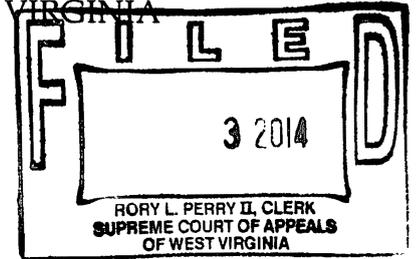


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0662



TERI SNEBERGER,

Plaintiffs Below, Petitioner,

VS.

Appeal from Final Orders of the
Circuit Court of Randolph County
(No. 11-C-148)

JERRY MORRISON d/b/a JERRY MORRISON
CONSTRUCTION and JAMES PHILLIPS,

Defendants Below, Respondents.

PETITIONERS' BRIEF

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TERI SNEBERGER,

A handwritten signature in cursive script that reads "Christopher L. Brinkley /att".

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ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT ERRED BY LIMITING, AFTER THE INTRODUCTION OF EVIDENCE AT TRIAL HAD ALREADY BEGUN, EACH OF THE PARTIES TO EQUAL AMOUNTS OF TIME (FIVE AND A HALF HOURS) TO PRESENT THEIR CASES INCLUDING BOTH DIRECT AND CROSS-EXAMINATION, AS WAS JUDGE WILFONG'S CUSTOM IN FAMILY COURT.

- II. THE TRIAL COURT ERRED IN PRECLUDING THE USE OF THE WORD "DEFECTIVE" BY A WEST VIRGINIA STATE CERTIFIED HOME INSPECTOR WITH RESPECT TO THE FIRE HAZARD CREATED BY THE PRESENCE OF WOODEN BEAMS INSIDE THE CHIMNEY BLOCK.

- III. THE TRIAL COURT ERRED IN PRECLUDING TWO LICENSED GENERAL CONTRACTORS, ONE OF WHOM IS ALSO AN ENGINEER, FROM TESTIFYING THAT THE CONSTRUCTION OF THE MASONRY CHIMNEY WAS DEFECTIVE AND THAT THE CONSTRUCTION TECHNIQUES EMPLOYED WERE UNREASONABLE.

- IV. THE TRIAL COURT ERRED IN GRANTING JAMES PHILLIPS' MOTION FOR JUDGMENT AS A MATTER OF LAW GIVEN TERI SNEBERGER'S EVIDENCE THAT MR. PHILLIPS WAS RESPONSIBLE FOR THE CONSTRUCTION OF THE CHIMNEY, THAT MR. PHILLIPS WAS AWARE THAT JERRY MORRISON HAD RUN WOODEN BEAMS THROUGH THE CHIMNEY BLOCK BUT FAILED TO ENSURE THAT SUCH BEAMS WERE REMOVED, THAT MR. PHILLIPS FAILED TO ENSURE THAT THE PAD FOR THE CHIMNEY WAS SUFFICIENTLY STRONG, AND THAT MR. PHILLIPS USED HIS FORKLIFT TO PARTICIPATE IN SETTING THE LOGS FOR THE HOME DESPITE HIS COMPLETE LACK OF KNOWLEDGE REGARDING LOG HOME CONSTRUCTION.

- V. THE TRIAL COURT ERRED IN FAILING TO GRANT TERI SNEBERGER'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON HER NEGLIGENCE AND BREACH OF WARRANTY CLAIMS AGAINST JERRY MORRISON, GIVEN HER OVERWHELMING EVIDENCE FROM EXPERTS AND CONTRACTORS WHO PERFORMED REMEDIATION WORK ON THE HOME, THAT THE HOME IS STRUCTURALLY UNSAFE AND IN DANGER OF COLLAPSING, THAT THE HOME NEEDS TO BE TORN DOWN AND REBUILT, THAT THE HOME WAS NOT BUILT IN A WORKMANLIKE MANNER, THAT THE HOME WAS NOT BUILT THE WAY A REASONABLY PRUDENT BUILDER WOULD HAVE BUILT IT, AND THAT THE HOME IS NOT A REASONABLY SAFE PLACE TO LIVE; IN RESPONSE TO WHICH MR. MORRISON TESTIFIED THAT HE

THOUGHT HE HAD DONE THE BEST JOB HE COULD AND THAT HE SPECULATED THAT SOME OF THE CONTRACTORS MAY HAVE CAUSED PROBLEMS DURING THEIR EFFORTS AT REMEDIATION.

- VI. THE TRIAL COURT ERRED IN GIVING A COMPARATIVE FAULT INSTRUCTION ALLOWING THE JURY TO APPORTION FAULT FOR THE DEFECTS IN THE HOME TO TERI SNEBERGER, BASED SOLELY UPON JERRY MORRISON'S SPECULATION THAT THE REMEDIATION EFFORTS MIGHT HAVE AFFECTED THE CONDITION OF THE HOME
- VII. THE TRIAL COURT ERRED IN INCLUDING DICTA IN ITS OUTRAGEOUS CONDUCT JURY INSTRUCTION
- VIII. THE TRIAL COURT ERRED FAILING TO FIND THAT THE VERDICT WAS AGAINST THE CLEAR WEIGHT OF THE EVIDENCE GIVEN TERI SNEBERGER'S OVERWHELMING EVIDENCE FROM EXPERTS AND CONTRACTORS WHO PERFORMED REMEDIATION WORK ON THE HOME, THAT THE HOME IS STRUCTURALLY UNSAFE AND IN DANGER OF COLLAPSING, THAT THE HOME NEEDS TO BE TORN DOWN AND REBUILT, THAT THE HOME WAS NOT BUILT IN A WORKMANLIKE MANNER, THAT THE HOME WAS NOT BUILT THE WAY A REASONABLY PRUDENT BUILDER WOULD HAVE BUILT IT, AND THAT THE HOME IS NOT A REASONABLY SAFE PLACE TO LIVE; IN RESPONSE TO WHICH MR. MORRISON TESTIFIED THAT HE THOUGHT HE HAD DONE THE BEST JOB THAT HE COULD AND THAT HE SPECULATED THAT SOME OF THE CONTRACTORS MAY HAVE CAUSED PROBLEMS DURING THEIR EFFORTS AT REMEDIATION.

STATEMENT OF THE CASE

This appeal arises from the August 14-16, 2013 trial of a defective home construction case in the Circuit Court of Randolph County, West Virginia before Judge Jaymie Wilfong. [Appendix Record (hereinafter "AR") 6-7, 822]. The home was constructed for Appellant Teri Sneberger by Appellees Jerry Morrison and James Phillips d/b/a Phillips Masonry. [AR 107-108, 529-531].

Ms. Sneberger filed suit against Mr. Morrison and Mr. Phillips as joint tortfeasors, alleging theories of liability grounded in breach of contract including the

implied warranty of habitability, negligence, fraud and misrepresentation, and outrageous conduct. [See AR 18, 822]. Ms. Sneberger sought to recover compensatory damages for the costs of putting the home in the condition it should have been in had the work been done properly, her expenses attempting to mitigate her damages, her annoyance and inconvenience, her loss of use of the home, and severe emotional distress, as well as punitive damages. [See AR 834-838].

A pretrial conference was held on January 31, 2013. [AR 850-856]. At that time, Ms. Sneberger's counsel stated that it would take 2-3 days to try the plaintiff's part of the case. [AR 851]. However, because many of the witnesses to be called by Mr. Morrison and Mr. Phillips would testify in the plaintiff's case-in-chief, Ms. Sneberger's counsel stated that the trial could "very likely" be completed in 3 days (with jury selection to take place at a prior time). [AR 852]. Counsel for Mr. Morrison and Mr. Phillips agreed, and the Court set aside three days for trial. [AR 852]. At no point during the pretrial conference was there any indication from Judge Wilfong that the parties would be allotted equal amounts of time, a mere 5.5 hours of time, to present their cases, including both direct and cross-examination. [AR 850-856].

