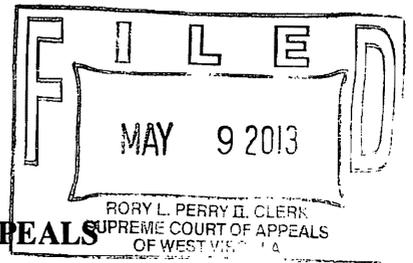


No. 13-0117



**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

DAVID W. DICKENS and  
DEBORAH A. DICKENS,

Plaintiffs below, Petitioners,

v.

SAHLEY REALTY COMPANY, INC.,  
a West Virginia Corporation,  
PATRICK L. STERNER,  
MELINDA R. STERNER,  
and WHR GROUP, INC., a foreign corporation  
doing business in West Virginia,

Defendants Below, Respondents.

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**PETITION OF APPEAL**

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**II.**  
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**III.**  
**Assignments of Error**

1. The Circuit Court improperly awarded summary judgment as to all claims and in favor of all Defendants below.
2. The Circuit Court incorrectly applied the law of anticipatory release.
3. The Circuit Court improperly applied the doctrine of *res ipsa loquitur*.

**IV.**  
**Statement of the Case**

Petitioners David and Deborah Dickens purchased a home in Rosehill Acres Subdivision in Putnam County in September of 2007. The previous owners were Patrick and Melinda Sterner. Mr. Sterner had been transferred by his employer Georgia-Pacific corporation to Oklahoma. Georgia-Pacific, as Mr. Sterner's employer, engaged WHR Group, Inc., a Wisconsin employee relocation company, to assist in the sale of the Sterners' home.

The Dickens successfully negotiated with WHR Group, Inc., buying the property for the sales price of \$327,500. In deciding whether to purchase the property the Dickens relied upon the accuracy of the disclosure statements prepared and submitted by both the Sterners and WHR Group to the effect that no problems existed with the subject property. Omitted from the disclosures was the fact that a water retention pond which was previously constructed on the adjacent lot by the developer Sahley Realty Company, Inc., had apparently slipped and had encroached upon the property. That problem had been a matter of much concern in the subdivision as discussed at meetings of the Rosehill Acres Homeowner's Association when the Sterners lived there before the Dickens bought their home.

In July of 2010 the Dickens discovered the retention pond problem in conversations with neighbors who had been aware of that problem. Homeowner Association minutes of meetings reflect on November , 2005 a

“Concern about the pit in back caving in, nothing settled.”

Again on November 20, 2006 the minutes read:

“Discussion concerning the safety of the pit occurred. Williams Building brought some treet to maybe put around the pit. Additional discussion too place regarding how to fix things until the HOA assumes responsibility of the pits, roads and drainage problems. All liabilities need to be explore(d)

before HOA takes over the roads and pits. Since the back pit is holding water and has become a mosquito issue members discussed contact the Planning Committee to explore filing a formal complaint as HOA and homeowners. Mike Comer will call about the drainage and inquire about what steps to take regarding the pit and slippage. . .”

After learning from their neighbors that the slip in the retention pond occurred during the Sterner’s occupancy and from a survey the Dickens had commissioned it was determined that the pond had encroached upon the property which they had purchased. The Dickens’ concern accordingly grew about the potential hazards.

The Dickens’ amended complaint, App.284 sues the Sterners and WHR Group, Inc., on the theories of breach of implied contract covenant of good faith and fair dealing, fraud and negligence. The Dickens’ suit against Sahley Realty Co., Inc., is for negligence which resulted in a trespass upon their property, App. 289.

WHR Group, Inc., initially moved to dismiss the Plaintiffs’ complaint under The Rules of Civil Procedure 12(b)(6) and 9(b), App.324. The Sterners filed a motion for summary judgment, App.33. A hearing was conducted on April 27, 2012, App.222. WHR Group argued with respect to the claim of fraud that the claim was not expressed with sufficient particularity, App.324-325(motion) and 225 (transcript of hearing). As regards their motion to dismiss the company argued that it was merely a “facilitator” of the move and relocation of the Sterners for which it was paid a fee by Georgia-Pacific. Further, WHR argued that it had made no warranties to the purchasers and had never occupied the property, App.325-326 (motion) and 232(transcript). Both WHR Group, Inc., and the Sterners relied on a document entitled “Release Agreement,” App.33-52 (motion) and 231 (transcript) arguing that it meant that they were thereby completely released. That agreement related to repairs made by Davis Building and Remodeling Company in and around the house as performed at the Dickens’ request, App.267.

