnesses should be ignored because the witnesses repudiated the same during their respective depositions. While City has cleverly attempted to meld multiple sections of the witnesses' deposition testimony to give an appearance of a repudiation by the witnesses, analysis of the entirety of their testimony reveals that Mr. Hardwick's and Mr. Call's deposition transcripts, in fact, affirm their Affidavit testimony. The suggestion of recanted testimony by these witnesses misrepresents facts as they appear in the record herein.

Upon a reading of the entirety of Mr. Hardwick's deposition, it cannot be disputed that he stood behind the testimony in his affidavit that "[a]lthough the law firm of Frazier & Oxley continued to occupy the Mezzanine, it was my understanding that City National Bank was obligated to transfer to St. James Management Company the legal right to possession of all of the premises within the St. James Building on October 31, 2000." For instance, in his deposition, Mr. Hardwick testified as follows:

- Q. Am I correct that at that time you hadn't really given it thought about whether or not these agreements had any effect on Frazier & Oxley's occupancy?
- A. No, I didn't. I did not. It wasn't part of my thought process. **However, I was – I will say that I was – I thought that the entire bank facility at the downtown location was bank facility and that there was – the board room upstairs, which we used on a regular basis for board activity, and I used for spreadsheet loan committee meetings and whatnot, was part of the**

**bank. So I assumed all along that the mezzanine, the basement, and the whole operation was part of the bank.**

*See*, Exhibit A (emphasis added). Thus, while Mr. Hardwick may not have considered the impact the LTA would have on the law firm of Frazier & Oxley, L.C., it is equally clear that Mr. Hardwick believed City had the obligation to give up possession of the “main bank” which included the Mezzanine.

During his deposition, Matthew Call does state that, if he had the ability to go back to the time of the executing the Affidavit, he would have requested that the last two (2) sentences of paragraph 12 be removed from it. Mr. Call, however, did not disavow the truth of the last two (2) sentences of paragraph 12 of his Affidavit as suggested by City. To the contrary, Mr. Call affirmed the truth of the entirety of his Affidavit when asked direct questions about the same.

For instance, Mr. Call testified to the following:

- Q. You just testified to Ancil’s question about Paragraph 12 that the last sentence of your affidavit is one that you’d like to delete. Yet in response to Mr. Scarr’s question, you did not rescind the substance of your answer; that is to say, if you’ll recall, common sense should be the guide.
- A. Right. But I also think he asked me if I was trying to render a legal opinion. And if it’s viewed that I’m trying to – that I, Matt Call, is trying to render a legal opinion, I’m certainly not. But, again, I’ll make the statement again, its common sense if you don’t renew your lease and you have no intentions of coming back, then you leave.
- Q. So –
- A. So that would mean from a layman, not a lawyer, that I vacate the premises that is under the terms of the lease.

Q. **So you'd like to take away the sentence, but you don't take away the concept?**

A. **Yeah, and I think I've said that. But, yes.**

\* \* \*

Q. The question I'm asking you is the affidavit which you signed –

A. Okay, yeah.

Q. – is in the main **a fair and honest representation of your testimony about the matters that are in dispute in this case?**

A. **In general terms, yes.**

See, Exhibit B (emphasis added). Thus, while Mr. Call may have expressed a desire not to have executed an Affidavit which contained the last sentences of Paragraph 12 because he landed directly in the middle of a dispute between St. James and his former employer, he never recanted his testimony. Accordingly, St. James presented the Trial Court with evidence that the “main banking facility” as contemplated in the LTA included the Mezzanine. Summary judgment was therefore inappropriate because, at a minimum, genuine issues of material fact exist with regard to whether the “main banking facility” as used in the LTA included the Mezzanine or not.

The second theme which the response brief attempts to develop as an uncontested fact is that St. James' President, John Hankins, knew about the existence of the sublease between City and Frazier in 2000. However, the first problem with Appellee's attempt on this point is Mr. Hankins' categorical denial that he knew about the existence of that sublease in 2000 and his testimony that he learned about it for the first time several years later in the discovery for the

underlying Frazier litigation. *See*, Exhibit C. Such evidence alone establishes a credibility issue for a jury.

