



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: YEAGER AIRPORT LITIGATION

CIVIL ACTION NO: 16-C-7000

THIS DOCUMENT APPLIES TO:

CENTRAL WEST VIRGINIA REGIONAL AIRPORT
AUTHORITY, INC., a West Virginia Corporation,

Civil Action No: 15-C-1022 KAN

Plaintiff,

v.

TRIAD ENGINEERING, INC., a West Virginia
corporation; et al.,

Defendants.

**ORDER DENYING JOINT MOTION FOR DETERMINATION OF
THE MEASURE OF PLAINTIFF'S RECOVERABLE DAMAGES AND
CAST & BAKER CORPORATION'S JOINDER TO THE MOTION**

On November 30, 2018, a hearing was conducted on certain Defendants' *Joint Motion for Determination of the Measure of Plaintiff's Recoverable Damages* ("Joint Motion") (Transaction ID 62610309) and *Cast & Baker Corporation's Joinder to Tencate Geosynthetics North America, Inc.'s Joint Motion for Determination on the Measure of Plaintiff's Recoverable Damages* (Transaction ID 62612643). Having reviewed the motions and briefs in support of and in opposition to the motion and joinder, having heard the argument of counsel, and having conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges unanimously **DENY**, in part, the motion and joinder, and hold certain rulings in abeyance, as set forth in the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**:

I. FINDINGS OF FACT

1. Plaintiff's Third Amended Complaint alleges that on March 12, 2015:

the Runway 5-23 EMAS and MSE area catastrophically failed sending hundreds of thousands of cubic yards of fill and other material cascading down and onto the Keystone Drive area of Charleston destroying homes, a church, public roads and damming a stream. All utilities in the area, including natural gas, electricity, water, sewer, telephone and fiber-optic services were destroyed. The damages suffered by the residents of Keystone Drive and the [Airport] Authority total in the millions of dollars.

Third Amended Complaint at ¶ 38 (Transaction ID 62170183)

2. Plaintiff's Third Amended Complaint identifies the following damages:

[i]n addition to the millions of dollars invested in the original EMAS and MSE structures' design and construction, the Authority has or will lose millions of dollars in remediation of the damages and the response to the damages caused by the wrongful conduct of the defendants, including the millions of dollars necessary to rebuild the RSA lost when the EMAS and MSE structures catastrophically failed. Losses were incurred by the Authority and others including persons and property owners near the Authority, public utilities, and businesses. Losses were sustained to neighboring homes and property to which no product was supplied, or work performed and for which the Authority is being called upon to make good. Further losses include, but are not limited to, expenses and costs for providing police, fire and emergency relief. The harm sustained as a result of defendants' conduct further includes, but is not limited to, all costs associated with the investigation of the slope failure, property damage and loss, aggravation, remediation costs, repair costs, construction costs, engineering costs, replacement costs, and other damages including attorney's fees and costs.

Third Amended Complaint at ¶ 41

3. Over the following weeks and months, Plaintiff alleges to have expended millions of dollars to compensate citizens affected by the MSE failure, to repair destroyed utilities, and to clean up and stabilize the failed MSE. Plaintiff alleges the costs of these expenditures include, but are not limited to: settlement of property damage claims in the amount of approximately \$1,200,000.00; courtesy payments to displaced residents (including miscellaneous expenses) in the amount of approximately \$72,000.00; temporary accommodations for displaced residents in the amount of approximately

\$175,000.00; utility restoration in the amount of approximately \$179,000.00; and mitigation/stabilization of the failed MSE in the amount of approximately \$4,900,000.00.

4. In an effort to restore the Runway 5 RSA, Plaintiff contracted with Schnabel Engineering to prepare several design options. In January 2018, Schnabel submitted an “Interim Runway Safety Area Study Final” (the “Study”) (Bates Nos. CWVRAA 2011-2164), to the Airport. The Study included nine different design alternatives. *Id.* The Airport selected alternative 9 for the rebuild of the MSE with a projected cost of \$22,160,000.00 (the “Rebuild”). *Id.* at Bates No. CWVRAA 2077. See also Deposition of Nicholas Keller, excerpts of which are attached as Exhibit E to Joint Motion, at pp. 138-140. Based on this selection, Plaintiff applied for and received several grants from the FAA for the Rebuild in the amount of \$23,165,070.00. See FAA Grant Nos. AIP # 3-54-0003-061-2017; AIP # 3-54-0003-062-2018 (Bates Nos. CWVRAA 2300-2336 and 2247-2271).

