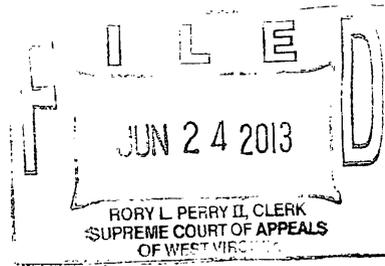


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 13-0117



**DAVID W. DICKENS and
DEBORAH A. DICKENS,**

Petitioners / Plaintiffs Below,

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,**

Respondents / Defendants Below.

**RESPONSE OF SAHLEY REALTY COMPANY, INC.
TO PETITION FOR APPEAL**

SAHLEY REALTY COMPANY, INC.

By Counsel

A handwritten signature in black ink, appearing to be "J. Harkins".

Jane E. Harkins, WV State Bar No. 5951
Christopher C. Ross, WV State Bar No. 10415

***PULLIN, FOWLER, FLANAGAN,
BROWN & POE, PLLC***
600 Neville Street, Suite 201
Beckley, WV 25801
Telephone: (304) 245-9300
Facsimile: (304) 255-5519
jharkins@pffwv.com
cross@pffwv.com

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QUESTIONS PRESENTED

1. Did the Circuit Court properly award summary judgment as to all claims in favor of all Defendants below?
2. Did the Circuit Court correctly apply the law of anticipatory release?
3. Did the Circuit Court properly apply the doctrine of *res ipsa loquitur*?

STATEMENT OF THE CASE

Petitioners / Plaintiffs filed their Complaint¹ in this action against Respondents / Defendants Sahley Realty Company, Inc. (“Sahley”), Patrick L. Sterner and Melinda R. Sterner (“the Sterners”), and WHR Group, Inc. (“WHR”). Defendant Sahley filed Third-Party Complaints against Terlin Enterprises, LLC (“Terlin”) and Rosehill Acres – Section Three Homeowners Association, Inc. (“the Homeowners Assoc.”)² Default Judgment was entered against Terlin on June 11, 2012. At the conclusion of discovery, Defendants Sahley, WHR, and the Sterners each moved for summary judgment, and a hearing thereon was conducted on October 26, 2012. *See Appendix to the Petition of Appeal (“Appendix”) pp. 0739-0809: 10/26/12 Hearing Transcript.*

At 5:00 p.m. the day before the hearing on these significant dispositive motions, Petitioners served their Response to Sahley’s Motion for Summary Judgment. In this Response, they raised the theory of *res ipsa loquitur* for the first time in these proceedings. *See Appendix*

1 Petitioners also filed an Amended Complaint, upon the Circuit Court’s determination that a more definite statement of the fraud claims against Respondents WHR Group, Inc. and Patrick and Melinda Sterner was needed. The Amended Complaint did not change nor add further allegations against Respondent Sahley Realty Co., Inc.

2 Counsel for the Homeowners Assoc., Joe Reeder, was elected as Judge of the Circuit Court of Putnam County in November, 2012. No new counsel has ever appeared to replace Judge Reeder, so it is not expected that the Homeowners Assoc. will participate in this appeal.

pp. 0599-0609: Pl. Resp. to Sahley's Mot. for Summ. J. The Circuit Court, by Circuit Judge Phillip M. Stowers, heard the arguments of the moving parties and the opposing arguments of Petitioners. On November 14, 2012, the Circuit Court issued a memorandum opinion finding that summary judgment should be granted for all Defendants, because no genuine issue of material fact existed as to any of Petitioners' claims. *See Appendix pp. 0009-0010: Judge Stowers' Memorandum Opinion.* A "Final Order of Dismissal Based on Summary Judgment" was entered on January 7, 2013, with detailed findings of fact and conclusions of law. *See Appendix pp. 0001-0008: Final Order of Dismissal.* The Circuit Court further found that *res ipsa loquitur* was not a theory applicable to the claims of Petitioners against Sahley, because Petitioners had not established any genuine issue of material fact as to whether the event alleged in their Complaint had resulted in damages of a kind which do not occur in the absence of negligence. *See id at p.0006.* It further found that certain Defendants had not breached an implied contract in violation of good faith and fair dealing nor had they engaged in fraud by inducing Petitioners to purchase property that had been encroached. *See id.*