Secondly, the response brief uses the circumstantial evidence of St. James' interaction with potential tenants for the ground floor of the bank to buttress its theory that Mr. Hankins knew about the Frazier sublease. In a mailing of floor plans for the ground floor to prospective tenant Merrill Lynch in 2000, and before the then current term of the Prime Lease expired, Appellee asserts that no plans were included in such mailing for the Mezzanine. The response brief then bootstraps other related correspondence regarding the Merrill Lynch plans by referencing excerpts which refer to Frazier's continued presence in the Mezzanine. These references are used to infer that St. James knew about the Frazier sublease. However, all such circumstantial evidence overlooks two important realities for St. James during the summer of 2000. First, tenants for commercial space in downtown Huntington were a precious commodity and, if Frazier were willing to pay St. James a fair market rent for Frazier's use of the Mezzanine, St. James did not want to lose such a prospect. Further, and as Mr. Hankins testified in his deposition, the negotiation of a "new lease for Frazier for the Mezzanine" does not mean that Mr. Hankins was aware that Frazier was currently a tenant in the premises pursuant to a sublease with City. *See, Id.* Finally, Mr. Hankins testified that when approaching a prospective tenant, his discussion would involve the entire banking facility, including the Mezzanine, if the potential tenant were interested in that much space. *See, Id.*

Therefore, the record reveals considerable contested facts on the issue of what St. James knew about the sublease and when they knew it. The jury is the appropriate repository for all credibility issues. In the final analysis, this appeal is focused on allowing Appellant the

opportunity to present this question to a Cabell County jury: Did the phrase “main banking facility” as it appears in the LTA include the Mezzanine of St. James’ building?

## II. DISCUSSION OF LAW

### A. Issues of Collateral Estoppel and Impossibility of Performance

In its response brief, Appellee asserts that summary judgment was properly granted, in its favor, by the Trial Court because: (1) the doctrine of collateral estoppel required that result; (2) it was impossible for City to comply with the LTA due to Judge Pancake’s decision that the Prime Lease had been surrendered to the detriment of Frazier & Oxley, L.C.; and, (3) the parties cannot be returned to their pre-contract status because St. James no longer owns the St. James Building. As will be demonstrated in turn below, each of the Appellee’s arguments is flawed and does not provide a basis for upholding the summary judgment awarded by the tribunal below.

#### 1. The Issue of Collateral Estoppel

Appellee asserts that the Trial Court correctly held that St. James “was precluded from relitigating the issue of whether or not a surrender of the prime lease occurred and that the sublease survived the LTA.” Appellant concedes, as it has before, that it cannot relitigate the issue of surrender because of the doctrine of collateral estoppel.<sup>2</sup> However, surrender is not the issue being litigated by St. James against City in this action. The Complaint herein does not even

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<sup>2</sup> This Court has stated that the doctrine of collateral estoppel applies if and only if four (4) conditions are satisfied: (1) the issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and, (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *See generally, Holloman v. Nationwide Mut. Ins. Co.*, 617 S.E.2d 816 (2005)(citing Syl. Pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)). While Appellant admits that three (3) of the elements stated above are met, the lower court erred in ruling that the issue presented in the case *sub judice* is identical to the issue decided by Judge Pancake in the eviction litigation against the law firm of Frazier & Oxley, L.C.

raise the issue of whether or not a surrender of the St. James/City Prime Lease occurred. Rather, Appellant's Complaint in the case at bar asserts an entirely different cause of action against City – a breach of the LTA.

Nothing in *Frazier I*, *Frazier II*,<sup>3</sup> or the Judgment Order for the underlying action between St. James and the Frazier law firm ("Frazier") provides that St. James was or is forever barred from filing a breach of contract action against City. In fact, the current breach of contract claim asserted by St. James in the instant case was expressly carved out of the *Frazier II* decision which focused solely on the surrender issue pending between St. James and Frazier. In footnote 17 of *Frazier II*, this Court observed: "[b]ecause we grant the writ of prohibition requested by Frazier & Oxley, **we need not consider issuing a separate writ on behalf of City National as City National is a party of this litigation only as a result of the now prohibited amended complaint.**" *Id.* (emphasis added). The response brief does not address this important point at all. Under footnote 17, if City is expressly removed from all of the considerations in *Frazier II*, then also removed from the reach of the *Frazier II* decision is St. James' claim that City breached the LTA. The estoppel issue simply has no bearing on the breach of contract claims against City asserted herein.

