

**BEFORE THE SUPREME COURT OF APPEALS OF THE  
STATE OF WEST VIRGINIA**

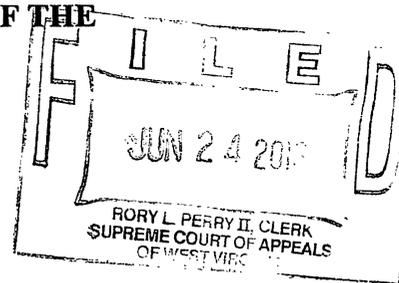
DAVID W. DICKENS and  
DEBORAH A. DICKENS,

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.



No. 13-0117

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**SUMMARY RESPONSE OF RESPONDENTS PATRICK L STERNER  
AND MELINDA R. STERNER**

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## INTRODUCTION

Respondents Patrick L. Sterner and Melinda R. Sterner (hereinafter referred to as “the Sterners”) submit this summary response pursuant to Rule 10(e) of the Revised Rules of Appellate Procedure.

On or about May 19, 2006, the Sterners purchased a house and lot located at 806 Wild Rose Lane, Scott Depot, West Virginia, also known as “Lot 329”. *Appellate Record* at 43 (hereinafter “*A.R.*”). The property was conveyed to the Sterners by deed of Terlin Enterprises, LLC, dated May 19, 2006, of record in the Office of the Clerk of the County Commission of Putnam County, West Virginia in Deed Book 465, page 680. *Id.*

The Sterners resided on the property for just over a year until the property was placed for sale due to the Sterners needing to relocate out-of-state for employment purposes. *Id.* To assist the Sterners with their relocation, Mr. Sterner’s new employer contracted with Respondent WHR Group, Inc. (“WHR”), an employee relocation company, to facilitate the move of the Sterners as well as facilitate the sale of the property. *Id.*

On May 6, 2008, the Petitioners, David W. Dickens and Deborah A. Dickens, entered into a contract to purchase the property from the Sterners. The Petitioners had the property inspected and requested certain repair work be performed on the property as a condition of the sale. *Id.* at 44. On May 31, 2008, WHR obtained a written estimate from Davis Building & Remodeling Company to perform the requested work. *A.R.* 47.

After completion of the work on the property, the Petitioners inspected the work that was performed, acknowledged and accepted the work, and duly executed a Release Agreement. *A.R.*

48. Thereafter, the Petitioners and the Sterners closed on the sale of the property, and title to the property was transferred from the Sterners to the Petitioners by deed dated September 27, 2007, which is of record in the Office of the Clerk of the County Commission of Putnam County, West Virginia in Deed Book 484, page 907. *A.R.* 49-51.

### ARGUMENT

Petitioners allege three distinct assignments of error in their appeal of the Circuit Court's Order granting summary judgment to the Respondents: 1. that summary judgment was improper; 2. that the court incorrectly applied the law of anticipatory release; and, 3. the court improperly applied the doctrine of *res ipsa loquitur*. Of these three, only the first two relate to claims against the Sterners and will be addressed in this Response.

**A. Summary Judgment was proper in this matter because the Petitioners failed to produce any evidence of the alleged "slip" or damages derived therefrom.**

There is a retention pond located on the parcel immediately adjacent to the property owned by the Petitioners. Petitioners claim that this retention pond has, at sometime in the past, slipped and this slippage allegedly "encroached" on their property. However, during the approximately fourteen (14) months of litigation in this matter, Petitioners never produced **any** evidence that a slip actually occurred or that it had affected their property. Despite ample opportunity, Petitioners never retained an expert to testify regarding the alleged defect in the retention pond. *A.R.* 780-785.

The Sterners filed their Motion for Summary Judgment on November 22, 2011. *A.R.* 33-52. This motion was argued on April 27, 2012 at which time the court denied the Sterners' motion as "premature" because "of the procedural stage of this case and the discovery which is

required. . .” *A.R.* 848. However, after the hearing, Petitioners conducted absolutely **no** discovery. Petitioners had over five (5) months to develop **some** evidence of their claims concerning a “slip” prior to the discovery cut-off of September 28, 2012 yet did not serve **any** interrogatories, requests for production, or requests for admission or depose any party or witness. Petitioners did not advance their case at all from the time of the April 27, 2012 hearing through the hearing on the Respondents renewed motions six (6) months later on October 26, 2012. Thus there was absolutely **nothing** beyond the mere allegations in the Complaint to “substantiate” the Petitioners’ claims regarding an alleged slip or any damages caused from the alleged slip.

Rule 56(e) of the West Virginia Rules of Civil Procedure states:

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.

