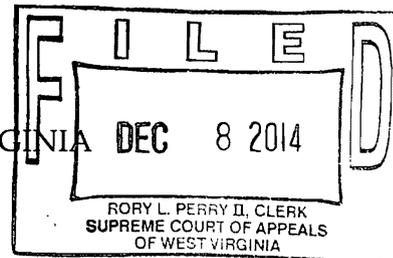


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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' REPLY BRIEF  
AND RESPONSE TO JERRY MORRISON'S  
CROSS ASSIGNMENT OF ERROR**

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TERI SNEBERGER

A handwritten signature in black ink, appearing to read "M. Masters", written over a horizontal line.

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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 THAT 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.

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- IX. THE TRIAL COURT DID NOT ERR IN DENYING JERRY MORRISON'S MOTION FOR JUDGMENT AS A MATTER OF LAW GIVEN TERI SNEBERGER'S OVERWHELMING EVIDENCE FROM MS. SNEBERGER, HER 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; THAT MR. MORRISON ACTED FRAUDULENTLY IN REPRESENTING THAT HE WAS COMPETENT TO BUILD THE HOUSE, IN TAKING MORE AND MORE OF MS. SNEBERGER'S MONEY DESPITE THEIR AGREED CONTRACT PRICE, AND IN CONCEALING FLAMMABLE WOOD IN THE CHIMNEY BLOCK; THAT MR. MORRISON BREACHED THE TERMS OF THE

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#### STATEMENT OF THE CASE

Appellant Ms. Sneberger notes that much of the Statement of the Case in Appellee Jerry Morrison's response brief is devoid of citations to the Appendix Record as required by W.Va.R.App.P. 10(c)(4) and 10(d). [Respondent Jerry Morrison's Brief (hereinafter "Morrison Brief"), pp. 1-3]. Although many of Mr. Morrison's alleged facts are accurate, neither this Court nor Ms. Sneberger should be required to hunt through the record to find them. Furthermore, many of those alleged facts lack detail; lack necessary context; or are irrelevant to the issues before this Court. Ms. Sneberger asserts that her Statement of the Case in Petitioner's Brief properly and adequately set forth the relevant facts.

With respect to Mr. Phillips' Statement of the Case, Ms. Sneberger concedes that it is largely accurate and to the extent that there are any mis-statements or missing context, they will be addressed within the context of the relevant Assignments of Error below.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Ms. Sneberger continues to assert that oral argument of this case, under W.Va.R.App.P. 19(a), is necessary as set forth in Petitioner's Brief on page 18.

#### ARGUMENT

Ms. Sneberger asserts that her Statement of the Case and her arguments on each of her Assignments of Error properly and adequately set forth the relevant facts and applicable authority. Ms. Sneberger further states that the majority of Mr. Morrison's and

Mr. Phillip's arguments were adequately addressed in Petitioner's Brief. Accordingly, Ms. Sneberger offers only brief reply comments.

However, as a general comment, Ms. Sneberger notes that the arguments in the Morrison Brief with respect to each of Ms. Sneberger's Assignments of Error are devoid of legal authority and/or citations to the Appendix Record as required by W.Va.R.App.P. 10(c)(7). Accordingly, Ms. Sneberger requests that this Court disregard Mr. Morrison's arguments in accordance with W.Va.R.App.P. 10(c)(7). In addition, many of Mr. Morrison's alleged facts lack detail; lack necessary context; or are irrelevant to the assignment of error.

Finally, Ms. Sneberger sets forth her reply arguments using the same numbering system for the Assignments of Error as used in Petitioner's Brief. Ms. Sneberger notes for the benefit of the Court that Mr. Morrison's brief has reordered some of the assignments of error. Appellee James Phillips is not subject to several of Ms. Sneberger's Assignments of Error and, accordingly, the numbering in Mr. Phillip's brief (hereinafter "Phillips Brief") does not match up with the Petitioner's Brief, but his arguments are in the same order as Petitioner's Brief when they are relevant to Mr. Phillips.