In 1999, as required by the Subdivision Regulations of Putnam County, West Virginia, Sahley caused a retention pond to be constructed during its development of Rosehill Acres – Section Three, for the purpose of collecting and carrying away surface water runoff. *See id at p. 0002.* By Deed, dated August 25, 2005, Sahley conveyed Lot No. 329 of Rosehill Acres - Section Three to Terlin. *See id.* Lot 329 shares its west property line with this retention pond. *See id.* Thereafter, Terlin constructed a single-family residential structure on Lot 329. *See id.* In the course of construction, Terlin buried pipes from the downspouts of the new house across the common property line, carving into and altering the contour of the east vertical side of the

retention pond (at the west side of Lot 329), contrary to the Regulations of Putnam County and the restrictive covenants of Rosehill Acres. *See id.* By Deed dated May 19, 2006, Terlin sold Lot 329 to the Sterners. *See id.* During the Sterner's ownership of Lot 329, Terlin was required by Sahley to remove the buried pipes and to restore the property that had been disturbed. Eventually, Mr. Sterner's employer transferred him to a new location, and it enlisted WHR, a relocation company, to handle the sale of Lot 329. *See id at p. 0003.* Through WHR, the Sterners sold Lot 329 to Petitioners, by Deed dated September 28, 2007. *See id.* Prior to their purchase, Petitioners caused Lot 329 to be inspected and requested that several items be repaired prior to consummating the purchase. *See id.* The inspection did not indicate any issues with the retention pond nor the property line separating Lot 329 from the slope of the retention pond. *See id.* The repairs requested by Petitioners, in the amount of \$4,230.00, were completed in or about June 2008, and Petitioners executed a Release in favor of the Sterners and WHR. *See id.*

In 2011, Petitioners instituted the instant action, claiming that, at some unspecified time prior to their purchase, a "slip" had occurred in the side of the retention pond along its common boundary with Lot 329. *See id.* Petitioners claim that the slip caused an encroachment, such that the dimension of the retention pond had expanded and "consumed" their property. *See id; and Appendix pp. 0286: Pl. Amend. Compl.* Petitioners further allege that the slip occurred because the retention pond was negligently constructed, maintained, and/or repaired by Sahley. *See Appendix pp. 0003: Final Order of Dismissal.* Ultimately, they asserted that the alleged slip and resultant damages would not have occurred absent the negligence of Sahley, per the doctrine of *res ipsa loquitur*. *See id.* Petitioners have since stated that *res ipsa loquitur* is the only issue of contested negligence remaining in the case. *See Appendix pp. 0774-0778: 10/26/12 Hearing*

Transcript.

Sahley maintains that the Circuit Court correctly concluded that the evidence was clear and uncontested that Petitioners purchased the property with open knowledge of the location and condition of the retention pond and, per their own inspection, raised no issue regarding the pond or the common boundary. *See Appendix pp. 0006: Final Order of Dismissal.* Further, the Circuit Court correctly concluded that Petitioners had failed to establish the existence of genuine issues of material fact as to whether: 1) a slip had ever occurred in the common boundary between the retention pond and Lot 329; 2) some instability or a lack of integrity in the area of that boundary caused an encroachment which has damaged their property; and 3) the alleged negligence of Sahley can be inferred merely from the purported existence of and damage from a slip, per *res ipsa loquitur*. *See id at pp. 0006-0007.*

SUMMARY OF ARGUMENT

The Circuit Court properly granted summary judgment in the instant action because Petitioners had failed to establish genuine issues of material fact as to the essential elements of their case against Sahley: that a slip occurred in a retaining wall at a common boundary with Petitioners' property; that the alleged slip would never have occurred unless Sahley had been negligent in its construction; and that the alleged slip had caused them damage. As the fundamental tenants of summary judgment practice require, Petitioners did not carry their burden against nor contradict Sahley's properly and well-supported Motion for Summary Judgment. Petitioners made no attempt to rehabilitate the evidence attacked by Sahley, produced no evidence to substantiate their theory of the case against Sahley, and fatally failed to demonstrate

the existence of any genuine issue for Trial against Sahley. Further, having themselves raised the specter of *res ipsa loquitur* in response to Sahley's Motion for Summary Judgment, Petitioners were unable establish that any such alleged slip and claimed resultant damage was of the kind which could not have occurred absent the sole fault of Sahley.

