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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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.

REPLY BRIEF

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I.

Table of Contents

II. Table of Authorities ..... ii,iii

III. Introduction 1

IV. Argument 1

A. The Release Agreement Upon Which the Court and the Sterners Rely Does Not Support Summary Judgment 1

B. Respondent WHR Group, Inc. Was Not Entitled to Summary Judgment In That It Too Erroneously Relied Upon the Release Agreement Which It Prepared and Presented 5

C. WHR Group, Inc. Appears as the Owner and Seller of the Property in Question Under its Own Documents 6

D. Sahley Realty Company, Inc. Erroneously Relies Upon The Case of *Goldstein v. Gilbert* 7

E. The Instant Case Satisfies the Requirements of *Res Ipsa Loquitur* 8

V. Certificate of Service 12

II.

Table of Authorities

Boardman v. Reed & Ford's Lessees, 31 U.S. 328 (1832) 11

Conley v. Hill, 115 W.Va. 175, 174 S.E.2d 883 syl.pt, 2 (1934) 3

Corbleys v. Ripley, 22 W.Va. 154 (1883) 11

Finch v. Inspectech, LLC, 229 W.Va. 147, 727 S.E.2d 823 (2012) 4

Foster v. City of Keyser, 202 W.Va.1, 501 S.E. 2d 165 (1997) 8,9

Goldstein v. Gilbert, 125 W.Va. 360, 23 S.E. 2d 606 (1942) 7

Hark v. Mtn. Fork Lumber Co., 127 W.Va. 586, 34 S.E. 2d 348 (1945) 8

Norvell v. Kanawha & Michigan R. Co., 67 W.Va. 467, 68 S.E.2d 88, 291 (1910) 4,5

Parillo v. Giroux Co. In., 426 A. 2d 1313 (R.I. 1981) 9

Prosser and Keeton on Torts 5th Ed. pp. 244 et seq. 8,9

Ratliff v. Norfolk and Southern Ry Co, 680 S.E.2d 28 (2009) 4

Shortt v.Hudson Supply & Equipment Co., 191 VA. 306, 60 S.E. 2d 900(VA. 1950) 7,8

Snyder v. Wheeling Electrical Co., 43 W.Va. 661, 28 S.E. 733 (1897) 9

Stallard v. Atlantic Greyhound Lines, 169 Va. 223, 192 S.E. 800 (1937) 5

State v. King, 64 W.Va. 546, 63 S.E. 468 (1908) 11

Taylor v. Chesapeake & Ohio Ry., 518 F.2d 536 (4th Cir 1975) 5

Thornton v. CAMC, 158 W.Va. 504, 213 S.E. 2d 102 (1975) 3,4,8

Warren v. Syme, 7 W.Va. 474 (1874) 11

Wendell v Payne, 89 W.Va. 356, 109 S.E.2d 734 (1921) 5

Williams v. Precision Coil, 194 W.Va. 52, 459 S.E.2d 329 (1995) 2,3,5

Statutes

W.Va. Code §8-24-1 et. seq 10

W.Va. Code §8-24-28 11

Text

8 Michie's Juris. Trespass 11

III.

Introduction

The Petitioners (hereinafter the Dickens) brought suit against three (3) Defendants, each of whom was awarded summary judgment below. Each Respondent has submitted a summary response to the Dickens' Petition of Appeal, Rule 10(e) Revised Rules of Appellate Procedure. The Dickens will hereinafter reply to each in seriatim. References are to pages within the appendix.

IV.
ARGUMENT

A.

THE RELEASE AGREEMENT UPON WHICH THE COURT AND THE STERNERS RELY DOES NOT SUPPORT SUMMARY JUDGMENT

Respondents Mr. And Mrs. Sterner who previously owned and occupied the Dickens' home moved for summary judgment based entirely upon a release which the Dickens signed on July 8, 2008, App. 47. That release which is Exhibit B to the Sterners' motion refers to "Repairs from Inspection" performed by an entity named Davis Building & Remodeling, see Exh. A to the Sterners' motion for summary judgment. The document purports to release every person or entity which might have had any interest whatsoever in the property upon which Davis Building and Remodeling performed their limited work at a cost $4320. The release states that all parties are released from

> "...all claims, demands, and causes of action that Releasor may have or that might subsequently accrue to

> Releasor arising out of or connected with, directly or indirectly, the purchase of property located at..."

