

14-1334

CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

MARY LOLA RYAN, a  
protected person;  
CLAUDE J. RYAN, III and  
HEATHER E. RIBEL, as co-guardians  
of MARY LOLA RYAN,

Plaintiffs,

v.

Civil Action No. 12-C-161-3  
James A. Matish, Chief Judge

BENEDUM AIRPORT AUTHORITY,

Defendant/Third-Party Plaintiff,

v.

THE THRASHER GROUP, INC.,

Third-Party Defendant.

**ORDER GRANTING THIRD-PARTY DEFENDANT THE THRASHER GROUP, INC.,  
AND DEFENDANT BENEDUM AIRPORT AUTHORITY'S MOTION FOR SUMMARY  
JUDGMENT**

Presently pending before the Court is the Third-Party Defendant The Thrasher Group, Inc.'s ("Thrasher" or "Third-Party Defendant") Motion for Summary Judgment. The Plaintiffs, Mary Lola Ryan, Claude J. Ryan, III, and Heather E. Ribel, as co-guardians of Mary Lola Ryan, filed their Complaint on April 4, 2012. The Defendant, Benedum Airport Authority ("BAA" or "Defendant"), subsequently filed an answer and joined The Thrasher Group, Inc., as a Third-Party Defendant. The Third-Party Defendant filed its Motion for Summary Judgment on August 29, 2014, in which Defendant BAA joined on September 24, 2014. The Plaintiffs filed their Response in Opposition to Defendants' Motion for Summary Judgment on October 10, 2014. A hearing was held on the matter on October 14, 2014.

Therefore, upon consideration of memoranda filed by the parties, the record, oral argument, and pertinent legal authorities, the Court makes the following findings of fact and conclusions of law.

## FINDINGS OF FACT

1. On or about October 24, 2006, the BAA initiated Civil Action No. 06-C-480-3 in the Circuit Court of Harrison County by filing its Petition for Condemnation ("2006 Condemnation Action").

2. The BAA, a public corporation, initiated the 2006 Condemnation Action for purposes of acquiring by way of eminent domain a hilltop comprised of 26.79+ - acres of real property near the BAA runway which encroached upon the airport's runway safety area. BAA also sought a 3.19 acre temporary construction easement. Most basically, the Federal Aviation Administration ("FAA") mandates a certain runway safety zone (i.e. safe departure/landing angle of airspace) adjacent to runways. The subject hill, owned by Plaintiff Mary Lola Ryan, was found to intrude upon that safe departure angle. Therefore, through the 2006 Condemnation Action, the BAA sought to acquire Ms. Ryan's hill, excavate it, and reduce its height in compliance with the FAA's regulations.

3. The subject 26.79+- acres of real property which the BAA sought to condemn/acquire was part of a larger tract of land owned by Plaintiff Mary Lola Ryan. This larger tract of land owned by Mary Lola Ryan contained approximately 161 acres and is referred to in Plaintiffs' Complaint as "Mary Lola Ryan's farm."

4. Thrasher was the engineer of record for the BAA at all relevant times hereto, and served as the project engineer for the FAA-mandated excavation project giving rise to the 2006 Condemnation Action.

5. On or about October 24, 2006, the BAA paid into Court the sum of \$98,000.00 which was estimated to be the fair value of Mary Lola Ryan's property to be taken by way of condemnation and adjacent property to be used for a temporary construction easement, included the damages, if any, to the residue beyond the benefits, if any, to such residue by reason of the taking.

6. By Order Permitting Entry on Land to be Condemned for Public Use, entered on October 24, 2006, the BAA and its agents/contractors were authorized to immediately enter upon the subject 26.79 acres and adjoining 3.19 acres construction easement to begin construction.

7. In early 2007, BAA moved to amend its Petition for Condemnation as it became necessary to require an additional 1.96 acres of Ms. Ryan's real property for purposes of completing the FAA-mandated excavation project.

