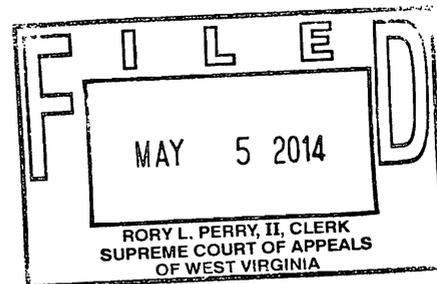


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 13-1083



**JENNIE BROOKS; MARY ADKINS;
WALTER BOYLE and VAUGHNA BOYLE;
BRIAN BRADLEY and EVANGELINE BRADLEY;
DALE CAMPBELL; JAIME CAMPBELL;
JONATHAN ESTEP and JULIE ESTEP;
ROY GWILLIAMS and BETTY GWILLIAMS;
AMANDA HICKS; SARA JAROS;
JOHN JONES and KAREN JONES;
DONZIE KAYLOR; ROGER KAYLOR;
JAMES KUHN and MINDY KUHN;
ROBERT MCCLOUD and
MELISSA MCCLOUD; DAN MCGLONE and
JUNE MCGLONE; DON NAPIER;
SHERRI NAPIER; DAVID STAMPER;
BERNIE THOMPSON and NANCY THOMPSON; and
THOMAS WELLMAN;**

Petitioners,

v.

**Case No. 13-1083
(On Appeal from Wayne County
Circuit Court, Civil Action No. 11-C-125)**

**CITY OF HUNTINGTON, a West Virginia
municipal corporation,**

Respondent.

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The Respondent City of Huntington's brief rests on one overarching theme: minimization of the harm that Petitioners (and Plaintiffs below) suffered as a result of the flood on May 10, 2011. The City contends that residents of Spring Valley, some of whom have dealt with *five* major floods since the City installed its storm water management system, were not sufficiently injured—when flood water surrounded and entered their homes and businesses—to support the jury's award.

To make that point, the City relies on *Jarrett* to argue that West Virginia law does not permit plaintiffs to recover both damages that compensate them for the diminution of value to their homes and that will enable them to live in flood-safe homes again. The City further argues that this Court's more recent ruling in *Ellis* should only apply to personal property, such as vehicles, but not to a person's home. Finally, the City contends that West Virginia should not follow the lead of other states and embrace sections of the Restatement of Torts that would permit the recovery of these damages.

Boiled down, the City's brief ignores the cardinal principle that underlies damage awards: to place the plaintiff back in the position he or she would presently enjoy but for the defendant's injurious conduct. *Kessel v. Leavitt*, 204 W.Va. 95, 187, 511 S.E.2d 720, 812 (1998). The Petitioners in this case lived in a stable and vibrant community in Spring Valley. They had valuable homes that were safe and dry. Now, as a result of the City's consistently negligent maintenance of its storm water management system, the neighborhood is a shell of its former self, the Petitioners' homes have lost value that will never be recovered, and their homes are not safe from floodwaters.

Reinstating the damages the jury awarded for the repairs necessary to flood-proof each home, in addition to allowing the damages awarded for the diminished value of their homes, is the only way to make Petitioners whole. Moreover, this conclusion is consistent with damages law from both West Virginia and across the country. Indeed, in *Ellis* this Court permitted such recovery in a damages action involving a car. What the City asks this Court to do in this appeal is to deny relief to plaintiffs similarly positioned as the plaintiff in *Ellis* simply because the damage is to a home rather than a car. The *Ellis* rule, however, is not unique to personal property. Courts from many other jurisdictions have permitted injured parties to recover damages that will compensate them for the damages the jury awarded. The Restatement of Torts provides additional support for these holdings. For these reasons, this Court should conclude that the Circuit Court erred by eliminating the cost of repair damages and reducing the jury's damages award by more than half.