## 2. The issue of impossibility of performance

Appellee takes the position in its response brief that the Trial Court correctly ruled on the doctrine of impossibility of performance: it was determined to be a valid defense to St. James'

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<sup>3</sup> As this Court stated in *Frazier II*, the sole issue to be determined in St. James's case against the law firm of Frazier & Oxley, L.C. was "whether a surrender of the prime lease occurred." *See, State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728 (2003).

breach of contract claim.<sup>4</sup> In short, the Trial Court ruled that City could not have performed the task of removing Frazier because, through its execution of the LTA, City surrendered the Prime Lease to Frazier's detriment and, in so doing, rendered City's ability to remove Frazier & Oxley, L.C. from the premises an impossibility. In truth, however, City's argument before this Court as well as the Trial Court's ruling below ignores a clear mandate of this Court. In *Waddy v. Riggleman, et al.*, 216 W. Va. 250, 606 S.E.2d 222 (2004), this Court found that, before the doctrine of impossibility of performance can justify failure to comply with a contract's terms, it must be demonstrated that the impossibility "resulted without the fault of the party seeking to be excused." *Id.* at p. 233.

If the Trial Court had analyzed whether City is "without fault" when rendering its decision, it would have found the doctrine of impossibility of performance to be inapplicable. The LTA was in reality a memorialization of the agreement which City and St. James made on April 25, 2000, when these two (2) parties met at the Bobby Pruett Steakhouse. At that meeting, City announced its intention not to renew the Prime Lease and St. James agreed to allow City out of the Prime Lease while possibly obtaining a new lease for the drive-thru facility. In other words, in agreeing to accept City's proposal for a new freestanding drive-thru banking facility lease, consideration for the LTA was created. Thus, City's contractual obligations under the LTA to return the "main banking facility" to St. James were created at the April 25, 2000 meeting.

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<sup>4</sup> Footnote 30 on page 24 of the response brief also asserts that "St. James 'effectively' concedes the issue of impossibility." St. James did not previously concede to the impossibility argument in its brief or otherwise. All Appellant was doing on page 23 of its brief was quoting the errant content of the Trial Court's Order.

Under the Prime Lease, it was City that had the duty to provide written notice of its intent to non-renew on or before August 31, 2000. Therefore, between the April 25 meeting and the Prime Lease's notice of termination date of August 31, 2000, it was always possible for City to perform its obligation under the LTA. City could have simply provided written notice of its intent not to renew before August 31, 2000 thereby complying with the Prime Lease and eliminating any argument by the law firm of Frazier & Oxley, L.C. regarding surrender. Alternatively, City could have notified Frazier & Oxley, L.C. of the non-renewal of the LTA and its intent to enforce an agreement between City and Frazier & Oxley, L.C. which stated that the term of the sub-lease would be concurrent with the term of the Prime Lease and that the sub-lease would expire upon the expiration or termination of the Prime Lease. Rather than complete either one of these simple tasks, City failed to take any action during the approximately four (4) month time period it had to secure Frazier & Oxley's exit from the Mezzanine of the St. James Building.

Under the *Waddy* decision, the doctrine of impossibility of performance should not apply to this case because City was not "without fault" in creating the impossibility herein. The response brief does not provide any evidence which negates the fact that City did nothing in its performance of this contract to comply with the Prime Lease and ensure that the Mezzanine level was vacated by Frazier. It simply chose not to do so. The Trial Court's reward to City for failing to take any appropriate action during an approximate 120 day period should be reversed.