On the first day of trial, Judge Wilfong mentioned a concern about completing the trial in allotted 3 days. [AR 88-89]. Ms. Sneberger's first witness was Mr. Morrison. [AR 90-91]. After counsel had examined Mr. Morrison for a lengthy period of time, a break was taken. [AR 90-146]. During the recess, for the first time, Judge Wilfong held a "talk about, procedurally, how we're going to split the three (3) days up." [AR 146]. Ms. Sneberger's counsel stated that he estimated that he could complete her case by

mid-afternoon the next day. [AR 146-147]. Counsel for Mr. Morrison and Mr. Phillips stated that their cases would take about a half day each. [AR 148]. Judge Wilfong, however, ruled that she would just divide the time up by 3, as she had done in Family Court. [AR 147-148, 150]. The Court also indicated that the time allotted to each party would include their cross-examination time. [AR 150-151]. After further discussion, Judge Wilfong stated that the parties would have “5 ½ hours” each for the presentation of their case-in-chief and cross-examination and again referenced her procedure in Family Court. [AR 152-157]. Ms. Sneberger’s counsel objected to the time limits given that they was not imposed prior to trial.¹ [AR 157]. At the conclusion the examination of Mr. Morrison by Ms. Sneberger’s counsel, Judge Wilfong noted that the imposition of time limits came after the presentation of evidence began, that was “not fair” to Ms. Sneberger, and that the limit could affect counsel’s questioning. [AR 176].

Because the time limit was imposed after trial began, while Ms. Sneberger’s counsel was in the middle of the examination of a witness, counsel was forced to rework his planned examinations “on the fly” as the trial continued. [AR 45].

The evidence at trial was as follows. Ms. Sneberger entered into a verbal contract with Mr. Morrison for the construction of a log home for the fixed total price of \$140,000 among other terms. [AR 132-133, 188-189, 583-589]. Although Mr. Morrison is not a licensed contractor, he was to be the general contractor and oversee the whole project.

¹ At the hearing on Ms. Sneberger’s motion for new trial, Judge Wilfong implied that Ms. Sneberger’s counsel was at fault for not seeking clarification on the division of time during the pretrial conference. [AR 46-49]. However, as noted above, during the pretrial conference, Ms. Sneberger’s counsel had specifically stated that he anticipated that it would take 2-3 days to try Ms. Sneberger’s case-in-chief. [AR 851].

[AR 91, 107-108, 584, 589, 529]. Mr. Morrison selected the logs to be used and made the decision about their placement. [AR 110-112, 195-197]. He was also responsible for the plumbing and electrical work. [AR 114-115, 213, 218-220]. Mr. Morrison made the decision that the chimney would be placed in the middle of the house to provide structural stability. [AR 115-116, 206-207]. He made the decisions about how thick the concrete should be in the basement and its placement on solid rock. [AR 120-121, 190, 248, 718-719, 725, 727, 757]. Finally, Mr. Morrison was responsible for the construction of the rafters and roof. [AR 202-203, 208-209].

Ms. Sneberger entered into another verbal contract with Mr. Phillips to do the block work, including a safe and proper fireplace and chimney. [AR 131, 193, 250-251, 529-530, 559, 589, 681, 726-727]. Mr. Phillips made the decisions about how to construct the chimney and about how to install the flues. [AR 530-531]. He built the block walls and fireplace chimney all the way up through the roof. [AR 627, 631, 662-663, 667]. Mr. Morrison later asked Mr. Phillips to operate Mr. Phillips' forklift and assist Mr. Morrison in setting the logs for the walls and the roof. [AR 130, 267-269, 559, 578, 663].

As construction progressed, Ms. Sneberger began to have concerns about the home. [AR 595]. The roof rafters are not straight and the roof sags. [AR 595, 602-604, 637]. The logs are spaced so far apart, there is more chinking between the logs than there are logs. [AR 595]. The logs are of different sizes, some of the logs are split, and others are not evenly stacked. [AR 161, 601-603]. Ms. Sneberger became concerned that the house was hazardous, unsafe, and in danger of collapsing. [AR 595, 615-616, 654].

Mr. Phillips understood that the chimney was going to be two stories tall. [AR 531, 563]. In addition, Mr. Morrison told Mr. Phillips that the base for the chimney was 5-6 inches thick and sitting on rock. [AR 253-255, 531-532, 561]. However, Mr. Phillips did no calculations or anything else to verify that this pad was sufficient to support the chimney he planned to build, except to talk to his former boss who told him it was adequate as long as it was sitting on solid rock.² [AR 532-534, 562-563]. Although Mr. Phillips was aware that the sufficiency of the base was dependent on the height of the chimney, he did not tell his boss how tall the chimney was going to be. [AR 533]. Mr. Phillips also admitted that if the chimney pad was only 3.5-4 inches thick and was not sitting on solid rock, it would not be sufficient for the chimney he built. [AR 533-534].

Because Mr. Phillips had never heard of Mr. Morrison, Mr. Phillips asked Ms. Sneberger if Mr. Morrison was a licensed contractor and was told that he was not. [AR 528-529]. However, when Mr. Morrison made representations to Mr. Phillips about the foundation for the chimney, Mr. Phillips simply took Mr. Morrison at his word even though he knew nothing about Mr. Morrison's reputation or honesty. [AR 534-535]. Mr. Phillips did not speak to anyone involved in pouring the concrete to confirm Mr. Morrison's representations. [AR 535]. Mr. Phillips did not ask for written verification from Mr. Morrison. [AR 535]. Nor did Mr. Phillips go to the edge of the concrete pad and check to see how thick it was, although he could have done so. [AR 536].

² Mr. Morrison testified that he did do a rough calculation of the chimney weight using Mr. Phillips' estimate that it would take 600 blocks at 30 pounds each, and determined that the 1800 pound total weight was a mere 10% of what the pad should be able hold. [AR 257-259]. Upon cross-examination, Mr. Morrison admitted that his calculation was off by a factor of 10 and the total estimated block weight should have been 18,000 pounds. [AR 277].

The chimney began in the basement. [AR 228, 259, 759]. Mr. Morrison admitted that there were wooden floor joists running through the chimney block at the first floor level, but he “believes” that he cut, at least some, of the centers out so the chimney flue liners could go on up and that the removal was done before concrete was poured at that level. [AR 111, 261-262, 759-760]. Mr. Phillips also knew these joists were present in the chimney block because he had laid the block up until it reached the joists and he was present when Mr. Morrison began cutting the joists out, however, Mr. Phillips left the property before the job was completed. [AR 261-262, 537, 565-566]. Mr. Morrison testified that he cut all the beams so they were more than 8 inches from the flues (except at the roof). [AR 750-751, 791]. However, he also admitted that the photographic evidence in this case proves that statement to be untrue. [AR 791-792]. Mr. Phillips contends that he has no responsibility for making sure the wooden joists were removed from his chimney. [AR 565].

When Mr. Phillips returned, Mr. Morrison had already poured the concrete. [AR 566-567]. Mr. Phillips then built the chimney on up to the second floor loft and then through the roof. [AR 208, 263-264, 567, 579-580]. The wooden roof ridge beam ran through the chimney block as well. [AR 209, 264]. Mr. Morrison told Mr. Phillips to leave that beam running through the chimney block due to concerns about stability of the roof. [AR 537-539]. However, Mr. Phillips later went back to Mr. Morrison and said

he could not leave that wooden beam in the chimney block and that it should be replaced with a steel plate so it wouldn't burn.³ [AR 538, 549, 567-568].

Note that since the chimney started in the basement, and then went up through the first floor, the second floor loft, and then out the roof, this was actually a three story chimney. This fact should have been evident to both Mr. Phillips and Mr. Morrison and completely undermines their assertion that the chimney foundation was sufficient.

Furthermore, neither Mr. Morrison nor Mr. Phillips told Ms. Sneberger that the floor joists and ridge beam were run through the fireplace chimney. [AR 600]. Had she known that, she would have panicked and told them that was unacceptable. [AR 600].