The Circuit Court properly analyzed *res ipsa loquitur* in the instant action, when it found that it would be wrong to infer negligence on the part of Sahley when Petitioners had failed to demonstrate that any event or harm had occurred to their property as a result of the sole negligence of Sahley.³ Proof of alleged harm is an essential element of any claim of negligence, and it remains a threshold issue in the defining statement of *res ipsa loquitur*. Thus, the Circuit Court properly found that Petitioners, who failed to evidence harm to their real property as the result of any action or omission on the part of Sahley, had failed to meet their burden in opposing Sahley's well-supported Motion for Summary Judgment by creating genuine issues of material fact as to the basic elements of *res ipsa loquitur*. For the above reasons, and for the arguments stated below, the Petition for Appeal should be denied.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in Rule 18(a) of the Revised Rules of Appellate Procedure (R.R.A.P.), oral argument in this matter is unnecessary. The issues raised here involve the application of well settled principles of law which justly and appropriately answer the questions presented. If this Court determines that oral argument is necessary, this case is appropriate for argument and disposition by memorandum decision under R.R.A.P. 19.

³ In fact, Plaintiffs made no showing of actual, monetary, compensable damages at any point during this litigation.

ARGUMENT

A. STANDARD OF REVIEW

The standard of review regarding an entry of summary judgment is *de novo*. See *Armor v. Lantz*, 207 W.Va. 672, 535 S.E.2d 737 (2000). In determining whether the granting of a motion for summary judgment was appropriate, the Supreme Court of Appeals of West Virginia has traditionally applied the same test that the circuit court should have applied initially. See *Conrad v. ARA Szabo*, 198 W.Va. 362, 369, 480 S.E.2d 801, 808 (1996).

B. THE CIRCUIT COURT PROPERLY AWARDED SUMMARY JUDGMENT AS TO ALL CLAIMS IN FAVOR OF SAHLEY.

1. Petitioners Failed to Offer More Than a Mere Scintilla of Evidence to Contradict Sahley's Motion for Summary Judgment.

In West Virginia, a “motion for summary judgment should be granted if the pleadings, affidavits or other evidence show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Harrison v. Town of Eleanor*, 191 W.Va. 611, 616, 447 S.E.2d 546, 551 (1994).⁴ A party who moves for summary judgment has the burden of demonstrating that there is no genuine issue of material fact in dispute. The non-movant must contradict the showing by pointing to specific facts that demonstrate that there is, indeed, a trialworthy issue. See Syl. Pt. 2, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

4 “Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this state. It is designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, if there essentially is no real dispute as to salient facts or it if only involves a question of law.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 459 S.E.2d 329, 335 (1995) (internal quotations omitted).

Rule 56(e) of the Rules of Civil Procedure (“R.C.P.”) provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Upon a properly-supported Motion for Summary Judgment, the burden of production shifts to the non-moving party who must either: 1) rehabilitate the evidence attacked by the moving party, 2) produce additional evidence showing the existence of a genuine issue for trial, or 3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). *See* Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). To withstand the motion for summary judgment, the non-moving party must show there will be enough competent evidence available at trial to enable a finding favorable to the non-moving party. Where the record contains no evidence to support an essential element of the non-movant’s case, there is no genuine issue of material fact, and the moving party is entitled to summary judgment as a matter of law. *See* Syl. Pt.3, *Lovell v. State Farm Mut. Ins. Co.*, 213 W.Va. 697, 584 S.E.2d 553 (2003). A non-movant must defend against a Motion for Summary Judgment with “more than flights of fancy, speculations, hunches, intuition, or rumors.” *Dunn v. Watson*, 211 W.Va. 418, 421, 566 S.E.2d 305, 308-9 (2002).

In their Complaint, Petitioners allege that a “slip” occurred at some time at the side of the retention pond along the boundary line of Lot 329, that this purported event was due to the malfeasance of Sahley, and that it resulted in an encroachment and taking of their property. *See Appendix pp. 0299: Pl. Amend. Compl.* In its Motion for Summary Judgment, including its

supplementations thereto necessitated by Petitioners' 11th-hour response, Sahley argued that the full breadth of Petitioners' "evidence" consisted merely of speculations, hunches, and rumors, as well as rampant hearsay. *See Appendix pp. 0341-0495: Sahley Mot. for Summ. J.* Petitioners merely proffered the speculative tales of their neighbors about some undefined occurrence at the retaining pond and attached unauthenticated notes of meetings of the Homeowners Association, which generally reference concerns about some vague event at the "back of the pit". *See Appendix pp. 0599-0609: Pl. Resp. to Sahley's Mot. for Summ. J.* None of Petitioners' offerings in this respect constitute affirmative "evidence" supporting Petitioners' allegations.