Davis provided the WHR Group, Inc. with a cost estimate for various repairs to the home and premises which the Dickens had asked for. These repairs were made before closing and have no connection to the problem which led to this litigation.

In response to the Sterners' motion, the Dickens responded by affidavit which specifically addressed their understanding and concomitant intent when signing the release. More particularly, the Dickens understood that:

> The release agreement related only to the repairs indicated in the David Building and Remodeling work estimate and had nothing whatsoever to do with the slip, the detention pond and the defects which were unknown to us at such time... App 89-90.

In the Final Order of Dismissal Based on Summary Judgment the Circuit Court found as fact that the aforementioned language as contained in the release relieved the Releasees from all claims, etc., i.e., that it was in fact a broad form release of any past or future claims related to the purchase of the property, Final Order paragraph 9. The Circuit Court found as fact that

> "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 wrong doing of any kind whatsoever in conjunction with sale of property in question releasing Sterners, WHR Group, the realtors and others. Final Order paragraph 16."

Based upon these findings of fact all motions for summary judgment were granted. The Circuit Court and now the Sterners in their submission cite Williams v. Precision Coil, 194 W.Va. 52, 459 S.E.2d 329 (1995) as authority for granting summary judgment.

Both the Sterners in their Summary Response and the Circuit Court in its decision are mistaken in arriving at the conclusion that the Davis Building and Remodeling release not only relieved the Sterners and all others of all liability related to the property purchased as a matter of fact, but also in their conclusion that no rationale trier of fact could find for the Dickens on the basis of this release. Williams Coil upon which the Sterners now place so much emphasis holds in no uncertain terms that:

> "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify application of the law..."
> Syl. Pt. 1

Since the meaning of the release provides the sole basis for awarding judgment to the Sterners a look at the law interpreting releases is in order, particularly as the law supports a jury question. For starters, the law is that a release ordinarily covers only such matters as may fairly be said to have been within the parties' contemplation at the time of execution, Conley v. Hill, 115 W.Va. 175, 174 S.E.2d 883 syl.pt, 2 (1934) overruled on other grounds, Thornton v. CAMC, infra. Applying this rule to the facts contained in the record indicates that the Sterners, WHR Group Inc. and the Dickens contemplated something different when the release was signed. The Dickens justifiably believed based on the language that the release agreement related to the Davis work since that is what is specifically mentioned in the document and led to the submission of the same for the Dickens to sign in the first place.

When there exists a conflict in the testimony regarding the signing of a release, a question for the jury remains, Norvell v. Kanawha & Michigan R. Co., 67 W.Va. 467, 68 S.E.2d 88, 291

(1910). In Thornton v. CAMC, 158 W.Va. 504, 213 S.E. 2d 102(1975) this Court adopted the "modern rule" regarding release of successive tortfeasors, finding that courts should consider as a question of fact what the intention of the party is when he/she signs a general release, syl.pt. 5. In the case at bar this represents a material question of fact relative to liability.

Recently, this Court has had occasion to consider an unconditional release clause as contained in a home inspection contract, Finch v. Inspectech, LLC, 229 W.Va. 147, 727 S.E.2d 823 (2012). The Circuit Court in Finch awarded summary judgment relying on the presence of release language in the contract. Like the agreement sub judice, the release there was anticipatory in nature. Further, like the agreement sub judice the agreement in Finch was prepared and presented by one of the released parties. In this case it was the WHR Group, Inc. which prepared and presented the document. In the document WHR Group identifies itself as the "relocation company" in one place but thereafter signed in another place as the seller, see Exhibit B to the Sterners' Motion for Summary Judgment, App. 47. While this Court held that the release in Finch was void and unenforceable as being contrary to public policy as defined in the regulations which govern home inspectors, the clear take away from Finch for present purposes is as follows. The presentation of a release prepared by the releasor to the releasee which not only releases the immediate work or activity but also any claims made in the future must be carefully scrutinized and interpreted as being limited to that which is reasonably known and discoverable at the time.

