

14-0662

IN THE CIRCUIT COURT OF RANDOLPH COUNTY  
STATE OF WEST VIRGINIA

TERI SNEBERGER,

Plaintiff,

v.

JERRY MORRISON d/b/a JERRY MORRISON  
CONSTRUCTION; JAMES PHILLIPS d/b/a  
PHILLIPS MASONRY; and PHILLIPS  
MASONRY, INC.;

Defendants.

**ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL**

On March 6, 2014, the parties, by their respective counsel, appeared before the Court on Plaintiff Teri Sneberger's motion for new trial pursuant to W.Va.R.Civ.P. 50 and W.Va.R.Civ.P. 59. Having reviewed the pleadings filed on behalf of the parties and heard the arguments of counsel, the Court hereby FINDS and ORDERS as follows:

The Court FINDS that:

- (1) No error was committed by the Court in ruling to equally divide time for the parties to present both their direct examinations and cross-examinations, insofar as all parties participated in the scheduling conference where the parties agreed that the trial would take three days. Although the Court's equal division of time was imposed after the Plaintiff began the presentation of her case at trial, the Court does not believe that a new trial is warranted on this basis.

FILED  
RANDOLPH COUNTY  
CIRCUIT COURT

2014 JUN -2 A 10:29

CIRCUIT CLERK'S OFFICE

Case No. 11-c-148

BY \_\_\_\_\_ DEPUTY

- (2) The Court acted appropriately when it precluded Plaintiff's expert Rebecca Deem, a West Virginia certified home inspector, from using the word "defective" with respect to her inspection of the chimney and determination that it presented fire hazards, since she was not a masonry construction expert.
- (3) The Court appropriately precluded Plaintiff's experts Broderick McGlothlin, who was qualified as an expert general contractor and builder, and Richard Rockwell, who was qualified as an expert general contractor, builder, and engineer, from testifying regarding any issues related to the home's chimney, including the placement of wooden beams in this chimney block, the flammability thereof, and appropriate construction techniques, because they were not masonry contracting experts and felt that they would not feel comfortable or qualified to testify as masonry experts.
- (4) The Court appropriately granted Defendant James Phillips' motion for judgment as a matter of law since Plaintiff Teri Sneberger failed to offer sufficient evidence from which a reasonable jury could find Mr. Phillips liable to Ms. Sneberger for either his work on the home's chimney or his work for Defendant Jerry Morrison in setting the logs for the home.
- (5) The Court appropriately denied Plaintiff Teri Sneberger's motion for judgment as a matter of law on her breach of contract and negligence claims against Defendant Jerry Morrison given that Mr. Morrison had

introduced evidence that he thought he had done a "good job" building her home.

- (6) The Court appropriately gave an instruction that Plaintiff Teri Sneberger could be found comparatively negligent given the testimony that Ms. Sneberger made changes to the construction plans and that subsequent contractors made changes to the home which Defendant Jerry Morrison thought could have affected the home's structural integrity.
- (7) The Court acted appropriately when it included the following language from Tanner v. Rite Aid of West Virginia, Inc., 194 W.Va. 643, 651 (1995)(cit. omitted) in its outrageous conduct jury instruction:

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'

over-ruling Plaintiff Teri Sneberger's objection that the foregoing language was dicta.

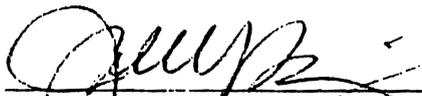
- (8) The jury's verdict was not against the weight of the evidence given the fact that Plaintiff Teri Sneberger made changes to the construction plans, Defendant Jerry Morrison's testimony that he thought he had done a "good job" on the home, and the fact that Ms. Sneberger retained contractors to make changes to the home after terminating Mr. Morrison which Mr. Morrison thought might impact the home's structural integrity.

WHEREFORE, the Court hereby DENIES Plaintiff Teri Sneberger's Motion for New Trial.

Plaintiff Teri Sneberger's objections hereto are preserved.

The Clerk is hereby directed to serve copies of this Order on counsel for all parties.

IT IS SO ORDERED, this 30<sup>th</sup> day of May, 2014.