In truth, Petitioners' only alleged supportive "facts" come from these rumors and accounts of other residents of Rosehill Acres. These persons are not scientific experts and cannot testify with precision as to survey lines and plat maps as Petitioners suggest; thus, their testimony would not make the fact of an encroachment more or less probable under Rule 401 of the West Virginia Rules of Evidence (R.E.). Further, Rule 702 requires that any proposed scientific evidence, here being the interpretation of a survey taken to establish property lines and an alleged encroachment, to be both relevant and reliable. *See Syl Pt. 3, Gentry v. Magnum*, 195 W.Va. 512, 466 S.E.2d 171 (1995). Notwithstanding the arguments surrounding lay versus scientific evidence, Petitioners seek to overcome their unavoidable lack of personal knowledge in the matters asserted by offering hearsay. The statements of neighbors and the minutes of past Homeowners Association meetings were proffered to prove the truth of the matter asserted, in contravention of the hearsay doctrine articulated in Rule 801. The Circuit Court properly granted Summary Judgment, recognizing that such testimony would amount to allowing unreliable information to establish technical facts (in lieu of "overblown" expert testimony, as

described by Petitioners) and would not make it more or less probable that Sahley was somehow negligent with respect to the retention pond.

Also, in response to Sahley's properly-supported Motion for Summary Judgment (and the Supplementations thereto), Petitioners did not provide any affidavits refuting the evidence provided in Sahley's Motion attacking Petitioners' attempted reliance on *res ipsa loquitur*. The only affidavit provided by Petitioners, offered in their last submission apparently in opposition to Sahley's argument that Petitioners' claims were time-barred, states that they had only learned of the alleged event in 2010. *See Appendix pp. 0703-0704: Pl. Supp. to Resp. to Sahley's Mot. for Summ. J: Affidavit of Deborah A. Dickens*. The Affidavit of Plaintiff, Deborah Dickens, did not counter nor raise a genuine issue of material fact as to the evidence offered by Sahley against the applicability of *res ipsa loquitur*. In stark contrast, Sahley had offered the Affidavit of Namer Sahley to address the elements of *res ipsa loquitur*, particularly that other responsible causes existed to explain an alleged slip or change in contour of the common boundary, such as the destructive actions of Terlin. *See Appendix pp. 0351-0352: Sahley's Mot. for Summ. J., Exhibit A: Affidavit of Namer Sahley*. Petitioners' vague and passing reference to Sahley's Affidavit could not alone contradict the evidence it revealed. *See Appendix pp. 0599: Pl. Resp. to Sahley's Mot. for Summ. J.*

Finally, Petitioners did not disclose the opinions nor the report of any expert as to their allegations that a "slip" ever occurred, that it was due to the some exclusive breach of duty of Sahley, and that it resulted in an encroachment onto Petitioners' property. *See Appendix pp. 0909-0911: Pl. Desig. Of Expert*. During the October 26, 2012 hearing on the Motions for Summary Judgment, Petitioners' counsel disclosed anew that Petitioners had commissioned a

survey of their property, proffering that ten (10) feet had been lost in the alleged slippage of the common side of the retention pond. *See Appendix pp. 0775-0777: 10/26/12 Hearing Transcript.* Before that utterance, however, this purported survey had never existed in this case, as it had not resulted in a written report nor the disclosure of any opinions, pursuant to Rule 26(b) of the R.C.P. or to the Court's Scheduling Order. Although Petitioners had untimely provided the name of an alleged surveyor, this phantom survey was not described nor provided, and, to the knowledge of Sahley, still does not exist. Further, Petitioners' counsel represented that they had retained an engineering expert witness, which was expected to support their claims of a slippage having occurred. *See id at p. 0779.* Although they had untimely disclosed the name of this engineer during the case, they ultimately conceded during the hearing that they had no opinions from him, because they did not wish to pay him \$10,000.00 to undertake destructive core drilling along the common boundary of the retention pond necessary for him to analyze its construction and integrity, and because they were worried about spoliation of the evidence. *See id at pp. 0779-0782.* Ironically, Petitioners concluded before the Circuit Court that "the use of experts is overblown." *See id at pp. 0790-0791.*