At the conclusion of the April hearing the Court held the motions in abeyance and directed that the Plaintiffs file an amended complaint, App.262(transcript).

Later motions for summary judgment were filed by Sahley Realty Company, Inc. and the WHR Group, Inc. which were thereafter augmented, App.341-495 and 496-594.

In that these motions, responses, arguments and augmentations together with the Circuit Court's ultimate ruling granting summary judgment to all Defendants, App.9-10(judge's letter) and App.1-8(judgment order) make up a significant portion of the record below the following is being submitted in order to break down the positions of each of the several parties separately and the responses to their argument by the Dickens.

### **The Sterners**

Mr. and Mrs. Sterner filed their motion for summary judgment shortly after the original complaint was served, App.33. To support their motion the Sterners relied entirely upon the contents of the release agreement which relates to repairs performed by Davis Building and Remodeling, App.47, exhibit B to the Sterner motion seeking judgment.

The Dickens responded to the Sterner motion that the release agreement related only to the repairs made by the Davis entity which was understood by the Dickens to have nothing whatsoever to do with the slip, retention pond and any defects which were then unknown to the Dickens, App.82-105. Executed affidavits on this matter were submitted by Patrick Sterner and David and Deborah Dickens, App.42 & 88. The release agreement was also signed and submitted by WHR Group, Inc., to the Dickens on June 11, 2008 after the Davis entity made the requested repairs. The release and the applicable law concerning releases will be hereinafter addressed. The Sterners renewed their motion in October, 2012, App.595.

In the Final Order of Dismissal Based on Summary Judgment the Circuit Court made the following findings as relates to the Sterners and the release agreement:

“9. At the completion of the [Davis Building and Remodeling] repair work, on or about June, 2008, Plaintiffs executed a Release in favor of, *inter alia*, the Sterners and WHR. The Release relieved the Releasees from all claims, demands and causes of action that Releasor may have or might subsequently accrue to Releasor arising out of a connected with, directly or indirectly the purchase of the [property].”

And

“16. . . when it was agreed that some repairs would be made to the property, which included no repairs regarding the pond, Plaintiffs signed a written release as to ‘liability , responsibility, negligence, or wrongdoing of any kind whatsoever in conjunction with sale of property in question’ releasing the Sterners, WHR Group, the realtors and others.”

**WHR Group, Inc.**

As indicated previously WHR Group, Inc. filed a Rule 12(b)(6) motion to dismiss based in part on the release agreement which it presented to the Dickens following the repairs made by the Davis entity. The Dickens responded to this initial motion that, among other things, the affidavits of Mr. Sterner and the President of WHR Group, Inc. as made in a supplemental filing, App.53-81 were in conflict and thereby raised a question of fact about who owned and who actually possessed the home when the Dickens were deciding whether to purchase it, App.90. More particularly, Mr. Sterner swore in his affidavit that:

“8. On September 28, 2007 he and his wife sold the property to WHR Group, Inc., by executing and delivering to WHR Group, Inc., a deed in blank with no grantee’s name filled in.”

And that:

“6. As part of his employment benefits, his employer engaged on his behalf WHR Group, Inc. . . to handle the sale of his property including purchasing the property at its market value if the property did not sale.”

On the other hand the President of WHR Group, Inc., swore in his affidavit that WHR Group.

“3. . . . does no more than facilitate the sale between the Sterner’s and the Plaintiffs. The property was never owned by WHR Group, Inc. . .

And

4. WHR Group, Inc. and its employees have never occupied or inspected the property in question nor has it ever made a representation to the Plaintiffs to the contrary.”

The Dickens also responded to the motion of WHR Group by submitting for the Court’s review their earlier responses to the first set of discovery from WHR Group, Inc., as verified by Plaintiff David Dickens, App.53 Among the submitted items was the disclosure statement of WHR Group, Inc. stating that no problems existed with the property including that there were “no encroachments.”

Defendant Sahley Realty also responded to the motion of the WHR Group with attached submissions indicating that a question of material fact remained as to the relationship between the “self-described relocation company” and the Sterners, App.150.