8. In or about March 2007, this Court granted BAA leave to amend its Petition for Condemnation, and BAA deposited an additional \$16,000.00 with the Clerk of this Court as reasonable compensation for the additional 1.96 acres condemned.

9. During the 2006 Condemnation Action, Mary Lola Ryan was represented at all times by counsel: initially by James D. Gray, Esquire, and later by Lori A. Dawkins, Esquire, of the firm Steptoe & Johnson PLLC.

10. The 2006 Condemnation Action developed into protracted litigation which lasted over three years.

11. A principle issue of contention between the BAA and Mary Lola Ryan in the 2006 Condemnation Action was the amount of compensation which Ms. Ryan should receive for not only the value of property taken by condemnation (~28.76 acres + 3.19 acre temporary construction easement), but also the amount of compensation Ms. Ryan should receive for the damage to the remaining portion of her farm (approximately 132.26 acres) caused by alleged erosion and sediment issues.

12. The remaining portion of Mary Lola Ryan's farm not taken by the BAA is formally referred to as the "residue" of the condemnation take.

13. To support her damage allegations in the 2006 Condemnation Action, Mary Lola Ryan retained two expert witnesses who were disclosed by filing on August 1, 2008. Ms. Ryan's experts were Patrick E. Gallagher, P.E., of CTL Engineering of WV, Inc., and certified real estate appraiser Larry M. McDaniel of Metro Real Estate Services, LLC.

14. Mr. Gallagher was retained by/on behalf of Mary Lola Ryan to evaluate her property at issue to determine, among other things, the potential for storm water impacts to the residue areas of Mary Lola Ryan's property adjacent to the portion of property taken by way of the BAA's condemnation.

15. Mr. Gallagher issued a letter to Mary Lola Ryan's counsel, Lori Dawkins, dated June 13, 2008, with the findings from his evaluation.

16. The second page of Mr. Gallagher's June 13, 2008, letter contains a section titled "Post Project Stormwater Issues." In this portion of his letter, Mr. Gallagher expresses, among others, the following opinions:

...the pre-existing watershed contributing to Mary Ryan's pond was 23.39 Acres. The Post-project watershed acreage is 33.96 acs.

...the project has resulted in a 45% increase in the contributing watershed into [Mary Lola Ryan's] existing farm pond...

...the pond will be receiving approximately 20% more runoff than pre-existing.

The additional watershed contributing to the farm pond will result in a need to increase the spillways systems of the pond in order to safely control the stormwater volumes. The cost of improving the pond would be estimated to be \$30,000.00.

17. Paragraph no. 14 of Plaintiffs' Complaint alleges that "as a result of Benedum Airport Authority's actions, ten acres of drainage that originally drained in the northerly direction now drains southerly, directly toward Mary Lola Ryan's farm," which Plaintiffs admit is based, at least in part, on Pat Gallagher's opinion expressed in in June 13, 2008, letter.

18. Paragraph no. 19 of Plaintiffs' Complaint in the instant action references alleged damage to a pond situate on Mary Lola Ryan's farm, which Plaintiffs admit is the same pond referenced in Pat Gallagher's June 13, 2008, letter.

19. As part of the 2006 Condemnation Action, Mary Lola Ryan retained Larry M. McDaniel to calculate appropriate damages and/or compensation for the BAA's condemnation of a portion of Mary Lola Ryan's farm.

20. Larry M. McDaniel completed his appraisal analysis of Ms. Ryan's property and issued his appraisal report on or about June 11, 2008. This appraisal report contained the substance of Mr. McDaniel's opinions.

21. Mr. McDaniel's appraisal calculated the total "Just Compensation" to which he believed Mary Lola Ryan was entitled for (a) the value of the land actually taken by BAA, (b) the severance damages to the residue, and (c) the temporary construction easement utilized by BAA during construction. Mr. McDaniel calculated this total Just Compensation to be \$292,100.00.