I. THE CIRCUIT COURT CORRECTLY FOUND THAT ELEVATING PETITIONERS' HOMES CONSTITUTES A REPAIR COST.

The City's brief opens with an unpreserved challenge to the Circuit Court's finding that raising the Petitioners' homes constituted a repair, rather than an improvement. (Resp. Br. at 9-11.) In support of this argument, the City contends that the need to elevate the homes out of potential future floodwaters "is pure speculation and conjecture" and that Petitioners' expert was not qualified to offer opinions about the new benchmark flood elevation. The City further argues that Petitioners' homes did not suffer structural damage and therefore were not in need of repair. Relatedly, the City asks this Court to serve as a fact finder and consider subsequent events, which are completely outside of the record, in concluding that no future flood risk exists. The Court should reject these arguments.

A. The City waived any challenge to the Circuit Court’s finding that elevating the homes is a cost of repair.

As an initial matter, this Court should disregard the City’s challenge to the Circuit Court’s finding that elevating the Petitioners’ homes constitutes a repair and not an improvement. (Resp. Br. at 9–11.) This Court’s rules permit a respondent to set forth a cross-assignment of error, but require that any such argument be set forth in a separate portion of the brief and that the cover page of the brief “clearly so reflect.” W. Va. R. App. P. 10(f). The rules further provide that, if a timely-filed respondent’s brief asserts cross-assignments of error, the petitioner’s reply brief is automatically permitted to be forty pages long instead of twenty, and is due thirty days after the date the respondent’s brief was filed rather than twenty days. W. Va. R.A.P. 10(g).

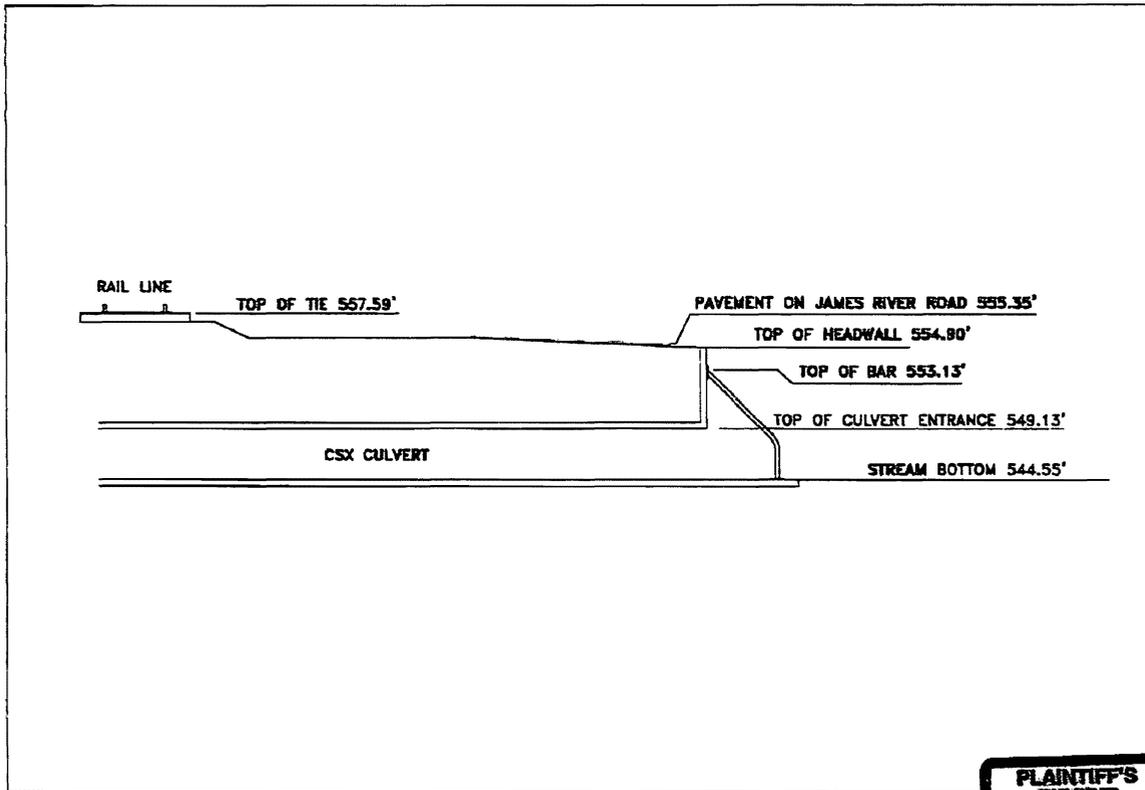
The City has not cross-appealed any of the trial court’s decisions or set forth a cross-assignment of error. Therefore, the City’s argument that the elevation of homes constitutes an improvement rather than a repair should be stricken.