  
Hon. Jaymie Godwin Wilfong

PREPARED BY:

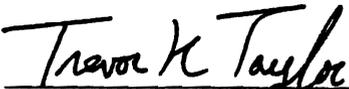
  
Marvyn W. Masters, Esquire  
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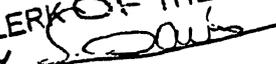
ENTERED

JUN 02 2014

PHILIP D. RIGGLEMAN, CLERK

REVIEWED AND APPROVED BY:

 *BY PERMISSION - CLB*  
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A TRUE COPY:  
ATTEST:  
PHILIP D. RIGGLEMAN  
CLERK OF THE CIRCUIT COURT  
BY  DEPUTY

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IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

FILED  
RANDOLPH COUNTY  
CIRCUIT COURT

TERI SNEBERGER,  
Plaintiff,

2014 JUN 10 P 1:02

CIRCUIT CLERK'S OFFICE

v.

CIVIL ACTION NO. 11-C-148

BY \_\_\_\_\_ DEPUTY Judge Wilfong

JERRY MORRISON d/b/a JERRY MORRISON  
CONSTRUCTION; JAMES PHILLIPS d/b/a  
PHILLIPS MASONRY; and PHILLIPS  
MASONRY, INC.,

Defendants.

---

**ORDER GRANTING JAMES PHILLIPS d/b/a  
PHILLIPS MASONRY'S MOTION FOR DIRECTED VERDICT**

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On the August 14, 2013, came the Plaintiff, Teri Sneberger, in person and by counsel, Christopher Brinkley, and came the Defendant, Jerry Morrison, in person and by counsel, Pat Nichols, and came the Defendant, James Phillips d/b/a Phillips Masonry, in person and by counsel, Trevor K. Taylor. The parties and counsel appeared pursuant to the previous order of this Court scheduling the above-styled action for trial.

After the seating of the jury, the panel was sworn by the Court to well and truly try the case.

Thereafter, the trial commenced, with the parties presenting opening statements. Thereafter, Plaintiff proceeded to call as witnesses, Jerry Morrison, Dale Shockey, Randall Watkins, Jack Butcher, Larry DeWitt, Rebecca Deem, Broderick McGlothlin, Richard Rockwell, James Phillips, Teri Sneberger, and Howard Byler.

The first witness called by the Plaintiff was Defendant Jerry Morrison. During a break in the examination, the Court announced that the parties would be given equal amounts of time for the presentation of their respective cases, including cross-examination. The Plaintiff objected to the Court's decision because it had not been made prior to the beginning of the trial and because the Plaintiff bore the burden of proof on most issues, thereby necessitating the presentation of more evidence than required of the Defendants. The Court overruled the Plaintiff's objection, noting that all parties were consulted as to the total amount of time that would be needed to complete the trial prior to scheduling it. Though the Court notes the Plaintiff objected to this procedure, it is important to point out that none of the parties ran out of time to present their evidence, and the trial was completed in a timely manner.

After Plaintiff rested her case in chief, each Defendant, separately, via oral motion outside the presence of the jury, requested that the Court issue a directed verdict in favor of the Defendants pursuant to Rule 50 of the West Virginia Rules of Civil Procedure. The Court ruled that the Motion by Defendant, Jerry Morrison, must be denied and all claims against him were to proceed. As for the Motion by James Phillips d/b/a Phillips Masonry, the Court considered the arguments proffered by counsel for Mr. Phillips. It was argued that the Motion for Directed Verdict should be granted because Plaintiff failed to provide any evidence that Mr. Phillips' alleged conduct rose to the level to satisfy the necessary criteria for fraud and misrepresentation, outrageous conduct, and punitive damages. Additionally, it was argued that Plaintiff failed to prove Mr. Phillips was negligent, breached the contract with Plaintiff, or breached the implied warranty of habitability or merchantability owed to Plaintiff. Plaintiff's counsel argued that there was sufficient evidence to submit these claims to the jury based upon the testimony and reasonable inferences that should be

drawn in Plaintiff's favor.