In October of 2012 WHR Group filed its motion for summary judgment adding to its motion the request that all cross-claims against it be dismissed with prejudice, App.496. In support of the motion WHR Group re-submitted the April, 2012 affidavit of its President, the warranty deed to the property dated September 28, 2007, the Release Agreement signed in June and July, 2008, its own disclosure statement as provided to the Dickens, the relocation home inspection report provided at its request by RAL Inspection Services, the Rosehill Acres Homeowner’s Association minutes which reference the problems complained of in this case, a deed transferring the ownership of the common areas from Sahley Realty to the Homeowner’s

Association on April 6, 2010, a copy of the boundary survey including the common areas and the retention pond or pit, and various discovery responses as sworn to by the Dickens. The Dickens filed a response, App.610-616.

Again, WHR Group referred to the release agreement as relates to the repairs done by the Davis entity. Moreover, WHR Group's own documents and those of the Sterners describe the agreed upon facts that WHR did take possession of the property, did negotiate the sale of the property, did interest itself in the details about the property, did make representations as to the property's condition and did specifically contain no mention of the retention pond.

WHR thereafter submitted filings against the other parties. Included therein was a response of WHR to the response made by Defendant Sahley Realty referencing a question about when encroachment of Plaintiff's last occurred. WHR's filing posited the position that a warranty deed grants a general warranty as to any encroachment, App.683.

In awarding summary judgment to WHR Group, Inc. the Circuit Court found that:

“5. . . . WHR Group a relocation company, was enlisted to handle the sale of the subject property. By Deed, dated September 28, 2007 the Sterners, through WHR, conveyed the real estate to Plaintiffs.

And,

9. . . . Plaintiffs executed a release in favor of, *inter alia*, the Sterners and WHR. . .

12. . . . the Sterners and WHR deny any knowledge of the alleged 'slip.'

16. . . .None of the employees of WHR Group ever viewed the property or had it brought to the company's attention, by any party, that there was a pond adjacent to the property being sold.”

### Sahley Realty Company

Sahley Realty filed its motion for summary judgment on October 3, 2012 asserting. 1) the Plaintiffs' negligence claim was barred by the statute of limitations and 2) no evidence existed that Sahley Realty was responsible for injuries or damages to the Plaintiffs, App.341. In support of the statute of limitations argument Sahley presented an affidavit from its President Namer Sahley stating that the retention pond in question was completed in 1999, App.354. In support of their second argument Sahley Realty argued that no evidence of any wrongful act or omission on their part exists. As with WHR Group, Inc., Sahley Realty submits as supporting attachments the Plaintiffs' sworn responses to discovery inclusive of the Homeowner's meeting minutes about the retention pond or pit, the April 6, 2010 deed of the common area from Sahley to the Homeowner's Association with the survey report dated October 2, 2009, the disclosures from the sellers as received from both the Sterners and WHR Group, Inc., the warranty deed of September 28, 2007, the Release Agreement and the Davis Building and Remodeling invoice and description of that work, the relocation home inspection report, and the Plaintiffs' sworn responses to WHR Group's requests for admission and combined interrogatories, App.356.

The Plaintiffs response to this motion, App.599-609 asserts that: a) no question exists but that the developer Sahley Realty installed the retention pond in view of Namer Sahely's affidavit b) no question exists about the boundaries in that Sahley as developer filed a map of record in the Office of the Clerk which was adopted in the deeds c) Sahley by its filing acknowledges duties to construct the pond and identify the lots d) the doctrine of *res ipsa loquitur* applies and e) the discovery of the problem by the Dickens occurred less than two(2) years before the complaint was filed therefore the statue of limitations was satisfied.

A supplement to the Dickens' response to Sahley Realty's motion was made after Sahley filed three(3) additional responses or supplements largely on the subject of *res ipsa loquitur*, App.617,625 and 731. In the Plaintiffs' Supplement to Response to Motion of Sahley Realty Company for summary judgment the Plaintiffs not only address the *res ipsa doctrine* which had become the focus of the arguments, but also supplied an affidavit from Plaintiff Deborah Dickens to firm up the date when the encroachment was discovered-July 21, 2010 which is the date on which their survey was completed, App.698.

The Final Order of Dismissal based on Summary Judgment holds:

“2. . . .The doctrine of *res ipsa loquitur* is not applicable because Plaintiffs have not provided evidence that the retention pond has in fact moved or circumstantial evidence of Defendants' negligence. . . [citing the test in Foster v. City of Keyser]

And,

5. . . Defendants have denied any knowledge of any encroachment by the pond, and Plaintiffs have offered no evidence to contradict this.