Hence, all Petitioners offered against Sahley's Motion for Summary Judgment was the barest hint at "evidence." Sahley showed that it was entitled to be dismissed as a matter of law, because Petitioners had not established genuine issues of material fact on the essential elements of negligence and *res ipsa loquitur*: the occurrence of a slip of the common boundary causing damage to Petitioners' property, and some act or omission of Sahley being the sole cause of it. Their Deed and the conjectural hearsay of neighbors and participants at meetings of the Homeowners Association do not qualify as affirmative evidence of the existence of a "slip" and

the purported extent thereof. No effort was made at all to offer evidence on the issue of what Sahley alone had done, or had failed to do, which had resulted in the alleged slip, to the exclusion of all other potential natural or man-made causes. In granting Sahley's Motion for Summary Judgment, the Circuit Court appropriately appreciated the extent and effect of Petitioners' failure to meet its evidentiary obligations under Rule 56(e) of the Rules of Civil Procedure.

2. Petitioners Failed to Adduce or Offer Sufficient Evidence to Oppose the Properly-Supported Motion of Sahley.

The Circuit Court was left with nothing to work with but the bald assertions of Petitioners, developed and supported no further than they had been in Petitioners' pleadings. In response to the Motion for Summary Judgment of Sahley, Petitioners presented no evidence of actual slippage or movement of the edge of the retention pond as a result of any act or omission of Sahley. Petitioners claimed in their Answers to Interrogatories and Responses for Requests of Production of Documents that certain of their Rosehill neighbors could be produced to testify about subjective observations of the retention pond, but Petitioners did not secure the testimony or sworn affirmations of any of these witnesses to offer in opposition to the Motion. *See Appendix pp. 0356-0359: Pl. Resp. to Sterner's First Set of Int.: Exhibit B of Sahley's Mot. for Summ. J.; and Appendix pp. 0446-0448: Pl. Resp. to First Set of Disc. Req. from WHR Group: Exhibit C of Sahley's Mot. for Summ. J; and Appendix pp. 0486-0487: Pl. Supp. List of Witnesses; Exhibit E of Sahley's Mot. for Summ. J.* Additionally, Petitioners neglected to serve any discovery on Sahley to ascertain any information about the construction of the retention pond or Sahley's involvement with it thereafter, if any.

Based on the alleged representations of the neighbors, Petitioners asserted in discovery that the alleged slippage had occurred during the ownership of the Sterners and that this event was known to members of the Homeowners Association and to the Putnam County Planning Commission. *See id.* Petitioners never, however, provided any affirmative evidence supporting this self-serving declaration. Some unspecific “notes” from meetings of the Homeowners Association, taken out of context and unauthenticated, do not qualify. Also and ironically, anything allegedly “known” by a municipal planning commission is a matter of public record, yet Petitioners provided nothing in support of their claim from the well-documented process of review and approval Sahley was required to undertake in Putnam County throughout its development of the Rosehill Acres subdivision.

Finally, Petitioners’ refusal to secure expert support for their claims represents another example of their failure to secure and offer necessary evidence against Sahley’s Motion. Although Petitioners scoffed at the need for experts, as being “overblown”, their chosen cause of action and subsequent effort to establish *res ipsa loquitur* require it. Although Petitioners conducted a thorough inspection prior to purchasing Lot 329 in 2007, which raised issue as to their property lines, they appear to now suggest that, by 2010, the alleged defect to their land along the western property line had suddenly become obscure and not readily ascertainable.

...[W]here an injury is obscure, that is, the effects of which are not readily ascertainable, demonstrable or subject of common knowledge, mere subjective testimony of the injured party or other lay witness does not provide sufficient proof; medical or other expert opinion testimony is required to establish the future effect of an obscure injury to a degree of reasonable certainty.

Johnson v. Buckley, No. 11-0060 (W.Va. Nov. 28, 2011) *citing* Syl. Pt. 11, *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974). For Petitioners’ to prove the acts or omissions of Sahley

solely and proximately caused the failure of an engineered retaining wall or erosion thereof, they need expert testimony to a reasonable degree of certainty. Without an expert's examination of any alleged slip, to define its nature and extent, including whether it would be proper to discount any and all other reasonable causes, the purported negligence of Sahley cannot be inferred as Petitioners urge. Assuming, *arguendo*, that Petitioners need not rely upon "overblown" expert opinions, Petitioners have made no attempt to oppose Sahley's Motion even with sworn lay witness testimony about the alleged tort in this action.

Petitioners' lack of development of their claims, so extreme that they could not provide affirmative and contradictory evidence against Sahley's Motion, was not lost on the Circuit Court when it granted summary judgment for Sahley.