Although Mr. Phillips knew nothing about log home construction or how to set logs, he spent 4-5 weeks using his forklift to help Mr. Morrison set the wall and roof logs. [AR 269-270, 272-273, 540-541, 558, 573]. Mr. Phillips used his forklift to help Mr. Morrison install the roof's ridge beam. [AR 746]. Mr. Phillips admitted that he was responsible for anything that happened while he was operating his forklift. [AR 540].

In addition to the testimony of Mr. Morrison, Mr. Phillips, and herself, Ms. Sneberger offered testimony from four contractors involved in remediating the deficiencies in her home, a West Virginia certified home inspection, and two expert general contractors

Dale Shockey, a master plumber, testified that the plumbing was not up to acceptable standards and that he had to renovate the plumbing. [AR 278-289].

³ Mr. Morrison testified that he was fired before he had an opportunity to cut the wooden ridge beam out of the chimney block and insert a piece of steel. [AR 209, 264-265, 751-752].

Randall Watkins, a licensed electrician, testified that the electrical system failed to comply with the National Electric Code; he had to add numerous additional circuits; he found numerous problems with the existing wiring, switches, and receptacles; and that the wiring was unsafe. [AR 291-312].

Jack Butcher, a general contractor, who put the finished roof on the home, had to build a new structure on which to put the roof, because Mr. Morrison's roof structure bowed up to 5-7 inches. [AR 315-321, 324-325, 328-329]. Mr. Butcher also found Mr. Morrison's roof structure to be structurally unsound. [AR 321-322]. Finally, Mr. Butcher found other problems and worked on finishing other aspects of the construction. [AR 322-323, 325-326, 328, 333-336].

Larry Dewitt, who has worked in the construction field for over 30 years, testified about his teardown of the original chimney and the photographs that were taken in the process. [AR 337-354, 374-376]. He testified that he found the roof ridge beam running through the chimney block and the flue liners no more than a couple inches from the beam which he classified as too close. [AR 342-344, 359-360, 864-866]. When Mr. Dewitt had the chimney torn down to the loft level, and after he had jackhammered and chiseled out the concrete, he found the wooden beams and joists still in the chimney block and, in some cases, in direct contact with the flue liners, as well as other beams which did not even reach the chimney block but which were supported on the block with spikes. [AR 344-351, 867-875]. He continued to tear the chimney down past the first floor and into the basement, where he found that the chimney base was less than 4 inches thick and sitting on dirt. [AR 351-353, 356, 860-863]. Mr. Dewitt

testified that this was an inadequate foundation for the chimney. [AR 356-357, 373]. He had to dig down another 30-36 inches before he hit solid rock and could rebuild the chimney pad. [AR 353-354, 356-358, 859]. Finally, Mr. Dewitt testified that it would have been impossible both to go back after the fact and cut out the wooden beams inside the chimney block because the chimney had been filled with concrete and to cut out the ridge beam and replace it with steel because the chimney block would have to be torn down to do it. [AR 375-376, 378-379].

The next witness was Rebecca Deem, a certified home inspector by the State of West Virginia following the completion of an eight week course which included practice home examinations and passage of an associated test. [AR 384-385, 402-403]. The course covered the identification of defective masonry and chimney construction, as well as the presence of combustible materials in proximity to a chimney. [AR 385-386, 403]. The course also taught investigators how to identify issues as "not present", "acceptable", "marginal", or "defective." [AR 405]. Ms. Deem was qualified as an expert in home inspection by Judge Wilfong. [AR 396-397].

Ms. Deem conducted an inspection of Ms. Sneberger's home, after Ms. Sneberger became concerned about the chimney. [AR 386-388]. Ms. Deem took photographs in the course of her inspection and was also given one photograph looking down into the chimney which accurately depicted what she saw when she looked into the chimney. [AR 388-389, 876-894]. She identified the beams being held on the chimney block with spikes as being "defective." [AR 392-393, 883]. Ms. Deem testified that when she examined the fireplace and chimney, she found that the main ridge beam was in close

proximity to or touching the flue which presented a fire and safety hazard and would cause the home to fail an inspection. [AR 395, 406, 416-419, 887, 893]. However, Judge Wilfong sustained an objection precluding Ms. Deem from classifying that condition as being “defective” on the basis that Ms. Deem is not a masonry expert. [AR 396-398, 401, 403-404, 405]. Ms. Deem also found gaps in the flue liners which would cause the home to fail an inspection.⁴ [AR 406, 888]. However, given Judge Wilfong’s prior ruling, Ms. Sneberger’s counsel did not ask Ms. Deem whether these gaps constituted “defects.” Ms. Deem identified numerous other deficiencies in the home. [AR 391-395, 407-411].

Broderick McGlothlin, a licensed general contractor with over 20 years of experience, then took the stand. [AR 424-425]. Mr. McGlothlin has worked on a couple hundred conventional frame, timber, and log homes. [AR 424-425, 452]. As part of his responsibilities as a general contractor, Mr. McGlothlin has ultimate supervisory authority over all aspects of the construction, including chimneys and other masonry work, is charged with identifying any problems, and has the authority to order that issues be fixed. [AR 426]. Mr. McGlothlin has supervised construction of chimneys in the past and even laid block and flue liners. [AR 427]. Mr. McGlothlin was qualified by Judge Wilfong as an expert in general contracting, but refused to qualify him as an expert on masonry work. [AR 428-429, 431-435].

Mr. McGlothlin inspected Ms. Sneberger’s house and reached a number of opinions. [AR 427-428, 435]. Mr. McGlothlin opined that running wooden beams through chimney block within two inches of the flue is not acceptable construction

⁴ Mr. Phillips agreed that there should not be any gaps in the flue. [AR 539].

because it presents a fire hazard. [AR 438-439]. He further testified that it was not acceptable construction to use spikes to hang beams on the chimney block. [AR 439]. Mr. McGlothlin also identified the roof rafters as containing gaps, being undersized, sagging, and in danger of collapse. [AR 440-442, 453-455]. He noted the presence of rotten or split logs, curved logs, logs which were not notched correctly, and logs which were not stacked vertically. [AR 442-444, 459-461, 463]. He also identified issues with the twisted ridge beam and the floor joists in the garage. [AR 444-447, 454-455, 457-458]. As a result, Mr. McGlothlin concluded that it was not safe for Ms. Sneberger to live in the home, that the home was not built in a workmanlike manner, and that it was not built the way a reasonably prudent builder would build it. [AR 447-448]. Accordingly, Mr. McGlothlin concluded that the home should be torn down and rebuilt at an estimated cost of \$150 per square foot or \$350,000 total. [AR 448-450].

On redirect examination, notwithstanding Mr. McGlothlin's qualification as an expert in general contracting and his knowledge of the properties of concrete, Judge Wilfong sustained an objection to Mr. McGlothlin opining whether it was acceptable to put concrete in a chimney around wooden beams because Mr. McGlothlin was not a masonry expert. [AR 477-479].

Richard Rockwell, who has 30 years of experience building over 500 log houses, testified next. [AR 481, 483]. Mr. Rockwell is a licensed general contractor and an engineer. [AR 482, 486]. Like Mr. McGlothlin, Mr. Rockwell has the responsibility to supervise his subcontractors, including masons, watch for masonry problems, and direct repairs if needed. [AR 489-490]. Mr. Rockwell builds log homes, primarily of

custom design, using prefabricated logs because they are easier to build, more efficient, and less expensive than using rough hewn logs.⁵ [AR 483-485]. In addition, using field cut logs raises issues of dryness of the wood, straightness and taper of the logs, proper notching of the logs, stability, the seal against air and water, and minimalization of the chinking between logs. [AR 487-489]. Mr. Rockwell testified that the general principles of engineering and physics, as well as the applicable codes, apply equally to conventionally framed homes, preformed log homes, and rustic log homes. [AR 492-493]. Judge Wilfong qualified Mr. Rockwell as an expert in engineering, contracting, and the construction of custom log homes, but not rustic log homes or masonry. [AR 491-492].