At a hearing on October 26, 2012 the Circuit Court had entertained arguments on the dispositive motions, App.739 (transcript of hearing).

**V.**  
**Summary of Argument**

The Circuit Court of Putnam County failed to recognize that the known and uncontested facts were sufficient, when considered together with the sworn filings of the Plaintiffs and the documentary evidence, to produce genuine issues of material fact from which a reasonable jury could determine liability in this case.

**VI.**  
**Statement Regarding Oral Argument and Decision**

The facts and arguments will be adequately presented in the record and briefs so that the decisional process would not be significantly aided by oral argument.

**VII.**  
**Argument**

**A.**  
**The Proper Standard of Review is de novo**

The Circuit Court's entry of summary judgment is reviewed de novo, Painter v. Peavy, 192 W.Va. 189, 451 S.E. 2d 755 (1994); McClure v. City of Hurricane, 227 W.Va. 482, 711 S.E. 2d 552 (2010).

**B.**  
**Questions of Fact Exist as to the Plaintiffs' Claims of Breach of Implied Contract and Fraud and Negligence Against Defendants Sterner**

The Amended Complaint alleges three(3) claims against Mr. and Mrs. Sterner. Count one alleges a breach of an implied contract. Count two(2) alleges fraud, characterized as both actual and constructive fraud under West Virginia law. Count four(4) alleges negligence.

In the decision of Thacker v. Tyree this Court held where a vendor of real estate is aware of defects which substantially affect the value or habitability of the property and the existence of which is not known to the purchasers and would not be disclosed by a reasonably diligent inspection the failure to disclose gives rise to a cause of action, 171 W.Va. 110, 297 S.E. 2d 885 (1982).

In Lengyel v. Lint, 167 W.Va. 272, 280 S.E. 2d 66 (1981) this Court set aside a summary judgment which dismissed a claim of fraudulent misrepresentation arising out of a real estate

transaction. The purchasers of a home there alleged that they had relied to their detriment on representations made about the home.

In West Virginia it is axiomatic that liability for negligence requires the existence and breach of a duty and resulting injury, Robertson v. LeMaster, 171 W.Va. 607, 301 S.E. 2d 563(1983); Evans v. Farmer, 148 W.Va. 142, 133 S.E. 2d 710(1963).

The Circuit Court concluded that the Dickens had put forth no set of facts which would support a finding in their favor under any of these theories. On the contrary it is undisputed that:

- The Sterners (and WHR Group, Inc.) acted as sellers of the property.
- The Sterners (and WHR Group, Inc.) presented disclosures which specifically represent that there are no encroachments, and that the boundaries are marked, App.142 & 93 & 442.
- The Dickens justifiably relied upon the accuracy of the representations made in these disclosures, App.90.
- After purchasing the property the Dickens learned that the property had been encroached upon and that the problem with the retention pond or pit was the subject of discussions at homeowner's meetings during the time of the Sterner's occupancy, App.111.

The above undisputed facts contained within the record below satisfy the elements of the claims made, and are sufficient to require that summary judgment should be denied so that a jury can decide the case. More particularly, the evidence establishes that the Sterners had a duty to disclose any defects including encroachments of the property. They (and WHR Group, Inc., addressed infra) failed in that duty. Under Thacker v. Tyree and Lengyel v. Lint causes of action arise both in contract and in fraud. Whether the Dickens acted deficiently or unreasonably is for a jury to determine, not for the Court as was done below. Moreover, if the jury actually believes that the Sterners (and WHR Group) failed to act reasonably in discharging their duty of accurate

disclosure about the conditions of the property by not knowing of the defects and the Dickens relied upon that fact as they have sworn they did, then a negligence cause of action exists for the jury to decide.

As to the claim of breach of an implied covenant of good faith and fair dealing the Dickens rely upon the fact that this case involves a business transaction in which such covenants are imposed, Ashland Oil v. Donahue, 159 W.Va. 463, 223 S.E. 2d 433 (1976); Barn Chestnut Inc. v. CFM Dev. Corp., 193 W.Va. 565, 457 S.E. 2d 502(1995). The failure to provide an accurate disclosure would likewise breach this provision of contract law when occurring in the commercial setting.