3. **The issue of returning part of the consideration given by St. James for the LTA due to impossibility of performance**

The Appellant's brief takes the position that, even if the doctrine of impossibility of performance applies herein, the Trial Court was obligated under West Virginia law to allow St. James to receive back from City the value of the consideration given for the "illegal or impossible" portion of the contract. In response, City argues that St. James' position on this point cannot be accepted by this Court because such argument was never presented to the Trial Court in the proceeding below. To wit: "this Court will search the record in vain for any assertion by St. James in the proceedings before Judge Hustead." Despite City's representations to the contrary, St. James did in fact present the same argument to Judge Hustead for consideration. As reflected in the transcript of the hearing regarding City's *Motion for Summary Judgment*, St. James' counsel argued:

the important point I want to make to the Court is the second Syllabus Point of the case,<sup>5</sup> and I read it:

But in such case where one party has paid the full consideration for the contract, in accordance with its terms, and the party has not performed, or has only partially performed, the party so performing will be entitled to recover back the consideration paid by him, or its value, *pro tanto*, as the failure to perform by the other party may be either **total or partial**.

*See*, Exhibit D (emphasis added). Thus, St. James undoubtedly argued that, even if the doctrine of impossibility of performance applies, it is to receive back from City the value of the consideration given for the "illegal or impossible" portion of the contract. The representation in

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<sup>5</sup> *Bell v. Kanawha Traction & Elec. Co.*, 83 W. Va. 640, 98 S.E. 885 (1919)

the response brief to this Court that Judge Hustead was not presented with this issue below is, therefore, wholly inaccurate.

The response brief also argues that St. James is not entitled to receive back any portion of its consideration for the LTA because, “if St. James prevails on this theory . . . City would be entitled to be returned to its pre-LTA position, i.e., occupancy of both the main banking facility, under the terms of the existing lease, and landlord to Frazier & Oxley, which is obviously and patently unworkable, particularly considering that St. James no longer owns the building.” City’s argument on this point is flawed, however, because it ignores both the law and the facts of record.

The unambiguous language of *Wysong v. Board of Ed.*, 86 W. Va. 57, 102 S.E. 733 (1920) which quotes a 1919 decision of this Court, *Bell v. Kanawha Traction & Elec. Co.*, 83 W. Va. 640, 98 S.E. 885 (1919), provides that failure to perform may be “**total or partial.**” Logic dictates, therefore, that if there is a total failure to satisfy one’s contractual obligations due to impossibility of performance, all of the consideration given is to be returned. In other words, the parties are to be fully returned to their pre-contract status. Alternatively, where a party completes a portion of the contract and another portion cannot be completed due to an impossibility, the consideration given for that portion of the contract which cannot be performed is the consideration that must be returned to the performing party by the party who could not complete that portion of the contract.

Moreover, the response brief does not address the fact that it is currently undisputed that City received the full benefit of its bargain under the LTA from St. James. City vacated the St. James Building by November 1, 2000 as was its desire when forming the LTA. City also

achieved its goal of obtaining a new lease for the drive-thru banking facility. The object of the LTA therefore fulfilled One Hundred Percent (100%) of City's expectations. St. James, on other hand, did not receive the full benefit of its bargain. The operation of the LTA only achieved approximately Seventy Percent (70%) of its expectations because on November 1, 2000, Frazier still occupied Four Thousand (4,000) square feet of the banking premises. When entering into the LTA with City, St. James believed it was receiving the "main banking facility" from City and that the "main banking facility" was comprised of not only the ground floor of the St. James Building, but the Mezzanine as well. Under the plain language of Syllabus Point 2 of *Bell*, St. James is therefore entitled to receive that portion of its unrealized bargain back from City. As succinctly stated by St. James' counsel to the Trial Court at the summary judgment hearing, "[t]he only way to enforce the law of West Virginia is to give this case to the jury and let the jury decide how much St. James is entitled to in damages based on what actually happened in this case." *See*, Exhibit D.

**B. Issue of an ambiguity within the language of the LTA**

The Trial Court below held that the references to a "certain banking facility" and a "main banking facility" in the LTA created an ambiguity in the agreement between the parties and that the existence of this ambiguity must be resolved against St. James. Such construction, according to the Trial Court, negated any contractual obligation requiring City to deliver the Mezzanine to St. James when City vacated the premises. Appellant contends that such decision constitutes an error.

