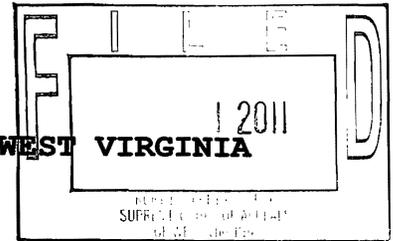


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0595



Raymond A. Hinerman, Sr., and
Barbara B. Hinerman, husband
and wife, Plaintiffs below,

Petitioners

v.

Appeal from a final order
of the Circuit Court of
Monongalia County (10-C-896)

Richard A. Rodriguez and
Rita C. Rodriguez, husband
and wife, Defendants below,

Respondents

PETITIONERS' BRIEF

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I. ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED BY FAILING TO ORDER RESPONDENTS TO DELIVER TO PETITIONERS, A GENERAL WARRANTY DEED FREE AND CLEAR OF ALL LIENS AND ENCUMBRANCES.
2. THE CIRCUIT COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT INASMUCH AS FACTS AND LAW DID NOT SUPPORT THE COURT'S RULING AND THE RULING WAS PRECIPITOUS.
3. THE CIRCUIT COURT ERRED BY NOT GRANTING THE PETITIONERS A CONTINUANCE IN ORDER TO CONDUCT DISCOVERY BECAUSE THERE ARE ISSUES OF MATERIAL FACTS, AT LEAST REGARDING THE ALLEGATIONS OF FRAUD.
4. THE CIRCUIT COURT ERRED BY FAILING TO GRANT PETITIONERS PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF LOSS OF VALUE OF THE HOUSE.
5. THE CIRCUIT COURT ERRED BY ORDER OF JULY 13, 2011, IN NOT REVERSING ITS RULING OF MARCH 4, 2011, PURSUANT TO A MOTION FOR RECONSIDERATION GRANTING SUMMARY JUDGMENT TO THE RESPONDENTS.
6. THE TRIAL COURT ERRED BY DENYING A STAY PURSUANT TO RULE 62(h) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE.

II. STATEMENT OF THE CASE

The House Agreement

On the 5th day of October, 2010, the Petitioners (sometimes referred to as the "Buyers" herein) and the Respondents (sometimes referred to as the "Sellers" herein) entered into a "Uniform Real Estate Purchase Agreement" (hereinafter "Purchase Agreement") for real property owned by the Sellers and known as Lot 14, Greystone Estates, Morgantown, Monongalia County, West Virginia, with a street address of 3960 Eastlake Drive, Greystone Estates (hereinafter the "house"). (Purchase Agreement, attached as Exhibit "A" to "First Amended Complaint", Appendix 66.)

For several years prior thereto and up to the sale of the real estate, said real estate was listed for sale by Kathy Martin of KLM Realtors (hereinafter "Realtor") as agent for the Sellers. ("First Amended Complaint", Appendix 58.)

The Buyers made a personal inspection of the house before signing the Purchase Agreement, but were never able to inspect a room on the first floor (basement) because it was full of children's toys stacked from the floor to the ceiling. ("First Amended Complaint", paragraph 3, Appendix 59.)

In late September 2010, before making a final offer, when Buyers tried to inspect said room, the door would not open for an unknown reason and Buyers now believe that the door was

locked so they could not inspect the room before making a final offer. ("First Amended Complaint", paragraph 4, Appendix 59.)

On December 21, 2010, Sellers' Realtor advised Buyers that said room, which Buyers were not able to inspect during earlier inspections, had a water leak which had just been discovered. On final inspection by the Buyers on December 22, 2010, prior to a scheduled closing, there were obvious ongoing attempts by Sellers to dry out a strong musty smell and obvious water leak, with a sign on the door which read "Do Not Open". ("First Amended Complaint", paragraph 5, Appendix 59.)

Buyers stated their position that the Sellers were responsible for the leak and its consequences under the Purchase Agreement dated October 5, 2010, and "Seller's Disclosure Statement" dated October 13, 2010, and Buyers intended to proceed with the sale at that time with the responsibility for the leak to be determined after closing. There were only nine (9) days to close before the Purchase Agreement expired and time was of the essence. ("First Amended Complaint", paragraph 6, Appendix 59; "Seller's Disclosure Statement", attached as Exhibit "B" to "Affidavit in Support of Motion for Preliminary Injunction", Appendix 40; and Purchase Agreement, attached as Exhibit "A" to "First Amended Complaint", Appendix 66-72.)

The Sellers refused to correct the leak which reduced the fair market value of the house, which value had been established by the Purchase Agreement (willing Buyers and willing Sellers).

The Sellers, as alleged in the "First Amended Complaint", also committed fraud by concealing and preventing the Buyers from a meaningful inspection of the room which was damaged by the water leak until approximately one (1) week before the final closing, but just one (1) day before Sellers unilaterally postponed the second of three (3) closing dates, moving the closing date closer to the December 31, 2010, deadline. ("First Amended Complaint", paragraph 8, Appendix 60.)

