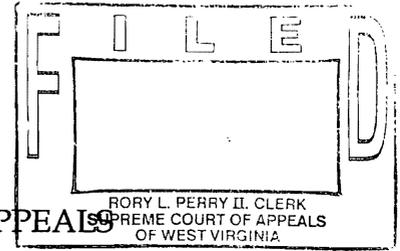


No. 13-0117



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

Summary Response of Respondent WHR Group In accordance with
Rule 10(e) Rules of Appellate Procedure

R. Vance Golden, III
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Email: vgolden@goldenamos.com
Phone (304) 485-3851
Counsel for Respondent WHR Group

Introduction

Respondent, WHR Group makes this summary response in accordance with Rule 10(e) Rules of Appellate Procedure. The response is in two parts. The first part sets forth the facts regarding the detention pond and alleged encroachment. The second part consists of WHR's argument and reasons why the summary judgment of the trial court was proper.

Facts Regarding Detention Pond and Alleged Encroachment

Petitioners have never adequately described the detention pond, which is at the root of all their complaints. Thus WHR Group as respondent herein will attempt to describe the pond for the Court. To do so it attaches a copy of the subdivision plat. App. 507. The petitioners own lot 329, adjacent to the detention pond. The pond area itself has imbedded in it large rocks or stones to prevent erosion and slippage similar to rip rap on a river bank. It takes storm drainage water and impounds the water to slow down and impede the progress of the water into a natural drain which goes under Scott Lane shown on the plat and further on to the waters natural course of destination downstream.

The natural contour of the land appears to have always slopped down from the head of the circle which is Wildrose Lane through Lot 329 to Scott Lane. The natural contour or slope has been changed at the detention pond where the slope downward is more pronounced at or near the boundary line between the

pond and the petitioners' lot 329. At the opposite side of the pond from petitioners' lot the side of the pond has been built up and appears like the wall of a small earthen dam which borders on Scott Lane. Although no testimony has been offered, the floor or bottom of the pond would appear to be slightly higher than Scott Lane. The entire detention pond area is completely covered and overgrown with weeds and the beginnings of small trees and other growth. It is impossible or difficult to see the stones imbedded in the sides of the pond because of the extensive growth of vegetation. This detention pond was built and planned by the developer Sahley Realty under subdivision requirements and guidelines of Putnam County. The pond is also to serve an adjacent subdivision to the rear of petitioners' lot 329. Two of the lots in this other subdivision are partially shown to the rear of petitioners' lot as lots 400 and 402. Although petitioners make no complaint or take issue with other alleged encroachments, the subdivision plat shows that at the rear of their lot 329 there is a "Gas Line" right of way which intrudes fifty (50) feet into their lot. At the front of the lot there are two separate sewer easements which encroach into their lot.

The integrity of the detention pond is not in question. There is no proof whatsoever that there has been any slippage or subsidence since petitioners have owned their lot. There is no proof whatsoever offered by the Plaintiffs that the design or construction of the pond will make it susceptible to slips or subsidence. If there were problems with the integrity of the pond at an earlier date those problems appear to have now been resolved. Future maintenance of the pond

area now is the responsibility of the homeowners association, the area having been transferred to it by deed from Sahley Realty. The area around the pond is not fenced. Respondents have never admitted that any part of the pond improvements or stones encroach into lot 329. If there is an encroachment there is no harm to lot 329 or the petitioners. No one is prohibiting petitioners from going upon any part of their property. Petitioners have room to mow their yard on all sides of their property.

Although petitioners allege encroachment, they offered no adequate proof of it in discovery responses. They declined before trial to enlist the aid of any experts regarding boundaries, encroachments, integrity of the pond or damages to their property. Petitioners invited the respondents to come to the premises and look for some purported boundary stakes and in discovery offered no explanation as to how those stakes were planted. App. 780 through 785, 756, 765, 766, 733, 774, 779, 780, 787, 794, 795. Petitioners, by counsel, in essence proposed to prove their common boundary line at the pond by hearsay evidence which is not admissible. Rule 802, West Virginia Rules of Evidence.

Petitioners have the burden of establishing by the preponderance of the evidence the boundary for which they contend. *Westover Volunteer Fire Department, Inc. v. Baker*, 142 W. Va. 404, 95 S.E. 2d 807 (1956) Syllabus 6. The plat of this subdivision shows that it was not approved until the year 2003. New subdivision boundary corners do not fall within any hearsay exceptions. Rule

803 (20), West Virginia Rules of Evidence; *Blair v. Woods*, 145 W. Va. 297, 115 S. E. 2d 88 (1960).