3. Petitioners Failed to Make a Proper Disclosure of Their Expert Witnesses.

The Circuit Court entered a Scheduling Order on January 26, 2012, requiring that all parties disclose expert witnesses by June 1, 2012. *See Appendix pp. 0851-0858: Scheduling Order*. Therein, Petitioners were directed to disclose their expert witnesses, providing:

...either a written report or a written summary of the anticipated testimony the party intends to use under Rules 702, 703, or 705 of the Rules of Evidence. The report or summary must describe the witness' opinions, the basis and reasons therefore and the witnesses' qualifications.

Id. At the hearing on October 26, 2012, which occurred after the conclusion of discovery and within weeks of the scheduled Pre-Trial Conference⁵, Sahley complained vigorously that Petitioners had not make a timely nor a proper disclosure of their experts. *See Appendix pp. 0765-0766: 10/26/12 Hearing Transcript*. Petitioners admitted to having no written report nor

⁵ The Pre-Trial Conference was to occur on November 16, 2012.

written summary of the anticipated opinions of their named surveying and engineering experts, and they seemed disinclined to rectify the situation, arguing instead that experts are “overblown” and are unnecessary to Petitioners’ case. *See id at p. 0791*. Sahley argued strenuously that the Circuit Court should strike the non-timely and incomplete identification of expert witnesses as a sanction for Petitioners’ failure to comply with the Circuit Court’s Scheduling Order. *See Sheely v. Pinion*, 200 W.Va. 472, 476-78, 490 S.E.2d 291, 295-297 (1997). Petitioners’ sudden and flippant rejection of any need for expert opinions, after having named two, was reactionary; further, it was tantamount to an admission by Petitioners that: 1) the Circuit Court had all the justification it needed to impose sanctions precluding their use of any experts; and 2) without expert testimony, they could not persevere in their insistence that the acts or omissions of Sahley (to the exclusion of all others) constituted breaches in the standard of care, had resulted in defects in the construction of the retention pond, and had caused a failure in stability and integrity of the boundary shared with Lot 329.

Nonetheless, the Circuit Court concluded that Petitioners had produced no affirmative evidence from any source, expert or otherwise, creating a factual issue against Sahley’s supported assertions that its construction of the retention pond had not resulted in any slip at the property line of Lot 329, and if any slip had occurred, it had resulted from other reasonable causes. Consequently, summary judgment was properly granted by the Circuit Court and should be affirmed.

C. THE CIRCUIT COURT CORRECTLY APPLIED THE LAW OF ANTICIPATORY RELEASE.

Because Petitioners have not referred to Sahley in the context of this assignment of error, Sahley speaks thereto only to the extent that this Court could, if Sahley stands silent, infer incorrectly that it agrees with Petitioners on this particular issue. Hence, Sahley maintains that the effect and purpose of a release is to do away with the right of recovery everywhere, under all law. *See Goldstein v. Gilbert*, 125 W.Va. 360, 253, 23 S.E.2d 606, 608 (1942). As the Circuit Court noted in the Final Order, “[a]t the time Petitioners’ purchased the property, the location of the pond was known to Petitioners or would have been known to a purchaser exercising diligent attention.” *See Appendix pp. 0006: Final Order of Dismissal, citing, Thacker v. Tyree*, 171 W.Va. 110, 297 S.E.2d 885 (1982). As for the related allegations of fraud, breach of contract, and negligence against WHR and the Sterners, the Circuit Court found: “[i]n reviewing the facts, in a light most favorable to Petitioners, they do not put forth any set of facts in discovery, by affidavit, or otherwise which would support a finding in their favor.” *See Appendix pp. 0006-0007: Final Order of Dismissal, citing, Thacker, supra; Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981); and *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E.2d 728 (1994). Thus, Summary Judgment was properly granted by the Circuit Court and said judgment should be affirmed on these issues.

D. THE CIRCUIT COURT CORRECTLY ANALYZED THE DOCTRINE OF *RES IPSA LOQUITUR* AND FOUND IT NOT TO BE APPLICABLE AS TO PETITIONERS' CLAIMS AGAINST SAHLEY.

Petitioners first raised the doctrine of *res ipsa loquitur* in a Hail Mary effort they served on Sahley on the eve of the hearing on its Motion for Summary Judgment. Even then, Sahley mounted a defense to that theory. It became readily apparent, however, that Petitioners were unprepared to present evidence of the elements required to support application of *res ipsa loquitur*. Ironically, Petitioners now claim that the Circuit Court improperly applied the doctrine of *res ipsa loquitur* to the facts and circumstances of this case.

