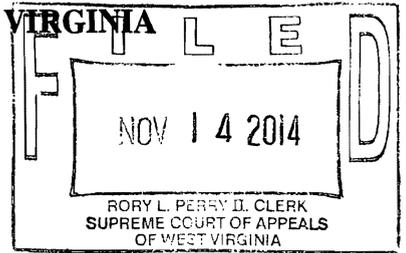


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0662



TERI SNEBERGER,

Plaintiff Below, Petitioner

vs.

**Appeal from Final Orders of the Circuit
Court of Randolph County
(No. 11-C-148)**

**JERRY MORRISON d/b/a JERRY MORRISON
CONSTRUCTION and JAMES PHILLIPS,**

Defendants Below, Respondents.

JAMES PHILLIPS' RESPONSE TO PETITIONER'S BRIEF

**Counsel for Respondent,
James Phillips,**

Trevor K. Taylor, Esq.
W. Va. State Bar I.D. #8862
ttaylor@taylorlawofficewv.com
Tiffany A. Cropp, Esq.
W. Va. State Bar I.D. #10252
tcropp@taylorlawofficewv.com
TAYLOR LAW OFFICE
34 Commerce Drive, Suite 201
Morgantown, WV 26501
304-225-8529

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STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Beginning on August 14, 2013, the Circuit Court of Randolph County presided over a three day trial in this matter. Petitioner filed her civil action against James Phillips d/b/a Phillips Masonry (hereinafter sometimes referred to as “Mr. Phillips”) for work performed at a home she built in the Beverly area of Randolph County. As part of the suit, Plaintiff alleged multiple causes of action against the general contractor, Jerry Morrison (hereinafter sometimes referred to as Mr. Morrison), and against the mason for the home, Mr. Phillips.

Upon the conclusion of Petitioner’s case-in-chief, both Mr. Morrison and Mr. Phillips moved for a directed verdict pursuant to Rule 50 of the West Virginia Rules of Civil Procedure. Although the Circuit Court denied Mr. Morrison’s motion, the Circuit Court found that the Motion sought by Mr. Phillips should be granted. (AR 9-16) The Circuit Court entered an Order reflecting its decision and detailing the deficiencies in Petitioner’s case-in-chief. (*Id.*) On August 16, 2013, the jury returned a verdict for Petitioner against Mr. Morrison in the amount of Forty Thousand Dollars (\$40,000.00). (*Id.* at 6.) The jury apportioned sixty percent (60%) of the fault to Mr. Morrison and forty percent (40%) fault to Petitioner. *Id.* After the conclusion of the trial, Petitioner made a motion for a new trial on several grounds. (*Id.* at 17-37.) However, the Circuit Court denied Petitioner’s request. (*Id.* at 1-5.) On October 24, 2013, the Circuit Court entered a Final Judgment Order. (*Id.* at 6-7).

II. PETITIONER’S FACTUAL ALLEGATIONS

Petitioner included a rather lengthy discussion of the evidence presented at trial in her Petition. However, this discussion omits several important facts which bear directly upon this Court’s consideration of Petitioner’s various Assignments of Error. The following is a brief

discussion of these important facts, which will be addressed in greater detail where appropriate in the “Argument” section of this brief.

A. Imposition of Time Limitations.

It is important to note that, with respect to Petitioner’s explanation of the Circuit Court’s imposition of equal time limitations upon the parties for the presentation of evidence, on January 31, 2013, the Court held a pretrial conference. (AR 850-858). Although Petitioner’s Counsel initially represented that she would require two to three days for trial, she later indicated that the entire trial could be done in said time. (AR 850, 13-16; 851, 18-19; 852, 6-8) At no time after the Circuit Court set aside three days for the trial, did Petitioner’s Counsel express any concerns regarding the time necessary to present Petitioner’s case. (AR 852, 6-8)

Further, it is also important to note that the Circuit Court accommodated for its imposition of its time limitations after Petitioner’s counsel began taking testimony from its first witness. (AR 176, 8-17) In that regard, the Circuit Court count only 50 percent of the time used by Petitioner’s Counsel with Mr. Morrison prior to the announcement of the time limitation.

Although Petitioner claims her counsel “was forced to rework his planned examinations ‘on the fly’ as the trial continued” as a result of the Circuit Court’s time limitation, at no time, whether during trial, in her motion for a new trial or in her Petition, has she identified evidence she was precluded from presenting to the jury. The Record is silent as to points where Petitioner’s Counsel informed the Circuit Court that he had additional evidence to present to the jury, but could not do so because of the time limitations placed upon him. In fact, Petitioner ultimately had additional time to present rebuttal evidence as Mr. Phillips was dismissed from the case, allowing for additional time for Mr. Morrison and Petitioner to present evidence. To

the extent Petitioner asserts that she lacked sufficient time in which to present evidence of her case against Mr. Phillips, this argument is fallacious. Petitioner's expert witnesses lacked the proper qualification to testify as masonry experts, and therefore, she lacked any evidence to demonstrate any wrongdoing on the part of Mr. Phillips.

B. Construction of Basement Walls and Chimney.

Petitioner acknowledges that she hired Mr. Morrison, an unlicensed contractor, to serve as the general contractor for the construction of her home and to oversee the whole project. (Petition at 5.) Petitioner has further acknowledged that Mr. Phillips had a limited role with regard to the construction of her house. (AR 662-663) In short, he was the mason who was to construct the basement walls and a chimney with two fireplaces. Mr. Phillips was not involved with the excavation work for the basement or the installation of the footers for the basement walls. (AR 246, 5-24, 22) Mr. Phillips only laid up the basement walls. (*Id.* 245, 20-22) At no time has anyone identified any problems with Mr. Phillips' work on the basement walls.

When Mr. Phillips was to begin construction of the chimney, Mr. Morrison advised him where to place the chimney. (*Id.* at 253, 10-13; 560, 21-24; 672, 21-24.) At that time, Mr. Phillips asked about the foundation put in place to support the chimney. (*Id.* at 253, 20-22). Mr. Morrison advised Mr. Phillips that there was five to six inches of concrete containing Fibre Flow that was sitting on solid bedrock. (*Id.* at 254-255.) Mr. Phillips subsequently talked with his old boss, James Roth, a vastly experienced local mason, about the foundation before beginning construction of the chimney. (*Id.* at 532, 19-533, 14.) Mr. Roth informed Mr. Phillips that five to six inches of concrete sitting on bedrock would be enough to hold a chimney with two fireplaces. (*Id.* at 533, 3-14.) With this information, Mr. Phillips began construction of the chimney.

Testimony of Petitioner's expert witnesses indicated that Mr. Phillips acted reasonably when he relied upon the representations made by Mr. Morrison regarding the foundation for the chimney. (AR 473, 18-474, 2; 474, 15-475, 16; 481-483; 488.) In fact, so did Larry Dewitt, the individual Petitioner hired to tear down the chimney constructed by Mr. Phillips. (*See id.* at 371-373.)

With regard to actual construction of the chimney, Mr. Phillips built the chimney up to and right under the floor joists on the first floor, as instructed. (AR 261, 17-23-264:2; 565, 2-567, 9.) Mr. Phillips was not responsible for removal of the floor joists. (*Id.* at 565, 18-566, 1.) Rather, this was Mr. Morrison's responsibility, and, just before Mr. Phillips left the worksite, Mr. Morrison had begun cutting the floor joists out. (*Id.* at 263, 2-22; 566, 2-11.) When Mr. Phillips' returned to the job, he saw only a concrete pad that was ready for him to start building the firebox and the rest of the chimney. (*Id.* at 263, 18-22; 566, 12-23.) He did not know any portion of the wooden joists remained in the concrete pad, and this was not discoverable upon inspection of the same. (*Id.* at 567; 568, 7-12.)

Thereafter, Mr. Phillips built the chimney up to the wooden roof ridge beam. (*Id.* at 264, 12-24; 567, 10-568, 6.) The ridge beam was to be cut out and replaced with steel by Mr. Morrison before Mr. Phillips completed the chimney. (*Id.*) Although Petitioner argues said wooden ridge beam was within inches of the chimney flue liners, this fact is of little consequence as the wooden ridge beam was to be removed prior to the completion of the chimney. Additionally, to the extent that Petitioner complains that certain wood beams and joists did not reach the chimney block and/or that said beams and joists were supported on the chimney block with spikes, there is no evidence that any of these alleged defects were the result of Mr. Phillips'

work as he was hired only to perform the block work on the chimney, not to construct the home or to ensure the home was structurally sound.