- 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.**

Mr. Morrison's brief asserts that "The Court indicated that if the trial went over three (3) days, another day may be scheduled." [Morrison Brief, p. 4]. In fact, Judge Wilfong repeatedly stated that the case would be submitted to the jury by Friday, the

third day of trial, and, more specifically said, "I'm not going to bring a jury in on Saturday, Sunday, and continue into Monday." [AR 89, 147, 150-151]. Furthermore, Judge Wilfong stated that even if the time limits had been imposed before the trial started and an extra day requested, "I might not have given it to you." [AR 154-155]. Mr. Morrison's assertion of fact is simply wrong.

Mr. Phillips and Mr. Morrison's principal response to Ms. Sneberger's Allegation of Error is that there is no evidence of anything Ms. Sneberger's counsel omitted as a result of reworking his examination "on-the-fly." First, during the hearing on the motion for new trial, Ms. Sneberger's counsel, subject to his duty of candor to the court under Rule of Professional Conduct 3.3(a)(1), specifically informed Judge Wilfong that given her mid-trial imposition of time limits, counsel had been forced to rework his examinations "on-the-fly." [AR 45]. Second, the only tangible proof that Ms. Sneberger's counsel could have presented the trial court in support of his statement would have been his confidential work-product, namely his trial outlines. [AR 45]. However, Ms. Sneberger's counsel is willing to tender his notes to the Court in camera if necessary.

In addition, although both Mr. Morrison and Mr. Phillips would have this Court believe that there was ample time for the presentation of additional evidence at the end of the case, after Judge Wilfong's mid-trial imposition of five and a half hour time limits and after the Sneberger had rested her case, this argument ignores three key facts. First, Judge Wilfong had specifically allocated five and a half hours to each party. [AR 850-856]. Nothing in the record suggests that Judge Wilfong would have given any party's unused time to another party. Second, even if Judge Wilfong would have made a party's

unused time available to another party, Ms. Sneberger's counsel had no way of knowing how much additional time she could take in the presentation of her case-in-chief based upon events which largely occurred after she had rested her case-in-chief, such as the dismissal of Mr. Phillips and the presentation of Mr. Morrison's case-in-chief.<sup>1</sup> [See AR 45-46]. Third, the case was submitted to the jury at 4:10 pm on the third day of trial. [AR 842]. In other words, presentation of the case ran nearly to the end of the last trial day allotted by Judge Wilfong anyway.

Finally, Mr. Phillips suggests that Ms. Sneberger's counsel initially stated that it would take two to three days for the presentation of her case and then conceded the entire case could "very likely" be tried in three days. [James Phillips' Response to Petitioner's Brief (hereinafter "Phillips Brief"), p. 9]. However, this statement is missing important context. Ms. Sneberger's counsel stated that "[T]he Plaintiff will probably take half a day and then Plaintiff's experts will go fairly quickly. We're going to take at least two or three days to try the case... Plus whatever [the defendants] need." [AR 851]. Ms. Sneberger's counsel then noted that since the majority of the witnesses that the defendants would call, would have already been called in Ms. Sneberger's case-in-chief, the case could "very likely" be completed in three days. [AR 852]. This statement is very important because it explains why Ms. Sneberger's counsel believed that the trial could "very likely" be completed in three days and it demonstrates that counsel anticipated that Ms. Sneberger's

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<sup>1</sup> Similar uncertainty as to the available time existed during Mr. Sneberger's presentation of her case-in-chief as she had no way of knowing how long counsel for Mr. Phillips and counsel for Mr. Morrison would take for their examinations and cross-examinations.

case-in-chief would take much longer than the defendants' cases-in-chief. Neither counsel for Mr. Morrison, counsel for Ms. Phillips, or Judge Wilfong expressed any concern over this statement by Ms. Sneberger's counsel [AR 852-856] until Judge Wilfong re-raised the allocation of time issue mid-trial and imposed equal 5.5 hour time limits on each of the parties. [AR 88-91, 146-157].