5. In addition to the costs associated with the clean-up of the Original Build and the construction cost of the Rebuild, Plaintiff claims to have suffered a loss of revenue from the failed MSE. In support of its claim, Plaintiff cites testimony of Terry Sayre, Director of the Central West Virginia Regional Airport, that the MSE failure precipitated the cancellation of the American Airlines flight providing service to Dallas, Texas. See Deposition of Terry Sayre, excerpts of which are attached as Exhibit 5 to *Plaintiff's Response* (Transaction ID 62678280), at pp. 64-67. Taking the historical data from the Dallas flight, Mr. Sayre calculated the Airport lost \$929,622.00 as result of the MSE failure.

III. CONCLUSIONS OF LAW

1. The Court **FINDS** the appropriate measure of damages to non-residential property, such as the property in this case is controlled by *Jarrett v. E.L. Harper & Sons, Inc.*, 160 W.Va. 399, 235 S.E.2d 362 (1977), per footnote 12 in *Brooks v. City of Huntington*, 234 W.Va. 607, 768 S.e.2d (2014), and the West Virginia Pattern Jury Instructions for Civil Cases, § 804. Damage to Non-Residential Real Property (2017), including Notes and Sources.

2. Syllabus point 2 of *Jarrett* states:

When realty is injured the owner may recover the cost of repairing it, plus his expenses stemming from the injury, including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover its lost value, plus his expenses stemming from the injury including loss of use during the time he has been deprived of his property.

Jarrett, 160 W.Va. 399, 235 S.E.2d 362 at 363

3. Furthermore, in Syllabus point 3 of *Jarrett*, the Supreme Court of Appeals of West Virginia held that, “annoyance and inconvenience can be considered as elements of proof in measuring damages for loss of use of real property.” *Id.*

4. Applying *Jarrett*, and § 804 of the West Virginia Pattern Jury Instructions to this case, if the jury finds Plaintiff has proven its claim against the Defendants, then Plaintiff may recover any of the following elements of damage which Plaintiff has proven by a greater weight of the evidence:

a. The cost of repairing the property.

If the property cannot be repaired, or if the cost of repair exceeds the property's market value before it was damaged, then Plaintiff may recover the property's reduction in value. To determine the reduction in value, the jury should determine the market value immediately before the damage to the property and subtract the market value immediately after the damage occurred.

b. Reasonable expenses incurred by Plaintiff as a result of the damage to the property.

- c. Reasonable compensation for any lost profits/lost rental value during the time Plaintiff was deprived of its property that have been proven to a reasonable degree of certainty by Plaintiff.

If lost profits/lost rental value are not an appropriate measure of damages for loss of use of Plaintiff's real property, then annoyance and inconvenience can be considered as elements of proof in measuring damages for loss of use. Syl. Pt. 3, *Jarrett*. Therefore, to prove damage for loss of use, Plaintiff must show either: (1) lost profits/rental value during the time Plaintiff was deprived of its property; or (2) annoyance and inconvenience during the time Plaintiff was deprived of its property proven to a reasonable degree of certainty.

5. While *Jarrett* controls, how it comes in is a matter of presentation and proof. Market value is only relevant if the cost of repair is greater than the market value. The Court **FINDS** that Plaintiff bears the burden of proof that the cost of repair is its measure of damage. The burden then shifts to Defendants to prove that the cost of repair exceeds the market value.

6. The Court takes under advisement the parties' arguments regarding the collateral source issue and defers ruling on that issue at this time.

7. To the extent not specifically addressed in this Order the Court **DENIES**, without prejudice, the remaining arguments raised in the Defendants' Joint Motion for Determination on the Measure of Plaintiff's Recoverable Damages and Cast & Baker's Joinder thereto. The Court will address any additional issues as necessary during trial or in connection with motions *in limine*.

It is so **ORDERED**.

ENTER: February 4, 2019.

/s/ Derek C. Swope
Lead Presiding Judge
Yeager Airport Litigation