In Ratliff v. Norfolk and Southern Ry Co, 680 S.E.2d 28 (2009) this Court reversed a summary judgment in which the lower court had concluded that a release signed by a railroad worker upon his separation from employment precluded later recovery by his widow for the

worker's mesothelioma. The rationale stated for this Court's decision was that to be valid a release must reflect a bargained-for settlement of a known claim for a specific injury. The release in this case relates only to the bargained-for work which was performed by Davis for the WHR Group at the request of the Dickens. That is all that was released. Such is consistent to what the Dickens believed when they signed the release. The matter should have been submitted to the jury, see e.g. Norvell supra; Wendell v Payne, 89 W.Va. 356, 109 S.E.2d 734 (1921); and see Stallard v. Atlantic Greyhound Lines, 169 Va. 223, 192 S.E. 800 (1937) and Taylor v. Chesapeake & Ohio Ry., 518 F.2d 536 (4th Cir 1975). The Sterners argument that Williams Coil was correctly applied and that the "clear terms" of the release was properly enforced could not be more misplaced.

B.

RESPONDENT WHR GROUP, INC. WAS NOT ENTITLED TO SUMMARY JUDGMENT IN THAT IT TOO ERRONEOUSLY RELIED UPON THE RELEASE AGREEMENT WHICH IT PREPARED AND PRESENTED

There exist glaring flaws and omissions in WHR Group's Summary Response. First, WHR Group has conveniently omitted that its motion for summary judgment which was cast initially as a 12(b)(6) motion to dismiss also relied on the release agreement like the Sterners. WHR Group instead writes, p. 6, that the release was not mentioned by the Court in its conclusions and that WHR Group

> "...will not address the issue, other than to say it believes that were there to be a trial, the release would be dispositive for the respondent."

This utter trivialization of the issue which the Circuit Court cited as the factual basis for its entry of summary judgment reflects a unique misunderstanding on the part of WHR about both the Circuit Court's ruling and the applicable law.

In regard to the release the WHR Group's "nonargument" suffers from the same infirmity as does the Sterners' argument. The Dickens affidavit reflects their understanding of what the release means (as prepared by WHR) and raises a fact question for the jury to decide. As such, the WHR Group, Inc. like the Sterners and the Circuit Court are plainly wrong in their conclusions about the dispositive effect of the release.

C.

WHR GROUP, INC. APPEARS AS THE OWNER AND SELLER OF THE PROPERTY IN QUESTION UNDER ITS OWN DOCUMENTS

WHR Group, Inc. filed its supplement to motion to dismiss arguing that they were "similar to a real estate broker," and had "no knowledge of any alleged defect and could not have gained such knowledge." Further, they asserted that had made no representations about the retention area. The Circuit Court adopted this view in its findings, App. 5 paragraph 16.

Contrary to WHR's assertions the record shows without controversy that WHR, Group, Inc. identifies itself as the seller, App. 48, that the company prepared and presented a disclosure statement representing that no problems existed in the property, App. 93-95, that the company caused an inspection report to be made by a third party which WHR Group provided to the Dickens, App. 96-105. Respondent Patrick Sterner stated in his affidavit that they sold the property to WHR Group, Inc. on September 28, 2007 which the WHR Group later sold to the

Dickens, App. 44-45. Thus, the question of possession and ownership together with duties that go with ownership exists for the jury.

Assuming, as the Court below found that WHR Group, Inc. actually had no knowledge of anything about the property or its condition when it negotiated and sold the property to the Dickens then under the existing record WHR certainly could reasonably be found by a jury to have been negligent as count four of the Amended Complaint alleges. As the seller of this property WHR Group had a duty to provide an accurate disclosure of any problem. The presentation of a disclosure of course anticipates that the WHR Group, Inc. was actually familiar with the property. The same applies to their contractual obligations to the Dickens as alleged in count one of the Amended Complaint, App. 284-290. As the owner of the property WHR Group, Inc. had all of the responsibilities and duties that the Sterners had, thus the affidavit of Mr. Sterner when considered together with the subsequent negotiations WHR Group, Inc. had with the Dickens and attendant documents submitted are sufficient to create genuine issue of material fact for the jury to determine. WHR failed to recognize much less address this important point in its submission to this Court.