**C.**  
**Questions of Fact Exist as to the Plaintiffs’  
Claims of Breach of Implied Contract and  
Constructive Fraud and Negligence  
Against WHR Group, Inc.**

For the same reasons as apply to the claims made against the Sterners, supra, the claims against WHR Group, Inc. should have survived summary judgment. These additional factors exist with regard to WHR Group, Inc. First, a difference of understanding exists between Mr. Sterner and WHR as to who was the seller and the owner of the property, App.44 (Sterner affidavit). Second, the fraud claim against WHR Group is one of constructive fraud.

Constructive fraud requires: 1) breach of a legal or equitable duty 2) the breach had either a) a tendency to deceive, b) a tendency to violate public or private confidence, or c) a tendency to injure public interests, State v. Morgan Stanley & Co., 194 W.Va. 163, 459 S.E. 2d 906 (1995). Such fraud may even exist when a Defendant does not know that the statement or act is false when it is made under circumstances such that the Defendant should have known of the falsity, Lengyel v. Lint, 280 S.E. 2d at 69. In this case, all negotiations were with WHR Group. By all

appearances to the Dickens and according to Mr. Sterner WHR appeared as owner and certainly was the party in possession. Under these circumstances WHR Group was charged with knowledge of the defect which the Sterners possessed. The Dickens' reliance on WHR's disclosures was reasonable and if not deemed reasonable it is for the jury to determine. If WHR, like the Sterners, failed to ascertain the problem with the encroachment then they too could be found negligent.

**D.**  
**There Exists a Jury Question as to**  
**Meaning of the Release Agreement**

The WHR Group Inc., and the Sterners relied upon the Release Agreement as a bar to the Dickens' claims. It is clear and beyond dispute that the Release Agreement, App.48 followed and addressed the repairs performed by Davis Building and Remodeling. As such it was clearly not the broad form and extensive release which these Respondents, and apparently the Circuit Court determined in paragraphs 8 and 9 of Final Order, App.3. As found by the Circuit Court this agreement even relieved the claim of fraud and misrepresentation which is plainly against the public policy and West Virginia law.

The Dickens swore that they understood the release to relate solely to the Davis repairs, App.89-90. Our law provides that this is ordinarily a jury question, Norvell v. Kanawha & Michigan R.Co. 67 W.Va. 467, 68 S.E. 288 (1910). Moreover, as this Court has previously determined that such a release of liability as this is void and unenforceable, Finch v. Inspectech, LLC., 229 W.Va. 147, 727 S.E. 2<sup>nd</sup> 823(2012) this decision is contrary to law. In that case a home inspection company was sued over defects which were not found or disclosed.

**E.**  
**Questions of Fact Exist as to Plaintiffs' Claims**  
**Against Sahley Realty Company, Inc.**

These facts appear without dispute in the record below and support the claim against

Sahley:

- Sahley Realty Company Inc. was the developer of the subdivision in which the Dickens purchased their home, App.355.
- Sahley Realty divided the lots including the Dickens/Sterner lot and the adjacent retention pond, App.635-637.
- Sahley Realty caused the construction of the retention pond which Sahley possessed and controlled until April 6, 2010, App.762.
- The boundary lines of properties were adopted by reference to Sahley's filings as referenced in Sahley's deeds (and followed in the Sterner/WHR Group's deed to the Dickens), App.661 & 664 & 666.

The legal effect of Sahley Realty's deeds which adopt maps as filed in the Office of the County Clerk, App.70-72 is to make the maps part of the deed, Snooks v. Wingfield, 52 W.Va. 441, 44 S.E. 277 (1903). This was a point obliquely raised by WHR Group in its response to Sahley Realty's motion, App.683-689 in arguing that the encroachment may have always been there and was conveyed in the deed. As a result the Sahley Realty Company cannot legitimately claim that they bear no responsibility for an encroachment which takes a portion of the Dickens' property when they laid out the boundaries to these lots and caused the retention pond to be built.

The Dickens assert that Sahley committed a trespass and negligence which damaged them. The trespass arises from the taking of Dickens land by the retention pond the boundaries of which Sahley laid out and caused to be constructed, Kincaid v. Morgan, 188 W.Va. 452, 425 S.E. 2d 128 (1992). The Dickens assert that taking based upon the result of the survey and the stakes showing the result of the survey. This claim of trespass made by the Dickens was not

mentioned by the Circuit Court in its order awarding summary judgment. On that ground alone, the judgment should be reversed and remanded.