C. Operation of Forklift for Log Construction.

Petitioner also complains that though Mr. Phillips knew nothing about log home construction or how to set logs for a log home, he spent four to five weeks using his forklift to help Mr. Morrison set the wall and roof logs. The evidence is clear, however, that Mr. Phillips only operated the forklift. (AR 267, 21-273, 6.) The record is absolutely devoid of any evidence that Mr. Phillips selected, cut, hooked the logs, rotated the logs, notched the logs or fastened the logs during the construction of the log walls. (See *id.* at 271-272; 570-573.) In this regard, Mr. Phillips acted only as a general laborer, following the instructions of the man in charge of constructing the walls, Mr. Morrison. (*Id.* at 679, 8-12.) Petitioner's experts testified that as a general laborer, Mr. Phillips could not be held liable for the construction of the logs where he did nothing more than operate the forklift to lift up logs and place them where he was told to place them. (*Id.* at 471; 523, 20-524, 20.)

D. Exclusion of Certain Expert Witness Testimony.

Petitioner complains that the Circuit Court excluded home inspector, Rebecca Deem; general contractor, Broderick McGlothlin; and Richard Rockwell, a licensed general contractor and engineer, as masonry expert witnesses. (Petition at 10-14.) While Petitioner goes to great lengths, using more than four pages of her Petition to attempt to create an error on the part of the Circuit Court when precluding these individuals from offering such testimony, she omits the testimony by these witnesses that was crucial to the Circuit Court's determination. In particular, Petitioner fails to advise this Court that both Ms. Deem and Mr. McGlothlin testified that neither of them were masonry experts and did not feel comfortable rendering opinions regarding the

masonry construction of the chimney at issue in this case. (AR 400, 1-21; 429, 20-431, 12) Both witnesses also admitted they had never performed masonry construction. (AR 361, 1-24)

As for Mr. Rockwell, Petitioner never tendered Mr. Rockwell to the Circuit Court as a masonry expert for the Circuit Court's consideration. Nevertheless, Petitioner asserts that the Circuit Court erred when it failed to admit Mr. Rockwell as an expert in this regard. However, much like Ms. Deem and Mr. McGlothlin, Mr. Rockwell also testified that he was not a masonry expert, had never held himself out to be a masonry expert and did not want to be a masonry expert. (AR 514, 6-23) Mr. Rockwell also had not performed masonry work. (*Id.*)

SUMMARY OF ARGUMENT

Petitioner assigned a number of errors to the Circuit Court's handling of the trial of this matter, asserting that various miscarriages of justice occurred.¹ However, when Petitioner's assignments of errors are reviewed in the context of West Virginia law and the evidence presented in this case, there is no reason to find that the Circuit Court made any reversible error. First, the Circuit Court operated within its sound discretion when it imposed equal time limitations upon each party for the presentation of evidence, especially where Rule 16 of the West Virginia Rules of Civil Procedure allows for it. Petitioner fails to set forth any material evidence she was unable to present to the jury as a result of the Circuit Court's time allotment or how this evidence would have assisted with the presentation of her case against Mr. Phillips.

Second, the Circuit Court was also within its sound discretion to preclude house inspector, Rebecca Deem, and general contractor, Broderick McGlothlin, from rendering

¹ Mr. Phillips does not respond specifically to Petitioner's assignments of error identified as V., VI. and VII. In particular, Mr. Phillips notes that Petitioner's fifth assignment of error addresses her allegation that the Circuit Court failed to grant her a motion for judgment as a matter of law with regard to claims she asserted against Mr. Morrison. As this assignment of error addresses claims asserted against Mr. Morrison, Mr. Phillips has no position on the correctness of the Circuit Court's decision. Further, Petitioner's assignments of error VI. and VII. address jury instructions given by the Circuit Court after Mr. Phillips was granted judgment as a matter of law for claims pending against Mr. Morrison.

masonry opinions regarding the allegedly defective masonry work of Mr. Phillips and/or reasonableness of Mr. Phillips' practices. Each of these individuals testified that she/he was not a masonry expert and that she/he was not comfortable providing masonry construction expert opinions. Additionally, for the same reasons, general contractor/engineer Richard Rockwell was not qualified to render masonry expert testimony. However, it is important to note that Petitioner failed to even proffer Mr. Rockwell to the Circuit Court as a masonry expert, and therefore, Petitioner can assign no error to the Circuit Court in this regard.

Next, the Circuit Court appropriately granted Mr. Phillips a directed verdict. Petitioner argues that the evidence she presented at trial showed that Mr. Phillips was a joint tortfeasor with Mr. Morrison with respect to her claims of negligence, breach of contract, including the implied warranty of habitability, fraud and misrepresentation and outrageous conduct. However, as will be discussed more fully below, when the evidence presented by Petitioner at trial is considered, it is evident that Petitioner failed to meet her burden of proof with regard to any of her claims as they relate to Mr. Phillips.

Finally, even if this Court should find the Circuit Court committed reversible error with regard to any of the aforementioned assignments of error or any other assignment of error not specifically addressed to Mr. Phillips, this Court, nevertheless, should affirm the jury's verdict and award of damages to Petitioner as said award is not against the clear weight of the evidence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument in this case is unnecessary because the principle issues in this case have been authoritatively decided previously, and the facts and legal arguments are adequately presented in this brief and

the record on appeal. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR BY IMPOSING TIME LIMITATION FOR THE PRESENTATION OF EVIDENCE.

Petitioner alleges that she was prejudiced by the Court's decision to allot each party equal amounts of time in which to present their cases. Petitioner claims that because she bore the burden of proof, she should have been allotted more time than the two defendants to present her case. Petitioner states that the Circuit Court's notification to the parties of its intent to afford them each equal amounts of time to present their case "in the middle of the presentation of her case" forced her "counsel to rework his examinations 'on the fly.'" As a result, Petitioner alleges the Circuit Court's decision was an abuse of its discretion, resulting in a miscarriage of justice.

Notably, however, Petitioner fails to set forth any material evidence she was unable to present to the jury as a result of the Circuit Court's time allotment or how this evidence would have assisted with the presentation of her case. Merely stating that she has been prejudiced by the Court's decision is insufficient to demonstrate that the Court erred and that "a miscarriage of justice" occurred.

Petitioner argues that this issue should have been addressed during the pretrial conference. According to the record, the Circuit Court did just that; at the January 31, 2013, pretrial conference the Circuit Court adopted the parties' representation that the case would require three days to try. (AR 852,10-16) Petitioner's unilateral assumption that she would be entitled to a greater portion of the three days set aside for trial than each of the defendants without communicating this assumption to the Court was an error by her and her counsel. In fact, this would be unfair. (*See id.* 147-148; 157.)

For Petitioner to assume that she would receive more than one-third of the time set aside for trial to present her case is unreasonable. At the pretrial conference, Petitioner's Counsel initially indicated that she believed it would take her at least two or three days to try the case, but then subsequently conceded that it was "very likely" that all the parties could get the trial "done in three days" with jury selection on a separate day. (AR 852, 6-8) As Petitioner aptly noted in her Brief, "a reasonable limit on time allowed for presenting evidence" is an appropriate subject for consideration at a pretrial conference. *See* W.Va.R.Civ.P. 16(c)(15). If a party believes the time allotted for the presentation of evidence is insufficient, or that one party's case may require more time than another's to present, he or she has an obligation to express this concern to the presiding Court to ensure that he or she has sufficient time in which to fully present his or her case. *See id.* Here, there is no indication that Petitioner ever advised the Court that the presentation of her case would require more than an equal share of that time. To date, Petitioner has still failed to identify why she required additional time. Indeed, she has offered no explanation of the specific prejudice she purportedly suffered as a result of the Court's decision. Even if Petitioner could show that her case was impacted by the time restriction, no prejudice can be demonstrated in her case against Mr. Phillips. The Circuit Court dismissed the claims against Mr. Phillips because the proffered experts were not qualified to address masonry issues. Thus, any restriction on time to present her case against Mr. Phillips does not create a reversible error regarding the dismissal of Mr. Phillips.