Upon hearing the evidence in this case, the Court found that the Motion sought by James Phillips d/b/a Phillips Masonry as to all claims asserted against Mr. Phillips should be **GRANTED**.

Regarding the Motion for the claims for fraud and misrepresentation, outrageous conduct, and punitive damages, the Court found that there was no evidence provided by Plaintiff to demonstrate that Mr. Phillips' actions in any way supported such a cause of action against him.

In West Virginia, to recover for fraud and misrepresentation, the law is as follows:

"[t]he essential elements in an action for fraud are: "(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it." Syllabus Point 5, *Kidd v. Mull*, 595 S.E.2d 308 (W. Va. 2004).

Furthermore, allegations of fraud must be established by clear and convincing evidence. Syl. Pt. 5, *Tri-State Asphalt Products, Inc. v. McDonough Co.*, 182 W. Va. 757, 391 S.E.2d 907 (W. Va. 1990). In this case, the Court finds that Plaintiff provided no evidence, "clear and convincing" or otherwise, to show that Mr. Phillips acted fraudulently.

Like the claims for fraudulent misrepresentation, the Court found that there was no evidence to support a claim for outrageous conduct against Mr. Phillips. In West Virginia, one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another, is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm, then a cause of action for outrageous conduct can be established. *Harless v. First National Bank in Fairmont* 289 S.E.2d 692 (W.Va. 1982). However, the hallmark of this

cause of action is that the actions must be intentional and outrageous. *Id.* In other words, such conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Id.* Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" *Tanner v. Rite Aid of West Virginia, Inc.*, 461 S.E.2d 149, 157 (W.Va. 1995). Additionally, even though the focus is on the defendant's conduct, the plaintiff must still prove severe emotional distress. *Id.* The Court found that Plaintiff did not provide any evidence to suggest that Mr. Phillips' conduct rose to the level needed to satisfy the elements for outrageous conduct.

Since there was no evidence to prove fraudulent misrepresentation or outrageous conduct, the Court found that there was no reason to submit a question to the jury regarding punitive damages regarding Mr. Phillips' alleged conduct. In West Virginia, "in actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive or vindictive damages." Syl. Pt. 9, *Cook v. Heck's Inc.*, 342 S.E.2d 453 (1986). Plaintiff failed to prove such damages were in any capacity warranted against Mr. Phillips, thus said claims were subject to dismissal at the close of Plaintiff's case.

The Court also found that there was not sufficient evidence for a reasonable juror to return a verdict in favor of Plaintiff with regard to her claims for negligence, breach of contract, or breach of implied warranty of habitability or merchantability owed to Plaintiff. The claims for negligence were dismissed because Plaintiff failed to demonstrate that Mr. Phillips deviated from the standard of care owed by a mason under like circumstances in this case. The evidence in this case

established that Mr. Phillips built the basement walls and was building the chimney in the middle of the home. There was no evidence presented by Plaintiff by any qualified witness in the field of masonry to establish that there were any problems with the basement walls. In fact, the Court heard evidence from Plaintiff's experts that if the home were to be tore down, one of the only components of the home that could be saved would have been the basement walls.

As for the chimney, Plaintiff essentially argued that there were three problems that Mr. Phillips was responsible for and that these problems satisfied the elements for her claims for negligence, breach of contract, and breach of implied warranty of habitability or merchantability. First, Plaintiff argued that the foundation was not proper for the chimney and that required the chimney to be tore down and replaced. However, the evidence on this issue was that Mr. Phillips did not install the foundation. The foundation was installed by Jerry Morrison, the alleged general contractor. Mr. Morrison testified that he informed Mr. Phillips that the foundation for this chimney consisted of 5-6 inches of concrete with fiber flo and that it was laid on top of "solid bedrock." Mr. Phillips testified that he contacted a well-respected masonry expert in the community and was informed that such a foundation would hold a two fire-pit chimney. Plaintiff's experts called in this case agreed that it is reasonable for a sub-contractor to rely upon the representations made by a general contractor. Additionally, the only witness that Plaintiff called with any knowledge regarding masonry, Larry DeWitt, testified that if a foundation of 5-6 inches of concrete with fiber flo was on solid bedrock, this would be a sufficient foundation for a chimney. Thus, the Court found that Mr. Phillips' conduct with regard to the foundation for the chimney was not sufficient for a reasonable juror to find Mr. Phillips to have acted unreasonably and that the same did not prove negligence, breach of contract, or breach of any implied warranty.