Mr. Rockwell inspected Ms. Sneberger's home. [AR 490]. He found that the logs were not stacked straight and plumb; the logs were notched improperly thereby affecting the stability, insulation, and chinking required; and some logs were crooked. [AR 494, 495]. He identified other deficiencies in the construction, such as the undersized and unsupported ridge beam, the undersized roof rafters, and the absence of collar ties to keep the walls from spreading apart. [AR 494-496, 498-499, 505]. Mr. Rockwell reached the conclusion that the house was in danger of collapsing. [AR 497]. In fact, he concluded that the only reason the house has not already collapsed is that the porches are pushing in on the house providing some degree of rigidity. [AR 497-498]. Accordingly, Mr. Rockwell opined that the house had not been built in a workmanlike

⁵ Mr. Morrison admitted that no one builds rustic log homes anymore and he is not an expert in log home construction. [AR 92, 93-94, 106]. However, since he was a good carpenter, he could do the "impossible." [AR 102-103, 106-107].

manner, had not been built the way a reasonably prudent builder would have built it, and that the home was not reasonably safe to live in. [AR 499]. In fact, Mr. Rockwell said this is the worst constructed home he has ever seen. [AR 501]. Like Mr. McGlothlin, Mr. Rockwell opined that the home needed to be torn down and rebuilt at a cost of \$150 per square foot. [AR 500-501].

Given Judge Wilfong's prior ruling precluding Mr. McGlothlin from testifying about the propriety of pouring concrete around wooden beams in the chimney due to the fact that he was not a masonry expert, Ms. Sneberger's counsel did not ask this question of Mr. Rockwell.

Finally, Ms. Sneberger testified that she experienced severe emotional distress as a result of the actions of the defendants and the hazards they created. [AR 590-591, 594-597, 631-632, 654]. Reverend Howard Biller confirmed that Ms. Sneberger suffered from severe emotional distress. [AR 690-692, 694-695].

In response to Ms. Sneberger's evidence, Mr. Morrison testified that he thought he had done the very best job he could for her. [AR 240]. However, Mr. Morrison never testified that he had built the house in a workmanlike manner, that he had built it as a reasonably prudent builder would, or that the house was fit for human habitation. Nor did he offer any other witness to this effect.

Mr. Morrison's counsel attempted to elicit testimony suggesting that the home had been damaged during the remedial work. However, Mr. Morrison testified that he did not think Ms. Sneberger had done anything wrong with respect to the construction

of the house as of the time he was discharged.⁶ [AR 170]. Furthermore, Mr. Morrison testified that when the ridge beam was cut, it might not have hurt anything or might have caused serious problems, depending on whether there was a chimney in place at the time; however he did not know how the cutting was done and he had no opinion whether it affected the house. [AR 764-765, 789-790]. Similarly, counsel for Mr. Morrison obtained testimony from Ms. Sneberger's expert, Mr. McGlothlin, that it was "possible" that remediation at the roof may have caused problems with the roof, but that he did not think it had happened in this case. [AR 479-480].

On August 15, 2013, at the conclusion of Ms. Sneberger's case-in-chief, Judge Wilfong granted a motion for judgment as a matter of law in favor of Mr. Phillips based primarily on the fact that there was no expert testimony in the field of masonry that Mr. Phillips' actions were improper. [AR 698-709, 710-711].

On August 16, 2013, following the conclusion of all evidence, the Court denied Ms. Sneberger's motion for judgment as a matter of law on her negligence and breach of contract claims against Mr. Morrison. [AR 800]. The motion was based upon the fact that Ms. Sneberger's two expert contractors testified that the home was not built in a workmanlike manner, was not reasonably fit for human habitation, and was not built in a reasonably prudent manner, in response to which Mr. Morrison offered no counter testimony except that he had done a good job, the best job he could. [AR 799-800].

Prior to charging the jury, Judge Wilfong indicated that she would give the "outrageous conduct" instruction tendered by Mr. Phillips and adopted by Mr.

⁶ Mr. Phillips similarly testified that he did not think Ms. Sneberger had done anything to

Morrison. [AR 783]. Ms. Sneberger's counsel objected to the instruction, noting that it contained dicta, as opposed to Ms. Sneberger's proposed instruction which included only black letter law. [AR 785]. The portion of the instruction objected to as dicta follows:

However, the hallmark of this cause of action is that the actions must be intentional and outrageous. In other words, such conduct is to 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.

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."

[AR 833].

Ms. Sneberger's counsel also objected to a comparative negligence instruction given that there was no evidence, beyond speculation, that she had contributed to the condition of her house. [AR 807-810]. Counsel further objected to the comparative negligence instruction based upon the fact that a proposed instruction had not been offered in a timely manner in accordance with Trial Court Rule 23.02. [AR 810-811].

The Court gave both the outrageous conduct and comparative negligence instructions to which Ms. Sneberger's counsel had objected. [AR 828-829, 833]. Counsel then renewed his objections to those instructions. [AR 841].

Later that day, the jury returned a verdict in favor of Ms. Sneberger and against Mr. Morrison in the amount of \$40,000, and apportioned 60% of the fault to Mr. Morrison and 40% of the fault to Ms. Sneberger. [AR 6, 842-845].

create a problem with her house. [AR 541].

A "Final Judgment Order" was entered on October 24, 2013. [AR 6-7].

On November 8, 2013, Ms. Sneberger filed a timely motion for new trial alleging the eight errors which are raised in this appeal. [AR 17-35]. Judge Wilfong heard arguments on the motion and denied the same on March 6, 2014. [AR 41-77]. A written order was entered on June 2, 2014. [AR 1-4].

On June 10, 2014, Judge Wilfong entered an additional written order with respect to judgment as a matter of law in favor of Mr. Phillips. [AR 9-16].

Ms. Sneberger filed a timely notice of appeal on July 2, 2014.

SUMMARY OF ARGUMENT

Teri Sneberger was deprived of justice as a result of Judge Wilfong's cumulative procedural and evidentiary errors during the August 14-16, 2013 trial against Mr. Morrison and Mr. Phillips.

The trial court's mid-trial decision to impose equal time limits on the parties for the presentation of their cases prejudiced Ms. Sneberger by forcing her counsel to re-tool his examinations "off the cuff" and leave out significant areas of inquiry.

The trial court's misapprehension expert admissibility standards under West Virginia law, the qualifications of Ms. Sneberger's experts, and the difference between general construction defects and masonry defects, lead to Judge Wilfong's improper preclusion of the use of the word "defective" by a West Virginia certified home inspector thereby minimizing the impact of her testimony; exclusion of testimony by licensed contractors who were qualified to identify the defects associated with hazards

inside chimney block; and ultimately the trial court's improper granting of judgment as a matter of law in favor of Mr. Phillips.

Judge Wilfong further erred in failing to enter judgment as a matter of law against Mr. Morrison given his lack of evidence rebutting the prima facie elements of Ms. Sneberger's breach of contract and negligence claims; in giving a comparative negligence instruction in the absence of supporting evidence against Ms. Sneberger; and in failing to find that the jury's verdict was against the clear weight of the overwhelming evidence offered against Mr. Morrison.

Finally, the trial court erred in including dicta in the outrageous conduct jury instruction.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Ms. Sneberger asserts that oral argument of this case is necessary pursuant to W.Va.R.App.P. 18(a), given that: (1) Petitioner has not waived oral argument; (2) this appeal is not frivolous; (3) the dispositive issues have not been authoritatively decided; and (4) the decisional process would be significantly aided by oral argument.

Petitioners assert that oral argument under W.Va.R.App.P. 19(a) is most appropriate given that this case primarily involves assignments of error in: the application of settled law, unsustainable exercises of discretion, and insufficient evidence and results against the weight of the evidence.