Further, the Circuit Court noted the need to allocate time to each party for presentation of the evidence during the first day of trial to ensure all parties had an equal opportunity in which to present their case. Although Petitioner had already called her first witness and had spent approximately one hour with him at the time the Circuit Court announced its decision, the Circuit

Court specifically noted that it would give this factor some consideration, counting only approximately 50 percent of time Petitioner had spent with said witness towards her total allotted time. (AR 176, 8-13) As such, the Circuit Court accounted for the timing of its announcement, and Petitioner cannot establish unfairness or prejudice in this regard.

Finally, Petitioner suggests that the Circuit Court's imposition of a time limitation on the presentation of evidence resulted in the imposition of West Virginia Family Court Rules on this case. In particular, Petitioner states that the Family Court Rules "clearly have no application to this case." Notably, there is no indication that the Circuit Court sought to impose any Family Court Rule(s) in this matter, and Plaintiff certainly does not point to any evidence to the contrary in her Petition. It is quite clear from the record that the presiding Judge made reference to and shared her experience and approach in Family Court as an anecdote to express the importance of time restrictions upon all involved parties to ensure completion of court proceedings in the time set aside on the Circuit Court's calendar. The Circuit Court sought to fairly allocate the allotted time by giving each party equal time in which to conduct their examinations of witnesses.

It is a well settled principle of West Virginia law that the West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788, 794 (1995). In *McDougal v. McCammon*, the West Virginia Supreme Court of Appeals acknowledged that "[a]s the drafters of the rules appear to recognize, evidentiary and procedural rulings, perhaps more than any others, must be made quickly, without unnecessary fear of reversal, and must be individualized to respond to the specific facts of each case." *Id.* (citing Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 Iowa L. Rev. 413, 415 (1989)). Thus, absent a few exceptions, this Court will

review all aspects of the circuit court's determinations under an abuse of discretion standard. *Id.* (citing *State ex rel. Johnson v. Tsapis*, 187 W. Va. 337, 419 S.E.2d 1 (1992)). As such, overturning a procedural ruling of a Circuit Court is warranted only upon showing of prejudice.

In the present case, Petitioner has not shown and cannot show any prejudice as a result of the time limitation imposed by the Circuit Court. Merely making the conclusory statement that the Circuit Court's decision caused her counsel to rework his examinations on the fly is insufficient to demonstrate that the Circuit Court abused its discretion. Petitioner fails to identify any material evidence she was unable to present to the jury as a result of the Circuit Court's decision or how this evidence would have assisted with the presentation of her case.

II. THE COURT DID NOT ERR BY PRECLUDING REBECCA DEEM FROM USING THE WORD "DEFECTIVE" DURING HER TESTIMONY.

Rebecca Deem, a certified home inspector, was tendered to the court as an expert in home inspection and the Circuit Court accepted Ms. Deem as an expert in home inspection. (AR 396, 22-23; *see also* 395, 10-24) However, Petitioner takes issue with the Circuit Court's holding that Rebecca Deem could not testify as to whether the placement of wooden beams and supports inside the chimney was "defective." Petitioner argues that Ms. Deem met the requirements of West Virginia Rule of Evidence 702, and therefore, such testimony should have been allowed. Notably, however, in order to meet the requirements of Rule 702 so as to offer testimony in the form of an opinion, one must first be qualified as an expert by knowledge, skill, experience, training or education. *See* W. Va. R. Evid. 702. Here, the opinion testimony Petitioner wished to solicit from Ms. Deem required masonry expertise, something Ms. Deem, admittedly did not possess.

The analysis to be applied in determining whether an expert is qualified to give an opinion is well established under West Virginia. Indeed, as noted previously, "Rule 702 of the

West Virginia Rules of Evidence is the paramount authority for determining whether or not an expert is qualified to give an opinion.” Syl. Pt. 6, in part, *Mayhorn v. Logan Med. Found.*, 193 W.Va. 42, 454 S.E.2d 87 (1994).” Syl. pt. 2, *Walker v. Sharma*, 221 W.Va. 559, 655 S.E.2d 775 (2007). The West Virginia Supreme Court of Appeals has interpreted Rule 702 as containing three requirements: “(1) the witness must be an expert; (2) the expert must testify to scientific, technical or specialized knowledge; and (3) the expert testimony must assist the trier of fact.” *Gentry v. Mangum*, 195 W. Va. 512, 524, 466 S.E.2d 171, 183 (1995). The West Virginia Supreme Court of Appeals has held that when determining who is an expert, a circuit court should conduct a two-step inquiry. “First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.” Syllabus point 5, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995). While this Court has recognized that a circuit court should “err on the side of admissibility,” in the present case, when Ms. Deem is considered pursuant to the standard set forth in *Gentry*, there can be no doubt that the exclusion of her testimony regarding the “defectiveness” of the masonry work was proper.

Petitioner argues that because Ms. Deem was “certified as a home inspector by the State of West Virginia and taught how to classify chimney issues as ‘defective,’” she was qualified under West Virginia law to testify that a chimney was defective in accordance with her training and certification from the State of West Virginia. However, what Petitioner fails to identify for this Court is the fact that Ms. Deem, herself, testified that she was not comfortable rendering opinions regarding the masonry for the chimney at issue in this case. Ms. Deem testified that she

was not a masonry expert and that she was not comfortable providing masonry construction expert opinions. (AR 400, 1-21) Admittedly, Ms. Deem had never built a fireplace, firebox or flue. (AR 399, 1-24) Further, she testified she had never provided recommendations to anyone regarding problems with a fireplace or chimney. (*Id.*) Again, Ms. Deem agreed that providing expert opinions regarding proper masonry construction was not something she felt comfortable doing in Court. (*Id.* at 399-400.)

Merely taking an eight week home inspection course for certification as a home inspector does not render an individual an expert, under West Virginia law, in a highly specialized area such as masonry. It certainly did not render Ms. Deem an expert as she testified that she was not comfortable offering masonry construction expert opinions. In fact, she testified that Petitioner's chimney was her first chimney inspection outside of those done during her training and that she had never performed any type of masonry construction. The placement of wooden beams and supports inside the block chimney obviously would be a masonry construction issue and an opinion as to whether such construction was "defective" would require an expert masonry opinion. By Ms. Deem's own admission, such an opinion was squarely outside her knowledge, skill, experience, training and/or education. Ms. Deem admitted she could not render the opinions Petitioner sought. As such, Petitioner failed to demonstrate that Ms. Deem possessed the minimal educational or experiential qualifications in a field that was relevant to the subject under investigation. Accordingly, the Circuit Court properly excluded Ms. Deem from offering testimony regarding the "defectiveness" of the construction of the chimney.

Despite the Court's holding, it still allowed Ms. Deem, over objection by Mr. Phillips, to testify whether any problems she identified with the masonry work she observed was a hazard and/or whether such problems would have had a negative impact on a home inspection or made

the home fail a home inspection. (AR 403, 24 - 404, 7) This testimony was advantageous to Petitioner given that such testimony was also beyond her experience and knowledge. For example, when questioned regarding her inspection of the chimney flue liner, she testified that she only did a visual inspection and did not inspect the flue by feeling it to determine whether the flue was sealed or had mortar around it. (AR 418, 10 - 419, 19) She testified that she was not a masonry expert and that she would defer to a masonry expert as to whether the flue was safe. (AR 419-421.) In fact, she noted that whenever she does an inspection, if she was to have a question about some of the masonry work, she would recommend that a masonry expert come in to certify that it was safe, *i.e.*, not defective. (*Id.*)

Under the above circumstances, the Circuit Court's exclusion of Ms. Deem's testimony regarding the "defectiveness" of the masonry work was proper. Indeed, given Ms. Deem's own testimony that she was not a masonry expert and that she was not comfortable providing masonry construction expert opinions, Petitioner cannot meet her burden by establishing that the Circuit Court's determination in this regard was clearly wrong. Syl. pt. 6, *Helmick v. Potomac Edison Company*, 185 W. Va. 269, 406 S.E.2d 700 (1991), cert. denied, 502 U.S. 908, 112 S. Ct. 301, 116 L. Ed.2d 244 (1991) (holding "The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong.")