Therefore, Ms. Sneberger contends that the trial court abused its discretion, erred, and created a miscarriage of justice when it imposed the time limits 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.**

Mr. Phillips' brief suggests that the trial court properly precluded Ms. Deem from testifying about "defects" associated with flammable wood in the chimney block or gaps in the flue liner because she is not a masonry expert. Ms. Deem did admit that she is not an expert mason. [AR 400]. In other words, Ms. Deem would not suggest that she was qualified to go out and perform masonry construction. However, as discussed in Petitioner's Brief on pages 10-11, Ms. Deem is a home inspector certified by the State of West Virginia as competent to evaluate defects associated with masonry and chimney construction.

Furthermore, West Virginia law holds that for an expert to give expert testimony on a topic, the expert only needs to meet minimal qualifications in an area of expertise

which covers the particular opinion. Syl.Pt. 5, Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995). Furthermore, the expert admissibility rules do not require “that the experience, education, or training of the individual be in complete congruence with the nature of the issue sought to be proven.” Id., 195 W.Va. at 525, 466 S.E.2d at 184 (cit. omitted). Finally, the expert admissibility threshold in West Virginia is liberal and a trial court should err on the side of admissibility. Id., 195 W.Va. at 525, 466 S.E.2d at 184 (cit. omitted).

With respect to whether there are defects present in chimney construction, a number of different professions would be qualified to offer expert testimony including home inspectors, general contractors, masons, and/or engineers. What Mr. Phillips and Mr. Morrison would have this Court do, is narrow the scope of issues that an expert may testify about and heighten the admissibility threshold for expert testimony in West Virginia. Specifically, in terms of this case, Mr. Phillips and Mr. Morrison would have this Court define the issue of defect in terms of the masonry block (which happens to surround wood, heat sources such as fireplace flues, and concrete), rather than defining the issue of defect in terms of whether it is appropriate to place flammable material in close proximity to a heat source and/or thermally conductive materials such as concrete (which in this case happens to be inside masonry block). This was a clear misapplication of West Virginia law.

Given that Ms. Deem met the minimal qualifications necessary to provide expert testimony under West Virginia law, her “defect” testimony should have been admitted. To the extent that Mr. Phillips and Mr. Morrison raise criticisms of Ms. Deem’s

qualifications beyond that threshold, vigorous cross-examination, careful instructions on the burden of proof, and rebuttal evidence were more appropriate than wholesale exclusion of Ms. Deem's use of the word "defect." *Id.*, 195 W.Va. at 525-526, 466 S.E.2d at 184-185 (cit. omitted).

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" with respect to the fire hazards she identified in the chimney. 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.**

Contrary to Mr. Morrison's argument, Ms. Sneberger did not offer any evidence about "fire damage" to the wooden beams in the chimney block, [Morrison Brief, p. 6], given that no fire occurred.

Mr. Phillips' brief suggests that the trial court properly precluded Ms. Sneberger's expert Broderick McGlothlin from testifying about the hazards associated with flammable wood in the chimney block, gaps in the flue liner, or whether a masonry contractor has acted with due care, because he is not an expert mason. Mr. McGlothlin admitted that he does not specialize in masonry or consider himself an expert mason. [AR 429-431]. In addition, Mr. McGlothlin does not do masonry work on his own construction projects. However, as discussed in Petitioner's Brief on pages 22-24, Mr.

McGlothlin is a licensed general contractor with over 20 years of construction experience and, as a general contractor, has knowledge about concrete and supervisory responsibility over masons and chimney construction on his projects.

Again, West Virginia law merely requires an expert to meet minimal qualifications in an area of expertise which covers the particular opinion. Syl.Pt. 5, Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995). Not only do the expert admissibility rules not “require...that the experience, education, or training of the individual be in complete congruence with the nature of the issue sought to be proven,” they also do not require “a specialist within a particular branch within the profession[.]” Id., 195 W.Va. at 525-526, 466 S.E.2d at 184-185 (cit. omitted). Finally, a trial court should err on the side of admissibility of expert testimony. Id., 195 W.Va. at 525, 466 S.E.2d at 184 (cit. omitted).