As stated above, Petitioners provided **no** affirmative evidence of **any** type to counter the Sterners’ motion. Throughout the entirety of the litigation of the Petitioners’ Complaint, encompassing more than a year, the Petitioners never produced or developed any evidence of any of their allegations beyond their allegations as stated in their initial pleadings. Even after having been granted a brief “reprieve” after the April 27, 2012 hearing where the court based its denial of the Sterners’ motion on the fact that the Petitioners still had many months of discovery ahead of them, the Petitioners failed to follow-up with **any** discovery, evidence, or facts to substantiate any of their claims.

Thus the court appropriately granted summary judgment to the Respondents, following this Court's holding in *Harrison v. Town of Eleanor*, 191 W.Va. 611, 616, 447 S.E.2d 546, 551 (1994), to wit: 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." The circuit court specifically warned the Petitioners at that April 27, 2012 hearing that it would "follow", "to the bane of whoever (sic)" this Court's ruling in *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E. 2d 329 (1995). *A.R.* 253. Despite this clear warning, Petitioners did nothing. Accordingly, this Court should allow the circuit court's ruling to stand.

**B. The circuit court properly enforced the clear terms of the Release Agreement between the Petitioners and the Sterners**

On July 8, 2008, after the Petitioners had entered into a contract to purchase the property, after the Petitioners had a property inspection performed, and after repairs were made to the property as requested by the Petitioners, the Petitioners, as Releasors, duly executed a Release Agreement which released the Sterners 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: 806 Wild Rose Lane, Scott Depot, WV 25560[.]" *A.R.* 48.

Petitioners retained their own property inspector. This inspector found no problems with the large, obvious retention pond on the adjacent parcel. The inspector only noted certain other conditions that needed to be repaired. The repairs were made and a subsequent Release Agreement was ratified by the Petitioners. "A release which states that it shall take effect on the

occurrence of a condition precedent is operative as a 'discharge' on the occurrence of the condition." *Clark v. Sperry*, 125 W. Va. 718, 720, 25 S.E.2d 870, 872 (1943).

As a condition of the sale of the property, the Petitioners required certain repairs to be performed included regrading the lot for drainage purposes, as well as several repairs to the house. *A.R.* 47. The cost of the repairs totaled \$4,320.00, an amount which is not insignificant. After the repairs were performed, the Petitioners "acknowledged and accepted" the repairs, duly executed the Release Agreement, and proceeded with the purchase of the property. The Release Agreement released all parties involved in the sale of the property including specifically the Sterners from any and all liability with regard to the sale of the property in exchange for the repairs. Full performance of the condition precedent was done, and valuable consideration was provided. The Release Agreement is valid and enforceable in accordance with its terms, including the release and discharge of the Sterners from the present lawsuit which is a claim "arising out of or connected with, directly or indirectly, the purchase of [the] property." *A.R.* 48.

Pursuant to the express language in the Release Agreement, the Petitioners agreed to forgo any right they may have to seek recovery for any claims that "might subsequently accrue" "arising out of or connected with" the purchase of the property. "The effect of a release is to do away with all right of recovery everywhere, under all law." *Goldstein v. Gilbert*, 125 W. Va. 250, 23 S.E.2d 606, 608 (1942). Thus, the Release Agreement executed by Petitioners bars them from bringing any action against the Sterners and does "away with all right of recovery everywhere, under all law" as against the Sterners with respect to the property. In ruling to enforce the Release, the circuit court committed no error.

Petitioners have produced absolutely no evidence to counter the plain language of the

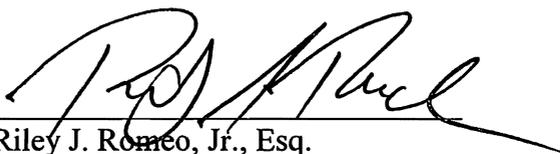
Release. Accordingly, the Petitioners fully released the Sterners upon valuable consideration upon a valid and enforceable written Release. Therefore, the circuit court correctly awarded the Sterners summary judgment regarding the Petitioners' claim.

### CONCLUSION

For the foregoing reasons these Respondents, Patrick L. Sterner and Melinda R. Sterner, respectfully request that the Supreme Court deny the Petitioners' Appeal and affirm the Order of the Circuit Court of Putnam County, West Virginia granting summary judgment to the Respondents on all issues.

Respectfully submitted this 24th day of June, 2013.

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By Counsel,



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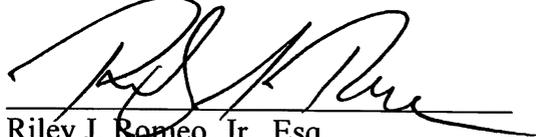
**CERTIFICATE OF SERVICE**

I, Riley J. Romeo, Jr., Esq., counsel for Respondents Patrick L. Sterner and Melinda R. Sterner, hereby state that on June 24, 2013, I served true and correct copies of the "Summary Response of Patrick L. Sterner and Melinda R. Sterner" on the parties hereto by U.S. mail, postage prepaid, addressed as follows:

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