22. Mr. McDaniel's appraisal report defined Severance Damage as "damage to the residue [which] may occur during a partial property taking of real estate."

23. The "residue" of Mary Lola Ryan's farm at issue in the 2006 Condemnation Action (i.e. the portion of Mary Lola Ryan's farm remaining after the BAA's condemnation take of approximately 28.76 acres) is the same real property at issue in the instant civil trial.

24. In arriving at the amount of Severance Damages to which he believed Mary Lola Ryan was entitled, Mr. McDaniel expressly relied upon Pat Gallagher's findings expressed in his June 13, 2008, letter, and attached Mr. Gallagher's opinion letter to the appraisal report.

25. According to Mr. McDaniel, the \$292,100.00 Just Compensation was comprised in part by \$161,100.00 for Severance Damages – of which \$92,000.00 was related to watershed concerns identified by Pat Gallagher's June 13, 2008, letter.

26. Mr. McDaniel's \$92,000.00 watershed damages figure may be broken down to \$62,000.00 for the diminution in value to Mary Lola Ryan's residual property, and \$30,000.00 for the cost of improving/remediating Mary Lola Ryan's farm pond as identified in Pat Gallagher's June 13, 2008, letter. Mr. McDaniel based his diminution value of the residue property upon the fact that the BAA's project increased the watershed onto Mary Lola Ryan's residue property by 10.57 acres, thus "dedicating land areas with viable utility for watershed purposes."

27. On June 23, 2008, a hearing was held before the condemnation commissioners appointed for the 2006 Condemnation Action. These commissioners issued a report finding that \$140,000.00 constituted just compensation for the property taken and any damage to the residue.

28. As part of the 2006 Condemnation Action, Thrasher engineer Chad Biller, PE, was deposed by Mary Lola Ryan's counsel, Lori Dawkins, on September 30, 2008. Part of the examination questioned Mr. Biller specifically about Pat Gallagher's watershed opinions outlined in Mr. Gallagher's June 13, 2008, letter, and Plaintiffs' erosion claims.

29. In March 2009, as part of the 2006 Condemnation Action, a site visit to Mary Lola Ryan's property was conducted and attended by Plaintiff Claude J. Ryan, III, representatives of the BAA, and perhaps others, whereat Mr. Ryan expressed concerns about perceived damage to his mother's property caused by the flow of water from the property taken by the BAA through condemnation.

30. In the 2006 Condemnation Action, Mary Lola Ryan filed a Statement of Contentions with this Court on or about September 25, 2009. In this filing, Ms Ryan contended that she

is entitled to receive the cost of improving a water retention pond located on her property as the expansion project increased the size of the watershed and the amount of water runoff the point was required to facilitate. These changes precipitated a need to increase the spillway

systems of the pond in order to safely control the storm water volume. Ms. Ryan contends that she should be awarded \$30,000.00 as compensation for improving the pond.

31. On October 1, 2009, Mary Lola Ryan disclosed 33 photos as anticipated trial exhibits in further support of her erosion damage claims in the 2006 Condemnation Action.

32. In the 2006 Condemnation Action, Mary Lola Ryan filed a Response to [BAA's] Objections to First Supplemental Disclosure of Exhibits, on or about October 21, 2009, in which she asserted that

[o]ne of the major issues of damages in this case involves the stormwater impact to the properties and pond that are adjacent to the lands taken by the Petitioner in the eminent domain action as a result of the major excavation work conducted by the Petitioner.

33. At some point during the pendency of the 2006 Condemnation Action, Plaintiffs Claude J. Ryan, III, and Heather E. Ribel provided the BAA and its contractors and representative with a hand-written authorization to enter Mary Lola Ryan's property to inspect multiple concerns they had regarding water runoff from the property taken by the BAA's condemnation including: "1. wet spot in meadow," "2. Rip rap behind pond," "3. Silt in the pond," "4. Close rip rap ditch to the right of the pond," "5. Red substance," and "6. Ruts near Silt Fence."

