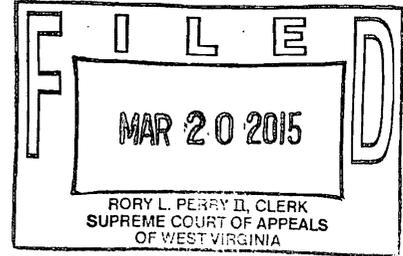


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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



Plaintiffs Below, Petitioners,

v.

BENEDUM AIRPORT AUTHORITY,

Defendant/Third-Party Plaintiff Below, Respondent.

and

THE THRASHER GROUP, INC.,
a West Virginia Corporation,
f/k/a THRASHER ENGINEERING,

Third-Party Defendant Below, Respondent.

On Appeal from the
Circuit Court of Harrison County, West Virginia
No. 12-C-161-3, The Honorable James A. Matish

**BRIEF ON BEHALF OF PETITIONERS, MARY LOLA RYAN, a
protected person; CLAUDE J. RYAN, III and HEATHER E. RIBEL, as co-guardians
of MARY LOLA RYAN, IN SUPPORT OF THEIR PETITION FOR APPEAL**

Plaintiffs Below, Petitioners,
MARY LOLA RYAN, a protected person;
CLAUDE J. RYAN, III and
HEATHER E. RIBEL, as co-guardians
of MARY LOLA RYAN,
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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ASSIGNMENT OF ERROR

- I. The circuit court’s decision to award summary judgment to the Respondents constitutes a reversible error because a genuine issue of material fact exists as to whether the Benedum Airport Authority complied with the agreed order of dismissal entered in Benedum Airport Authority v. Mary Lola Ryan, Circuit Court of Harrison County, Civil Action No. 06-C-480-3, and the circuit court’s Conclusions of Law set forth in Paragraphs 8, 9, 10, 11, 12, 13, 14, 16, and 17 in the circuit court’s Order Granting Summary Judgment were in error.

STATEMENT OF THE CASE

In its Order Granting Third-Party Defendant The Thrasher Group, Inc., and Defendant Benedum Airport Authority’s Motion for Summary Judgment (hereinafter, “Order Granting Summary Judgment”), the circuit court set forth its Findings of Fact and such Findings are generally accurate and can be relied on by the Court. The relevant facts can be broken down into three categories: pre-settlement; post-settlement, pre-instant suit; and instant suit.

- A. The Petitioners and Benedum Airport Authority were previously engaged in litigation involving the same property and ultimately settled such lawsuit.**

Petitioner Mary Lola Ryan owns a farm located on Corbin Branch Road in Bridgeport, West Virginia. That farm is adjacent to the North Central West Virginia Airport. The North Central West Virginia Airport is operated by the Benedum Airport Authority (“BAA”).

In 2006, the BAA determined that it needed to increase the size of its runway safety area. R. 000376, 000643.¹ To do this, it determined that the best course of action was to take a portion of the Mary Lola Ryan farm. To accomplish this goal, BAA instituted the civil action styled: Benedum Airport Authority v. Mary Lola Ryan, Circuit Court of Harrison County, Civil Action No. 06-C-480-3, hereinafter referred to as the “2006 Action.” The BAA ultimately sought to take 28.76

¹ All references to the appendix herein are cited as R. [Bates Number].

acres of the Mary Lola Ryan farm plus an additional 3.19 acre temporary construction easement. Id. at R. 000644. To expand the runway safety area, the BAA would have to essentially move and otherwise modify a hillside, significantly altering the landscape. Id. at R. 000643.

One of the issues that arose in the 2006 Action was the Petitioners' right to receive compensation for damages to the residue of the Mary Lola Ryan farm and the amount of such compensation. Id. Damages associated with the increased erosion due to increased water runoff from the site was one issue that the parties focused on in the 2006 Action. Id. at R. 000644. The Petitioners offered expert opinions as to the expected increase in water runoff and the costs for the Petitioners to manage that additional water runoff. Id. at R. 000644-645.

The Thrasher Group, Inc. ("Thrasher") was the engineer for the BAA's airport safety area expansion project. See id. at R. 000041. Its employee, Chadwick Biller, was its project manager. Id. at R. 000375-376. As part of the discovery process in the 2006 Action, the Petitioners deposed Mr. Biller. Id. at R. 000373. During that deposition, Mr. Biller discussed how the site still needed to stabilize. Id. at R. 000391 (C. Biller Depo. 73:4-9). Part of that stabilization would occur as a result of vegetation growth on the disturbed areas of the site. Id. According to Mr. Biller, there was a limited increase in the amount of water runoff that occurred due to the disturbance at the site. Id. at R. 000392-393 (C. Biller Depo. 76:23-78:2). Mr. Biller acknowledged the limited problems that the Petitioners were facing on the Mary Lola Ryan farm, such as wet spots in the meadow. Id. at R. 000391 (C. Biller Depo. 73:20-24). However, per Mr. Biller, once the vegetation came in and the site stabilized, that problem would cease and he did not expect any further problems. Id. at R. 000392 (C. Biller Depo. 74:20-22).