Appellant's brief acknowledged that the Trial Court could consider the use of seemingly contradictory phrases "certain banking facility" versus "main banking facility" in the same

document as an ambiguity. Appellant also recognized that West Virginia case law contains authority for the proposition that ambiguous language is generally to be construed against the drafter. However, Appellant's brief also argued that such construction is not appropriate in this case because of the following factors:

1. The LTA is not a contract of adhesion. Unlike contracts of adhesion, which is the context in which the general above-stated rule operates, the LTA was a real estate contract between two parties of equal bargaining positions, one a wholly owned publicly traded banking corporation that is routinely involved in real estate contracts and the other a commercial landlord and relator. Additionally, both entities had lawyers involved in the drafting/editing of the LTA.
2. Legal authority exists in West Virginia under *Hays and Co. v. Hays*, 186 W. Va. 153, 411 S.E.2d 478 (1991) and its related chain of cases for the proposition that when faced with phrases of ambiguity in a contract, a trial court should consider the parole evidence surrounding such ambiguity to resolve any confusion created by the ambiguous language at issue.
3. In the case at bar, the deposition testimony of Appellee's agents Call and Hardwick affirms that the LTA was executed with the understanding that both of the above stated phrases carried a single message: City National's non-renewal of the Lease included the Mezzanine and, upon City's departure, St. James could possess both the Mezzanine and the ground floor of the bank.
4. Further evidence that Appellee was absolutely aware that the Mezzanine was included in the LTA appears nine (9) months later in the form of a letter to Frazier from City's in house general counsel, John Alderman. That letter contains written notice to Frazier that the lease termination in question was applicable to all the premises which the bank previously leased, including the Mezzanine.
5. Contemporaneous with the signing of the LTA was the execution of a second lease for the drive-thru facility. Since there was no reference made to the Mezzanine in the second lease, that component of the leasehold had to be involved in the LTA's phrase "main banking facility" despite any ambiguity in the contract to the contrary.

Accordingly, on the authority of the *Hays* decision and the five factors identified above, Appellant continues to assert that it was error for the Court below to construe the ambiguity against St. James and dismiss its contract claim.

The response brief does nothing to challenge Appellant's position on this point. It only addresses three (3) ambiguity issues. It identifies, at great length, the nature of the ambiguity regarding the two (2) phrases identified above. It cites cases for the general proposition that determining the existence of an ambiguity is within the province of the trial judge and not the jury. It quotes the case of *Nisbet v. Watson*, 162 W. Va. 522, 251 S.E.2d 774 (1979) as authority for generally construing a contractual ambiguity against its author. However, the response brief does not address the more complicated points of contract law at issue here. First, the response brief does not discuss, much less distinguish the *Hays* case. Second, the response brief does not include any rebuttal of the parole evidence facts contained in the record and discussed in detail by Appellant in its brief. In short, the "response" of Appellee which is set forth in its response brief on the issue of ambiguous construction is no response at all to Appellant's position.

Finally, the response brief ends its discussion of the construction ambiguity issue on a curious note. It asserts that the reason the LTA contains an ambiguity is because St. James and its President, John Hankins, considered the Mezzanine to be a separate issue from the "main banking" facility. As "evidence" for this assertion, the Response Brief identifies six (6) conclusory assertions in a string cite. In truth, none of these points are grounds upon which a dispositive motion should be granted under Rule 56 of the Rules of Civil Procedure because of the existence of conflicting parole evidence. Each of these six (6) facts are disputed and, as such,

constitute a jury issue to be considered by the trier of fact. Appellee's six (6) points only achieve meaning for this litigation in the context of parole evidence.