B. Ample evidence supported the court’s order below that raising the Petitioners’ homes was a repair and not an improvement.

Even if the City did not waive this argument by failing to set forth cross-assignments of error, there is nothing speculative about the jury’s award of damages for the costs of elevating the Petitioners’ homes. As recognized by the Circuit Court below, the damages awarded by the jury were not an improvement, but rather for necessary repairs, *i.e.*, to put the Petitioners back in safe, dry homes. The evidentiary predicate for the jury’s award was laid by Petitioners’ home engineering expert David Tabor, and their hydrologist Mark Kiser.

Mr. Tabor explained to the jury that Petitioners needed to elevate their homes by two feet in order to place them above the maximum elevation that flood water could reach in Spring

Valley. (J.A. at 1436-38, 1440.) The Petitioners' homes are located in a bowl. They are surrounded by hills to the east, south, and west. To the north are an elevated road, railroad tracks, and the City of Huntington. (*Id.* at 1208-09.) The railroad tracks set the maximum elevation that water could rise in Spring Valley. This exhibit shows elevations for various features of the storm water control project, culvert, road, and railroad tracks.



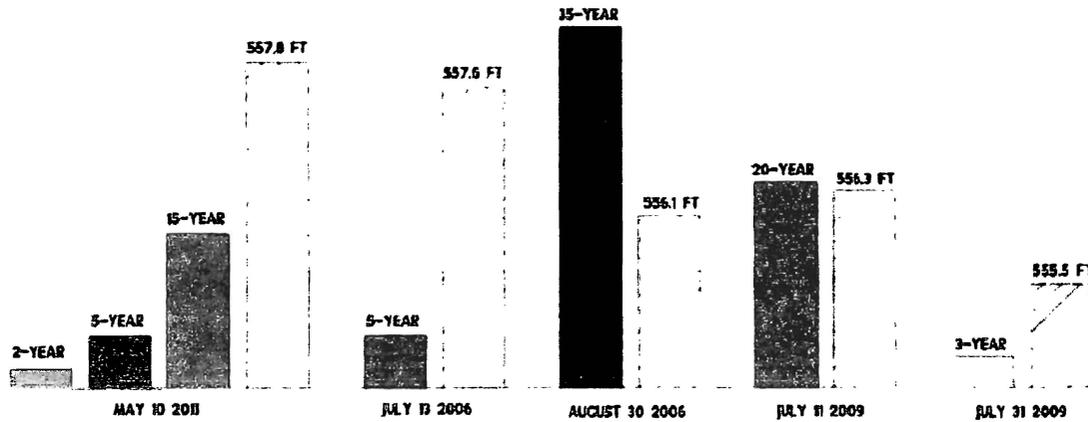
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(*Id.* at 1757.) If water were to reach the top of the railroad tracks, it would spill over into the City of Huntington.

Mr. Kiser introduced the following chart into the record without objection from the City. This chart sets forth severity of each storm event and maximum elevation of each flood.