In the Purchase Agreement, the Buyers agreed to accept the house in its "as is" condition, as it was on the date of the execution of the Purchase Agreement, not as it was on the date of closing. ("First Amended Complaint", paragraph 9, Appendix 60.)

Paragraph 23 of the Purchase Agreement contains the following language:

23. PRE-CLOSING WALK-THROUGH INSPECTION.

Buyer shall have the right to re-inspect Property prior to closing in order to ascertain that the Property is in the same physical condition as it was as of the date of this Agreement...." (Emphasis added.)

(Purchase Agreement, attached as Exhibit "A" to "First Amended Complaint", Appendix 70.)

The closing occurred on December 30, 2010, but was not consummated until January 3, 2011, due to the Monongalia County Courthouse being closed on December 31, 2010. ("First Amended Complaint", paragraph 11, Appendix 60.)

The Sellers contend that the "as is" provision in the Purchase Agreement creates no responsibility on them for the damages. ("Richard A. Rodriguez's and Rita C. Rodriguez's Motion for Summary Judgment", filed on January 21, 2011, page 6, first paragraph, Appendix 92.)

Paragraph 25 of the Purchase Agreement contains the following language:

25. OTHER ADDENDA/PROVISIONS: Notice of Agency Relationship, Privacy Policy

**It is understood this property is being sold "as is" and Sellers will make no repairs. However, Buyer has the right to have inspections as stated in Item #12 and 13 and if not satisfied with inspections may void this contract with earnest money returned to Buyer.

This offer is not contingent upon an appraisal.

(Purchase Agreement, paragraph 25, attached as Exhibit "A" to "First Amended Complaint", Appendix 71.)

Paragraph 12 of the Purchase Agreement, contains the following language:

12. PROPERTY INSPECTION:

A. Subject to BUYER'S rights of inspection reserved below in Section F" of this paragraph, if applicable, BUYER accepts the Property in its present existing state and condition and is not in reliance upon any representation made by SELLER, or SELLER'S or BUYER'S

agent(s), except for those made in any written disclosure statement provided to BUYER. (Emphasis added.)

(Purchase Agreement, paragraph 12, attached as Exhibit "A" to "First Amended Complaint", Appendix 67.)

The water damage occurred in the basement and crawl space after the date of execution of the Purchase Agreement according to the "Seller's Disclosure Statement". ("Seller's Disclosure Statement", attached as Exhibit "B" to "Affidavit in Support of Motion for Preliminary Injunction", Appendix 40.)

Paragraph 17 of the Purchase Agreement contains the following language:

17. PROPERTY DISCLOSURE STATEMENT.

SELLER agrees to provide to the BUYER a Property Disclosure Statement 7 days after acceptance of this Agreement. BUYER shall acknowledge receipt and have until 10 days to review and terminate this Agreement as a result of a disclosure made in the Property Disclosure Statement.

(Purchase Agreement, attached as Exhibit "A" to "First Amended Complaint", paragraph 17, Appendix 69.)

Paragraph 9(b) of the "Seller's Disclosure Statement" contains the following language:

9. BASEMENTS AND CRAWL SPACES (complete only if applicable).

(b) Has there ever been any water leakage, accumulation, or dampness within the basement or crawl space? Yes No

("Seller's Disclosure Statement", paragraph 9(b), attached as Exhibit "B" to "Affidavit in Support of Motion for Preliminary Injunction", Appendix 40.)

The Disclosure Statement was signed on October 13, 2010, by both Respondents. Therefore, the leak occurred after the Purchase Agreement was signed. The Disclosure Statement conclusively establishes the leak was not in existence at the time the Purchase Agreement was signed. ("Seller's Disclosure Statement", attached as Exhibit "B" to "Affidavit in Support of Motion for Preliminary Injunction", Appendix 41.)

Procedural History

The Petitioners filed suit in the Circuit Court of Monongalia County, West Virginia, on December 27, 2010, asking the Court to compel the Respondents to deliver a Deed to them for the real property, which property, Sellers, by virtue of the Purchase Agreement, had agreed to sell. (Complaint, Appendix 7, and Purchase Agreement, attached as Exhibit "A" to "First Amended Complaint", Appendix 66.) Sellers were refusing to deliver a Deed to Buyers without Buyers first releasing Sellers from any water damage claim which had occurred to the real property after the Purchase Agreement was signed on October 5, 2010. ("Complaint", paragraph 8, Appendix 2-3.)

Respondents filed "Richard A. Rodriguez's and Rita C. Rodriguez's Motion to Dismiss the Plaintiff's Complaint and to

Deny the Motion for Injunctive Relief" on December 30, 2010.
(Appendix 43-57.)