III. THE COURT DID NOT ERR WHEN IT EXCLUDED THE TESTIMONY OF BRODERICK MCGLOTHLIN AND RICHARD ROCKWELL FROM TESTIFYING REGARDING THE ALLEGED DEFECTIVENESS OF THE CONSTRUCTION OF THE CHIMNEY AND/OR THE CONSTRUCTION TECHNIQUES EMPLOYED IN SAID CONSTRUCTION.

A. Broderick McGlothlin testified that he was not a masonry expert and he did not feel comfortable testifying as a masonry expert.

Petitioner argues that Broderick McGlothlin should have been allowed to offer expert opinions regarding the placement of wooden beams in the chimney block, the flammability thereof and appropriate construction techniques regarding the same. Petitioner argues that, as a general contractor, Mr. McGlothlin had supervisory responsibility over masons and chimney work on his projects and had working knowledge of the properties of concrete. Notably, however, by Mr. McGlothlin's own admission, he does not perform masonry work, does not have any special training in masonry and does not consider himself an expert in masonry. (AR 429, 20-431, 12) In fact, Mr. McGlothlin testified that he did not feel comfortable testifying as a masonry expert as he was not aware of the actual code provisions as they related to chimney and/or masonry projects. (AR 431, 9-12)

As noted previously, when determining who is an expert, a circuit court is to conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify. Syl. Pt. 5, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995). Despite his experience as a general contractor, Mr. McGlothlin cannot meet this standard.

While Mr. McGlothlin testified that he has supervisory responsibility over masons and chimney work on his projects and has a working knowledge of concrete, by his own admission,

he is not familiar with the standards by which masonry projects are to be constructed. (AR 431, 9-12) To meet the standard set forth in *Gentry*, it is reasonable to conclude that Mr. McGlothlin must first possess some knowledge of the standard to which a masonry contractor, in this case Mr. Phillips, is held before he can be said to possess the knowledge or expertise necessary to render an opinion regarding the reasonableness of Mr. Phillips' conduct or defects in the chimney masonry work. The reasonableness of a mason's conduct and/or defects with a mason's work would be determined by the standards by which he or she is to perform the work. This is information Mr. McGlothlin admittedly did not possess. Mr. McGlothlin even admitted that whenever he was asked to inspect the home, he focused solely upon framing issues and had nothing to do with regard to the masonry work. (AR 431, 466-467) Under these circumstances, it cannot be said that Mr. McGlothlin possessed the minimal educational or experiential qualifications to offer such opinion testimony. As such, Mr. McGlothlin's area of expertise did not cover the particular opinion for which Petitioner sought to proffer him, and therefore, the Circuit Court properly excluded his testimony regarding the placement of wooden beams in the chimney block, the flammability thereof and appropriate construction techniques regarding the same.

Petitioner seeks to draw a distinction between the type of testimony she sought to elicit from Mr. McGlothlin and the type of testimony an expert mason would have been necessary to provide. In her brief, she asserts that Mr. McGlothlin was not being offered for "distinctly masonry issues," yet Petitioner notes that she sought to have Mr. McGlothlin offer testimony regarding the transfer of heat through concrete and the placement of wooden materials within a chimney in proximity to the flue with regard to the appropriateness of masonry construction of a chimney. Certainly, such subjects go to the heart of proper masonry construction for which a

masonry expert is necessary. In any event, even if this Court were to find that such subjects did not require expert masonry testimony and were within the purview of Mr. McGlothlin's expertise, the Circuit Court still did not err. Indeed, the Circuit Court allowed Mr. McGlothlin to offer testimony regarding the acceptableness of running wood through the chimney block and whether the fireplace and chimney presented a fire hazard. (AR 438-439) Indeed, Mr. McGlothlin was permitted to testify that it is not an acceptable construction technique to run wood through the chimney block because it presents a fire hazard. (*Id.*) Under these circumstances, Petitioner was able to solicit from Mr. McGlothlin the testimony that she initially sought to have Mr. McGlothlin offer.

As noted previously, the admissibility of testimony by an expert witness is a matter within the sound discretion of a circuit court, reversible only when such decision is clearly wrong. *See* Syl. pt. 6, *Helmick v. Potomac Edison Company*, 185 W. Va. 269, 406 S.E.2d 700 (1991). Here, there is no evidence that the Circuit Court abused its discretion when precluding Mr. McGlothlin from serving as an expert witness with regard to masonry construction. In fact, if anything, the Circuit Court inappropriately permitted Petitioner to obtain advantageous testimony over its own ruling by allowing Mr. McGlothlin to testify regarding the acceptableness of running wood through the chimney block and whether the fireplace and chimney presented a fire hazard.

B. Petitioner never sought to have Richard Rockwell accepted by the Circuit Court as a masonry expert, but, even if she did, Mr. Rockwell testified that he was not a masonry expert and did not want to be a masonry expert.

Petitioner never requested that the Court accept Mr. Rockwell as an expert in masonry. In fact, Petitioner did not even submit to the Court the argument that the areas for which Mr. Rockwell should be accepted as an expert included masonry work. Petitioner inquired as to Mr.

Rockwell's qualifications, including his work as a general contractor and oversight of masonry subcontractors; however, when she tendered Mr. Rockwell as an expert, it was only for "civil engineering, construction and contracting related to log homes." (AR 489, 16-492, 14) As such, it is evident that Petitioner did not seek to tender Mr. Rockwell as an expert to render an opinion regarding masonry work. (*Id.*)

In fact, the Court specifically indicated to Mr. Phillips that if Petitioner sought to have Mr. Rockwell qualified as a masonry expert or asked questions relating to the masonry work performed by Mr. Phillips, then the Court would permit Mr. Phillips to contest Mr. Rockwell's qualification regarding the same at that time. (AR 492, 5-14) At no time during this exchange between Mr. Phillips' counsel and the Court did Petitioner argue that, in fact, she had tendered Mr. Rockwell as a masonry expert. (*See id.* at 489-492) Further, she did not argue that the areas in which the Court had accepted Mr. Rockwell rendered him qualified to offer expert opinions regarding masonry work. (*Id.*) Petitioner also did not argue at any other time that Mr. Rockwell possessed any other education or expertise that rendered him an expert regarding masonry work. (*Id.*) Additionally, she failed to ask any questions of Mr. Rockwell regarding the masonry work performed by Mr. Phillips that would have prompted a decision by the Court as to Mr. Rockwell's ability to render such expert opinions. (*Id.*) Under these circumstances, there was no error by the Court when defining the parameters of Mr. Rockwell's expert testimony. Rather, Petitioner failed to tender Mr. Rockwell to the Court as a masonry expert whether by his qualification as a civil engineer, contractor or otherwise.

In an attempt to excuse this clear error on her part, Petitioner argues that she did not seek to have Mr. Rockwell qualified as a masonry expert and/or to ask him questions regarding whether it is acceptable to put concrete around wooden beams inside a chimney because she had

no duty to do so where she knew that such efforts would draw objections, which would be sustained. To support this proposition, Petitioner erroneously relies upon syllabus point 7 of *State v. Taylor*, 130 W. Va. 74, 42 S.E.2d 549 (1947), which states that “[w]hen an objection to evidence is distinctly made and overruled and an exception taken, the objection need not be repeated to the subsequent introduction of the same or similar evidence, unless it appears that such objection has been otherwise waived.” *Id.* 130 W. Va. at 75, 42 S.E.2d 549. Quite clearly, this holding in *State v. Taylor* has no application to the present case. The situation presented in this case is distinctly different from that presented in *State v. Taylor*.