Applying the West Virginia Rules of Evidence and the applicable case law, as a general contractor with knowledge of concrete and supervisory responsibility over masonry contractors, Mr. McGlothlin was clearly qualified to testify about the existence of deficiencies in the masonry work and whether the work of a mason, such as Mr. Phillips, complied with the standard of due care. To the extent that Mr. Phillips and Mr. Morrison raise criticisms of Mr. McGlothlin’s qualifications beyond that threshold, vigorous cross-examination, careful instructions on the burden of proof, and rebuttal evidence were more appropriate than wholesale exclusion of the foregoing testimony from Mr. McGlothlin. Id., 195 W.Va. at 525-526, 466 S.E.2d at 184-185 (cit. omitted).

With respect to Ms. Sneberger’s expert, Richard Rockwell, Ms. Sneberger did not attempt to elicit opinions about the quality of the chimney construction from him given

Judge Wilfong's prior limitations on the testimony of Ms. Deem and Mr. McGlothlin. [AR 396-398, 401, 403-404, 405, 477-479]. Having had the same objection to Ms. Sneberger's experts sustained twice, there was no reason to attempt to elicit that evidence from yet another witness. Although 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), speaks in terms of not having to continue to make an objection which has been over-ruled, there is no reason not to apply the same rule when the court has sustained an objection. Accordingly, it was not necessary for Ms. Sneberger to ask such questions of Mr. Rockwell in order to preserve the issue for appeal.

However, Ms. Sneberger would note that Mr. Rockwell has 30 years of experience building hundreds of log homes, is a licensed general contractor and an engineer, is responsible for supervising the masons on his construction projects and judging the quality of their work, and testified that the general principles of engineering, physics, and building codes apply equally to all types of homes. [AR 481-492]. Notwithstanding the fact that Judge Wilfong qualified Mr. Rockwell as an expert in civil engineering, contracting, and the construction of log homes [AR 491-492], Judge Wilfong also indicated during Mr. Rockwell's testimony that she would rule the same way she had with respect to Ms. Deem and Mr. McGlothlin when it came to masonry issues. [AR 492]. Again, there was no reason for Ms. Sneberger to have to ask masonry defect and standard of care questions of a third expert witness when objections to them have already been sustained twice.

In short, Judge Wilfong did not believe it was appropriate for anyone to testify about what could happen to flammable materials near heat sources inside a masonry block chimney, related defects, the sufficiency of such construction, or whether such construction met the standard of due care, unless such person was an expert mason. This ruling was clearly contrary to West Virginia law

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 the 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.**

Mr. Morrison offers no response to this Assignment of Error except to raise, improperly, a Cross Assignment of Error. *See infra*.

Mr. Phillips' response brief asserts that, after Mr. Morrison informed Mr. Phillips how thick the chimney pad was and what it was made of, Mr. Phillips contacted his old

boss who told Mr. Phillips that “five to six inches of concrete sitting on bedrock would be enough to hold a chimney with two fireplaces.” [Phillips Brief, pp. 3, 23-24]. This argument leaves out several key facts. First, Mr. Phillips understood this was to be a two story chimney. [AR 531, 563]. However, the undisputed evidence is that this was a three story chimney running from the basement, up past their first floor, up past the loft level, and then out the roof. [See Petitioner’s Brief, pp. 7-8]. Mr. Phillips clearly did not have a clear appreciation for the height of the chimney he was building. Second, although Mr. Phillips knew that the sufficiency of the chimney pad was dependent on the height of the chimney, Mr. Phillips did not tell his old boss how tall the chimney was going to be. [AR 533]. Third, the indisputable evidence is that Mr. Phillips relied solely upon the representations of Mr. Morrison, a man Mr. Phillips knew nothing about except that Mr. Morrison was an unlicensed contractor [AR 528-529], did absolutely nothing to verify Mr. Morrison’s representations [AR 532-536, 562-563], and Mr. Morrison’s representations were flat out false as evidenced by the fact that when the chimney pad was dug out and replaced by Larry Dewitt, the pad was less than four inches thick, the pad was sitting on dirt, and Mr. Dewitt had to dig down another thirty to thirty-six inches to find bedrock. [AR 351-354, 356-358, 859-863].