At an expedited hearing (December 30, 2010) between Christmas and New Years, Sellers agreed to deliver a General Warranty Deed without pre-conditions, but objected to a General Warranty Deed, free and clear of all liens and encumbrances. The Court ruled that Respondents need only deliver to Petitioners, a General Warranty Deed and not a Deed "free and clear of all encumbrances", as called for in the Purchase Agreement. ("Order" of February 2, 2011, Appendix 173-174, and Purchase Agreement, attached as Exhibit "A" to "First Amended Complaint", paragraph 5, Appendix 67.)

On January 7, 2011, Petitioners filed an Amended Complaint seeking repairs to the real estate or payment for the loss of the fair market value, with allegations of fraud by a separate claim regarding a boat, which has no relationship to the Purchase Agreement and house. ("First Amended Complaint", Appendix 58-65.) Note, the boat issue is not a part of this appeal and remains in litigation in the Circuit Court of Monongalia County, West Virginia. ("Order" of March 4, 2011, Appendix 198.)

On January 20, 2011, Petitioners filed "Plaintiffs' Response to Defendant's Motion to Dismiss Plaintiffs' Complaint, which Defendants are now Referring to as a Motion for Summary

Judgment and Plaintiffs' Request for a Continuance Under Rule 56(f)" as well as the "Affidavit of Plaintiff/Counsel for Plaintiffs, Raymond A. Hinerman, Sr., in Support of Plaintiffs' Motion to Continue All Proceedings Relative to the Defendants' Motion for Summary Judgment". The Motion was noticed for hearing on February 2, 2011. The Sellers' "Motion to Dismiss Plaintiffs' Complaint and to Deny the Motion for Injunctive Relief", which Defendants were referring to as their "Motion for Summary Judgment", was also noticed for hearing on February 2, 2011. (Appendix 73.)

On January 21, 2011, Respondents filed a Motion for Summary Judgment and on January 24, 2011, Petitioners filed their "Notice of Motion for Summary Judgment" with "Affidavit of Raymond A. Hinerman, Sr., in Support of Motion for Summary Judgment on the Issue of Liability Alone". (Appendix 87 and Appendix 129). On January 31, 2011, Petitioners filed their response to Respondents' Motion for Summary Judgment which was filed on January 21, 2011. (Appendix 138-155.)

Oral argument occurred on February 2, 2011, and the Court, by an "Order" entered on March 4, 2011, granted Respondents' Motion for Summary Judgment and denied Petitioners' Motion for Partial Summary Judgment on the issue of loss of value of the house. The separate boat issue denominated as such, remains

before the Circuit Court. ("Order" of March 4, 2011, Appendix 194-199 and "First Amended Complaint", Appendix 61.)

On March 4, 2011, Petitioners filed their "Motion to Set Aside Proposed Court Order of February 2, 2011, Granting Defendants' Motion for Summary Judgment Regarding the House at 3960 Eastlake Drive, Morgantown, WV", and Memorandum in Support of said Motion. (Appendix 182 and Appendix 187.)

A hearing was scheduled for April 1, 2011, on Buyer's Motion for Reconsideration pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. On March 30, 2011, Respondents filed their Responses to Plaintiffs' Motion to Reconsider (Appendix 204-214), and the hearing scheduled for April 1, 2011, was continued until April 6, 2011, to afford Petitioners' counsel an opportunity to review the Respondents' response. ("Order" of April 21, 2011, Appendix 215-216.)

Thereafter, the hearing scheduled for April 6, 2011, was postponed due to a medical condition suffered by counsel for the Petitioners, which required surgery on April 7, 2011.

On April 25, 2011, Petitioners' counsel filed a Motion for the Court to "Render Decision without Additional Oral Argument Regarding Plaintiff's Motion for Reconsideration". (Appendix 217-219.) However, the Court set a hearing on this matter for May 25, 2011, which hearing was continued until June 6, 2011.

At the hearing on the Motion for Reconsideration on June 6, 2011, the Court denied the motion. (Appendix 220-221.)

III. SUMMARY OF ARGUMENT

The Petitioners are entitled to receive a General Warranty Deed, free and clear from all liens and encumbrances.

The Court misconstrued the Purchase Agreement, and the law applied by the Court in granting Respondents' Motion for Summary Judgment was not applicable to the actual facts. The Court improperly denied Petitioners' Motion for Partial Summary Judgment and Petitioners' Request for a Continuance and improperly denied Petitioners' Motion for Reconsideration. ("Order" of July 13, 2011, Appendix 220-221.)

The Court's fact finding did not establish that there are no material issues of fact regarding the fraud claim. One of the important factual issues is was there any fraud as alleged in the "Complaint".

The Purchase Agreement is controlling and the Circuit Court misconstrued it regarding Petitioners' Motion for Summary Judgment and based its ruling on non-applicable law and facts. The applicable substantive law based on uncontested facts regarding loss of value of the house is Bryant v. Willison Real Estate Co., 177 W.Va. 120, 350 S.E.2d 748 (1986). ("Order" of July 13, 2011, Appendix 220-221.)

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for Memorandum Decision without oral argument.