ARGUMENT

- I. THE TRIAL COURT ERRED BY LIMITING, AFTER THE INTRODUCTION OF EVIDENCE AT TRIAL HAD ALREADY BEGUN, EACH OF THE PARTIES TO EQUAL AMOUNTS OF TIME (FIVE AND A HALF HOURS) TO PRESENT THEIR CASES INCLUDING BOTH DIRECT AND CROSS-**

EXAMINATION, AS WAS JUDGE WILFONG'S CUSTOM IN FAMILY COURT.

A. Standard of Review

The West Virginia Supreme Court of Appeals reviews the trial court's procedural rulings for an abuse of discretion. Syl.Pt. 1, McDougal v. McCammon, 193 W.Va. 229, 455 S.E.2d 788 (1995).

B. Argument

Judge Wilfong abused her discretion and erred in imposing equal 5.5 hour time limits on the parties, consistent with her practice in Family Court, after the trial had begun and in the middle of Ms. Sneberger's examination of Mr. Morrison. [AR 146-157]. In fact, even the trial court noted that this procedural move was "not fair" and could have an effect on the questioning by counsel. [AR 176].

As a threshold matter, the Family Court Rules clearly have no application to this case. Rather, the West Virginia Rules of Civil Procedure govern all civil actions in the trial courts. W.Va.R.Civ.P. 1.

Under the West Virginia Rules of Civil Procedure, a trial court certainly has the authority to set "a reasonable limit on the time allowed for presenting evidence," however, this is a subject which should have been addressed during the pretrial conference. *See* W.Va.R.Civ.P. 16(c)(15).

This untimely ruling particularly prejudiced Ms. Sneberger for two reasons. First, her counsel was in the middle of the presentation of her case at the time it was made thereby forcing counsel to rework his examinations "on the fly." [AR 45]. Second, as the plaintiff, Ms. Sneberger bore the burden of proof on all issues except for

affirmative defenses. Because of the burden of proof, the presentation of the plaintiff's case in a civil action almost always takes longer than the defendant(s)' case.

Therefore, Ms. Sneberger contends that the trial court abused its discretion, erred, and created a miscarriage of justice when it imposed the timelines on the presentation of evidence in an untimely and prejudicial manner. Accordingly, this Court should order that a new trial be held.

II. THE TRIAL COURT ERRED IN PRECLUDING THE USE OF THE WORD "DEFECTIVE" BY A WEST VIRGINIA STATE CERTIFIED HOME INSPECTOR WITH RESPECT TO THE FIRE HAZARD CREATED BY THE PRESENCE OF WOODEN BEAMS INSIDE THE CHIMNEY BLOCK.

A. Standard of Review

The West Virginia Supreme Court of Appeals reviews the trial court's evidentiary rulings for an abuse of discretion. Syl.Pt. 1, McDougal v. McCammon, 193 W.Va. 229, 455 S.E.2d 788 (1995).

B. Argument

Judge Wilfong abused her discretion and erred by precluding Ms. Sneberger's expert, Rebecca Deem, from using the word "defective" to describe deficiencies related to the chimney, thereby minimizing the impact of her testimony. [AR 396-398, 401, 403-404, 405].

Pursuant to W.Va.R.Evid. 702, a witness may provide opinions based upon scientific, technical, or specialized knowledge if they are qualified to do so by knowledge, skill, experience, training, or education.

5. In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b)

in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.

Syl.Pt. 5, Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995)(emphasis added).

In the body of the Gentry decision, the West Virginia Supreme Court of Appeals further elaborated on the meaning of this Syllabus Point:

Because of the "liberal thrust" of the rules pertaining to experts, circuit courts should err on the side of admissibility. *See* II Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 7-2(A) at 24 ("[t]his standard is very generous and follows the general framework of the federal rules which favors the admissibility of all relevant evidence"). In *Cargill*, 185 W.Va. at 146-47, 405 S.E.2d at 646-47, we stated:

"West Virginia Rule of Evidence 702 enunciates the standard by which the qualification of an individual as an expert witness will be determined. It cannot encompass every nuance of a specific factual matter or a particular individual sought to be qualified. It simply requires that the witness must, through knowledge, skill, experience, training, or education, possess scientific, technical, or other specialized knowledge which will assist the trier of fact to understand the evidence or to determine a fact in issue. It cannot be interpreted to require ... that the experience, education, or training of the individual be in complete congruence with the nature of the issue sought to be proven."

Our message is consistent with that of the United States Supreme Court: "Conventional **185 *526 devices," like vigorous cross-examination, careful instructions on the burden of proof, and rebuttal evidence, may be more appropriate instead of the "wholesale exclusion" of expert testimony under Rule 702. *Daubert*, 509 U.S. at ----, 113 S.Ct. at 2798, 125 L.Ed.2d at 484. Professor Charles McCormick's often quoted statement is still relevant within the context of Rule 702: "While the court may rule that a certain subject of inquiry requires that a member of a given profession, such as a doctor, an engineer, or a chemist, be called, usually a specialist in a particular branch within the profession will not be required." Charles McCormick, *Evidence* ¶ 14 at 29 (1954).

Id., 195 W.Va. at 525-526, 466 S.E.2d at 184-185.

Ms. Deem was certified as a home inspector by the State of West Virginia and taught how to classify chimney issues as “defective.” [AR 384-386, 402-403, 405]. Clearly, Ms. Deem was qualified under West Virginia law to testify that a chimney was defective in accordance with her training and certification from the State of West Virginia.

Therefore, Ms. Sneberger contends that the trial court abused its discretion, erred, and created a miscarriage of justice when it misapplied West Virginia law on the admissibility of expert testimony and improperly precluded Ms. Deem from using the word “defective.” Accordingly, this Court should order that a new trial be held.

III. THE TRIAL COURT ERRED IN PRECLUDING TWO LICENSED GENERAL CONTRACTORS, ONE OF WHOM IS ALSO AN ENGINEER, FROM TESTIFYING THAT THE CONSTRUCTION OF THE MASONRY CHIMNEY WAS DEFECTIVE AND THAT THE CONSTRUCTION TECHNIQUES EMPLOYED WERE UNREASONABLE.

A. Standard of Review

The West Virginia Supreme Court of Appeals reviews a trial court’s determination of the admissibility of expert testimony under an abuse of discretion standard. Syl.Pt. 1, Watson v. Inco Alloys International, Inc., 209 W.Va.234, 545 S.E.2d 294 (2001)(cits. omitted).

B. Argument

Judge Wilfong abused her discretion and erred by refusing to qualify Ms. Sneberger’s expert general contractors, Broderick McGlothlin and Richard Rockwell, as experts capable of judging masonry work, and in precluding Ms. Sneberger’s expert,

Broderick McGlothlin, from testifying whether it is acceptable to put concrete around wooden beams inside a chimney based upon the fact that he was not a masonry expert. [AR 428-429, 431-435, 477-479, 491-492].

Note that both Mr. McGlothlin and Mr. Rockwell were tendered to testify about masonry issues within the context of general construction. They were not being offered as experts on distinctly masonry issues such as the appropriate type of masonry; the amount of mortar to use between blocks; or the acceptable degree of block overlap. Rather, they were to be asked about heat transfer through concrete, flammability of wooden materials, and the placement of wooden materials within a chimney in proximity to the flue.

Mr. McGlothlin is a licensed general contractor who has over 20 years of experience in the construction of hundreds of homes of different types; has supervisory responsibility over masons and chimney work on his projects; and has a working knowledge of the properties of concrete. [AR 424-427, 452, 478-479]. Clearly, Mr. McGlothlin was qualified under West Virginia law, as set forth above, to testify as a general contractor about masonry issues such as the propriety of putting concrete around wooden beams inside a chimney in accordance with his experience.

Similarly, Ms. Sneberger's expert, Richard Rockwell, has over 30 years' experience building over 500 homes and exercise supervisory responsibility over masons on his construction projects. [AR 481-483, 486, 489-490, 492-493]. As with Mr. McGlothlin, as a general contractor, Mr. Rockwell was qualified to testify about masonry issues.