**STORM EVENTS AND FLOOD LEVELS
SPRING VALLEY DRIVE AND WACO ROAD**



**PLAINTIFF'S
EXHIBIT
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(*Id.* at 738.) During the flood on May 10, 2011, the water reached a maximum elevation of 557.8 feet. (*Id.* at 1216-18.) This nearly reached the spillover point, stopping just short of the top of the railroad tracks. In providing his expert opinion, Mr. Tabor, in turn, relied on the information prepared by the hydrologist to determine the new benchmark flood elevation for purposes of raising the homes. He was asked how high he recommended the houses be raised and why. He responded:

[W]e used two feet mainly due to the elevation...between the homes and the downstream drainage conditions. We knew that was somewhere between a foot and 18 inches. And, basically, if the water backs up high enough, it will crest the railroad downstream. Once it crests the railroad, it's just going to flow right on down into the city. So, we want up out of that elevation, because we know the water couldn't get any higher than that.

(*Id.* at 1440.) There was no competing expert or challenge at trial to the benchmark flood elevation established by this evidence.

In addition, the City's argument that the risk of future flooding is speculative is rebutted by the evidence of four prior floods that have been attributed to the City's negligence. As reflected in the above chart of flood events and elevations, the residents of Spring Valley have suffered through multiple floods during the last few years that have caused significant damage. The chart also demonstrates, and Mr. Kiser testified, that flood elevation does not correspond to amount of rainfall. (*Id.* at 1216-18.) In other words, one would expect that a greater rainfall would result in a higher flood elevation. This has not occurred in Spring Valley. Larger storm events expressed on the chart as 20- year and 35-year events have produced smaller floods. Instead, the flood elevation is governed by the degree to which the City allowed debris to clog the storm water system.

A jury in a separate 2010 proceeding conclusively established that the City caused four other floods. And in this appeal, in a liability finding that the City is not contesting on appeal, a separate jury conclusively established that the City's negligence caused the 2011 flood. Based on this established track record, the jury did not need to speculate as to whether a flood may or may not occur again as the City's actions (or lack thereof) speak for themselves: it will happen again, it is only a matter of time. Indeed it would be speculative to assume that this will *not* happen again.

The fact that the homes did not suffer any structural damage does not mean that they did not need to be repaired. Mr. Tabor explained to the jury how elevating the homes would mean getting the floor plates and heating/cooling components above the flood level to prevent future

damage. (*Id.* at 1439-40.) In Mr. Tabor’s words, elevating the homes is simply “a process to get the house safe so you can inhabit it, so you can have heat, so you can live there.” (*Id.* at 1440.)

As a last ditch effort to save its argument, Respondent improperly presents evidence to the Court that is not in the record. Specifically, in footnote 4, Respondent informs the Court that the “trash rack at issue has been removed, thus making [the proposition that the City will negligently maintain it in the future] impossible.” (Resp. Br. at n.4.) Respondent provides no citation for this proposition, nor could it as the proffered fact post-dates the trial.

This is not only procedurally inappropriate for presentation to this Court, it is wrong. As Petitioners’ expert in stormwater systems, Mark Kiser, explained to the jury, the stormwater management system is not limited to the trashrack but includes a 1,200 foot long culvert that runs under the City of Huntington. (J.A. at 1209-10.) The City’s own engineering expert, Patrick Gallagher, explained that the trash rack’s purpose was to keep trash from plugging up the system, because “[i]t’s much harder to clear [debris] out if it’s a couple hundred feet into the system than it is to prevent it from getting in there.” (*Id.* at 1495.) Of course, the City has a duty to maintain the entirety of the system and not just the trash rack. (*Id.* at 981.) Should the City continue to fail to maintain the system, including this long underground culvert, another flood will occur.

Because the jury correctly found, based on all the evidence, that the elevations were a recoverable repair, and because Respondent has not appealed that finding, the City’s argument in this regard should be rejected.

II. THE JURY'S DAMAGES AWARD IS CONSISTENT WITH WEST VIRGINIA CASE LAW, THE RESTATEMENT OF TORTS, AND CASES FROM ACROSS THE COUNTRY.