**C. Issue of a Mutual Mistake of Law**

Assignment of Error No. 6 advanced by Appellant herein asserts that both parties, at all material times, acted under a mutual mistake of law which had a substantial negative impact on their performance under the LTA and resulted in measurable damage to St. James. Simply stated, that mistake was over the substantive landlord tenant law in West Virginia. Both parties wrongly assumed that the law never awarded a sub-tenant any right or opportunity which could become greater than those rights and opportunities of the tenant under a lease. Moreover, City assumed Frazier would be required to vacate the premises upon City's departure from the St. James Building because of an agreement between City and Frazier which called for the term of the sub-lease to be concurrent with the term of the Prime Lease and that the sub-lease would expire upon the expiration or term of the Prime Lease. Therefore, the parties believed that, when they agreed to not renew the Prime Lease, Frazier was legally bound by the actions of City.

By the time the parties learned in the holding of *Frazier I* that they were both wrong in this assumption in the context of a surrender, City had vacated the premises and St. James had sustained significant damages. The six (6) pages in the response brief which discuss the mistake of law issue misses the point of Appellant's Assignment of Error Number 6 and warrants a reply from Appellant on three (3) separate levels of analysis.

The first such misfire occurs with Appellee's misrepresentation that St. James's withdrawal of the second count in the Complaint regarding City's alleged concealment of its sublease with the Frazier law firm was, in essence, the withdrawal of a mistake of fact claim. To

the contrary, the original claim comprising the second count of the Complaint was that City had fraudulently concealed from St. James the existence of a sublease between City and Frazier. Such concealment was an extraordinarily important fact to St. James because had the landlord known about the existence of a written sublease at any material time before the Lease notification period expired, it would have changed its entire course of conduct regarding notice of the non-renewal. Actually, the reason St. James dropped the fraud claim is because such litigation may have encountered statute of limitations problems and, more importantly, carried heightened proof requirements which St. James did not believe it could ultimately meet at trial.

Accordingly, the response brief is just wrong when it characterizes the withdrawal of this fraud claim as the withdrawal of a mistake of fact claim and then states that, “. . . here St. James knew about the occupancy of Frazier and Oxley in the mezzanine, but failed to make the required inquiry or to make express provision for same in the LTA.” City’s proffer in this regard twists beyond recognition the salient facts of this case. For example, under Article XII of the Lease, it was City’s exclusive option to notify St. James if City wanted to terminate the leasehold. Further, only City knew about the existence of the Frazier sublease at the time it decided to terminate the Lease and at all material times thereafter. St. James was never mistaken about either of those facts and it certainly never considered them in its decision to withdraw the fraud claim.

Second, Appellee’s use of Syllabus Point 2 in *Ryan v. Ryan*, 220 W. Va. 1, 640 S.E.2d 64 (2006) to assert that St. James’ claim of mistake of law in this case has no legal basis is also erroneous. In fact, *Ryan* may be relied on by Appellant as support for its claim of applicability on the mistake of law point. City and St. James entered into the LTA with the common

misunderstanding that the rights of a sub-tenant in West Virginia never rose to any level which were substantially greater than those of a tenant. City knew at the time it executed the LTA that the Frazier law firm was its sub-tenant under the terms of a written sub-lease. City also assumed that, despite such sub-tenancy, it could bind Frazier to a surrender of the sub-tenant's rights. Conversely, St. James had no knowledge of that fact, as no evidence of such sub-lease had ever been presented either directly or indirectly to it. Therefore, there was no common ground between the parties on the existence of a sub-lease. Yet, while the parties' knowledge of Frazier's legal status may have differed, both parties mutually believed that under West Virginia law whatever Frazier's legal status was, the law firm's rights were always subordinate to City's rights under the prime Lease. In other words, regardless of the nature action which the landlord and tenant took on the Prime Lease, be it a non-renewal, a termination or a surrender, the two parties to the Prime Lease mutually believed that the sub-tenant was bound and controlled by the substance of tenant/landlord interaction. Accordingly, when their mutual mistake regarding Frazier's rights as a sub-tenant were determined by this Court to be greater than City's rights as a tenant, neither party could fully perform under the LTA. Their mutual mistake of law regarding the consequences of surrendering a lease to a sub-tenant's detriment occurred in real time in this case. That is to say that, during the time between the formation of the contract not to renew the Prime Lease at the April, 2000 steakhouse dinner meeting and the time the contact was memorialized in writing on September, 27, 2000, the mutual mistake of law shared by the parties was neither one of conjecture nor future speculation. The mandate of contemporaneousness required the Ryan decision is, therefore, met in the instant facts.