V. ARGUMENT

1. THE CIRCUIT COURT ERRED BY FAILING TO ORDER RESPONDENTS TO DELIVER TO PETITIONERS, A GENERAL WARRANTY DEED, FREE AND CLEAR OF ALL LIENS AND ENCUMBRANCES.

The Petitioners sought an injunction seeking a Court order compelling Respondents to deliver to the Petitioners, a General Warranty Deed, free and clear of all liens and encumbrances as was required by the Purchase Agreement. (Purchase Agreement, paragraph 5, attached as Exhibit "A" to "First Amended Complaint", Appendix 67.)

As Petitioners entered the courtroom on December 30, 2010, Respondents' three (3) lawyers advised the Court that the Respondents would deliver a General Warranty Deed to Petitioners, but not one "free and clear of all liens and encumbrances."

The Court denied Petitioners' request for a General Warranty Deed, free and clear of all liens and, apparently because the Court believed there was no difference between the two (2) types of Deeds. Petitioners objected and only received a General Warranty Deed. ("Order" of February 2, 2011, Appendix 173-174.)

West Virginia Code §36-4-2 is as follows:

General Warranty: A covenant by a grantor in a deed, "that he will warrant generally the property hereby conveyed" or a covenant of like import, or use the words "with general warranty" in a deed, shall have the same effect as if the grantor had covenanted that he, his heirs and personal representatives will forever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of...

West Virginia Code §36-4-6, is as follows:

Freedom from encumbrances: A covenant, by any grantor in a deed containing the words "free from all encumbrances", or a covenant of like import, shall have the same effect as if the grantor had covenanted for himself, his heirs and personal representatives, that the premises are freely and absolutely acquitted, exonerated and forever discharged, and the grantee, his heirs and assigns, will be saved harmless and indemnified of, from and against any and every charge and...

Comparing the two statutes, it is clear that there is a significant difference between the two (2) types of Deeds, not only different statutes, but they are materially different.

West Virginia Code 36-4-2 ...will forever warrant and defend the said property unto the grantees.

West Virginia Code 36-4-6 ...that the premises are freely and absolutely acquitted, exonerated and forever discharged, and the grantee, his heirs and assigns will be saved harmless and indemnified of from and against any and every charge...

Paragraph 5, page 2 of the Purchase Agreement states as follows:

Upon the acceptance of this offer by SELLER and the fulfillment of all conditions stipulated herein to be performed by BUYER, SELLER shall by proper deed

containing covenants of GENERAL WARRANTY, free and clear of all liens and encumbrances, convey said property to Barbara B. Hinerman.

(Purchase Agreement, attached as Exhibit "A" to "First Amended Complaint", paragraph 5, Appendix 67.)

Clearly, Petitioners get additional protection with a General Warranty Deed free and clear of all liens and encumbrances. Also, it was required in the Purchase Agreement. (Purchase Agreement, attached as Exhibit "A" to "First Amended Complaint", paragraph 5, Appendix 67.)

It is difficult to understand the Circuit Court's ruling of December 30, 2010. The language in the Purchase Agreement is clear and unambiguous. The standard for review of this issue of law is *De Novo*. See Carr v. Hancock, 316 W.Va. 474, 607 S.E.2d 803 (2004). This error was preserved in the Court "Order" of February 2, 2011.

2. THE CIRCUIT COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT SINCE FACTS AND LAW DID NOT SUPPORT THE COURT'S RULING AND THE RULING WAS PRECIPITOUS.

Petitioners believe that there are material issues of fact regarding the fraud claim which should preclude a summary judgment. See Rule 56(c) which states as follows:

The judgment (Rule 56) sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In Franklin D. Cleckley, Robin J. Davis, Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure, Second Edition* (2006), at page 1245, the following appears:

[c] Findings required. It was held in *Fayette County National Bank v. Lilly* (199 W.Va. 349, 484 S.E.2d 232 (1997)), by Justice Davis, that although the standard of appellate review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed. The Supreme Court has also held that an order granting partial summary judgment must contain factual findings sufficient to permit meaningful appellate review. Where the order granting summary judgment is insufficiently clear to permit an appellate court to determine whether the grounds for granting the motion are valid, remand is appropriate.

The Court also reviews de novo the entry of partial summary judgment, and a denial of a motion for summary judgment, where such a ruling is properly reviewable by the Court.

Further, rulings on cross-motions for summary judgment are reviewed de novo. In determining whether a motion for summary judgment is appropriate, the Court will apply the same test that the circuit court should have applied initially. The Supreme Court is not wed, therefore, to the lower court's rationale, but may rule on any alternate ground manifest in the record.

[Basis for granting judgment. Summary judgment is proper where the record demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

The fact that the parties filed cross-motions for summary judgment does not mean that summary judgment for one party or the other is necessarily appropriate. *Id.* at 1243.

[Litigation Handbook on West Virginia Rules of Civil Procedure, Second Edition (2006).]