In *State v. Taylor*, this Court was left to consider whether a defendant was prejudiced by the action of a circuit court in permitting the prosecuting attorney, over the objection of her attorney, to elicit from her, on cross-examination, the admission that several years previously she had been indicted for robbery by assault and had been convicted of assault and battery and sentenced to serve one year in the jail of Harrison County. *Id.* 130 W. Va. at 85, 42 S.E.2d 549. Notably, however, in that case, substantially the same information was later brought out, without objection or exception by the defendant, by the prosecuting attorney in the cross-examination of another witness who testified on behalf of the defendant. *Id.* The State argued that the introduction of the same information without objection and exception amounted to a waiver of the objection of the defendant to the testimony on that subject. The Court rejected this argument, finding that the rule supported by the weight of authority is that a party does not waive an objection once made and overruled by his failure to renew the objection each time the same or similar evidence is introduced. *Id.* (citing 23 C. J. S., Criminal Law, Section 1080). The Court held that “when an objection has been distinctly made and overruled, it need not be repeated to

the same class of evidence, as it may be assumed that the court will adhere to its ruling during the trial.” *Id.* (citing 53 Am. Jur., Trial, Section 146).

In the present case, Petitioner was not objecting to the introduction of evidence, and therefore, this Court’s decision in *State v. Taylor* has no application to this case. *State v. Taylor* cannot be “logically” read to mean that a plaintiff need not attempt to introduce evidence, which he or she believes may be excluded given a trial court’s previous ruling on similar evidence. This is especially true where the evidence she wishes to introduce is expert testimony. Indeed, each expert must be evaluated by the court based upon that expert’s own credentials. Without such a determination by the trial court, a party cannot argue on appeal that the circuit court erroneously excluded such expert testimony when the trial court was never given the opportunity to consider the admission of such evidence in the first place. To allow a petitioner to make such an argument on appeal would be highly prejudicial to the respondent(s) as it would allow a petitioner to introduce evidence for the first time on appeal even though the trial court was never given the opportunity to consider its admissibility. This certainly was not the outcome of the *State v. Taylor* decision, and Petitioner’s proposition cannot be read as a logical extension of said decision either. This Court, in *State v. Taylor*, sought to aid litigants during the trial process by preserving his or her objection to particular evidence with which the trial court had been presented and been given an opportunity to consider its admissibility. This Court recognized that once a litigant objected to the admissibility of the evidence, he or she need not reassert said objection each and every time the opposing party seeks to reintroduce the same or similar evidence. To adopt Petitioner’s strained reading of *State v. Taylor* would allow appeal by ambush and would improperly invade the trial court’s authority as the admissibility of such evidence would be determined for the first time on appeal.

Even if this Court were to adopt Petitioner's strained reading of *State v. Taylor* and consider the admissibility of Mr. Rockwell's testimony regarding the alleged defectiveness of the chimney masonry work and/or the reasonableness of the techniques employed by Mr. Phillips, the record demonstrates that Mr. Rockwell is not qualified to render such opinions. Much like Mr. McGlothlin, Mr. Rockwell also testified that he was not a masonry expert, had never held himself out to be a masonry expert and did not want to be a masonry expert. (AR 514, 6-23) In fact, Mr. Rockwell testified that he does not perform masonry work; rather, he subcontracts this work out to others. (*Id.*) No evidence was proffered by Petitioner as to Mr. Rockwell's knowledge of the standards Mr. Phillips' conduct purportedly violated, resulting in defective masonry work. Accordingly, by Mr. Rockwell's own admission, he did not possess the expertise necessary to render an opinion regarding the reasonableness of Mr. Phillips' conduct as a mason or any purported defects in the chimney masonry work performed by Mr. Phillips. Under these circumstances, Mr. Rockwell, like Ms. Deem and Mr. McGlothlin, did not qualify as an expert witness under the two-step inquiry set forth in *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995).

IV. THE COURT APPROPRIATELY GRANTED MR. PHILLIPS' MOTION FOR A DIRECTED VERDICT.

Petitioner argues that Mr. Phillips was inappropriately granted a directed verdict at the close of her case-in-chief. According to Petitioner, she presented sufficient evidence for a jury to find that Mr. Phillips was a joint tortfeasor with Mr. Morrison with respect to her claims of negligence, breach of contract, including the implied warranty of habitability, fraud and misrepresentation and outrageous conduct. However, when the evidence presented by Petitioner in her case-in-chief is considered, it is quite evident that Petitioner failed to meet her burden of proof with regard to any of her claims as they relate to Mr. Phillips. Indeed, Petitioner failed to

present any competent evidence of a duty Mr. Phillips either owed to her or breached that would give rise to any of the her alleged claims, affording her a right to recovery.

A. Standard of Law for a Directed Verdict.

West Virginia Rule of Civil Procedure 50(a) authorizes a party to move for a directed verdict. “When a defendant makes such a motion, a circuit court should direct a verdict in the defendant's favor if “the plaintiff's evidence, considered in the light most favorable to him, fails to establish a prima facie right to recovery[.]” *Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720,820-821 (1998) (quoting Syl. pt. 1, in part, *Brannon v. Riffle*, 197 W. Va. 97, 475 S.E.2d 97 (1996) (quoting Syl. pt. 3, in part, *Roberts ex rel. Roberts v. Gale*, 149 W. Va. 166, 139 S.E.2d 272 (1964))). “In this regard, ‘every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence.’” *Id.* (quoting Syl. pt. 2, in part, *Brannon*, 197 W. Va. 97, 475 S.E.2d 97). The West Virginia Supreme Court of Appeals applies a *de novo* standard of review when a circuit court grants a motion for directed verdict. In this regard, after considering the evidence in the light most favorable to the nonmovant party, this Court will sustain a directed verdict when only one reasonable conclusion as to the verdict can be reached. *Id.*

B. Foundation of the Chimney.

In support of her argument, Petitioner claims that Mr. Phillips unreasonably relied upon Defendant Jerry Morrison’s representations about the thickness of the chimney pad, the claim that the pad was sitting on solid rock and the removal of the flammable material from the chimney. Petitioner argues that Mr. Phillips failed to do anything to independently verify that Mr. Morrison’s statements regarding the sufficiency of the pad to support the chimney were

correct. First, Petitioner's assertion is incorrect. Second, even if Petitioner's assertion were true, Petitioner failed to present any evidence that Mr. Phillips, as a reasonably prudent mason, had any obligation to undertake any actions to independently verify Mr. Morrison's statements.

Essentially, Mr. Phillips was the mason who constructed the basement walls and a chimney with two fireplaces. He did not perform the excavation work for the basement or install the footers for the basement walls. (AR 246, 5-24, 22.) Rather, Mr. Phillips only built the basement walls, which according to Mr. Morrison was good quality work. (*Id.* 245, 20-22.) In fact, Petitioner's own expert, Mr. McGlothlin, noted that while he was of the opinion the house should be torn down and started over, the basement walls did not need to be removed; they could remain. (*Id.* at 468, 6-24.) With regard to the chimney, Mr. Phillips was asked to do the block work on the chimney, which he agreed to do. (*Id.* at 248, 19-22.) Upon completion of the basement walls, Mr. Phillips asked that he be advised when he was to come back out to do the chimney work. (*Id.* 248, 23-249, 2.)

Upon returning to the job to begin work on the chimney, Mr. Phillips was informed where to construct the chimney, a decision made prior to Mr. Phillips' return to the worksite. (*Id.* at 253, 10-13; 257, 2-10; 560, 21-24; 672, 21-24.) Before beginning construction on the chimney, Mr. Phillips asked about the foundation constructed to support the chimney. (*Id.* at 253, 20-22). Mr. Morrison informed him that there were five to six inches of concrete containing Fibre Flow sitting on solid bedrock. (*Id.* at 254-255.) Both Mr. Morrison and Mr. Phillips testified that Petitioner was present for this conversation, and Petitioner testified that Mr. Phillips was told by Mr. Morrison that the foundation was sufficient for the chimney. (*Id.* at 252, 7-11; 561, 13-14; 680, 11-13.) In fact, Petitioner testified that Mr. Phillips reasonably believed what Mr. Morrison told him regarding the foundation and that Mr. Phillips had no reason to

question Mr. Morrison. (*Id.* at 680, 5-22.) As noted previously, Mr. Phillips talked with his former boss, James Roth, an experienced mason from the area, about the foundation. (*Id.* at 532, 19-533, 14.) Mr. Phillips was informed by Mr. Roth that the foundation, as represented by Mr. Morrison, would be enough to hold a two fireplace chimney. (*Id.* at 533, 3-14.)