34. Per the Order of this Court, Mary Lola Ryan and the BAA submitted the 2006 Condemnation Action to mediation on or about November 16, 2009.

35. Mediation was unsuccessful and the parties engaged in settlement discussions at the pre-trial conference in the 2006 Condemnation Action.

36. On or about November 18, 2009, the parties reached a settlement whereby the BAA accepted Mary Lola Ryan's demand for \$250,000.00 "as just compensation for the property or estates, rights, or interests therein, condemned in this proceeding, as described in the Amended Petition for Condemnation, including the damages, if any, to the residue beyond the benefits, if any, to such residue, by reason of the taking." The settlement was reflected by letter dated November 18, 2009, from BAA counsel Norm Farley to Mary Lola Ryan's counsel Lori Dawkins.

37. The parties' settlement of the 2006 Condemnation Action was further memorialized by an Agreed Order of Dismissal entered by this Court on December 11, 2009.

38. This Court's Agreed Order of Dismissal entered in the 2006 Condemnation Action states that

the Court finds that just compensation for the lands and all interest in real estate taken by the petitioner herein, as well as damages to the residue of said real estate... is Two Hundred Fifty thousand Dollars (\$250,000.00).

39. Plaintiffs admit that the term "residue" as used in the Agreed Order of Dismissal of the 2006 Condemnation Action refers to the approximately 132.26 acres of Mary Lola Ryan's farm that remained after the BAA's condemnation take.

40. This Court's December 11, 2009, Agreed Order of Dismissal dismissed the 2006 Condemnation Action, with prejudice.

41. The only potential future issue which the Agreed Dismissal Order excepted from the full and final resolution of all claims regarded a specific type of environmental pollution, which is not relevant in the instant action.

42. On October 20, 2011, the West Virginia Department of Environmental Protection ("WVDEP"), through its inspector, Tim Hodge, inspected the BAA's site. During his inspection, he found that the site was unsatisfactory in the following areas: silt fence, sediment traps, maintenance, permanent seed and mulch, vigor of grass, all downslope areas protected, and devices installed in a timely manner. Mr. Hodge also issued a Notice of Violation for "[h]aving allowed sediment-laden water to leave the site without going through an appropriate device."

43. The WVDEP informed the BAA of the Notice of Violation and results of the compliance investigation by letter dated November 21, 2011. In response to this letter, The Thrasher Group, Inc., agreed in part with the findings, proposed several recommendations to resolve the outstanding issues, and proffered that all issues would be resolved by May 1, 2012.

44. The BAA filed its Notice of Termination of its National Pollutant Discharge Elimination System ("NPDES") permit by letter dated September 28, 2012, wherein it admitted that it continued to discharge storm water until June 21, 2012.

45. Claude Ryan was deposed on May 27, 2013, and stated that he did not believe that the NPDES permit would remain open for as long as it did. He also stated that he believed that the additional water would be better managed by the BAA, and that the lack of reclamation was unforeseeable at the time of settlement.

46. Since settling the 2006 Condemnation Action, the only remediation work performed by or on behalf of the Plaintiffs was the installation of two culverts in May 2011 and Spring 2012, respectively. The cost of this work totaled approximately \$488.

47. No contractors have been hired to remediate the Plaintiffs' storm water concerns.

48. Plaintiffs initiated the instant civil action by Complaint filed on or about April 4, 2012, against the BAA. The Complaint alleges that earthwork made necessary by the 2006 Condemnation Action changed the drainage pattern of the taken area, causing an additional ten acres of water runoff onto Ms. Ryan's property, as well as multiple issues arising from such drainage.