The Court apparently relied on the fact that before the consummation of the sale, Petitioners were advised of the leak, did not have a professional inspection and, therefore, had to buy the house "as is" with no repairs, even though the damage occurred after the Purchase Agreement was signed.

Petitioners do not disagree with the above facts. However, according to the Purchase Agreement, a professional inspection is an option Petitioners could have exercised and did not, but it was Petitioners' decision not to have such inspection. ("Order" of March 4, 2011, Appendix 196, and Purchase Agreement, paragraph 12, attached as Exhibit "A" to "First Amended Complaint, Appendix 66.)

Regarding the house claim, Petitioners assert that the Court's findings of fact are not material because the Court's facts were not violations of the Purchase Agreement and the law as set forth in Bryant v. Willison Real Estate Co., 177 W.Va. 120, 350 S.E.2d 748 (1986), and the "Affidavit of Raymond A. Hinerman, Sr., in Support of Motion for Summary Judgment on the Issue of Liability Alone". (Appendix 126-128.)

Paragraph 12A of the Purchase Agreement, Property Inspection, reads as follows:

Subject to BUYER'S rights of inspection reserved below in Section F" of this paragraph, if applicable, BUYER accepts the Property in its present existing state and condition and is not in reliance upon any representation made by SELLER, or SELLER'S or BUYER'S agent(s), except for those made in any written disclosure statement provided to BUYER. (Emphasis added.)

(Purchase Agreement, attached as Exhibit "A" to "First Amended Complaint", paragraph 12A, Appendix 67.)

In their Disclosure Statement, Sellers denied any water damage in the basement and crawl space which is where the damage occurred and, therefore, it occurred after the date of execution of the Purchase Agreement. ("Seller's Disclosure Statement" attached as Exhibit "B" to "Affidavit in Support of Motion for Preliminary Injunction", paragraph 9, Appendix 40.)

The standard for review of summary judgment or denial thereof is *De Novo*. See Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997). This issue was preserved in the "Order" of March 4, 2011.)

3. THE CIRCUIT COURT ERRED BY NOT GRANTING THE PETITIONERS A CONTINUANCE IN ORDER TO CONDUCT DISCOVERY BECAUSE THERE ARE ISSUES OF MATERIAL FACTS, AT LEAST REGARDING THE ALLEGATIONS OF FRAUD.

In the West Virginia case of Powderidge Unit Owners Ass'n v. Highland Properties, LTD., 196 W.Va. 692, 474 S.E.2d 872, (1996), the Court held that strict compliance with Rule 56(f) was unnecessary. The Court stated in part as follows:

At a minimum, the party making the motion for a continuance under Rule 56(f) must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material fact will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.

Further, Elliott v. Schoolcraft, 213 W.Va. 69, 576 S.E.2d 796 (2002) held that the Circuit Court should have entered a scheduling order before considering defendant's motion for summary judgment. Also see Board of Education v. VanBuren and Firestone, Architects, Inc., 165 W.Va. 140, 267 S.E.2d 440 (W.Va. 1980), which held that granting a motion for summary judgment before discovery is complete is precipitous. (Emphasis added.) No scheduling order had been entered, discussed or proposed in the instant case. Petitioners believe that they met their burden for a continuance pursuant to Rule 56(f) and Powderidge, Id. ("Affidavit of Plaintiff/Counsel for Plaintiffs, Raymond A. Hinerman, Sr., In Support of Plaintiffs' Motion to Continue all Proceedings Relative to the Defendants' Motion for Summary Judgment", Appendix 129-135.)

The Court abused its discretion in not granting Petitioners a continuance to conduct discovery. See "Affidavit of Plaintiff/Counsel for the Plaintiffs, Raymond A. Hinerman, Sr.,

in Support of Plaintiffs' Motion to Continue All Proceedings Relative to Defendants' Motion for Summary Judgment" and the Appendix (Appendix 129-135 and Appendix 182) filed in regard to Buyer's Motion to Set Aside Summary Judgment and the Court's "Order" of March 4, 2011 (Appendix 194-199). The standard for review of this issue is abuse of discretion see In Interest of Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996). This error was preserved in the Order of March 4, 2011.

4. THE CIRCUIT COURT ERRED BY FAILING TO GRANT PETITIONERS PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF LOSS OF VALUE OF THE HOUSE.

Attached to the Petitioners' Motion for Partial Summary Judgment was the Affidavit of Raymond A. Hinerman, Sr. one of the Petitioners. In paragraph 7 of Plaintiffs' Motion for Summary Judgment, there is an uncontested statement that water damage occurred at 3960 Eastlake Drive after October 5, 2010, in an unknown dollar amount and it reduced the fair market value of the property. (Appendix 127-128.)

Paragraph 9 is also verification that the full purchase price has been paid and the Buyers have performed all of their contractual obligations in full. That statement also was uncontested. ("Affidavit of Raymond A. Hinerman, Sr., in Support of Motion for Summary Judgment on the Issue of Liability Alone", Appendix 128.)