The arguments presented in the remainder of Respondent's brief urging this Court to reject the jury's award are similarly flawed. The City contends that this Court's decision in *Ellis* should not extend to real property or to damage that is not "structural," that a plaintiff must first pay for repairs out of pocket before seeking recovery for them, and that the Restatement's reasons personal rule should not be adopted in West Virginia because of the relative "insignificance" of these Petitioners' losses. Like the City's argument regarding the necessity of Petitioners' repairs, these contentions fail to acknowledge the realities of this case: that the plaintiffs below suffered significant damage to their homes which cannot be repaired through either compensation for diminution in value or elevation *alone*, and that these Petitioners are not financially equipped to personally expend the money for such repairs. This is why this Court should follow both *Ellis* and the "reasons personal" rule, which together would provide for full recovery of the Petitioners' losses and put them back in the position they were in prior to the flooding caused by the City's negligence.

A. Under *Ellis*, Petitioners can recover both the diminished value of their homes and the cost to repair them.

Respondent argues that West Virginia law does not permit a plaintiff to recover diminished value and repair costs. In making this argument, the City relies on *Jarrett v. E.L. Harper & Son, Inc.*, 160 W. Va. 399, 235 S.E.2d 362 (1977), to contend that West Virginia law precludes the type of recovery obtained by the Petitioners, and that *Ellis v. King*, 184 W. Va. 227, 400 S.E.2d 235 (1990) should not be extended to real property. However, because the jury properly determined that only by elevating the homes can the homes be restored to their pre-

flood conditions, the *Ellis* rule allowing the cost of repairs plus diminution in value of the property should apply. *Ellis*, 184 W. Va. at 229-30, 400 S.E.2d at 237-38.

In arguing for application of the *Jarrett* rule instead of *Ellis*, Respondent does not acknowledge the crucial distinction between this case and the facts of *Jarrett*: that the property in *Jarrett* “appears now to be in as good condition as it was before the injury.” *Jarrett*, 160 W. Va. at 404, 235 S.E.2d at 365. Here, the jury found that Petitioners’ homes were in a sufficiently perilous state that restoration was necessary to prevent further harm. The jury awarded those costs on top of the diminution in value costs to assure that Petitioners would be made whole. Therefore, the *Ellis* rule should apply.

Petitioners understand that *Ellis* concerned personal property, but there is no reason for the same rule not to apply to real property because there is no reason to value a person’s automobile over the person’s home. Such an application would be consistent with the reasons personal rule of the Restatement (Second) of Torts, discussed *infra*, as well as the principle that a jury may consider what remedy would make a plaintiff whole when awarding damages.

Moreover, the “narrowness” of the *Ellis* ruling was due to the Court’s requirements that a plaintiff prove: (i) that the value was diminished following repair; (ii) that the damage is “structural,” *i.e.* it affects future use, even after repair, and (iii) that the property had significant value prior to the damage. *Ellis*, 184 W. Va. at 230-31, 400 S.E.2d at 238-39. Albeit in the context of homes rather than vehicles, all of these elements were met here. The jury heard evidence of the diminished value of Petitioners’ homes even after eventual elevation. (J.A. at 1439.) The established risk of future flooding affected Petitioners’ future use of the property. And, as Petitioners’ homes and places of businesses ranged in value from \$51,875 to \$84,500, the property had significant value prior to the damage. (J.A. at 747.)

Finally, the fact that the damage in *Ellis* was “structural” meant simply that “no amount of repair can return the vehicle to its condition prior to the accident and consequently, to the value it had prior to the injury.” *Ellis*, 184 W. Va. at 229-30, 400 S.E.2d at 237-38. The same is true here with respect to Petitioners’ homes. Petitioners could continue to replace siding, drywall, or other features of their homes, but they would never be truly repaired. Quite simply, homes in Spring Valley, which were perfectly safe before this storm water management system was installed and negligently maintained by the City, are no longer fit to be in Spring Valley in their present condition due to the risk of recurring flooding. For that reason, the jury properly determined that only elevating the homes can restore them to the condition they were in before the flooding. Under the *Ellis* rule, this Court should allow those cost of repairs plus the diminution in value of the Petitioners’ property, and the jury’s verdict should be reinstated.