49. In the instant case, Plaintiffs retained and disclosed Pat Gallagher as an expert witness. For his opinions in this matter, Mr. Gallagher issued a letter dated April 9, 2014, in which he identified four areas of concern, and estimated a cost of \$31,000 to remediate the same four areas. Plaintiff Claude J. Ryan, III, acknowledges that areas 1-3 were known to the Plaintiffs in the 2006 Condemnation Action, and concerns for such areas were raised and examined in that action. With respect to the fourth area, Mr. Ryan has conceded that he has neither had the area tested nor examined by an expert.

50. Mr. Ryan acknowledges that he has no evidence that the BAA violated any statute or regulation as alleged in the Plaintiff's Complaint.

51. Mr. Ryan acknowledges that he and his sisters authorized the settlement of the 2006 Condemnation Action on behalf of their mother, and were in no way forced into that settlement.

52. On or about August 29, 2014, Thrasher filed a Motion for Summary Judgment and supporting Memorandum of Law. Specifically, Thrasher sought an award of summary judgment with respect to all of the Plaintiffs' claims in favor of Defendant BAA and Third-Party Defendant Thrasher, based upon the doctrines of *res judicata* and/or collateral estoppel.

53. On September 2, 2014, a hearing date for Thrasher's Motion for Summary Judgment was scheduled for October 14, 2014.

54. On or about September 24, 2014, BAA filed notice of its Joinder in Third-Party Defendant The Thrasher Group, Inc.'s Motion for Summary Judgment, "adopt[ing] and incorporat[ing] the arguments set forth therein to the extent they are not expressly limited in application to Third-Party Defendant The Thrasher Group, Inc."

55. On October 10, 2014, Plaintiffs filed their response to Thrasher's Motion for Summary Judgment and to BAA's Joinder in Thrasher's Motion. The Court did not receive a copy of this Response prior to the October 14, 2014, hearing.

56. On Tuesday, October 14, 2014, the Court heard oral argument regarding Thrasher's Motion for Summary Judgment.

### CONCLUSIONS OF LAW

1. Rule 6(d)(2) of the West Virginia Rules of Civil Procedure states that a Response, unless a different period is set by the court<sup>1</sup>, shall be served "at least 4 days before the time set for a hearing, if served by mail, or ... at least 2 days before the time set for the hearing, if served by hand delivery... ." Additionally, in computing any time period prescribed, "[t]he last day of the period ... shall be computed, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the next day which is not a Saturday, Sunday, or a legal holiday." Rules Civ. Proc. Rule 6(a). According to the same rule, Columbus Day is a legal holiday. *Id.* In this case, the Plaintiffs filed their Response to the The Thrasher Group, Inc.'s Motion for Summary Judgment on Friday, October 10, 2014; the following three days, which are the same three days that immediately preceded the October 14, 2014, hearing date, were Saturday, Sunday, and Columbus Day, respectively. Therefore, in order to serve a timely response, the Plaintiffs should have filed their response by Thursday, October 9, 2014, to meet the requirement that personal service be made upon the defendant at least two days prior to the scheduled hearing, or October 7, 2014, for service by mail. Accordingly, this Court concludes that the Plaintiffs' Response was untimely, and, as such, the belated response should not be considered in the Court's ruling on the matter. however

2. West Virginia Rule of Civil Procedure 56(c) provides that summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file,

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<sup>1</sup> A Scheduling Order was in effect by the Court allowing parties to submit dispositive motions until October 10, 2014, with responsive pleadings accepted until October 27, 2014; however, because a hearing was scheduled and noticed, the parties are held to the time period prescribed by Rule 6(d) of the West Virginia Rules of Civil Procedure. It has been the practice of this Court to consistently advise all counsel at the time of the Scheduling Conference that they may file dispositive motions early, in which case a hearing on such matter will be scheduled; all motions filed within two months of the Final Pretrial Conference date will not receive a separate hearing date and will be heard and addressed at the Final Pretrial Conference. In this case, the Motion for Summary Judgment was filed on August 29, 2014, which was more than two months prior to the Final Pretrial Conference.