Second, Plaintiff asserted that Mr. Phillips was responsible for the problems associated with the floor joists that went through the chimney at the first floor level. The evidence provided by Plaintiff demonstrated that there were wooden floor joists that went through the chimney and abutted the flue liner from the basement fire pit. The evidence further demonstrated that such a condition presented a fire hazard. However, there was no evidence that Mr. Phillips knew of this condition. The evidence presented during Plaintiff's case was that Mr. Morrison was responsible for cutting out the floor joists at the first floor level. Mr. Morrison testified that once Mr. Phillips had the chimney laid up to the first floor, Mr. Morrison began removing the floor joists. When this occurred, Mr. Phillips left the project. While Mr. Phillips was gone, instead of removing all of the floor joists, Mr. Morrison poured a concrete pad around the floor joists so that the fire pit at the first floor could be built. There was no evidence that Mr. Phillips was responsible for the removal of the floor joists at the first floor level. Finally, the evidence was that Mr. Phillips expected that when he returned to the project to resume work on the chimney that the floor joists were already removed by Mr. Morrison. Again, the Court found that Mr. Phillips' conduct with regard to the removal of the joists on the first floor was not sufficient for a reasonable juror to find Mr. Phillips to have acted unreasonably and that the same did not prove negligence, breach of contract, or breach of any implied warranty.

Third, Plaintiff asserted that Mr. Phillips was responsible for the problems with her home because he failed to remove the wooden ridge beam that ran through the chimney where the chimney exited the roof. The evidence provided by both Mr. Phillips and Mr. Morrison was that the ridge beam was to be cut out of the chimney, but Mr. Phillips was fired before he had an opportunity to do it. Again, the Court found that Mr. Phillips' conduct with regard to the removal of the ridge

beam at the roof of the home was not sufficient for a reasonable juror to find Mr. Phillips to have acted unreasonably and that the same did not prove negligence, breach of contract, or breach of any implied warranty.

Finally, Plaintiff asserted that Mr. Phillips was responsible for the problems associated with the construction of the log home due to issues associated with how the logs were installed. The evidence produced by Plaintiff during her case was that Mr. Phillips was paid to run his fork lift to pick up and place logs for the walls and roof of the home. However, there was no evidence that Mr. Phillips had any knowledge of the log home building process. His role was merely as an equipment operator. The evidence demonstrated that Mr. Phillips had no role in cutting, notching, or selection of the logs. There was no evidence that Mr. Phillips understood the process associated with stacking the logs, the sizing of the logs, or the quality of the logs needed for the home. Mr. Phillips never held himself out in any capacity as a contractor with any special knowledge with regard to log homes. In fact, the only evidence in this case regarding who knew something about log homes was that Mr. Morrison was in charge of that part of the project. Mr. Morrison testified that it was his role to tell Mr. Phillips what log went where and when to pick up what log. There was no evidence from any of Plaintiff's experts to suggest that Mr. Phillips was responsible for the problems associated with the log home walls or roof. Accordingly, there was no evidence to suggest that Mr. Phillips acted negligently, breached a contract, or breached an implied warranty with regard to the log walls and roof.

Based upon the foregoing, the Court so **ORDERED** that **all claims** asserted against James Phillips d/b/a Phillips Masonry, must be **DISMISSED** and the Court so **GRANTED** a directed verdict in favor of James Phillips d/b/a Phillips Masonry pursuant to Rule 50 of the West Virginia Rules of Civil Procedure.

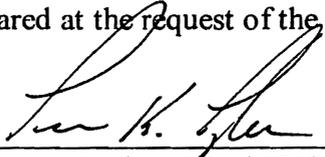
The Court notes for the record Plaintiff's other objections to the entry of this Order which are **DENIED**.

The Clerk of this Court is ORDERED to send a copy of this Order to all counsel of record.