At the time of the hearing on Petitioners' Motion for Summary Judgment, the case of Bryant v. Willison Real Estate Co., 177 W.Va. 120, (1986), 350 S.E.2d 748, had not been located, at least by the Petitioners. However, the facts as of the date of the filing of Plaintiffs' *Motion for Summary Judgment* were as follows:

1. The Buyers had paid the full purchase price. ("Affidavit of Raymond A. Hinerman, Sr., in Support of Motion for Summary Judgment on the Issue of Liability Alone", Appendix 9.)

2. The "as is" clause is no warranty and the property, in its existing condition on the date of the Purchase Agreement of October 5, 2010, is what the Plaintiffs bargained for. (See Bryant v. Willison.)

3. The amount in controversy was unknown, but the Ad damnum clause stated \$75,000.00, \$40,000.00 which is the boat, which is not substantial. (See Bryant v. Willison.)

4. The water damage occurred after the Purchase Agreement was executed. ("Seller's Disclosure Statement" attached as Exhibit "B" to "Affidavit in Support of Motion for Preliminary Injunction", Appendix 40.)

None of the above facts were contested. Therefore, the Petitioners' Partial Summary Judgment Motion on liability alone, should have been granted. ("Seller's Disclosure Statement",

attached as Exhibit "B" to "Affidavit in Support of Motion for Preliminary Injunction", Appendix 40.) Purchase Agreement, attached as Exhibit "A" to First Amended Complaint, Appendix 66; "Affidavit of Raymond A. Hinerman in Support of Motion for Summary Judgment on the Issue of Liability Alone", Appendix 9; and the case of Bryant v. Willison, *Id.* Buyers did not get what they bargained for, which is a contractual violation by the Sellers. (Bryant v. Willison, Syllabus Pt. 4.)

The Respondents breached their agreement with the Petitioners by their refusal to compensate Petitioners for the water damage by either satisfactorily making necessary repairs, or their failure to compensate Petitioners for the reduction in the fair market value of the property. ("First Amended Complaint", paragraph 7, Appendix 60.)

Petitioners have paid to the Respondents, the full purchase price of the property and have therefore performed in full, all of their contractual obligations. Petitioners have never waived nor released Respondents from their contractual obligations to convey the real property known as 3960 Eastlake Drive, Morgantown, West Virginia, in the same condition as it was on October 5, 2010; not as it was after the damage which occurred after October 13, 2011 ("Seller's Disclosure Statement", attached as Exhibit "B" to "Affidavit in Support of Motion for Preliminary Injunction", paragraph 9, Appendix 40, and

"Affidavit of Raymond A. Hinerman, Sr., in Support of Motion for Summary Judgment on the Issue of Liability Alone", Appendix 126-128.)

The standard for review of this issue is *De Novo*. See Fayette County National Bank v. Lilly, 199 W.Va. 349, 454 S.E.2d 232 (1997). This issue was preserved in the Order of March 4, 2011.

5. THE CIRCUIT COURT ERRED BY ORDER OF JULY 13, 2011, IN NOT REVERSING ITS RULING OF MARCH 4, 2011, PURSUANT TO A MOTION FOR RECONSIDERATION GRANTING SUMMARY JUDGMENT TO THE RESPONDENTS.

In the "Order" of March 4, 2011, the Circuit Court determined that the Petitioners were advised of the leak before the closing and yet went forward with the sale. That is true but those are not facts upon which the Court should have determined there were no material facts in dispute. Petitioners did not have to refuse to go forward with the sale and had other options, not conditions. (Paragraph 12 of Purchase Agreement, attached as Exhibit "A" to *First Amended Complaint*, paragraph 4, Appendix 66-67.)

Material facts would be facts when applied to the law and the Purchase Agreement, would have entitled the Petitioners to prevail. No such finding by the Court based on the Purchase Agreement was made regarding the issue of diminution of the fair market value of the house. (See *Litigation Handbook*, page 1245.)

The facts that the Court found were "material" were not! Arguably, they were regarding the fraud issues; however, Petitioners had no opportunity to discover the "real facts."

After the hearing on February 2, 2011, but before the entry of the "Order" on March 4, 2011, Petitioner, Raymond A. Hinerman, Sr., wrote to the Court citing and copying the Court with the case, Bryant v. Willison Real Estate Co., Etc., Id., and mailed the case to the Judge asking for a reconsideration before entry of the Order from the February 2, 2011, hearing.) Nevertheless, the "Order" was entered on March 4, 2011, without comment about the Bryant v. Willison, Id. (Appendix 194-199.)

The cases cited by the Judge in the "Order" granting Respondents' Motion for Summary Judgment are not applicable to the case *sub judice* since the damage to the real estate in those two (2) cases occurred before the sales agreement was signed, not after it was signed, as it is in the instant case. See Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995) and Thacker v. Tyree, 171 W.Va. 110, 112, 297 S.E.2d 885,888 (1982). ("Order" of March 4, 2011, Appendix 196.)