B. The damages awarded were necessary to mitigate future harm.

The City attempts to distinguish the cases cited by Petitioners awarding damages such as these as mitigation expenses on the grounds that Petitioners should first be required to spend the money to perform the repairs.

This is not the law, nor do policy reasons support such a rule. Indeed, it would have been difficult, if not impossible, for the Petitioners to spend that money without already having it in hand or without even knowing whether they ever *would* have it in hand. It would make no sense, legally or as a matter of policy, to have a rule requiring an impoverished and injured plaintiff to first spend money for necessary repair costs before a defendant is made to pay for those damages.

The *Kelly* court, discussed in detail in the Petitioners’ opening brief, did not require such expenditures be already made when it allowed a plaintiff to recover, *inter alia*, damages of over

\$590,000 to build an erosion and flood control system “which was necessary to protect against flooding that might result from the damage caused by the fire and changes to the topography due to subsequent fire-related erosion.” *Kelly v. CB&I Constructors, Inc.*, 179 Cal. App. 4th 442, 454, 102 Cal. Rptr. 3d 32, 41 (Cal. App. 2009); *see also United States v. CB & I Constructors, Inc.*, 685 F.3d 827 (9th Cir. 2012) (no mention of whether restoration efforts had commenced, but permitting award for restoration costs of burned acreage, which would include reforestation).

C. This case falls squarely within the universe of cases applying the “reasons personal” rule, and this Court should adopt Section 929 of the Restatement (Second) of Torts.

The City relies on *Jarrett* and *Ellis* to argue that Petitioners cannot recover for repair costs in excess of the market value of their homes. Petitioners have urged the Court to adopt and apply the “reasons personal” rule found in Comment (b) of § 929 of the Restatement (Second) of Torts, which would allow such a recovery if a plaintiff can establish personal reasons for wanting to stay in his home. The parties agree that this Court has never had occasion to consider this Restatement section. The City attempts to distinguish Petitioners’ numerous cases on point by arguing that *those* cases involved “serious damage or complete destruction of real property,” and states that those other courts were attempting to “place [plaintiffs] in their pre-tort condition.” (Resp. Br. at 15.)

This is a false distinction, and finds no support in the case law. The reasons personal rule focuses on whether the owner has a personal purpose for restoring land to its original condition. Rest. (Second) of Torts § 929 cmt. b. It does not rest on the *kind* of damage to the property. Indeed, none of the cases cited in Petitioners’ initial brief state or imply that the property damage had to be in the form of *structural* damage as opposed to water or other kinds of damage. The

jury here was, of course, only trying to reach the same goal attempted in the other reasons personal cases: to put the plaintiffs back where they were before the injury.

Nor is Petitioners' damage from flooding—which entered their garages, crawlspaces and businesses, causing water damage and sewage odor—materially distinguishable from damage suffered in cases applying the rule. For example, in *Osborne v. Hurst*, 947 P.2d 1356 (Alaska 1997), the court remanded for retrial and consideration of plaintiffs' reasons personal for restoration when a fire had burned down trees on their vacation property. In *Lampi v. Speed*, 362 Mont. 122, 261 P.3d 1000 (2011), the court remanded for consideration of restoration damages when plaintiff was seeking recovery for burnt trees and vegetation.¹ Likewise, in *Board of County Commissioners v. Slovek*, 723 P.2d 1309 (Colo. 1986), plaintiffs were seeking restoration for a washed away fence and a damaged pond and dikes. Surely the prevention of water damage to a plaintiff's only home deserves the same remedy as repair of a plaintiff's vacation home, vegetation, or pond.

This Court's opinion in *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010) does not compel a different result. By the time of trial, the continued contamination in *Perrine* "had already ceased, and the Plaintiffs merely s[ought] monetary compensation for damage to their land," *id.* at 515 n. 32, whereas here the Petitioners proved that there was sufficient risk of continued flooding such that preventative repairs were necessary.