Petitioner argues that Mr. Phillips failed to do anything to verify that the pad was sufficient to support the chimney he built. First, as the discussion above demonstrates, this assertion is not correct. Mr. Phillips did do something, he asked Mr. Morrison about the foundation in place, and he then consulted a vastly experienced mason to determine whether the foundation that Mr. Morrison represented was in place was sufficient to support a two fireplace chimney. Based upon Mr. Morrison's representations regarding the foundation and after his consultation with Mr. Roth, Mr. Phillips began building the chimney. The record in this matter contains no evidence that the foundation Mr. Morrison represented to Mr. Phillips was in place was insufficient to support the chimney. (*See generally* AR.)

Moreover, Petitioner's own expert testified that Mr. Phillips acted reasonably when he relied upon the representations made by Mr. Morrison. For example, Mr. McGlothlin testified that it is reasonable for a masonry subcontractor to rely upon what is told by the general contractor. (*Id.* at 473, 18-474, 2.) Mr. McGlothlin testified that if a subcontractor was informed by a general contractor that the thickness of the slab in the basement was five to six inches, it would be unreasonable for the subcontractor to drill down into the basement floor to test the depth of the floor to determine whether it is five to six inches thick. (*Id.* at 474, 15-475, 16.) Further, Mr. Rockwell offered similar testimony, noting that he would expect a subcontractor, or in this case, a mason, to listen to and trust the information he provided regarding footers and foundations and it would not be reasonable for him or her to conduct an independent

investigation to confirm the information he provided the subcontractor. (*See id.* at 481-483; 488.) Additionally, Larry Dewitt, the individual Petitioner hired to remove the chimney Mr. Phillips constructed and who was a lay witness at trial, offered similar testimony. (*See id.* at 371-373.)

Here, Petitioner selected Mr. Morrison to serve as the general contractor to oversee the construction of her home and to see it to its completion. As Mr. Phillips saw it, Mr. Morrison was the man in charge. (AR 529) The evidence clearly shows that Mr. Morrison undertook excavation for the basement, and he poured the concrete pad in the basement upon which the chimney was to be built. Mr. Phillips was not present for any of this work, but whenever he returned to begin construction of the chimney, Mr. Phillips sought information regarding the foundation. Mr. Phillips, like all subcontractors in the construction industry, was left to rely upon the representations made by Mr. Morrison as Petitioner had selected him to oversee the construction of her house. This was a reliance that both Petitioner and her experts testified was reasonable. Under these circumstances, only one reasonable conclusion could have been drawn with regard to Mr. Phillips and the foundation for the chimney - Mr. Phillips was not responsible for its alleged insufficiency.

C. Removal of the Floor Joists, Construction of the First Floor Pad and Planned Removal of the Ridge Beam.

Petitioner also argues “that Mr. Morrison, who was responsible for the overall construction of the home, ran flammable wooden beams and supports through that chimney block. The testimony is also undisputed that Mr. Phillips was aware of Mr. Morrison’s actions, but abdicated his responsibility for the chimney to Mr. Morrison on the presumption that Mr. Morrison would remove the flammable material.” Though this statement is not completely clear, it appears to be a misstatement of the evidence. It suggests that Mr. Phillips knew Mr. Morrison

ran flammable wooden beams and supports through the chimney block and allowed them to remain in place when the chimney was completed. However, there is no evidence that Mr. Phillips was aware wooden beams and supports had been run through the chimney block and allowed to remain in place. Further, there is also no evidence that Mr. Phillips' reliance upon Mr. Morrison to remove the floor joists and/or the ridge beam from the path of the chimney was an unreasonable action of a prudent mason.

According to the trial testimony, both Mr. Phillips and Mr. Morrison stated that Mr. Phillips built the chimney up to and right under the floor joists on the first floor. (AR 261, 17-23-264:2; 565, 2-567, 9.) At that time, Mr. Phillips left the job because Mr. Morrison had to do additional work before Mr. Phillips could continue constructing the chimney, namely he had to remove the floor joists from the chimney and build another base for another firebox. (*Id.* at 261, 17-262, 13.) When Mr. Phillips returned to the job, he came back to a concrete pad that was ready for him to start building the firebox and the rest of the chimney. (*Id.* at 263, 18-22; 566, 12-23.) Mr. Phillips testified that he did not know any portion of the wooden joists remained in the concrete pad. (*Id.* at 568, 7-12.) Mr. Phillips could see only concrete where the wooden joists once were. (*Id.* at 567; 568, 7-12.)

Subsequent to returning to the worksite, Mr. Phillips built the chimney up to the wooden roof ridge beam. (*Id.* at 264, 12-24; 567, 10-568, 6.) According to Mr. Morrison and Mr. Phillips, the ridge beam was to be cut out and replaced with steel by Mr. Morrison before Mr. Phillips completed the chimney. (*Id.*) Petitioners' expert, Mr. McGlothlin, testified that this planned change "would comply with the Code" and would not be a fire hazard. (*See id.* at 472.) There is no available evidence that indicates Mr. Phillips planned to finish constructing the chimney with the wooden roof ridge beam in the chimney, concealing it from Petitioner.

Given the evidence supplied to the jury during trial, only one reasonable conclusion could have been drawn regarding the removal of the floor joists and construction of the first floor pad – Mr. Phillips neither knew nor should he have known that any wooden joists remained in the in the concrete pad. As such, Mr. Phillips owed no duty to either disclose this condition to Petitioner or to take any steps to remediate it. Further, there is no evidence that Mr. Phillips unreasonably relied upon Mr. Morrison for the removal of the floor joists. Additionally, only one reasonable conclusion could have been drawn regarding the removal of the ridge beam – Mr. Phillips told Mr. Morrison the wooden ridge beam could not remain inside the chimney block and that it should be replaced with a steel beam, and that Mr. Phillips had stopped working on the chimney to allow Mr. Morrison time to perform this work. As with the floor joists, there is no evidence that Mr. Phillips unreasonably relied upon Mr. Morrison for the removal of the ridge beam.

D. Placement of the Logs.

Although Petitioner asserts that Mr. Phillips became a joint tortfeasor with Mr. Morrison whenever he participated in the placement of the logs, Petitioner failed to demonstrate any breach of a duty owed by Mr. Phillips to her in this regard. Petitioner acknowledges that Mr. Phillips had no expertise in the construction of a log home, and at no time did Petitioner present any evidence to the jury that Mr. Phillips exercised some control over the placement of the logs.

Witness testimony at trial demonstrated that Mr. Phillips only operated the forklift to move the logs from point A to point B. (*Id.* at 267, 21-273, 6.) Both Mr. Morrison and Mr. Phillips testified that Mr. Phillips never performed any other task with regard to the logs, such as selecting, cutting, hooking the logs, rotating the logs, notching the logs or fastening the logs during the construction of the log walls. (*See id.* at 271-272; 570-573.) Mr. Morrison and

Petitioner acknowledged during their trial testimony that Mr. Phillips never represented that he knew anything about log homes or their construction. (*See id.* at 272-273; 679-680.) Petitioner acknowledged that she had no evidence that Mr. Phillips knew anything about setting logs for a log home. (*Id.* at 679.) Further, she also admitted that at no time did Mr. Phillips act like he was a log home builder. (*Id.*) Petitioner went on to testify that, while operating the forklift, Mr. Phillips was acting only as a laborer. (*Id.* at 679, 8-12.)

Petitioner's expert, Mr. McGlothlin, testified that it is not reasonable to hold an individual responsible for faulty construction of log walls when his only job was to operate a forklift to lift up logs and place them where he was told to place them. (*Id.* at 471.) Similarly, Petitioner's other expert, Mr. Rockwell, testified that it would be unreasonable to hold a crane operator responsible for the way a home is built whenever the operator's only job was to operate the crane by taking a log from the ground and moving it to where it was being put on the wall or the roof. (*Id.* at 523, 20-524, 20.) According to Mr. Rockwell, such an individual is a crane operator and that is all he does. (*Id.* at 524.)