Those facts are not applicable to this case because the loss occurred well after the Purchase Agreement was executed. (Affidavits of Defendants, Richard A. Rodriguez and Rita C. Rodriguez, Appendix 176-181, and "First Amended Complaint", Appendix 59, and "Seller's Disclosure Statement", attached as

Exhibit "B", to "Affidavit in Support of Motion for Preliminary Injunction", Appendix 40.)

The facts of Bryant to this writer seem to be nearly identical the facts of Hinerman v. Rodriguez, e.g., a sales contract was executed with Buyers purchasing the property "as is", and before closing, the real property was damaged. See page 749 of Bryant where Chief Justice Miller stated "on February 18, 1980, before the delivery of the Deed, a water line broke...permitting water to run throughout the building...."

Bryant reported that the Circuit Court apparently did not consider when the leak occurred and the Bryant Purchase Agreement places the "risk of loss" on the Seller. (See page 751 of Bryant and Purchase Agreement, attached as Exhibit "A" to "First Amended Complaint", paragraph 6, Appendix 34.)

Also, the instant Purchase Agreement has a risk of loss clause which places risk of loss on the Sellers. See paragraph 6 of the Purchase Agreement, "Risk of Loss Before Consummation of Sale", which is as follows:

If the improvements are destroyed or damaged because of fire, flood or an act of nature prior to closing, BUYER may terminate the purchase agreement by written notice to SELLER and the earnest money deposit shall be returned to BUYER. In event BUYER does not elect to terminate this Agreement, BUYER shall be entitled to the Property and any insurance proceeds payable on account of the damage or destruction, not to exceed the purchase price agreed to in this Agreement. Risk of loss shall be on BUYER after closing and delivery of Deed. (Emphasis added.)

("First Amended Complaint", paragraph 6, Appendix 34.)

Also, in Bryant, Chief Justice Miller discusses "equitable conversion" which places the risk of loss on the purchaser if there is no "Risk of Loss Provision", or the Vendor is not at fault. (See Syllabus Pt. 2). These facts are not the same as Hinerman v. Rodriguez.

Further, Chief Justice Miller, at page 752 of Bryant, discusses an "as is" condition in a Sales Agreement and stated as follows:

The use of an "as is" provision in a real estate sales contract is generally intended to negate the existence of any warranty as to the particular fitness or condition of the property. This type of clause simply means that the purchaser must take the premises covered in the real estate sales contract in its present condition as of the date of the contract. (Emphasis added.)

The Monongalia County Circuit Court places, it appears, some significant relevance on the fact that after the purchase agreement was signed, Petitioners did not have a professional inspection performed, which Petitioners were entitled to but not compelled to, under the Purchase Agreement. (Purchase Agreement, paragraph 12, attached as Exhibit "A" to "First Amended Complaint".)

Buyers did personally inspect the property on at least two (2) occasions, one of which was the final walk through. ("First Amended Complaint", paragraphs 3, 4 and 5, Appendix 59.)

Paragraph 23 of the Purchase Agreement, Pre-Closing Walk-Through Inspection states as follows:

BUYER shall have the right to re-inspect Property prior to closing in order to ascertain that the Property is in the same physical condition as it was as of the date of this Agreement and to verify that all repairs, if any, have been performed as agreed upon by BUYER and SELLER. SELLER shall have water, fuel and electric utilities on at the time of the final walk-through. The results of the inspection shall be made known to the SELLER immediately. Failure to conduct a final walk-through inspection and report results shall be deemed a waiver of BUYER'S final inspection and repair rights and BUYER agrees to accept Property in its present condition. (Emphasis added.)

(Purchase Agreement, attached as Exhibit "A" to "First Amended Complaint", paragraph 23, Appendix 70.)

Petitioners agree that the defect they complain of was disclosed to them as having occurred after the contract was signed. A professional inspection would provide no additional information except the extent of the damages and cost of repair. This was Buyers' option and they chose not to exercise it. Regardless of the findings, such an inspection would only provide information to benefit Buyers in deciding whether they will go forward with the sale. It caused no prejudice to Sellers.

The above issues are not material because as Chief Justice Miller explains in Bryant, Syllabus Point 4:

Where the risk of loss in on the vendor and the casualty damage to the property is not substantial,

the Purchaser is [177 W.Va. 122] entitled to sue for specific performance, and the purchase price is abated to the extent the property was damaged.

Damage was referred to by Chief Justice Miller as "an abatement of the sales price". (See page 753, Bryant v. Willison.)

It is very clear that Sellers had no right to terminate the Purchase Agreement on any issue except failure to perform by Buyers if they failed to pay the full purchase price. (Purchase Agreement, attached as Exhibit "A" to "First Amended Complaint", paragraph 4, Appendix 66.) The Buyers paid the purchase price in full and had inspections as they desired except for the toy room (basement damaged).