ENTER: June 9, 2014

  
HONORABLE JAYMIE GODWIN WILFONG

Prepared at the request of the Court by:



Trevor K. Taylor, Esq. (WVSB #8862)  
TAYLOR LAW OFFICE  
34 Commerce Drive, Suite 201  
Morgantown, WV 26501  
Counsel for James Phillips d/b/a Phillips Masonry

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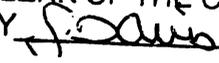
JUN 10 2014

PHILIP D. RIGGLEMAN, CLERK

cc:

cc: Nicols

cc: Brimney

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ATTEST:  
PHILIP D. RIGGLEMAN  
CLERK OF THE CIRCUIT COURT  
BY  DEPUTY

**From:** "Hart, Leslie" <Leslie.Hart@courtsv.gov>  
**Subject:** RE: Sneberger v Morrison, et al.  
**Sent date:** 07/02/2014 01:26:23 PM  
**To:** "Sherri L. Rasmussen" <sherri@themasterslawfirm.com>

SHERRI: Per our discussion, that arrangement is agreeable to me. I will submit my billing/invoice for the two (2) hearings to you directly with the transcripts once I complete them. The trial transcript is 883 pages. The copy cost for it is \$662.25. Please advise if you would like your client to pick up that transcript or if you wish to have me mail it. I could possibly divide it into two of the large pack envelopes that I have.

Thank you, Leslie Hart.

Leslie Weese Hart, CCR  
Official Court Reporter  
Twentieth Judicial Circuit  
Randolph County Courthouse  
2 Randolph Avenue  
Elkins, WV 26241  
(304) 630-6188  
Leslie.Hart@courtsv.gov

-----Original Message-----

From: Sherri L. Rasmussen [mailto:sherri@themasterslawfirm.com]  
Sent: Wednesday, July 02, 2014 1:12 PM  
To: Hart, Leslie  
Cc: Chris Brinkley  
Subject: Sneberger v Morrison, et al.

Dear Leslie:

This email is to confirm that The Masters Law Firm, lc will be sending you a check in the amount of \$656.25, to cover the cost of the trial transcript related to this case. Further, you will be sending us a bill for the cost of the transcript related to the Motions Hearing and the Pre-trial Conference, once you have determined the cost of those transcripts.

Please confirm my understanding by responding to this email.

Many Thanks- Sherri

--  
Sherri L. Rasmussen, Legal Assistants  
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181 Summers Street  
Charleston, West Virginia 25301  
Phone (304) 342-3106  
Fax (304) 342-3189

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permanently delete the original e-mail, any copy and any printout thereof. Thank you.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. \_\_\_\_\_

TERI SNEBERGER,

Petitioner/Plaintiff Below,

v.

(Civil Action No. 11-C-148)  
Jaymie Godwin Wilfong

JERRY MORRISON d/b/a JERRY MORRISON  
CONSTRUCTION; JAMES PHILLIPS d/b/a  
PHILLIPS MASONRY; and PHILLIPS  
MASONRY, INC.;

Respondents/Defendants Below.

**CERTIFICATE OF SERVICE**

I, Christopher L. Brinkely, counsel for Petitioner/Plaintiff Below, do hereby certify that a true and exact copy of the foregoing "Notice of Appeal" was served upon:

Philip D. Riggleman  
Randolph Circuit County Clerk  
Randolph County Courthouse  
2 Randolph Avenue  
Elkins, West Virginia 26241-4099

Leslie Weese Hart, CCR  
Official Court Reporter  
Circuit Court of Randolph County  
Randolph County Courthouse  
2 Randolph Avenue  
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*Counsel for James Phillips d/b/a Phillips Masonry,  
and Phillips Masonry, Inc.*

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Nichols & Nichols  
Post Office Box 201  
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*Counsel for Jerry Morrison d/b/a  
Jerry Morrison Construction*

in an envelope properly addressed, stamped and deposited in the regular course of the United States Mail, this 2<sup>nd</sup> day of July, 2014.



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Christopher L. Brinkley  
West Virginia State Bar No. 9331

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