The third glaring mistake revealed in Appellee's response brief on the mistake of law issue is seen in its incorrect identification of the actual mistake of law. The response brief states that the mistake was over the issue of whether or not City would be able to surrender the Mezzanine at the time it vacated the ground floor. However, the misstep of St. James and City in using the word "surrender" in the LTA did not become apparent to the parties at this point in their interaction. *Frazier I* had not been handed down yet. Rather, the actual mutual mistake of law which Appellant asserts herein as an assignment of error was whether or not City's right to terminate the lease for whatever reason was absolute for Frazier. At all material times herein, both parties believed that it was as a matter of law. What both parties learned when *Frazier I* was handed down was that they could not surrender Frazier's sub-leasehold to Frazier's detriment and that they were barred, as a matter of law in West Virginia, from doing so.

The Response Brief devotes six (6) pages to a rejection of the applicability of the mistake of law doctrine in this case on the grounds the issue of surrender was never discussed by the parties in the making of their termination contract. According to the response brief, since surrender was never even contemplated by St. James and City, the mutual mistake of law doctrine must be dismissed. If the Appellant's mistake of law analysis actually turned on the discussion of the surrender issue, Appellee would be correct. However, the surrender analysis has no role in consideration of the actual mistake of law which existed at the time the contract herein was formed in April, 2000, or during the time the contract was performed over the next six (6) months or at the time the contract was memorialized on September 27, 2000. The misunderstanding of the law which Appellant advocated to the Trial Court involved the parties' mutually shared misunderstanding of the law governing the tenant/subtenant relationship. St.

James and City both assumed that the rights of the sub-tenant never rose above those of the tenant and if the tenant gave notice of its intent to not renew a lease despite the term of that non-renewal, the subtenant was absolutely bound by such action. If such non-renewal were achieved by a document which characterized the non-renewal as a surrender of the lease, the use of that term was unimportant to St. James and City. The concept of a surrender only became important when the Court identified the actual governing law of surrender in the *Frazier I* decision.

In the context of this mutual mistake of law, Appellant offers *Brandon v. Riffle*, 197 W. Va. 97, 475 S.E.2d 97 (1996) as legal authority which instructs circuit courts in West Virginia on the process which is to be followed when a mutual mistake of law arises in a contracts case. The trial court is to treat a mutual mistake of law as a mistake of fact and allow the parties to “take it back” to their respective positions before the contract was formed. Allowing the parties to return to their “pre-contract status” would have been the correct action for the trial court below to have taken. Since St. James no longer owns the building where the Fifth Third Bank is currently located, the appropriate resolution for the amount of damages St. James should be paid by City is for the jury to determine. It was error, therefore, for the tribunal below to refuse to do so.

**D. Issue of *Res Judicata***

City also contends the response brief that the Trial Court’s Order granting summary judgment in its favor was properly granted pursuant to *res judicata*. The first reason the issue of *res judicata* should not be heard or accepted by this Court in this case is that City failed to raise it as a defense before the Trial Court.

In Syllabus Point 2 of *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996), this Court stated, “to preserve an issue for appellate review, a party must articulate it with

such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect.” This Court further stated that “the rule in West Virginia is that parties [seeking to preserve an issue for appellate review] must speak clearly in the circuit court, on pain that, if they forget their lines, they will be bound forever to hold their peace. *Id.* at p. 216, 170; *see also, Miller v. Triplett*, 203 W. Va. 351, 507 S.E.2d 714 (1998).

During the approximate five (5) year period this litigation was pending before the Trial Court, City failed to raise the issue of *res judicata*. City’s *Motion to Dismiss* failed to argue that *res judicata* barred a breach of contract claim. City failed to assert *res judicata* as defense in its Answer and Counter-Claim. Likewise, at no time during the briefing or arguing of City’s *Motion for Summary Judgment* before the Trial Court did City assert that *res judicata* was dispositive. City simply failed to raise the issue of *res judicata* before the Trial Court and, therefore, *res judicata* analysis has not been properly preserved for appeal and must not now be introduced.