D.

SAHLEY REALTY COMPANY, INC. ERRONEOUSLY RELIES UPON THE CASE OF *GOLDSTEIN v. GILBERT*

In its response Respondent Sahley Realty Company, Inc. argues that the Circuit Court correctly applied the law of anticipatory release, Response p. 15. Sahley cites as its supporting authority the decision in *Goldstein v. Gilbert*, 125 W.Va. 360, 23 S.E. 2d 606 (1942). Goldstein interpreted *Virginia* law. The interpretation which was therein made was the effect of a release

on later claims which are made against joint tort feasors in Virginia, Shortt v.Hudson Supply & Equipment Co., 191 VA. 306, 60 S.E. 2d 900(VA. 1950). Suffice it to say that West Virginia's law on the subject of releasing joint tort feasors differs, Thornton v. C.A.M.C., supra. The reliance upon this authority is misplaced.

E.

THE INSTANT CASE SATISFIES THE REQUIREMENTS OF *RES IPSA LOQUITUR*

Sahley Realty argues that the Circuit Court correctly found that the doctrine of *Res Ipsa Loquitur* was not applicable to the Dickens' claims. The parties agree that the test is that which is set forth in Foster v. City of Keyser, 202 W.Va.1, 501 S.E. 2d 165 (1997). The question then is whether the record supports the three prong test stated in Foster.

The Event Is The Kind Which Ordinarily Does Not Occur Without Negligence

As previously noted in the Petition of Appeal, p. 13, the Dickens alleged negligence by Sahley. The retention pond which Sahley was responsible for encroaching (trespassing) on the Dickens property, App. 289. Encroachment can occur by 1) the retention pond having slipped after Sahley constructed it or 2) it was originally constructed on the property of the Dickens/Sterner in error. The Dickens became firmly aware of the encroachment as a fact when the survey was completed on July 21, 2010 and the survey stakes were set, App. 704 (Deborah Dickens Affidavit).

It is submitted that this proof of encroachment not only raises an inference of negligence as is necessary for the doctrine to apply, Prosser and Keeton on Torts 5th Ed. pp. 244 et seq., but also it constitutes direct proof of a trespass, Hark v. Mtn. Fork Lumber Co., 127 W.Va. 586, 34

S.E. 2d 348 (1945), syl. pt. 2. The physical facts themselves are the evidence, Foster, 501 S.E. 2d at 179 discussing the case of Snyder v. Wheeling Electrical Co., 43 W.Va. 661, 28 S.E. 733 (1897).

Other Responsible Causes Are Sufficiently Eliminated by the Evidence

The requirement is that other causes, including conduct by the Plaintiffs or third parties, by sufficiently eliminated by the evidence. This is another way of stating that circumstantial evidence must be present which permits the reasonable inference that the negligence complained of was the Defendant's negligence. Historically, this requirement meant that the Defendant had exclusive control of the instrumentality or premises involved in the accident, Prosser and Keeton on Torts, supra p. 249. Under Foster, proof of exclusive control is eliminated, control being but one ingredient of the circumstantial evidence considered.

This Court in Foster followed the Restatement of Torts 2d §328D formulation of *res ipsa loquitur*, citing the decision in Parillo v. Giroux Co. In., 426 A. 2d 1313 (R.I. 1981), Foster, S.E. 2d at 184:

> ". . . there is no necessity for a Plaintiff to eliminate all other possible causes of the accident. All that is required is that the Plaintiff produce sufficient evidence from which a reasonable man could say that, on the whole, it was more likely than not that there was negligence on the part of the Defendant."

The negligence here is manifested by the encroachment which consumed part of the Dickens lot. A reasonable man could indeed infer that it was more likely than not that fault lies with Sahley Realty from the following which appears in the record below:

> 1) Sahley Realty was the developer of Rosehill Acres subdivision where this property was located, App. 371. As developer they were responsible

for building and placement of the retention pond.