Mr. Phillips’ brief also mischaracterizes Mr. Dewitt’s testimony as suggesting that Mr. Phillips acted reasonably in relying on Mr. Morrison’s representations. [Phillips Brief, pp. 4, 25]. Mr. Dewitt was actually asked if the builder of a chimney was justified in relying on another builder’s representations about the pad, if “it’s bedrock” because “that’s what you’re looking for[.]” [AR 371-373]. There is no evidence anywhere in the

record that the builder of a chimney may justifiably rely upon false statements from an unlicensed contractor that the builder knows nothing about.

Similarly, Mr. Phillips' brief suggests that Ms. Sneberger's expert Richard Rockwell testified that it was reasonable for Mr. Phillips to rely upon Mr. Morrison's representations about the thickness of the chimney pad. [Phillips Brief, pp. 4, 24-25]. The actual testimony relied upon by Mr. Phillips reads as follows:

- Q: You would agree with me that it's reasonable for a subcontractor to rely upon what a general contractor tells them about conditions of the home whenever they're doing work there, wouldn't you agree with that?
- A: In my case, sir, with the subcontractors that I work with, yes.
- Q: I understand in your case. But in the normal day-to-day operations if a sub comes in and he's doing work and a general tells him something, it's reasonable for that sub to rely upon what the general is telling him?
- A: Oh, yes. We have to, in this business. As long as they're a bona fide licensed contractor and got any experience at all, we have to trust them.

[AR 524-525]. As noted above, Mr. Phillips admitted he knew nothing about Mr. Morrison, such as his experience, except that Mr. Morrison was NOT a licensed contractor. The very testimony cited by Mr. Phillips in his response demonstrates that Mr. Phillips violated the standard of care by relying upon the misrepresentations of an unlicensed contractor who Mr. Phillips knew nothing about.

In addition, Mr. Phillips himself admitted that a three and a half to four inch thick pad, such as that upon which Mr. Phillips built Ms. Sneberger's chimney, was not sufficient for the chimney that Mr. Phillips built. [AR 534].

Mr. Phillips' reliance upon false information from an unlicensed contractor and

failure to perform or secure any sort of verification of this critical construction element was unreasonable, and the burden of Mr. Phillips' unreasonable actions should fall on Mr. Phillips, not the innocent home owner.

With respect to the presence of wooden beams run through the chimney block, Mr. Phillips was responsible for the construction of the chimney, made the decisions about the construction of the chimney, and was to provide a safe and proper chimney. [AR 529-531, 681]. Mr. Phillips was aware that Mr. Morrison had placed wooden beams inside Mr. Phillips chimney block. [AR 261-262, 537, 565-566]. Although Mr. Phillips observed Mr. Morrison starting to cut the wooden beams out of Mr. Phillips' chimney, Mr. Phillips left the work site and there is no evidence that he did anything to ensure that Mr. Morrison actually removed the wooden beams from the chimney block. [AR 261-262, 537, 565-566]. Mr. Phillips returned to find that Mr. Morrison had poured concrete into the chimney and simply assumed that Mr. Morrison, an unlicensed contractor about whom Mr. Phillips knew absolutely nothing, had in fact gone on and removed the wooden beams. [AR 566-568]. But as with the construction of the chimney pad, Mr. Phillips' reliance on Mr. Morrison was not reasonable, and the undisputed evidence is that Mr. Morrison did not cut the wooden beams out of the chimney block. [AR 791-792, 864-865, 871-875].

With regard to Mr. Phillips' operation of his forklift to help Mr. Morrison set the logs of the home, the evidence is undisputed that: (1) Mr. Phillips knew nothing about setting logs (2) but chose to help when asked by Mr. Morrison. [AR 540-541, 578]. Mr. Phillips further admitted that he was responsible for whatever happened while he was

operating his forklift. [AR 540]. Mr. Phillips chose to participate in an aspect of construction of this home about which he admits have no knowledge whatsoever.