Moreover, the contamination in *Perrine* had begun in 1911, and the court defined classes as owners as of 2003 or later (the property class) or persons who resided on the property for

¹ Contrary to Respondent's argument, *Lampi* is not distinguishable simply because Montana and West Virginia differ on the temporary versus permanent injury point of law. In *Lampi*, that was a wholly separate issue, which is not before the Court here.

certain periods since 1966 (the medical monitoring class). *Id.* at 498, 502. The plaintiffs in *Perrine* had expressly abandoned their claims for diminished value to their properties. *Id.* at 591 (Ketchum J., dissenting). Here, Petitioners proved diminished value because they all owned their homes both before and after the flooding, and Respondent's actions during their ownership directly caused the depreciation. Further, the fact that *Perrine* involved soil damage as opposed to severe water damage is of no moment, because, again, the focus of the rule is on the plaintiff's *reasons* for wanting to restore the property. There is also no indication in *Perrine* that the plaintiffs argued for application of the reasons personal rule. Even more importantly, unlike the *Perrine* plaintiffs, Petitioners *here* did *not* abandon their diminished value measure of damages during the trial. Rather, pursuant to the Circuit Court's pretrial orders, Petitioners put on evidence of both diminished value *and* restoration costs, and the jury determined that awarding both categories of damages would be just.

Lastly, Petitioners' reasons personal argument is not an attempt to "change" West Virginia law. Rather, it is a request for this Court to recognize and adopt this exception to the rule on restoration damages. The Court has not been confronted with the issue before and would not be overturning any precedent in recognizing the reasons personal rule. Instead, it would be adopting a long-standing section of the Restatement relied on by numerous other courts in similar compelling circumstances. Adopting the reasons personal rule of the Restatement would allow the Petitioners, who put on abundant evidence of their reasons for wanting to elevate their homes so that they might safely remain in them through future floods, to collect the damages award the jury thought fair.

III. THE CIRCUIT COURT ERRED BY NOT PROVIDING THE OPTION OF ACCEPTING A REMITTITUR OR ELECTING A NEW TRIAL, AND PETITIONERS' TRIAL STRATEGY DEPENDED ON THE COURT'S PRETRIAL RULINGS ALLOWING THEM TO SEEK DAMAGES FOR BOTH COSTS.

Respondent diminishes the significance of Petitioners' right to a new trial by referring to it as simply a "typical practice" and dismissing it as "unnecessary." (Resp. Br. at 19.) This Court has long held that, "[w]hen a court grants a remittitur, the plaintiff *must be given* the option of either accepting the reduction in the verdict or electing a new trial." Syl. Pt. 9, *Perrine, supra* (emphasis added); *see also* Syl. Pt. 10, *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993) (if a "plaintiff declines to accept [a] remittitur, then a new trial *will be ordered* solely on the issue of damages.") (emphasis added). This is not merely a "typical practice," but black-letter law recognizing a plaintiff's right to present again the damages issue to a jury when a remittitur has been directed after what the court determines to be an over-calculation of damages. Respondent cites no authority holding that the rule is to be applied in the trial court's discretion.

Petitioners presented evidence of damages at trial based on the Circuit Court's pretrial ruling that they could recover for restoration costs. The jury heard this evidence and ruled in Petitioners' favor, allowing the costs. If the Circuit Court's remittitur ruling is upheld, Petitioners are entitled to present their damages evidence to a jury based on a true understanding of what damages will ultimately be permitted.

CONCLUSION

For the reasons set forth above and in Petitioners' initial brief, this Court should reverse the judgment below and remand the case with instructions that the Circuit Court deny the City's motion for remittitur and reinstate the jury's verdict in favor of the Petitioners. In the alternative, this Court should reverse the Circuit Court's remittitur order and remand with instructions to

enter a modified remittitur order that does not reduce the entire award of cost of repair damages and provides the Petitioners with the option to elect a new trial in lieu of the remittitur.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of May, 2014, the foregoing **Petitioners' Reply Brief** was hand delivered to counsel for parties to this appeal as follows:

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