2) Concern about the retention pond (the pit) was noted as early as November 3, 2005, App. 372.

3) The concern about the pond (referred to as the pit) continued in November, 2006, App. 374. In fact the members of the Rosehill Homeowners Association worried about "all liabilities. . . before Homeowners Association takes over the roads and pits" (3d paragraph of homeowners meeting on November 20, 2006).

4) By deed dated April 6, 2010 Sahley Realty Company conveyed the common areas including the retention pond to the homeowners association, App. 375.

5) The deed of April 6, 2010 adopted the description of the common areas under a prior survey, App. 378-381.

6) The 2010 survey done for the Dickens showed that the so-called common area including the retention pond was encroaching on their property, App. 703-704. The Dickens survey was completed on July 21, 2010, slightly more than three(3) months after the Sahley deed.

7) Only a short time before this survey was done for the Dickens neighbors in the Rosehill Acres subdivision told Mr. Dickens for th first time about the earlier problems with the retention pond and cautioned him about possible further problems, App. 156-157.

In view of the foregoing, both the Circuit Court in its order, paragraph 2 under conclusions of law, and Sahley Realty in its submission, pp. 17-19 are plainly wrong.

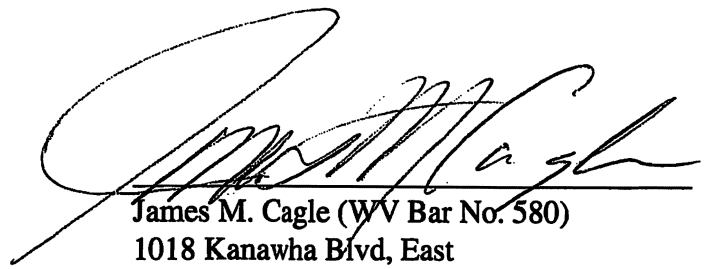
The Indicated Negligence (Trespass) was within
<u>the Scope of Sahley's Duty to the Plaintiffs</u>

Sahley is the developer of the subdivision. As such, Sahley laid out the lots, caused the retention pond to be built and established the location of the same for the entire subdivision. Sahley as developer answered to the planning commission, W.Va. Code §8-24-1 <u>et. seq</u>. In that connection the plan of the development inclusive of the size and location of lots and retention

ponds had to be approved, Code §8-24-28. To argue as Sahley does, p. 19, that there is no duty shown is to argue that the owner of an adjacent lot owes no duty to his neighbor not to encroach upon the neighbor's land. Boundary disputes are old and well-settled in our jurisprudence, Boardman v. Reed & Ford's Lessees, 31 U.S. 328 (1832); Corbleys v. Ripley, 22 W.Va. 154 (1883); Warren v. Syme, 7 W.Va. 474 (1874); State v. King, 64 W.Va. 546, 63 S.E. 468 (1908). So is the law of trespass, 18 Michie's Juris. Trespass. Therefore, to answer Sahley's argument the duty owed and violated by Sahley was the duty not to encroach upon another's property as well as the duty to adhere to the boundary lines established as approved by the Planning Commission.

Conclusion

For the foregoing reasons and those set forth in the Petition of Appeal the judgment of the Circuit Court of Putnam County should be reversed and the case remanded for further proceedings.



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CERTIFICATE OF SERVICE

The undersigned, Counsel for the Plaintiffs does hereby certify that a true and correct copy of the ***Reply Brief*** was served via fax upon the attorneys listed below on this the 17th day of July, 2013.

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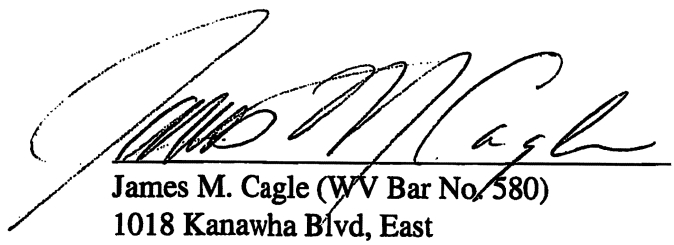

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