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Angelucci v. Fairmont General Hosp., Inc.*, 618 S.E.2d 373 (W. Va. 2005); *see also Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 336 (W. Va. 1995); *see also* Syl. Pt. 2, *Harrison v. Town of Eleanor*, 447 S.E.2d 546 (W. Va. 1994).

3. Under West Virginia law, if the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the non-moving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue of fact, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure. *Williams* at Syl. Pt. 3.

4. When a motion for summary judgment is made and supported by affirmative evidence of record that there is no genuine issue of material fact, “an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not respond, summary judgment, if appropriate, shall be entered against the adverse party.” *See* Rule 56(e) of the West Virginia Rules of Civil Procedure.

5. The party opposing summary judgment must satisfy its burden of proof by offering more than a mere scintilla of evidence; it must produce evidence sufficient for a reasonable jury to find in its favor. *Williams*; *see also Painter v. Peavy*, 451 S.E.2d 755 (W. Va. 1994). The evidence illustrating the factual controversy cannot be conjectural or problematic. *Id.* “Unsupported speculation is not sufficient to defeat a summary judgment motion.” *Id.*, citing *Felty v. Graves-Humphreys Co.*, 808 F.2d 1126, 1128 (4<sup>th</sup> Cir. 1987); *see also Wristen v. Raleigh County Emergency Services Authority*, 518 S.E.2d 650, 652 (W. Va. 1999). The non-moving party “cannot create a genuine issue of fact through mere speculation or the building of one inference upon another.” *Id.* “Inferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuition, or rumors.” *Id.*

6. The doctrines of *res judicata* (a.k.a. claim preclusion) and collateral estoppel (a.k.a. issue preclusion) are closely related. *State v. Miller*, 194 W. Va. 3, 9 (1995). With respect to *res judicata*, the West Virginia Supreme Court has held that

[b]efore the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, if presented, in the prior action.

Syl. Pt. 4, *Blake v. CAMC*, 201 W. Va. 469 (1997). Similarly, collateral estoppel will bar a claim if the following four conditions are met:

(1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Syl. Pt. 1, *Miller*, 194 W. Va. 3 (1995).

7. In the instant case, the Third-Party Defendant made a properly supported motion for summary judgment under Rule 56, establishing by affirmative evidence that there was no genuine issue of material fact for trial with respect to plaintiffs' claims against it. Thus, the burden shifted to the Plaintiff to rehabilitate the evidence presented by Defendant Thrasher, produce additional evidence showing the existence of a genuine issue for trial, or submit an affidavit explaining why further discovery was necessary to prove that *res judicata* and collateral estoppel do not apply in this case.

8. The Court finds that Plaintiff did not respond in opposition to Defendants' motion for summary judgment by producing any competent evidence of a genuine issue of material fact. Rather, Plaintiff's only response was assertions made by counsel at oral argument, which is insufficient to defeat a properly supported motion for summary judgment. *See* Syl. Pt. 3, *Guthrie v. Northwestern Life Ins. Co.*, 208 S.E.2d 60 (W. Va. 1974) ("Summary judgment cannot be defeated on the basis of factual assertions contained in the brief of the party opposing a motion for such judgment."); *see also City of Morgantown v. W. Va. University Medical Corp.*, 457

S.E.2d 637, 643 (W. Va. 1995) (mere assertions at oral argument are insufficient to defeat summary judgment). The Court further finds that merely stating the “anticipated” trial testimony of a witness is insufficient as a matter of law to defeat Defendant BAA and Third-Party Defendant Thrasher’s motion for summary judgment.