However, in light of the fact that the trial court had sustained an objection to Mr. McGlothlin's qualification to testify about masonry issues and the question of whether it is acceptable to put concrete around wooden beams inside a chimney asked of a witness who was not a masonry expert, Ms. Sneberger's counsel did not pose such question to Mr. Rockwell knowing that they would draw an objection which would be sustained.

In Syl.Pt. 7, State v. Taylor, 130 W.Va. 74, 42 S.E.2d 549 (1947), overruled on other grounds in State v. McAboy, 160 W.Va. 497, 236 S.E.2d 431 (1977), the West Virginia Supreme Court of Appeals held that where an objection to evidence is over-ruled, objection need not be made when the same or similar evidence is offered later in the trial. Logically, the repeated proffer of similar evidence to which the trial court has sustained and objection would be equally futile.

Therefore, Ms. Sneberger contends that the trial court abused its discretion, erred, and created a miscarriage of justice when it misapplied West Virginia law on the admissibility of expert testimony and improperly precluded general contractors from offering evidence about masonry issues to the extent that they involve heat transfer through concrete, the placement of wood in close proximity to the flue in a chimney, and the placement of concrete around wooden beams inside chimney block. Accordingly, this Court should order that a new trial be held.

IV. THE TRIAL COURT ERRED IN GRANTING JAMES PHILLIPS' MOTION FOR JUDGMENT AS A MATTER OF LAW GIVEN TERI SNEBERGER'S EVIDENCE THAT MR. PHILLIPS WAS RESPONSIBLE FOR THE CONSTRUCTION OF THE CHIMNEY, THAT MR. PHILLIPS WAS AWARE THAT JERRY MORRISON HAD RUN WOODEN BEAMS THROUGH THE CHIMNEY BLOCK BUT FAILED TO ENSURE THAT SUCH BEAMS WERE

REMOVED, THAT MR. PHILLIPS FAILED TO ENSURE THAT THE PAD FOR THE CHIMNEY WAS SUFFICIENTLY STRONG, AND THAT MR. PHILLIPS USED HIS FORKLIFT TO PARTICIPATE IN SETTING THE LOGS FOR THE HOME DESPITE HIS COMPLETE LACK OF KNOWLEDGE REGARDING LOG HOME CONSTRUCTION.

A. Standard of Review

The West Virginia Supreme Court of Appeals reviews a trial court's grant or denial or judgment as a matter of law under a *de novo* standard of review. Gillingham v. Stephenson, 209 W.Va. 741, 745, 551 S.E.2d 663, 667 (2001).

B. Argument

Judge Wilfong erred in granting James Phillips' motion for judgment as a matter of law on the basis that there was no expert testimony in the field of masonry that Mr. Phillips had done anything improper. [AR 698-711].

The West Virginia Supreme Court of Appeals has set forth the following rules for evaluating a defendant's motion for judgment as a matter of law:

3. When the plaintiff's evidence, considered in the light most favorable to him, fails to establish a prima facie right of recovery, the trial court should direct a verdict in favor of the defendant.

Syl.Pt. 3, Roberts v. Gale, 149 W.Va. 166, 139 S.E.2d 232 (1964).

5. Upon a motion for a directed verdict, all reasonable doubts and inferences should be resolved in favor of the party against whom the verdict is asked to be directed.

Syl.Pt. 5, Wager v. Sine, 157 W.Va. 391, 201 S.E.2d 260 (1973).

In practice, this means that judgment as a matter of law is not appropriate unless "only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's

ruling granting a directed verdict will be reversed.” See Syl.Pt. 3, Brannon v. Riffle, 197 W.Va. 97, 475 S.E.2d 97 (1996).

Ms. Sneberger alleged that Mr. Phillips and Mr. Morrison were joint tortfeasors guilty of negligence, breach of contract including the implied warranty of habitability, fraud and misrepresentation, and outrageous conduct. [See AR 18, 822].

Under a negligence theory, a contractor is required to use such care and caution as a reasonably prudent person should have under the same or similar circumstances. See Syl., Collar v. McMullin, 107 W.Va. 440, 148 S.E. 496 (1929).

Every contract related to the construction of a new home contains an implied warranty of habitability, meaning that the home will be constructed in a workmanlike manner and be reasonably fit for human habitation. Syl.Pt. 1, Gamble v. Main, 171 W.Va. 469, 300 S.E.2d 110 (1983).

Concealment of the truth about a material fact in the performance of a contract constitutes fraud. Syl.Pt. 1, Lengyel v. Lint, 167 W.Va. 272, 276-277, 280 S.E.2d 66, 69-70 (1981).

The tort of outrage arises where a defendant intentionally or recklessly causes severe emotional distress to another. Syl.Pt. 6, Harless v. First National Bank in Fairmont, 169 W.Va. 673, 289 S.E.2d 692 (1982). Finally:

14. Tortfeasors whose wrongful acts or omissions, whether committed intentionally or negligently, concur to cause injury are joint tortfeasors who are jointly and severally liable for the damages which result from the wrongs so committed.

Syl.Pt. 14, Strahin v. Cleavenger, 216 W.Va. 175, 603 S.E.2d 197 (2004).

In summary of the voluminous pinpoint record citations set forth above in the Statement of the Case on pages 4-14, the testimony was undisputed that Mr. Phillips was responsible for and built the block chimney and that Mr. Morrison, who was responsible for the overall construction of the home, ran flammable wooden beams and supports through that chimney block. The testimony is also undisputed that Mr. Phillips was aware of Mr. Morrison's actions, but abdicated his responsibility for hazards associated with the chimney he was building to Mr. Morrison on the presumption that Mr. Morrison would remove any flammable material. Although some of the wooden beams may have been removed, the photograph evidence proves that considerable amounts of wood remained within the chimney block in close proximity to the flue. That fact proves that the neither Mr. Morrison nor Mr. Phillips had any intention of going back and cutting that wood out. In fact, the wood was concealed from sight within concrete at the first floor and loft levels. In other words, the combined actions of Mr. Phillips (in building the chimney and presuming that Mr. Morrison would address any flammability issues) and Mr. Morrison (in placing flammable material in the chimney block) combined to create the concealed fire hazard defect.

The same analysis holds true for the construction of the chimney pad, upon which the central structural support for the house, the chimney, rested. Mr. Morrison was responsible for the construction of the pad and misrepresented its construction to Mr. Phillips. However, Mr. Phillips did nothing to verify the sufficiency of the pad other than secure the approval of his former boss to whom Mr. Phillips did not even

give the size of the chimney. In fact, Mr. Phillips testified that he treated this chimney like a 2 story chimney, when he clearly built a 3 story chimney.

Finally, it is also undisputed that Mr. Phillips had no expertise whatsoever in the construction of a log home. Nevertheless, under the guidance of Mr. Morrison, Mr. Phillips spent 4-5 weeks operating his forklift setting the logs for the home. The placement of the logs in the walls and roof of the home are what creates a continuing significant risk of the house collapsing. Given his admitted lack of experience in constructing log homes, Mr. Phillips had no business whatsoever being involved in the setting of the logs. But for Mr. Phillips and his forklift, the logs would not have been lifted and put into place improperly, and there would be no danger of the home collapsing. However, because he chose to willingly participate in the placement of the logs, Mr. Phillips became a joint tortfeasor liable for any associated defects in that regard as well.

Finally, the West Virginia Supreme Court has rejected Defendant James Phillips' "Sgt. Shultz defense" claiming that he has no liability because he did not know any better.⁷ See McComas v. ACF Industries, LLC, 232 W.Va. 19, 27, 750 S.E.2d 235, 243 (2013)("Willful ignorance [of the proper and safe way to do a job] is no defense").

Accordingly, there was sufficient evidence for a jury to find that Mr. Phillips and Mr. Morrison were joint tortfeasors with respect to Ms. Sneberger's claims of negligence, breach of contract including the implied warranty of habitability, fraud and

⁷ Sgt. Shultz is, of course, a character from the "Hogan's Heroes" television show who was aware of the mischief of the prisoner's under his guard but deliberately ignored it, by loudly professing "I know nothing!"

misrepresentation, and outrageous conduct.⁸ Accordingly, the trial court erred in granting Mr. Phillips' motion for judgment as a matter of law; this error constituted a miscarriage of justice; and a new trial should be held in this matter.