With respect to Mr. Phillips' analysis of McComas v. ACF Industries, LLC, 232 W.Va. 19, 750 S.E.2d 235 (2013), the fact that it was a deliberate intent case is irrelevant. Rather the importance of that decision with respect to this case is that the West Virginia Supreme Court of Appeals stated that "Willful ignorance [of the proper and safe way to do a job] is no defense[.]" Id., 232 W.Va. 19, 27, 750 S.E.2d 235, 243. Mr. Phillips then says that there is no evidence that he was willfully ignorant of the proper way to do the job. To the contrary, Mr. Phillips help set the logs on the Sneberger home using his forklift notwithstanding his utter lack of knowledge about how to build a log home. [AR 269-270, 272-273, 540-541, 558, 573, 746]. Given the fact that Mr. Phillips' only piece of knowledge about Mr. Morrison was that Mr. Morrison was not a licensed contractor [AR 528-529], Mr. Phillips use of his own forklift to help set the logs for a log home with a complete lack of knowledge as to whether it is being done correctly or not, is the very definition of willful ignorance.

Mr. Phillips claims that there was no evidence that he breached the appropriate duty of care owed by a mason. First, a contractor's duty of care to act as a reasonably prudent person is imposed by law. See Aikens v. Debow, 208 W.Va. 486, 498, 541 S.E.2d 576, 588 (2000). Second, Judge Wilfong improperly precluded Ms. Sneberger's experts from testifying about the duty of care required from Mr. Phillips as discussed above.

With respect to Mr. Phillips' argument that fraud must be proven by clear and convincing evidence, there can be no more clear and convincing evidence than the fact

that concrete was used to conceal the presence of flammable wood in close proximity to a heat sources, namely the flues. [AR 791-792, 864-865, 871-875]. Mr. Phillips' failure to follow through and ensure that the flammable wooden beams had been removed from inside Mr. Phillips' chimney block made him an joint tortfeasor with respect to the clear and convincing fraud perpetuated on Ms. Sneberger.

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 misrepresentation, and outrageous conduct. 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.**

In response to the suggestion on page eight of the Morrison Brief that Ms. Sneberger terminated Mr. Morrison because she was running out of money, Ms. Sneberger testified that she terminated her agreement with Mr. Morrison because some

of Mr. Morrison's workers expressed concerns about the quality of the work; Mr. Morrison was demanding ever more payment for materials and services (notwithstanding the \$140,000 contract price); Mr. Morrison had not provided a turn-key ready home in four months in accordance with the terms of the contract; Ms. Sneberger had numerous concerns about the quality of the construction including the sagging roof, log spacing, and others; Ms. Sneberger was concerned that the house was hazardous or unsafe; she was suffering severe emotional distress as a result of this misadventure; and she was running out of money. [AR 592-595, 643]. When counsel for Mr. Morrison asked Ms. Sneberger why she did not have Mr. Morrison come back to address any of her concerns with the construction, she replied, "The way he cobbled up the entire house, I certainly didn't want to ask him to come back and do anything else." [AR 654].

Accordingly, given the overwhelming evidence on behalf of Ms. Sneberger and Mr. Morrison's failure to offer evidence fairly addressing the elements of Ms. Sneberger's negligence and breach of contract claims against Mr. Morrison, the trial court erred when it failed to grant Ms. Sneberger's motion for judgment as a matter of law on those claims; 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 JERRY MORRISON'S SPECULATION THAT THE REMEDIATION EFFORTS MIGHT HAVE AFFECTED THE CONDITION OF THE HOME**

Mr. Morrison's allegation that Ms. Sneberger increased the size of the home by excavating for a garage without regard to the effect it would have on the home is extremely misleading. [Morrison Brief, p. 11]. The idea to add a basement and attached

garage actually came from Mr. Morrison and/or one of his associates. [AR 117-119, 186, 589-590]. Clearly, since Mr. Morrison was building the house, he not only knew about the addition of the basement / garage, but it was his responsibility to account for that in the construction.

In short, while Mr. Morrison offered some speculative testimony that actions taken by Ms. Sneberger or the contractors performing the remediation MAY have had some effect on the house, he has offered no testimony that such actions actually DID effect the house.

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**

Mr. Morrison blatantly mis-states the record when he suggests that Ms. Sneberger did not raise this Assignment of Error until this appeal. [Morrison Brief, p. 13]. Ms. Sneberger objected to the instruction at trial. [AR 785, *see also* 833]. The issue was raised again in Ms. Sneberger's motion for new trial. [AR 32-33]. Finally, the point was argued at the hearing on the motion for new trial. [AR 62-63].