Argument And Reasons Why The Summary
Judgment Was Proper

Petitioners do not specifically deny any finding of fact or law made by the trial court in its final order of dismissal based on summary judgment, App. 1, in their petition. They merely state that “facts were sufficient, when considered together... to produce genuine issues of material fact.” Petitioners did not avail themselves of any discovery in preparation for trial. Their responses to discovery requests were vague and not very responsive. As the trial court found in paragraph 13. of its findings of facts,

Plaintiffs, in discovery, presented no evidence of current instability in the pond. The pond remains today as it was at the time of conveyance to Plaintiffs. Plaintiffs have also not set forth any evidence of damages.

Further, the trial court in paragraph 16. of its findings, found no evidence to support a case against WHR in “actual fraud, constructive fraud, breach of contract and negligence.”

In its conclusions of law, the trial court explained in paragraph 4. that Petitioners had “received the benefit of their bargain.” At the time of purchase, “the location of the pond was known or would have been known to a purchaser exercising diligent attention.” Employees of WHR were never upon the property.

WHR's sole task in the purchase was to assist the Sterners' employer to sell the property when Mr. Sterner was transferred.

Although the trial court made mention of a release, App. 48, signed by the Petitioners in paragraph 16. of its findings of fact, it did not rely upon the existence of the release in making its ruling for summary judgment. No mention of the release is made in the trial court's conclusions of law. The trial court did not mention the release in its memorandum to counsel dated November 14, 2012. App. 9. Petitioners make this an issue as the second assignment of error in their petition. As the trial court did not specifically address that issue, WHR as a respondent in its response 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.

Petitioners, as their third assignment of error, say the court improperly applied the doctrine of *res ipsa loquitur*. As WHR, by all accounts, never had anything to do with construction or maintenance of the detention pond it will not address that issue; that issue is between the petitioners and respondent Sahley Realty. This leaves the first assignment of error which WHR will briefly address. At the close of discovery, WHR filed both a motion in limine App. 961 through 964 and a motion for summary judgment with attachments. App. 496 through 594. The trial court conducted a hearing on the 26th day of October, 2012 as to all motions pending. App. 739 through 809. Subsequent to the hearing WHR made a supplement to its pending motion. App. 657 through 685. For purposes of this response, WHR is not going to re-argue all the points below that

it made for the granting of summary judgment in its favor. It is enough that the trial court decided quite properly, that petitioners, "in reviewing the facts, in a light most favorable to Plaintiffs... do not put forth any set of facts in discovery, by affidavit or otherwise which would support a finding in their favor under *Thacker v. Tyree*, 171 W.Va. 110, 297 S.E. 2d 885 (1982); *Lengyel v. Lint*, 167 W.Va. 272, S.E. 2d 66 (1984); or *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E. 2d 728 (1994).

The trial court conducted two hearings on the record, the last one for summary judgment on the 26th day of October, 2012 which was previously mentioned herein. App. 496 through 594. A prior hearing had been conducted on the 27th day of April, 2012 to consider various motions of respondents to dismiss. App. 222 through 284. This first hearing was before discovery.

The trial court's guiding light in the case, as Judge Stowers expressed over and again was *Williams v. Precision Coil*, 194 W.Va. 52, 459 S.E. 2d 320 (1995). Using the same analysis as Justice Cleckley who cites prior State and Federal cases in *Williams*, Id.; there being no genuine issue of material fact or law, WHR Group, respectfully for all the foregoing reasons requests the judgment below should be affirmed.