V. THE TRIAL COURT ERRED IN FAILING TO GRANT TERI SNEBERGER'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON HER NEGLIGENCE AND BREACH OF WARRANTY CLAIMS AGAINST JERRY MORRISON, GIVEN HER OVERWHELMING EVIDENCE FROM EXPERTS AND CONTRACTORS WHO PERFORMED REMEDIATION WORK ON THE HOME, THAT THE HOME IS STRUCTURALLY UNSAFE AND IN DANGER OF COLLAPSING, THAT THE HOME NEEDS TO BE TORN DOWN AND REBUILT, THAT THE HOME WAS NOT BUILT IN A WORKMANLIKE MANNER, THAT THE HOME WAS NOT BUILT THE WAY A REASONABLY PRUDENT BUILDER WOULD HAVE BUILT IT, AND THAT THE HOME IS NOT A REASONABLY SAFE PLACE TO LIVE; IN RESPONSE TO WHICH MR. MORRISON TESTIFIED THAT HE THOUGHT HE HAD DONE THE BEST JOB THAT HE COULD AND THAT HE SPECULATED THAT SOME OF THE CONTRACTORS MAY HAVE CAUSED PROBLEMS DURING THEIR EFFORTS AT REMEDIATION.

A. Standard of Review

The West Virginia Supreme Court of Appeals reviews a trial court's grant or denial of judgment as a matter of law under a *de novo* standard of review. Gillingham v. Stephenson, 209 W.Va. 741, 745, 551 S.E.2d 663, 667 (2001).

B. Argument

Judge Wilfong and erred in failing to grant Ms. Sneberger's motion for judgment as a matter of law against Mr. Morrison on her breach of contract and negligence claims. [AR 799-800].

According to the West Virginia Supreme Court of Appeals, the rule governing a

⁸ Ms. Sneberger's evidence in response to Mr. Phillips' motion for judgment as a matter of law would have been even stronger had the Court not improperly limited the defect testimony by

plaintiff's motion for judgment as a matter of law is:

Where the evidence given on behalf of defendant is so clearly insufficient to support a verdict for him that such verdict, if returned by the jury, must be set aside, and the evidence in support of plaintiff's claim is clear and convincing, it is the duty of the trial court, when so requested, to direct a verdict for the plaintiff.

Syl., Vaccaro Brothers & Co. v. Farris, 92 W.Va. 655, 115 S.E. 830 (1923).

Under a negligence theory, a contractor is required to use such care and caution as a reasonably prudent person should have under the same or similar circumstances.

See Syl., Collar v. McMullin, 107 W.Va. 440, 148 S.E. 496 (1929).

In addition, every contract for the purchase of a new home contains an implied warranty of habitability, meaning that the home will be constructed in a workmanlike manner and be reasonably fit for human habitation. Syl.Pt. 1, Gamble v. Main, 171 W.Va. 469, 300 S.E.2d 110 (1983).

Ms. Sneberger offered the testimony of two expert general contractors, one of whom is also a civil engineer, that: (1) the home is structurally unsafe and in danger of collapsing; (2) the house needs to be torn down to the foundation and rebuilt; (3) the home was not built in a workmanlike manner; (4) the dwelling was not built the way a reasonably prudent builder would have built it; and (5) the house is not a reasonably safe place for Ms. Sneberger to live. [AR 447-448, 499]. Ms. Sneberger also offered testimony from a West Virginia certified home inspector regarding the deficiencies in the home, as well as evidence from four workmen who were involved in remediating the Defendants' work with respect to the chimney block, electrical work, plumbing, and

Ms. Deem and/or the testimony by Mr. McGlothlin and Mr. Rockwell related to the

roofing. [AR 278-289, 291-312, 315-326, 328-329, 333-336, 337-354, 356-360, 374-376, 384-395, 405-407, 416-419].

In response, Defendant Jerry Morrison never testified that he built Ms. Sneberger's home in a reasonably prudent manner or that the home was constructed in a workmanlike manner and was reasonably fit for human habitation. Nor did Mr. Morrison offer any expert testimony on these issues. Rather, he simply testified that he thought he had done the best job he could. [AR 240].

In other words, Mr. Morrison offered no testimony which squarely addressed the elements of Ms. Sneberger's negligence and breach of contract claims against him. Considering the testimony offered by Mr. Morrison, and even drawing all reasonable inferences from that evidence in his favor, the evidence is clearly insufficient to counter Ms. Sneberger's clear and convincing evidence regarding Mr. Morrison's failure to build the house as a reasonably prudent contractor would have; Mr. Morrison's failure to build the home in a workmanlike manner; and the fact that the dwelling is not suitable for human habitation.

Accordingly, the trial court erred when it failed to grant Ms. Sneberger's motion for judgment as a matter of law on her negligence and breach of contract claims against Mr. Morrison; that error was a miscarriage of justice; and this Court should order a new trial in this case.

VI. THE TRIAL COURT ERRED IN GIVING A COMPARATIVE FAULT INSTRUCTION ALLOWING THE JURY TO APPORTION FAULT FOR THE DEFECTS IN THE HOME TO TERI SNEBERGER, BASED SOLELY UPON

reasonableness of Mr. Phillips' conduct and the defects in the chimney masonry work.

JERRY MORRISON'S SPECULATION THAT THE REMEDIATION EFFORTS MIGHT HAVE AFFECTED THE CONDITION OF THE HOME

A. Standard of Review

The West Virginia Supreme Court of Appeals reviews the giving of a jury instruction under an abuse of discretion standard. Syl.Pt. 6, Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995).

B. Argument

Judge Wilfong abused her discretion and erred in giving a comparative fault instruction. [AR 807-811, 828-829].

A defendant bears the burden of proof on an affirmative defense such as comparative fault. Syl.Pt. 4, Rowe v. Sisters of Pallottine Missionary Society, 211 W.Va. 16, 560 S.E.2d 491 (2001). Affirmative defenses must be proven by a preponderance of the evidence. See Syl.Pt. 7, Powell v. Time Insurance Co., 181 W.Va. 289, 382 S.E.2d 342 (1989). Finally, testimony about a mere possibility is not sufficient to establish a preponderance of the evidence. Cale v. Napier, 186 W.Va. 244, 247, 412 S.E.2d 242, 245 (1991)(“mere speculation will not sustain the...burden of proof”); Syl., Moore v. West Virginia Heat & Light Co., 65 W.Va. 552, 64 S.E. 721 (1909)(“mere equipoise of evidence is insufficient to satisfy the burden of proof, nor is conjecture or theory or bare possibility of the existence of the ultimate fact to be proved sufficient”).

Furthermore, it is improper to give a jury instruction unless it is supported by both the law and the evidence in the case. Syl.Pt. 12, Bailey v. Norfolk & Western Railway Co., 206 W.Va. 654, 527 S.E.2d 516 (1999).

The only testimony offered by Mr. Morrison suggesting that Ms. Sneberger bore

some degree of fault for the condition of her home arose from his speculation about what may have occurred during the remediation efforts. [AR 764-765, 789-790]. This testimony is insufficient to carry Mr. Morrison's burden of proof with respect to Ms. Sneberger's comparative fault.

Accordingly, the trial court abused its discretion and erred in finding that Mr. Morrison's testimony was sufficient to give a comparative fault instruction and in actually giving such an instruction; these errors were a miscarriage of justice; and this Court should order a new trial be held on this case.

VII. THE TRIAL COURT ERRED IN INCLUDING DICTA IN ITS OUTRAGEOUS CONDUCT JURY INSTRUCTION

A. Standard of Review

The West Virginia Supreme Court of Appeals reviews the formulation of a jury instruction under an abuse of discretion standard. Syl.Pt. 6, Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995).