In contrast to the law applicable to the tort of outrage and jury instructions set forth in Petitioner's Brief on pages 33-35, Mr. Morrison's brief recites punitive damages

law. [Morrison Brief, pp. 13-14]. In other words, Mr. Morrison does not discuss the correct law.

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.**

Mr. Phillips argues that Ms. Sneberger made key decisions about the size and construction of her home, that interior walls were removed during remediation, and that staircases were moved during remediation. However, Mr. Phillips offers no evidence whatsoever that any of these non-specific facts have any relevance to the issues that were placed before the jury.

Mr. Phillips also argues that since the jury visited the home, the verdict cannot be against the weight of the evidence. However, Mr. Phillips neglects to mention that this visit to Ms. Sneberger's house occurred several years after the events that are the subject matter of this lawsuit and after she invested well over \$100,000 dollars in trying to

remediate the defects created by Mr. Morrison and Mr. Phillips. [AR 278-379, 598-599, 610-614].

Mr. Phillips notes that Ms. Sneberger did not offer any medical evidence in support of her annoyance and inconvenience and her emotional distress. While true, Ms. Sneberger did offer her own testimony on those issues, as well as the testimony of Reverend Biller. [AR 590-591, 594-597, 631-632, 654, 690-695].

Finally, Mr. Phillips argues that there is no evidence that the jury's calculation of damages was erroneous. As a threshold consideration, Ms. Sneberger is the only person who put on any evidence of her damages. Furthermore, both Mr. McGlothlin and Mr. Rockwell testified that the home needed to be torn down and rebuilt at a cost of \$350,000. [AR 448-450, 500-501]. In addition, Ms. Sneberger testified about a \$7500 lost tax credit; \$27,163.82 she paid for materials; \$46,136 in payments to Mr. Morrison, plus an unidentified amount of cash; \$11,760.89 in payments to Mr. Phillips; an additional \$4,482.50 in payments to Mr. Phillips; \$48,031.61 for remediation labor; and \$99,960.75 for remediation materials. [AR 610-614]. Clearly, the jury's \$40,000 verdict was grossly inadequate.

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.

## RESPONSE TO JERRY MORRISON'S CROSS ASSIGNMENT OF ERROR

- IX. THE TRIAL COURT DID NOT ERR IN DENYING JERRY MORRISON'S MOTION FOR JUDGMENT AS A MATTER OF LAW GIVEN TERI SNEBERGER'S OVERWHELMING EVIDENCE FROM MS. SNEBERGER, HER 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; THAT MR. MORRISON ACTED FRAUDULENTLY IN REPRESENTING THAT HE WAS COMPETENT TO BUILD THE HOUSE, IN TAKING MORE AND MORE OF MS. SNEBERGER'S MONEY DESPITE THEIR AGREED CONTRACT PRICE, AND IN CONCEALING FLAMMABLE WOOD IN THE CHIMNEY BLOCK; THAT MR. MORRISON BREACHED THE TERMS OF THE CONSTRUCTION CONTRACT; THAT MR. MORRISON'S CONDUCT WAS OUTRAGEOUS AND CREATED SEVERE EMOTIONAL DISTRESS IN MS. SNEBERGER; AND THAT THE HOME WAS CONSTRUCTED IN SUCH A WAY THAT IT PRESENTED AN IMMINENT THREAT TO HUMAN LIFE THEREBY ENTITLING MS. SNEBERGER TO RECOVER PUNITIVE DAMAGES.

### 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

In response to Ms. Sneberger's Assignment of Error with respect to the trial court's grant of Mr. Phillips' motion for judgment as a matter of law (Assignment of Error IV above), Mr. Morrison's brief appears to set forth a cross assignment of error pursuant to W.Va.R.App.P. 10(f). [Morrison Brief, pp. 9-10]. Rule 10(f) further requires that the cross assignment of error must be in a separate section of the responsive brief and must set

forth both citations of authority and citations to the Appendix Record as required by W.Va.R.App. 10(c)(7).