Though Petitioner seeks to hold Mr. Phillips responsible for the setting of the log walls, there is absolutely no evidence that Mr. Phillips did anything other than operate a forklift to move logs from point A to point B during the log setting process. Further, at no time was any evidence ever presented at trial that would indicate Mr. Phillips negligently operated the forklift resulting in any damage to Petitioner. The record is clear that no one, including Mr. Phillips, worked on this home under the impression that Mr. Phillips was a log home builder. In fact, it was just the opposite because it was Mr. Morrison that was sought out and retained by Petitioner to build this specialty home. Mr. Phillips was merely a laborer who operated a large forklift to pick up the logs and place them where and how Mr. Morrison wanted them placed. Petitioner

testified that during the construction process she did not feel that Mr. Phillips had actual construction responsibilities for the building of the walls. Yet, Petitioner now argues that evidence was sufficient for the jury to decide in her favor on this issue. This argument is without factual and legal support and is not sufficient to have survived the Motion for a Directed Verdict for Mr. Phillips.

E. Analysis of Applicable Law.

Citing to *McComas v. ACF Industries, LLC*, -- W. Va. --, -- S.E.2d --, No. 12-0548 (2013), Petitioner argues that the West Virginia Supreme Court of Appeals has found that “willful ignorance [of the proper and safe way to do a job] is no defense,” suggesting that Mr. Phillips was somehow liable for the allegedly insufficient foundation for the chimney, for the alleged failure of Mr. Morrison to remove all the floor joists before constructing the concrete pad for the remainder of the chimney and for the allegedly improperly set log walls. First, it is important to note that Petitioner misrepresents the holding of this Court’s decision in *McComas*. It is a case wherein the Court reviewed the granting of summary judgment in a deliberate intent cause of action, and held that “willful ignorance of a specific unsafe working condition is no defense under subparagraph (B) of the deliberate intent statute.” *Id.* at 18-19. Obviously, *McComas* has little, if any, application to the present case as this is not a cause of action filed pursuant to the deliberate intent statute. Mr. Phillips raised the inapplicability of the *McComas* decision previously; however, Petitioner failed to address this issue below and she ignores it again on appeal. Second, even if this Court were to find these two cases are comparable in some respect, as the discussion above clearly illustrates, Petitioner failed to present any evidence of “willful ignorance” on the part of Mr. Phillips during the trial of this matter that would in some way make him liable to Petitioner.

The discussion above demonstrates that the evidence presented by Petitioner with regard to the work performed by Mr. Phillips was insufficient to support her claims for negligence, breach of contract, including the implied warranty of habitability, fraud and misrepresentation and outrageous conduct. Indeed, with regard to negligence, Petitioner had an obligation to establish by a preponderance of the evidence that Mr. Phillips owed a duty of care to her; that Mr. Phillips' breached his duty of care which he owed to her; and that she was injured and incurred damages as a direct and proximate result of Mr. Phillips' breach. *Keffer v. Bottling.*, 141 W.Va. 839, 93 S.E.2d 225 (1956). In negligence, there can be no recovery of damages, unless the defendant owed a duty to the party injured, no matter what their damage may be. *Simmons v. Chesapeake & O. Ry. Co.*, 97 W.Va. 104, 124 S.E. 503 (1924); *Uthermohlen v. Bogg's Run Min. & Mfg. Co.*, 50 W. Va. 457, 40 S.E. 410 (1901). A party owes the duty of due care, or in other words, the same degree of care which would be exercised by a reasonably prudent person in like circumstances. *Honaker v. Mahon*, 210 W. Va. 53, 552 S.E.2d 788 (2001). In the present case, Petitioner has failed to establish any evidence that Mr. Phillips failed to act as a reasonably prudent mason would in like circumstances. In fact, Petitioner's own expert testified that it is reasonable for a subcontractor to rely upon the information provided by a general contractor. Accordingly, Mr. Phillips reasonably relied upon the statements provided by Mr. Morrison regarding the foundation for the chimney and that the concrete pad on the first floor was ready for him to reconvene work on the chimney. Further, there is no evidence that Mr. Phillips negligently operated the forklift when moving the logs for Mr. Morrison to set the walls on the house that would make him responsible to the Petitioner for any defects in those walls.

With regard to Petitioner's breach of contract/breach of the implied warranty of habitability, there is no evidence to support this claim either. Mr. Phillips did not have an opportunity to complete the work on the chimney as he was left to await Mr. Morrison's removal of the wooden ridge beam. Additionally, to the extent Petitioner alleges the work on the chimney was unsuitable, breaching the implied warranty of habitability, Petitioner is not entitled to recovery where Mr. Phillips was unaware of the conditions that made it unsuitable. *Gamble v. Main*, 171 W. Va. 469, 300 S.E.2d 110 (1983). Here, Mr. Phillips was not aware of the purported insufficiency of the foundation for the chimney. Further, he was also not aware that any wooden joists had been left inside of the concrete pad constructed on the first floor. Instead, he reasonably relied upon the representations made by Mr. Morrison regarding the sufficiency of the foundation and his work in removing the floor joists and constructing the concrete pad. Petitioner's own experts testified that Mr. Phillips' actions in this regard were not only reasonable, but followed an acceptable industry standard.

Finally, with regard to Petitioner's claims for fraud and misrepresentation and outrageous conduct, Petitioner also presented no evidence of any of these claims as they relate to Mr. Phillips. "The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that Petitioner relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it." Syl. Pt. 5, *Kidd v. Mull*, 215 W. Va. 151, 595 S.E.2d 308 (2004). Allegations of fraud must be established by clear and convincing evidence. Syl. Pt. 5, *Tri-State Asphalt Products, Inc. v. McDonough Co.*, 182 W. Va. 757, 391 S.E.2d 907 (1990). Simply put, Petitioner has presented no evidence of a specific act committed by Mr. Phillips that was material and false. She has pinpointed the defects associated with Mr. Phillips as the wooden

floor joists and supports and the wooden ridge beam running into the chimney block. She also noted that the chimney, as a whole, was built on an insufficient pad. Notably, however, there is no evidence that any of this was the result of Mr. Phillips' work or that he even knew of these conditions and/or sought to conceal or misrepresent them to Petitioner. Further, with regard to Mr. Phillips' work on the setting of the logs, Mr. Phillips worked only as a laborer, operating the forklift. Thus, there was nothing proven fraudulent about Mr. Phillips' work on this home.

As for her claim of outrage, the hallmark of this cause of action is that the actions must be intentional and outrageous. In other words, such conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Harless v. First National Bank in Fairmont* 289 S.E.2d 692 (W.Va. 1982); *Tanner v. Rite Aid of West Virginia, Inc.*, 194 W.Va. 643, 461 S.E.2d 149, 157 (1995); *Stump v. Ashland, Inc.*, 201 W. Va. 541, 499 S.E.2d 41 (1997). Petitioner failed to present sufficient evidence of a claim for negligence, breach of contract/breach of the implied warranty of habitability or fraud and misrepresentation. As such, there was certainly no evidence presented at trial of actions on the part of Mr. Phillips that would have risen to the level of conduct required under the case law of outrage. In fact, it is important to note that the jury did not find Mr. Morrison liable for fraud, misrepresentation or outrageous conduct. There is no question that Mr. Morrison had a much larger role in the construction of this home as the general contractor and with the issues Petitioner has raised with regard to its construction. Yet, Petitioner argues that evidence was sufficient for the jury to find Mr. Phillips liable for fraud, misrepresentation and outrageous conduct. Petitioner's argument is without factual and legal support, and was insufficient to have denied the Motion for a Directed Verdict

for Mr. Phillips. Accordingly, the Circuit Court properly granted Mr. Phillips' motion for directed verdict.

V. THE CIRCUIT COURT PROPERLY FOUND THAT THE VERDICT WAS NOT AGAINST THE CLEAR WEIGHT OF THE EVIDENCE.

The West Virginia Supreme Court has held that a new trial should rarely be granted. *JWCF, LP v. Farruggia*, -- W. Va. --, -- S.E.2d --, No. 12-0389, *19 (W.Va. 2013). In *Neely v. Belk Inc.*, 222 W. Va. 560, 668 S.E.2d 189 (2008), this Court observed the following about the standards for reviewing determinations of motions for a new trial:

Although subjecting the trial court's decision to review for an abuse of discretion, we also noted in *In re State Public Building Asbestos Litigation* that a new trial should rarely be granted and then granted only where it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. *In re State Public Building Asbestos Litigation*, 193 W. Va. at 124, 454 S.E.2d at 418 (quoting 11 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* 2803 at 32-33); see also, *Morrison v. Sharma*, 200 W. Va. 192, 194, 488 S.E.2d 467, 470 (1997).