1. Petitioners Cannot Avoid Summary Judgment Merely by Invoking the Doctrine of *Res Ipsa Loquitur*.

This Court has firmly established that raising *res ipsa loquitur* alone cannot defeat summary judgment.

The fact that a party invokes *res ipsa loquitur* does not mean that no proof is necessary for purposes of a motion for summary judgment. There still must be some facts presented and the three prong *res ipsa loquitur* test must still be satisfied.

Bronz v. St. Jude's Hosp. Clinic, 184 W.Va. 594, 599, 402 S.E.2d 263, 268 (1991). This Court set out the three-prong test, as follows:

Pursuant to the evidentiary rule of *res ipsa loquitur*, it may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Syl. Pt. 4, *Foster v. City of Keyser*, 202 W.Va. 1, 501 S.E.2d 165 (W.Va. 1997). In other words, this Court recognizes that the elements of negligence must exist as to a given tortfeasor, being duty and breach of duty, although the evidentiary rule of *res ipsa loquitur* allows the element of damage (that result which was proximately caused by a breach of duty) may be presumed if each of the three-prongs of the *Foster* test are satisfied. Failure to prove any one element mandates rejection of *res ipsa loquitur*. See *id* at 16, 501 S.E.2d 180. Further, this Court has found:

The doctrine of *res ipsa loquitur* cannot be invoked where the existence of negligence is wholly a matter of conjecture and the circumstances are not proved, but must themselves be presumed, or when it may be inferred that there was no negligence on the part of the defendant. The doctrine applies only in cases where defendant's negligence is the only inference that can reasonably and legitimately be drawn from the circumstances.

Syl. Pt. 4, *Crum v. Equity Inns, Inc.*, 224 W.Va. 246, 685 S.E.2d 219 (W.Va. 2009).

a. Prong One: The Alleged Event is not a Kind that Ordinarily Does Not Occur in the Absence of Negligence.

The Circuit Court examined the first of the three *Foster* elements and asked whether the alleged event in this case, being “slippage” of a slope, is of a kind which ordinarily does not occur in the absence of negligence. It found that Petitioners had not provided evidence that the retention pond had, in fact, moved and that no evidence had been presented as to any negligence on the part of Sahley. See *Appendix pp. 0006: Final Order of Dismissal*. Stated alternatively, Petitioners had not provided any evidence that there had been an actual event that caused harm for which Sahley could be held negligent, so the first factor of the *Foster* test of *res ipsa loquitur* had not been met. Even if a slippage had been demonstrated, as the Circuit Court reasoned, Petitioners would not be able to demonstrate that it could not have occurred other than through the sole negligence of Sahley, for the simple and unavoidable fact

that soil erosion can occur for many reasons, natural and unnatural, and, if any such event occurred in this case, it was not obviously due to the negligence of Sahley. *See Appendix pp. 0004: Final Order of Dismissal.* The Circuit Court correctly concluded that negligence could not be inferred on the part of Sahley merely on the nature of an alleged slippage event. *See id at p. 0006.*

b. Prong Two: Other Responsible Causes, Including the Conduct of Petitioners and Third Persons, Were Not Sufficiently Eliminated by the Evidence.

The Circuit Court did not reach the second prong of the *Foster* test, but if it had, Petitioners would have been required to eliminate all other reasonable causes for the slippage that they claimed harmed their property. Petitioners failed to produce any evidence that would demonstrate a single cause of any slippage or loss of soil from the bank of the retention pond abutting the west boundary of Lot 329, and further failed to provide any evidence as to the sole fault of Sahley. Further, they did not controvert the affirmative evidence offered by Sahley as to the likelihood that the actions of Petitioners, Third-Parties, and nature itself could have reasonably caused a change in the contour of the common boundary. While not apparently relying thereon in its conclusions, the Circuit Court's Findings of Fact recognize that Sahley had offered proper evidence of other causes which could reasonably explain any alleged encroachment in this action.

[O]ther reasonable causes exist to explain same: 1) Terlin damaged the side of the retention pond by illegally burying drainage pipes to carry water from the downspouts of the house; 2) by very nature of the retention pond as a receptacle for surface-water runoff, the constant passage of water from the eastern (uphill) part of Section Three of Rosehill Acres across and over the east edge of the pond would naturally and expectedly lead to a change in the contour; and 3) any failure in maintenance and/or preservation of the

retention pond was initially assumed by the Homeowners Association with its inception in 1999, and fully and finally by conveyance of the common areas to it in 2010.