The only significant difference between Bryant v. Willison and the case *sub judice* is that the Respondents in the case *sub judice* stated they will make "no repairs". Petitioners agree, but that provision is only applicable to conditions that pre-existed October 5, 2010, when the Purchase Agreement was formally executed. That exception, when coupled with the "as is" language, in the Purchase Agreement, certainly did not mean damages after the execution of the Agreement, but repairs that may be needed at the time of execution of the agreement. (Purchase Agreement, attached as Exhibit "A" to "First Amended Complaint", paragraph 25, Appendix 71.)

The standard for review of this issue is *De Novo*. Bowers v. Wurzburg, 205 W.Va. 490, 519 S.E.2d 148 (1999). This issue was preserved in the "Orders" of March 4, 2011, and July 13, 2011.

6. THE TRIAL COURT ERRED BY DENYING A STAY PURSUANT TO RULE 62(h) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE.

Rule 62(h) *Stay of judgment as to multiple claims or multiple parties.* - When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments....

Thus the Court, by virtue of denying the stay, was treating the "Order" of March 4, 2011, as a final appealable order and appealable even though the specific 54(b) language was omitted from the Order.

Rule 62(i) *Stay of judgment pending application for Appeal.* - On motion...the Court may stay the issuance of execution upon a judgment and any other proceedings for its enforcement for such reasonable time...as will enable the moving party to present to an appellate court a petition for appeal from the judgment.

In the *Litigation Handbook on West Virginia Rules of Civil Procedure*, Second Addition, at page 1202, the following statement is made:

...[I]f an order does not contain the appropriate Rule 54(b) appeal language, the Supreme Court will determine whether the order approximates a final order in its nature and effect. (Emphasis added.)

discretion since Rule 62(h) of the W.Va.R.Civ.P. is discretionary. This issue was preserved in the "Order" of March 4, 2011.

VI. CONCLUSION

The Purchase Agreement's language should be literally followed unless it is ambiguous.

The "Order" of March 4, 2011, should be reversed and the Respondents ordered to deliver to the Petitioners, a "corrective deed" with the following warranty, "General Warranty free and clear of all liens and encumbrances" as well pay for any recording fees or other fees to the Clerk of the County Commission of Monongalia County, West Virginia, for recording the Corrective Deed.

The Petitioners purchased a home in Morgantown, West Virginia, and paid the full purchase price pursuant to a *Uniform Sales Agreement and Disclosure Statement* executed by Petitioners and Respondents (Petitioners did not sign the *Disclosure Statement*.)

Although the Purchase Agreement contained the statement that there would be "no repairs" and the property would be purchased "as is", both of those provisions relate to the existing condition of the house on the date of the signing of the agreement which was October 5, 2010.

The Disclosure Statement executed by both Respondents stated that in the basement and crawl space, as of October 13, 2010, had no water damage or water problems.

The case *sub judice* is nearly identical factually with the Bryant case. Based on Bryant and the Purchase Agreement, the Petitioners, upon paying full purchase price and establishing that the damage occurred after the signing of the contract on October 5, 2010, would be entitled to an abatement of the purchase price to the extent that the fair market value of the house was reduced by the damage.

Petitioners request the Court reverse the Order of March 4, 2011, which granted summary judgment to the Respondents and denied partial summary judgment to the Petitioners.

There are absolutely no material issues of fact contrary to the Petitioner's Affidavit and *Motion for Partial Summary Judgment*.

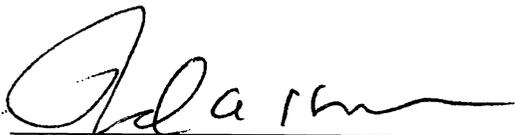
The Respondents never requested a continuance and, therefore, it would appear as though there would be no impediment to this Honorable Court granting Petitioners' *Motion for Partial Summary Judgment* or directing the Circuit Court to do so. Obviously, if this is done, the *Motion for a Continuance* would be moot, except on the issues of fraud.

The reversal of the *Order* of March 4, 2011, granting Respondent's summary judgment, would resolve all pending issues

before the Circuit Court regarding the Deed and the house. The only issue that would remain pending in the Circuit Court of Monongalia County is the issue of the boat, which facts or law have nothing to do with the Purchase Agreement. It is a separate claim.

The March 4, 2011, "Order" approximates a final appealable Order since all house issues were resolved; a Motion for Reconsideration and a Stay of the Summary Judgment until all issues were resolved was denied.

Respectfully submitted,

Signed: 
RAYMOND A. HINERMAN - WV ID #1737
Counsel of record for Petitioners

VII. CERTIFICATE OF SERVICE

I hereby certify that on the 30 day of July, 2011, true and accurate copies of the PETITIONERS' APPENDIX OF DOCUMENTS and PETITIONERS' BRIEF were deposited in the United States mail, contained in postage-paid envelopes, addressed to counsel for all other parties to this appeal as follows:

Gary S. Wigal, Esq.
GIANOLA, BARNUM, WIGAL & LONDON, L.C.
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Counsel for Respondents

Signed:



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Counsel of record for Petitioners