Id. (quoting *Neely*, 222 W. Va. at 566, 668 S.E.2d at 195). The Court went on to explain that “determining whether a valid claim has been established, the assessment of evidence and testimony is, of course, within the province of the trier of fact.” *Id.* (quoting *Hutchison v. City of Huntington*, 198 W. Va. 139, 157, 479 S.E.2d 649, 667 (1996)). As such, this Court concluded that it “owe[s] great deference to the verdict.” *Id.* (quoting *Hutchison v. City of Huntington*, 198 W. Va. 139, 157, 479 S.E.2d 649, 667 (1996)). It has been a long standing principle of this Court that a new trial will not be granted where some evidence has been given, which tends to prove the fact in issue, or the evidence consists of circumstances and presumptions merely because the court would have given a different verdict than the jury. Syl. pt. 3, *Miller v. Insurance Co.*, 12 W. Va. 116, 29 Am. Rep. 452 (1877). Indeed, “to warrant a new trial in such

cases, the evidence should be plainly insufficient to warrant the finding of the jury. And this restriction applies *a fortiori* to an Appellate Court.” *Id.* (Emphasis in original)

In the present case, Petitioner is not entitled to a new trial for liability or damages, or both. Despite Petitioner’s argument that she “set forth voluminous pinpoint record citations” to warrant a finding by the Circuit Court that the verdict was against the clear weight of the evidence, notably absent from Petitioner’s citations, however, were any citations to testimony that demonstrate Petitioner made key decisions regarding the size and construction of the log cabin. (AR 186-188) Petitioner ultimately decided to include a basement as well as an attached garage. (*Id.*) She determined how the garage would be placed and the manner in which it would be accessed. (*Id.*) Further, Petitioner also determined the number of logs high the home would be even though her determination was against the recommendation of Mr. Morrison. (*Id.* at 199-200.) Evidence was also presented to the jury that after Mr. Morrison was terminated, the upstairs interior walls that supported the roof were removed. (*Id.* at 231.) Further, the jury also heard testimony that Petitioner removed staircases accessing the basement and the upstairs. (*Id.* at 231-232.)

Largely, Petitioner’s rationale for why she is entitled to a new trial is the testimony of two expert witnesses, Mr. McGlothlin and Mr. Rockwell. However, neither of these witnesses ever constructed a primitive log cabin, and therefore, could offer no testimony specific to the type of home Petitioner had retained Mr. Morrison to construct. (*Id.* at 452-453; 483-486.) Further, Petitioner’s home underwent a significant amount of work subsequent to Mr. Morrison being fired. (AR 278-379) Many of these workmen that reportedly performed remediation work at the home could not identify who had performed the work that they were purportedly remediating. (*Id.* at 288-289, 307-308) It should be noted that much of the work was not in its

finished state when Mr. Morrison was fired. For example, it included only rough plumbing and temporary receptacles. (*Id.* at 220.)

Further, this Court must not overlook the fact that in addition to hearing the testimony of the witnesses and viewing each to determine their credibility, the jury also had an opportunity to travel to the home and observe it in its current state. Accordingly, the jury had the unique opportunity to actually compare the structure to the testimony that had been offered by Petitioner and her witnesses, including testimony that the home was structurally unsound. Further, with regard to Petitioner's alleged annoyance and inconvenience, as well as her alleged "severe emotional distress," at no time did Petitioner present any medical evidence to support her allegations.

Obviously, the assessment of this evidence and testimony is within the province of the trier of fact, and Petitioner has failed to demonstrate that the evidence presented is plainly insufficient to warrant the finding of the jury, particularly the jury's award of damages to Petitioner. A new trial should not be granted merely because a court would have given a different verdict than that awarded by the jury. The Petitioner carries the heavy burden of demonstrating that the jury's verdict and award of damages was improper. Here, Petitioner seeks to nullify the jury's careful consideration of the evidence and asks to have the jury's verdict award of damages overturned without articulating any reasonable explanation why.

It is important to note that, even if this Court were to find that the jury's apportionment of fault was in some way incorrect, at no time has the Petitioner presented any evidence that the jury's calculation of her damages was erroneous, regardless of its assignment of liability. This Court has held that a circuit court should "not find a jury verdict to be inadequate unless it is a sum so low that under the facts of the case reasonable men cannot differ about its inadequacy."

See State ex rel. Meadows v. Stephens, 207 W. Va. 341, 532 S.E.2d 59 (2000) (quoting Syl. Pt. 2, *Fullmer v. Swift Energy Co. Inc.*, 185 W. Va. 45, 404 S.E.2d 534 (1991)).

Here, the jury was not bound to adopt Petitioner's expert witnesses' assessments of her damages. Neither of these witnesses had ever constructed a primitive log cabin. Mr. McGlothlin testified that the home was structurally unsound and should be torn down and rebuilt, yet the home, which Mr. McGlothlin testified is in danger of collapse, has remained standing and sound despite harsh winters with heavy snow, including Super-Storm Sandy. (AR 478) Further, it also should be noted that Petitioner's other expert, Mr. Rockwell, testified that he believed the home could be repaired, noting that the worst problem with the home was the roof system that should be replaced. (*See id.* at 500) Mr. McGlothlin's estimation of the cost of replacement of the home included only \$40,000.00 for materials with the bulk of his estimation covering the cost of labor. Obviously, replacement of the roof would be substantially less than reconstruction of the home in its entirety. Under these circumstances, the jury's award of damages to Petitioner is neither plainly contrary to the weight of the evidence nor without sufficient evidence to support it. Accordingly, even if this Court should find that the jury should reconsider apportionment of fault, the jury's award of damages should be affirmed.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant James Phillips d/b/a Phillips Masonry requests that this Honorable Court affirm the Circuit Court of Randolph County's previous holdings at the trial of this matter, finding the Court made no errors when it (1) imposed equal time limitations upon the presentation of evidence, (2) precluded Petitioner's expert witness Rebecca Deem from testifying to allegedly "defective" conditions with the masonry work of Mr. Phillips, (3) precluded Petitioner's expert witness, Broderick McGlothlin, from

rendering expert opinions regarding masonry, (4) defined the scope of the testimony of Petitioner's expert witness, Richard Rockwell, (5) granted Mr. Phillips' motion for a directed verdict, and (6) denied Petitioner's request for a new trial, finding the jury's determination of liability and damages were reasonable.

Signed: Trevor K. Taylor HOC
Trevor K. Taylor, Esq.
W.Va. State Bar I.D. #8862
Tiffany A. Cropp, Esq.
W. Va. State Bar I.D. #10252

TAYLOR LAW OFFICE
34 Commerce Drive, Suite 201
Morgantown, WV 26501
304-225-8529

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2014, true and accurate copies of the foregoing **James Phillips' Response to Petitioner's Brief** were served *via* United States Regular Mail, postage-paid, addressed to counsel for all other parties to this appeal as follows:

Christopher L. Brinkley, Esq.
THE MASTERS LAW FIRM, LC
181 Summers St.
Charleston, WV 25301
Counsel for Plaintiff

Patrick A. Nichols, Esq.
NICHOLS & NICHOLS
P.O. Box 201
Parsons, WV 26287
*Counsel for Jerry Morrison Construction
d/b/a Jerry Morrison Construction*

Signed: Trevor K. Taylor / tac
Trevor K. Taylor, Esq.
W. Va. State Bar I.D. #8862
ttaylor@taylorlawofficewv.com
Tiffany A. Cropp, Esq.
W. Va. State Bar I.D. #10252
tcropp@taylorlawofficewv.com
TAYLOR LAW OFFICE
34 Commerce Drive, Suite 201
Morgantown, WV 26501
304-225-8529