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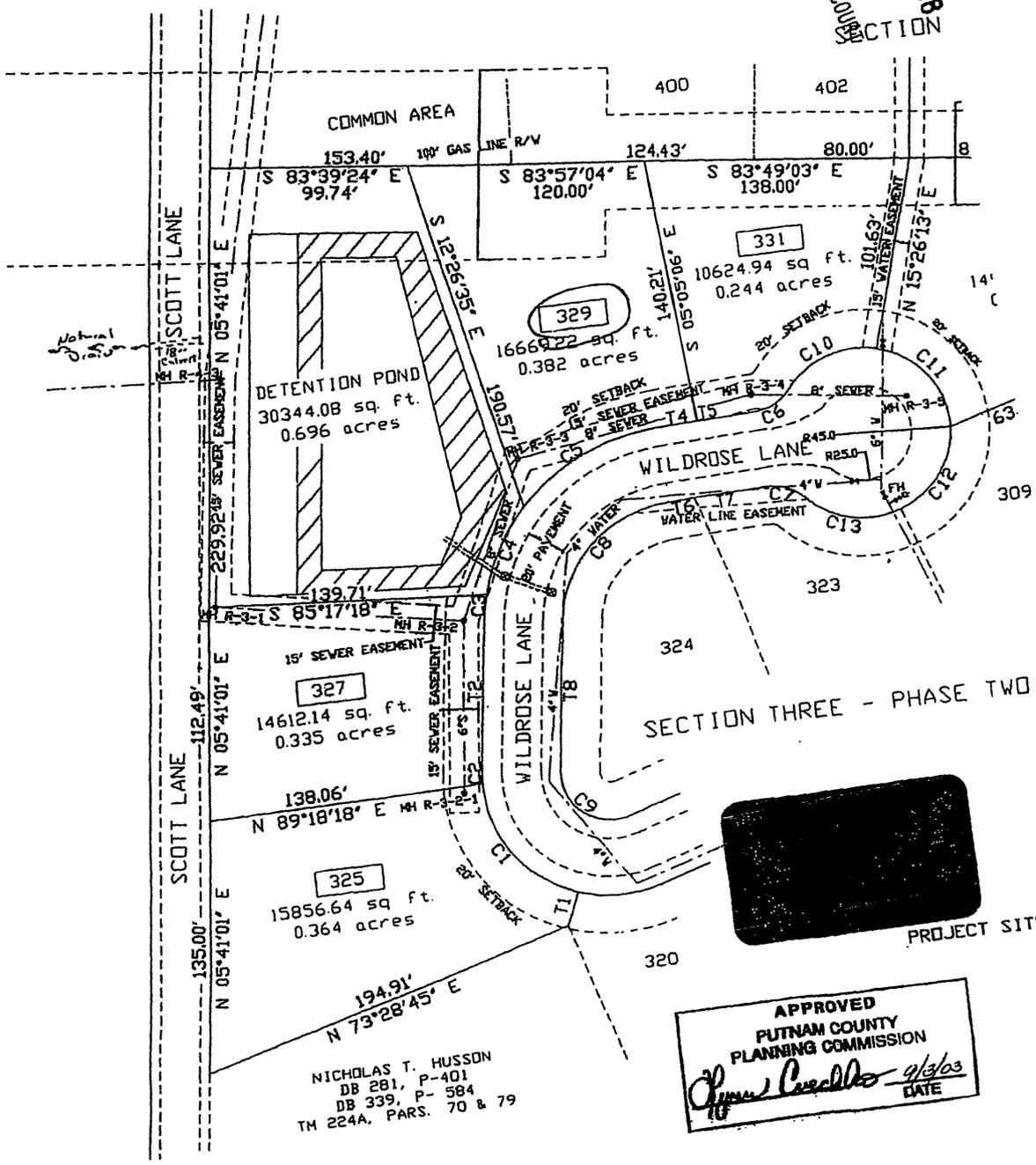
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C2	4°46'38"
C3	7°56'49"
C4	28°05'50"
C5	44°57'21"
C6	49°59'41"
C7	81°00'00"
C8	114°00'00"
C9	67°44'36"
C10	77°38'51"
C11	67°07'30"
C12	67°28'07"

CHORD BRG
S 33°35'13" E
S 04°17'41" E
S 10°39'24" E
S 28°48'44" E
S 65°12'20" E
N 68°43'09" E
N 67°19'09" E
S 47°11'00" E
S 50°19'00" E
S 71°32'45" E
N 35°44'21" E
N 36°38'50" E
S 76°03'22" E

CURVE TABLE	LENGTH	TANGENT	CHD LENGTH
RADIUS	65.46'	81.10'	76.01'
	63.46'	5.46'	5.46'
	101.96'	14.14'	14.13'
	101.96'	50.00'	49.50'
	101.96'	80.00'	77.96'
	25.00'	21.81'	21.13'
	25.00'	21.81'	21.13'
	61.96'	21.81'	80.48'
	25.46'	50.63'	42.70'
	45.00'	53.21'	50.16'
	45.00'	60.98'	56.42'
	45.00'	52.72'	49.76'
	45.00'	52.99'	49.98'

TANGENT	NUMBER	DISTANCE
46.68'	T1	18.48'
2.73'	T2	80.00'
7.08'	T3	83.99'
25.51'	T4	20.00'
42.19'	T5	14.89'
11.66'	T6	12.90'
11.66'	T7	39.48'
39.20'	T8	80.00'
30.21'	T9	90.00'
36.21'		
29.86'		
30.05'		

2012 OCT -3 PM 12:38
 FILE
 PUTNAM CO. CREDIT COLLECTION
 SECTION



NICHOLAS T. HUSSON
 DB 281, P-401
 DB 339, P-584
 TM 224A, PARS. 70 & 79

APPROVED
 PUTNAM COUNTY
 PLANNING COMMISSION
[Signature]
 DATE

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Petitioners,

No. 13-0117

V.

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

Respondents,

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June, 2013, I served a true and correct copy of the Summary Response of Respondent WHR Group upon the following person by mailing, postage prepaid, true copies thereof through the United States Mail, addressed as follows:

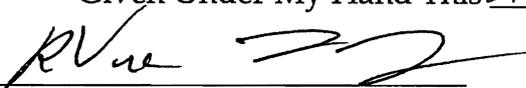
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Counsel for Defendants,
Patrick L. Sterner and Melinda R. Sterner

Given Under My Hand This 21st day of June, 2013.



WHR Group, INC. by Counsel of Record

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