However, the Cross Assignment of Error was not set forth in a separate section of the Morrison Brief, nor does it contain citations to the alleged facts in support. [Morrison Brief, pp. 9-10]. Accordingly, Ms. Sneberger requests that this Court disregard Mr. Morrison's Cross Assignment of Error in accordance with W.Va.R.App.P. 10(c)(7) and W.Va.R.App.P. 10(f).

Admittedly, at the close of Ms. Sneberger's case-in-chief, Mr. Morrison made a motion for judgment as a matter of law. However, Mr. Morrison did not ask that the trial transcript of his motion for judgment as a matter of law be included in the record on appeal as he was required to do under W.Va.R.App.P. 7(e) which states, in part:

The respondent may, within ten days after receiving the petitioner's list [of proposed contents for the appendix], serve on the petitioner a list of additional parts of the record to which it wishes to direct the Court's attention.

Accordingly, this Court is deprived of the opportunity to review Mr. Morrison's motion and Ms. Sneberger's response.

With respect to legal authority, the Morrison Brief does cite a single case on the standard for granting a motion for judgment as a matter of law. [Morrison Brief, p. 9]. However, in contrast to the Petitioner's Brief with respect to her similar allegation of error at pages 25-26, 28 arising from the trial court's grant of Mr. Phillips' motion for judgment as a matter of law, the Morrison Brief does not recite any authority on how to apply the evidence to the judgment as a matter of law standard or set forth any of the elements of

the substantive claims upon which Mr. Morrison sought judgment as a matter of law. [Morrison Brief, pp. 9-10]. In fact, the Morrison Brief mentions Ms. Sneberger's negligence, fraud, and outrage claims only by name, and never mentions Ms. Sneberger's breach of contract, warranty of habitability, punitive damages claims.

Furthermore, the jury returned a verdict in Mr. Morrison's favor on breach of contract, fraud, outrage, and punitive damages. [AR 842-844]. Therefore any allegations of error with respect to those theories are moot.

With respect to the Ms. Sneberger's negligence claim, Mr. Morrison's brief provides no citations to facts showing that no reasonable jury could find in Ms. Sneberger's favor. Rather, with the exception of brief comments about the construction of the chimney pad which are unsupported by citation to the record [Morrison Brief, pp. 9-10], the thrust of Mr. Morrison's argument is that since a judgment as a matter of law was granted in favor of Mr. Phillips, the trial court was compelled to grant judgment as a matter of law in favor of Mr. Morrison as well. [Morrison Brief, pp. 9-10]. Of course, Mr. Morrison cites no authority compelling such a conclusion.

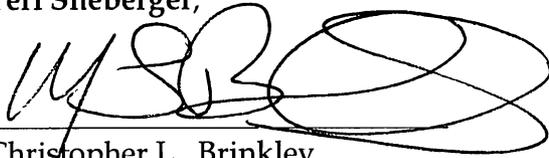
Nevertheless, Ms. Sneberger would refer to the Court to her lengthy citations of fact and law in Petitioner's Brief including the facts in her Statement of the Case, pages 2-15; the law set out in her fourth Assignment of Error, pages 25-26, 28; and the arguments in her fourth, fifth, and eighth Assignments of Error, pages 27-29, 30-31, 36-37.

Accordingly, there was sufficient evidence for a jury to find that Mr. Morrison negligent in the construction of Ms. Sneberger's home. Accordingly, the trial court properly denied Mr. Morrison's motion for judgment as a matter of law.

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; deny Mr. Morrison's Cross Assignment of Error; and/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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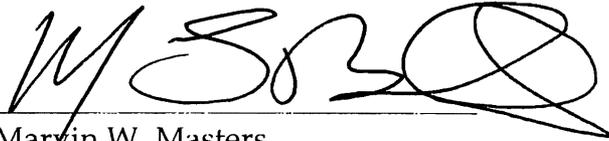
CERTIFICIATE OF SERVICE

I, Christopher L. Brinkley, hereby certify that on December 8, 2014, I served a true and accurate copy of the foregoing Petitioners' Reply Brief and Response to Jerry Morrison's Cross Assignment of Error, via postage prepaid, First Class, United States Mail, on the following individuals:

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