The Circuit Court was specific in its conclusion that the Dickens did not meet the first part of the test for applying the doctrine of *res ipsa loquitur*, Final Order paragraph 2 p. 6. That test requires that one demonstrate that the event be of a kind which ordinarily does not occur in the absence of negligence, Foster v. City of Keyser, 202 W.Va. 1, 501 S.E. 2d 165 (1997). The Plaintiffs' evidence satisfies that test.

Negligence is the failure to do what a reasonable and prudent person would ordinarily do under the circumstances or doing what such a person would not have done under the circumstances, Birdsell v. Monongahela Power Co., 181 W.Va. 223, 382 S.E. 2d 60(1989); Bond v. Morton Bldgs, Inc., 815 F. Supp. 944 (S.D. W.Va. 1993). Contrary to the Circuit Court's finding the known facts do set forth a prima facie case upon which a reasonable jury could find negligence on the part of Sahley Realty Company. More particularly, Sahley a) had the duty to adhere to its own established lot boundaries in the construction, location and condition of the retention pond which it possessed and b) had the duty of knowing that the retention pond which it alone controlled encroached on a neighbor's property. That duty would be owed to all of those who purchased property in the subdivision which Sahley developed and to the Dickens in particular. A jury could find that reasonable and prudent developer would not have allowed this to occur. Whether this constitutes negligence is for a jury alone to determine, not for the Circuit Court as it has done.

As stated in Foster in defining *res ipsa loquitur*:

“ . . . in the absence of evidence to the contrary. . . the mere fact that a damage-causing event occurs. . . suffices for liability.” 501 S.E. 2d at 178.

In the instant case the pond was under Sahley Realty's exclusive control when it encroached upon the property in question. The encroachment or more accurately the trespass, is not otherwise satisfactorily explained other than by Sahley's acts or omissions. The Circuit Court accordingly erred in its application of the doctrine of *res ipsa loquitur* in supporting summary judgment.

**F.**

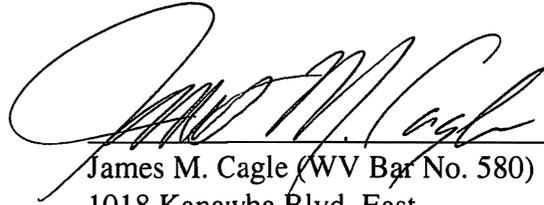
**A Motion for Summary Judgment Should Only be Granted When it is Clear that there is No Genuine issue of Fact and inquiry into the Facts is Not Desirable to Clarify the Application of the Law**

The Circuit Court below reached conclusions that are properly intended for a jury. The most obvious example of error is the Court's decision about the release as a bar. Not only does the ruling conflict with recent precedent finding anticipatory releases void as against public policy, but also such provisions commonly have been considered by juries in reaching their verdicts, Finch v. Inspectech, LLC, *supra*. The Court's conclusion that there is nothing for a reasonable jury to consider in view of the disclosures which inform of no problem at all represents error as those omissions raise issues critical to the claims made which a jury can properly consider. Further, that the retention pond encroaches on the Dickens property provides a basis for the jury to determine whether the trespass results from Sahley Realty's negligence. The testimony of the Dickens to this effect is sufficient for the jury to pass upon the question. After all, it is undisputed that the retention pond was solely within the developer's control.

What the Circuit Court did below is to actually weighing the evidence which is not the Court's function, Painter v. Peavy, *supra* syl. pt. 3; State v. Morgan Stanley & Co., Inc. *supra*. Those decisions should have been left for the jury and the Court's judgment taking the decisions away from the jury constitutes reversible error.

**VIII.**  
**Conclusion**

For the foregoing reasons the judgment below should be reversed and the case remanded for trial by jury.

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

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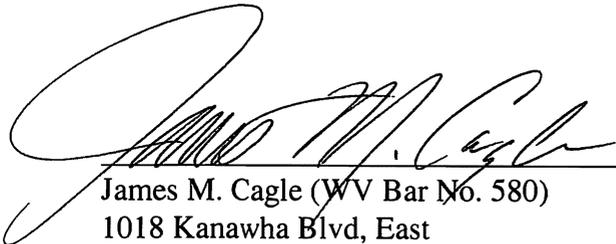
**IX.**  
**CERTIFICATE OF SERVICE**

The undersigned, Counsel for the Plaintiffs does hereby certify that a true and correct copy of the *Petition of Appeal* was served via fax upon the attorneys listed below on this the 9<sup>th</sup> day of May, 2013.

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