9. The Court finds as a matter of law that the elements of *res judicata* are met because (1) there was final adjudication on the merits of the 2006 Condemnation Action via an agreed settlement by the parties; (2) the 2006 Condemnation Action involved the same parties as the present action, namely Mary Lola Ryan, by Claude Ryan, III, and Heather E. Ribel acting as co-guardians, and Benedum Airport Authority; and (3) issues of damages that are alleged in this action were adequately litigated and settled and eventually settled for final resolution on the merits between Mary Lola Ryan, by Claude Ryan, III, and Heather E. Ribel acting as co-guardians, and Benedum Airport Authority by able counsel during the 2006 Condemnation Action. Similarly, the elements of collateral estoppel are met because, as stated above, (1) the previously decided issue of damages is identical to the one presented in the present action; (2) the settlement of the 2006 Condemnation Action is as a final adjudication on the merits; (3) the Plaintiffs, Mary Lola Ryan, by Claude Ryan, III, and Heather E. Ribel, acting as co-guardians, against whom the doctrine is invoked in this case, were a party to a prior action; and (4) Mary Lola Ryan, by Claude Ryan, III, and Heather E. Ribel, acting as co-guardians, had a full and fair opportunity to litigate the issues in the prior action. The Court finds that Plaintiff did not produce any counter evidence to rebut the Defendants’ claims of *res judicata* and collateral estoppel.

10. The court finds as a matter of law that the Plaintiff has provided no evidence in this case through which the Plaintiff can prove that the Defendant acted negligently, violated any state or environmental law, or breached the implied terms of the settlement agreement reached in the 2006 action for which the Plaintiff has standing to bring a claim.

11. The Court finds as a matter of law that no issue of material fact exists to indicate that Defendant acted negligently, violated any state or environmental law, or breached the implied terms of the settlement agreement reached in the 2006 action.

12. In Plaintiffs’ oral argument on the motion, counsel for Plaintiff represented that the Defendant’s negligent omissions created more damage than was anticipated during the 2006 Action; however, no supporting evidence was submitted to show that the Defendants negligently allowed further damage by failing to reclaim the land.

13. The Court finds as a matter of law that expert testimony or reports are required to prove that the Defendants were negligent in their actions on the land. Expert testimony or reports are also required to prove that the current damage significantly exceeds what that damage would have been had the defendants not acted negligently.

14. The Court finds that the Plaintiff did not present an expert on the issue of negligence and additional or unanticipated damages.

15. The language of Rule 56(e) of the West Virginia Rules of Civil Procedure is mandatory and requires that if the non-moving party sets forth specific facts showing that there is a genuine issue for trial, summary judgment shall not be granted.

16. Based on the foregoing, the Court determines that there is no genuine issue of any material fact pertinent to the claims of the Plaintiff against the Defendant, and Defendants are therefore entitled to judgment in its favor as a matter of law.

17. In addition to the foregoing conclusion, this Court is of the opinion that, even if there was an issue of material fact, the Plaintiffs are not entitled to bring a claim stemming from the aforementioned Notice of Violation issued by the WVDEP. The Notice of Violation specifically refers to W. Va. Code § 22-11-1, et seq., or the "Water Pollution Control Act"; however, upon inspection, it is clear that only the director of the WVDEP may institute a claim for violations of the rules set forth in the Water Pollution Control Act. W. Va. Code § 22-11-22(a). Therefore, as private citizens, the Plaintiffs do not have standing to bring claims for the issues identified in the Notice of Violation.

WHEREFORE, it is hereby ORDERED AND ADJUDGED by this Court for the foregoing reasons that Summary Judgment is hereby granted in favor of Defendant and Third-Party Defendant.

It is further ORDERED that the Defendant, Benedum Airport Authority and Third-Party Defendant, The Thrasher Group, Inc., be forever dismissed, with prejudice, from this action.

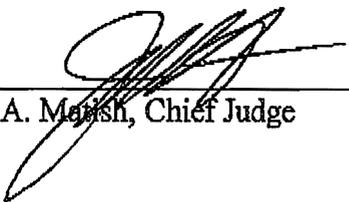
The Clerk is directed to remove this case from the docket and to transmit a certified copy of this order to:

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ENTER: 11/21/2014

  
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James A. Marsh, Chief Judge