City attempts to circumvent this black letter law by implying that its argument hinges on the “recent” case of *Lloyd’s, Inc. v. Lloyd*, 2010 W. Va. LEXIS 10.<sup>6</sup> The *Lloyd* decision however merely affirms the long standing jurisprudence of West Virginia regarding *res judicata*. The law upon which City relies in making its *res judicata* argument is actually a quote from Syllabus Point 4 of *Blake v. Charleston Area Medical Center* – a 1997 decision.<sup>7</sup> Thus, the *Lloyd’s* decision does not provide a new or “recent” development in the law which would excuse City’s failure to raise *res judicata* before the Trial Court. City is therefore prohibited from raising *res judicata* as a response or defense to St. James’ appeal.

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<sup>6</sup> The opinion in *Lloyd’s* was filed March 4, 2010.

<sup>7</sup> 201 W. Va. 469, 498 S.E.2d 41 (1997).

Secondly, even if City had argued *res judicata* before the Trial Court, summary judgment would not be warranted pursuant to such doctrine because the breach of contract claim asserted herein is not the same issue disposed of in the eviction litigation against Frazier & Oxley, L.C. As stated above, the sole issue to be determined in St. James's eviction action against Frazier & Oxley, L.C. was "whether a surrender of the prime lease occurred." *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728 (2003). The Complaint against City herein however does not seek a determination of whether a surrender of the Prime Lease occurred. Appellant's Complaint against City asserts an entirely different cause of action – breach of contract. Thus, the issues between the two (2) cases are not identical and *res judicata* does not apply.

City nonetheless argues in the response brief that *res judicata* bars the breach of contract action against it because "it could have been resolved had it been presented in the prior litigation." City's position that *res judicata* bars St. James's breach of contract claim is quite disingenuous given its prior representations and arguments before the Trial Court and this Court.

City was originally a party to the *Frazier & Oxley* eviction action because it was added as a Third-Party Defendant by the law firm of Frazier & Oxley, L.C. Following St. James's filing of a Motion to Amend the Complaint in the eviction action to include additional claims against the Frazier defendants as well as a direct claim for breach of contract against City, Frazier and City served a Notice of Dismissal of the Third Party Complaint which resulted in City being dismissed. When St. James was permitted to amend its Complaint to include a direct cause of action against City in the eviction proceeding, City filed a brief with this Court which sought a writ prohibiting the enforcement of the Trial Court's Order which allowed direct claims by St.

James against City. As grounds for the writ, City argued that it should not be included in the St. James and Frazier & Oxley, L.C. eviction litigation because “[t]his dispute is not between City National and St. James, nor between City National and Frazier & Oxley. Rather, it is a dispute between St. James and Frazier & Oxley . . .” *See*, Exhibit E (emphasis added).

City’s positions are clearly inconsistent. On the one hand, i.e., in 2003 when City forged an agreement with Frazier & Oxley for City’s dismissal from the case, City argued that St. James’s breach of contract claim could not be brought in the eviction litigation because the sole issue to be litigated therein was whether or not the Prime Lease was surrendered. On the other hand, City now argues that St. James’s breach of contract claim is barred from proceeding pursuant to the doctrine of *res judicata* because it should have been brought in the litigation against Frazier & Oxley, L.C. Such argument is double-speak which arose from City’s change of positions in the underlying litigation. It should not be approved of now by this Court. *Res judicata* has no application to the dispute between St. James and City and the Trial Court’s decision should be reversed.

### III. CONCLUSION

For the above-stated reasons as well as those set forth in the *Brief of Appellant*, the award of summary judgment to City was error, and Appellant respectfully requests that this Honorable Court reverse the Trial Court’s Order and remand this matter for a trial on the merits of Appellant’s breach of contract claim.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that he served the foregoing Reply Brief of Appellant upon counsel named below by depositing the same in the United States Mail, postage prepaid at Huntington, West Virginia, on the 7<sup>th</sup> day of April, 2010, addressed as follows:

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**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**

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