See Appendix pp. 0004: Final Order of Dismissal. Yet, Petitioners produced no evidence as to the exclusivity of Sahley as the cause of the alleged harm for which they sought the application of *res ipsa loquitur*.

c. Prong Three: The Indicated Negligence Was Not Within the Scope of Sahley's Duty to Petitioners.

The Circuit Court did not reach the third prong of the *Foster* test either. However, Petitioners have not demonstrated that Sahley owed any duty to Petitioners as mere subsequent purchasers of Lot 329. As set forth *supra*, in order to establish a *prima facie* case of negligence, a defendant must be proven guilty of some act or omission in violation of a duty owed to a plaintiff, as no action for negligence will lie without a duty broken. *See* Syl. Pt. 1, *Parsley v. General Motors Acceptance Corp.*, 167 W.Va. 866, 280 S.E.2d 703 (1981). The circumstances of negligence must still exist under *res ipsa loquitur*. *See* Syl. Pt. 4, *Crum v. Equity Inns, supra*. "It is clearly an incorrect statement of the law to say that *res ipsa loquitur* dispenses with the requirement that negligence must be proved by him who alleges it." *Foster v. Keyser*, at 14, 501 S.E.2d at 178 (*internal quotes omitted*). Petitioners have failed to establish what, if any, duty Sahley owed to them, and how Sahley violated that duty, so the evidentiary rule of *res ipsa loquitur* is unavailable to allow them to infer damages from the alleged negligence of Sahley.

2. Under Any Analysis of *Res Ipsa Loquitur*, Petitioners' Case Against Sahley Must Fail.

Petitioners chose to raise *res ipsa loquitur*, but they subsequently failed to meet the shifting burden required of them against Sahley's Motion for Summary Judgment, per Rule 56(e). As has been demonstrated herein, Petitioners' case is replete with substantial deficiencies that make any success on the merits a dubious proposition. Petitioners put minimal effort into properly developing their case, then into defeating Sahley's Motion for Summary Judgment. Left with one recourse, Petitioners have appealed what amounted to their failed attempt to assert an evidentiary rule which they were not prepared to substantiate. Thus, Summary Judgment was properly granted by the Circuit Court and said judgment should be affirmed on these issues.

CONCLUSION

Simply stated, Petitioner brought a civil action in which no compensable damages were alleged and no evidence was offered in support of their fundamental claim: that some undefined, unestablished "slippage" of a slope adjoining their real property resulted in an encroachment across the common boundary line. In response to Sahley's properly-supported Motion for Summary Judgment, Petitioners did not carry their burden against or contradict Sahley's evidence that it was not liable to Petitioners. Petitioners made no attempt to rehabilitate the evidence attacked by Sahley, produced no evidence to substantiate their theory of the case against Sahley, and fatally failed to demonstrate the existence of any genuine issue for Trial against Sahley.

WHEREFORE, Respondent prays that this Honorable Court deny the Petition for Appeal and affirm the decision of the Circuit Court.

Respectfully submitted,

SAHLEY REALTY COMPANY

By Counsel



Jane E. Harkins, WV State Bar No. 5951
Christopher C. Ross, WV Bar No. 10415

***PULLIN, FOWLER, FLANAGAN,
BROWN & POE, PLLC***
600 Neville Street, Suite 201
Beckley, WV 25801
Telephone: (304) 245-9300
Facsimile: (304) 255-5519
jharkins@pffwv.com
cross@pffwv.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 13-0117

DAVID W. DICKENS and
DEBORAH A. DICKENS,

Petitioners / Plaintiffs Below,

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,

Respondents / Defendants Below.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Respondent, Sahley Realty, Inc., does hereby certify on this 24th day of June, 2013, that a true copy of the foregoing "**RESPONSE OF SAHLEY REALTY COMPANY, INC. TO PETITION FOR APPEAL**" was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:



Jane E. Harkins, WV State Bar No. 5951
Christopher C. Ross, WV Bar No. 10415

**PULLIN, FOWLER, FLANAGAN,
BROWN & POE, PLLC**
600 Neville St., Ste. 201
Beckley, WV 25801
Telephone: (304) 254-9300
Facsimile: (304) 255-5519