B. Argument

Judge Wilfong abused her discretion and erred in including dicta in the outrageous conduct jury instruction. [AR 783, 785, 833].

With respect to jury instructions, the West Virginia Supreme Court of Appeals has held that:

6. The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.

Syl.Pt. 6, Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374

(1995).

However, “a circuit court should refrain wherever possible from gratuitously adding language to its charge that is not an element of the claim or defense and that can better be presented to the jury by way of closing argument.” *Id.*, 194 W.Va. at 117, 459 S.E.2d at 394.

The elements of the tort of outrage have been succinctly set forth by the West Virginia Supreme Court of Appeals as follows:

6. 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.

Syl.Pt. 6, Harless v. First National Bank in Fairmont, 169 W.Va. 673, 289 S.E.2d 692 (1982).

Nevertheless, rather than giving a succinct instruction on the tort of outrage based upon the Syllabus Point in Harless, over Plaintiff’s objection, the Court gave a lengthy instruction consisting largely of *dicta* taken from the body of Harless decision:

The Virginia Court’s definition is patterned after Section 46 of the *Restatement (Second) of Torts* and reflects the hallmark of this tort which is intentional and outrageous conduct. As comment (d) to Section 46 of the *Restatement* suggests, the 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.”

Harless, 169 W.Va. at 695, 289 S.E.2d at 704-705 (emphasis added) and from the body of the decision in Tanner v. Rite Aid of West Virginia, Inc., 194 W.Va. 643, 651, 461 S.E.2d 149, 157 (1985)(cit. omitted):

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!"

The trial court abused its discretion and erred in including this gratuitous language in the outrage instruction; this error was a miscarriage of justice; and this Court should order that a new trial be held in this case.

VIII. THE TRIAL COURT ERRED FAILING TO FIND THAT THE VERDICT WAS AGAINST THE CLEAR WEIGHT OF THE EVIDENCE GIVEN TERI SNEBERGER'S OVERWHELMING EVIDENCE FROM EXPERTS AND CONTRACTORS WHO PERFORMED REMEDIATION WORK ON THE HOME, THAT THE HOME IS STRUCTURALLY UNSAFE AND IN DANGER OF COLLAPSING, THAT THE HOME NEEDS TO BE TORN DOWN AND REBUILT, THAT THE HOME WAS NOT BUILT IN A WORKMANLIKE MANNER, THAT THE HOME WAS NOT BUILT THE WAY A REASONABLY PRUDENT BUILDER WOULD HAVE BUILT IT, AND THAT THE HOME IS NOT A REASONABLY SAFE PLACE TO LIVE; IN RESPONSE TO WHICH MR. MORRISON TESTIFIED THAT HE THOUGHT HE HAD DONE THE BEST JOB THAT HE COULD AND THAT HE SPECULATED THAT SOME OF THE CONTRACTORS MAY HAVE CAUSED PROBLEMS DURING THEIR EFFORTS AT REMEDIATION.

A. Standard of Review

The West Virginia Supreme Court of Appeals reviews a trial court's denial of a motion for new trial under an abuse of discretion standard and the trial court's underlying factual findings pursuant to a clearly erroneous standard. Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995).

B. Argument

Judge Wilfong erred in failing to grant Ms. Sneberger's motion for new trial based upon the verdict being against the clear weight of the evidence or enter judgment as a matter of law in favor of Ms. Sneberger against Mr. Morrison. [AR 799-800].

3. A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the *West Virginia Rules of Civil Procedure*, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.

6. " 'Where the evidence given on behalf of the defendant is clearly insufficient to support a verdict for him so that such verdict, if returned by a jury, must be set aside, and the evidence of the plaintiff is clear and convincing, it is the duty of the trial court, when so requested, to direct a verdict for the plaintiff.' Point 5 Syllabus, *Sommerville v. The Pennsylvania Railroad Co.*, 151 W.Va. 709 [155 S.E.2d 865 (1967)]." Syl. pt. 4, *Jones, Inc. v. W.A. Wiedebusch Plumbing and Heating Co.*, 157 W.Va. 257, 201 S.E.2d 248 (1973).

Syl.Pts. 3, 6, In re State Public Building Asbestos Litigation, 193 W.Va. 119, 454 S.E.2d 413 (1994).

Ms. Sneberger has set forth voluminous pinpoint record citations above in the Statement of the Case on pages 4-14. However, in summary, Ms. Sneberger offered the testimony of two expert general contractors, one of whom is also a civil engineer, that: (1) the home is structurally unsafe and in danger of collapsing; (2) the house needs to be torn down to the foundation and rebuilt; (3) the home was not built in a workmanlike manner; (4) the dwelling was not built the way a reasonably prudent builder would have built it; and (5) the house is not a reasonably safe place for Ms. Sneberger to live.

[AR 447-448, 499]. Mr. McGlothlin and Mr. Rockwell both testified that the house needed to be torn down and rebuilt at a cost of \$150 per square foot, which Mr. McGlothlin calculated at \$350,000. [AR 448-450, 500-501]. Ms. Sneberger also offered testimony from a West Virginia certified home inspector regarding the deficiencies in the home, as well as evidence from four workmen who were involved in remediating the Defendants' work with respect to the chimney block, electrical work, plumbing, and roofing. [AR 278-289, 291-312, 315-326, 328-329, 333-336, 337-354, 356-360, 374-376, 384-395, 405-407, 416-419]. In addition, both Ms. Sneberger and Reverend Biller testified about her extreme emotional distress as a result of the actions of Mr. Morrison. [AR 590-591, 594-597, 631-632, 654, 690-692, 694-695].

In response, Defendant Jerry Morrison never testified that he built Ms. Sneberger's home in a reasonably prudent manner or that the home was constructed in a workmanlike manner and was reasonably fit for human habitation. Nor did Mr. Morrison offer any expert testimony on these issues. Rather, he simply testified that he thought he had done the best job he could. [AR 240].

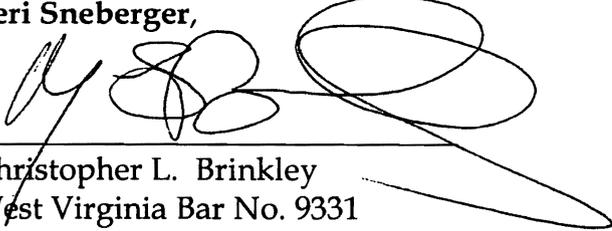
Given that Mr. Morrison wholly failed to even meet the prima facie elements of Ms. Sneberger's case, the jury's verdict finding that Ms. Sneberger's damages totaled \$40,000 and that she was 40% responsible for the condition of her house were against the clear weight of the evidence. [AR 6, 842-845].

Accordingly, the trial court erred and this Court should enter judgment finding liability against Mr. Morrison with no fault on the part of Ms. Sneberger and order new trial on damages, or alternatively remand this case for a new trial on all issues.

CONCLUSION

Wherefore, Teri Sneberger respectfully requests that the West Virginia Supreme Court of Appeals review the foregoing assertions of error which occurred during the August 14-16, 2013 trial of this case; reverse Judge Wilfong's erroneous rulings; remand this case to the Circuit Court of Randolph County with instructions to enter judgment as a matter of law with respect to the liability of Jerry Morrison and the lack of fault on the part of Teri Sneberger, to hold a new trial with respect to the liability of James Phillips, and to hold a new trial with respect to damages; or alternatively otherwise remand this case for further proceedings consistent with this Court's decision; and for such other relief as this Court may deem appropriate.

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CERTIFICATE OF SERVICE

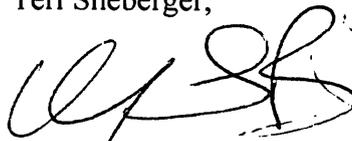
I, Christopher L. Brinkley, counsel for Petitioner/Plaintiff Below, do hereby certify that a true and exact copy of the foregoing "**Petitioner's Brief**" was served upon the following individuals:

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in an envelope properly addressed, stamped and deposited in the regular course of the United States Mail, this 3rd day of October, 2014.

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