The Petitioners and the BAA ultimately settled the 2006 Action for \$250,000. Id. at R. 000647. There was no written settlement agreement. Rather, the agreement was memorialized by an Agreed Order of Dismissal. Id. Such dismissal order resolved the 2006 Action.

B. After the 2006 Action was resolved, the Mary Lola Ryan farm continued to experience additional and extensive damage as a result of the water runoff and erosion.

After the Petitioners and the BAA settled the 2006 Action, the damage to the Mary Lola Ryan farm continued to accrue in the fall of 2011. Two third parties as well as Thrasher documented some of the issues and damages that were visible from a site inspection.

On or about October 4, 2011, Bradley Durst, an employee of the West Virginia Conservation Agency, went to the Mary Lola Ryan farm and memorialized his visit by letter dated October 21, 2011. R. 000106. In that letter, he discussed how a portion of the site is void of vegetation. Id. He also opined that the site had not been engineered to account for the additional runoff. Id. Finally, he found that based upon the additional runoff, the type of soil, the “failure to establish a proper stand of vegetation to prevent erosion and slow the runoff, and the failure to use practices to manage flow velocities and direction[,]” the Mary Lola Ryan farm suffered the ramifications of the work on the BAA’s site. Id. at R. 000107.

On October 20, 2011, the West Virginia Department of Environmental Protection (“DEP”) conducted an inspection of the site. Id. at R. 000467. In its evaluation, the DEP made a number of findings. Id. Based upon those findings, the DEP issued a Notice of Violation. Id. at R. 000468. The DEP found that the silt fence, sediment traps, maintenance, permanent seed and mulch, and vigor of grass were all unsatisfactory. Id. at R. 000467. Further, the DEP found that all of the downslope areas were not protected and devices were not installed in a timely manner. Id. The DEP based its Notice of Violation on the conclusion that the BAA had “allowed sediment-laden water to leave the site without going through an appropriate device.” Id. at R. 000468.

On behalf of the BAA, Thrasher issued a response to the Notice of Violation by letter dated December 12, 2011. Id. at R. 000471. In its letter, Thrasher agreed “that there are areas of the

project where vegetation has not been established.” Id. Thrasher proposed a number of corrective actions to resolve the violations and set forth a proposed timeline for completion of the proposals:

1. Reestablish silt fence and ditch checks in the eroded areas. December 30, 2011;
2. Correct washed out areas so water will drain into the rock lined ditch. December 30, 2011
3. Take soil samples of the sloped areas and determine proper seed/lime/fertilizer mixture. February 1, 2012
4. Regrade if necessary any slope without established vegetation and reseed/mulch unvegetated areas. March 1, 201[2]
5. Submit a final NOT for this permit. May 1, 2012

Id. at R. 000471-472. Thrasher then stated that it would issue a change order to have these corrective actions implemented. Id. at R. 000472. However, the damages continued to accrue after the DEP issued the Notice of Violation.

C. As a result of the additional damage, the Petitioners brought the instant action on or about April 4, 2012.

On or about April 4, 2012, the Petitioners filed their Complaint against the BAA. R. 000001; R. 000007. Then, on or about August 16, 2013, the BAA filed its Third-Party Complaint against Thrasher. Id. at R. 000037; R. 000040.

By letter dated September 28, 2012, BAA filed its Notice of Termination of NPDES permit. Id. at R. 000648. In that letter, the BAA “admitted that it continued to discharge storm water until June 21, 2012.” Id.

On May 27, 2014, the parties conducted a site inspection of the Mary Lola Ryan farm. On the same day, the Respondents deposed Petitioner Claude Ryan. Id. at R. 000173. During that deposition, Petitioner Claude Ryan discussed how he and his sister, Petitioner Heather Ribel, had settled the 2006 Action on behalf of their mother, Petitioner Mary Lola Ryan, and how such settlement was meant to encompass the reasonable damages that they expected. Id. at R. 000183 (C. Ryan Depo. 39:2-12). Mr. Ryan stated that it was the Petitioners’ belief that the BAA would reclaim the property, specifically establishing grass and other vegetation. Id. at R. 000180 (C. Ryan

Depo. 25:4-7). He discussed why he expected that to be done: specifically stating that in his experience in construction, the job was not done until it was reclaimed. Id. at R. 000182 (C. Ryan Depo. 33:24-34:21; R. 000186-187 (C. Ryan Depo. 52:23-53:2). Further, he did not believe that the NPDES permit could be held open as long as it had. Id. at R. 000179 (C. Ryan Depo. 23:17-20). Mr. Ryan also discussed how the damages were far greater than the Petitioners ever imagined and how such damages are directly related to the BAA's inability to establish grass. Id. at R. 000177 (C. Ryan Depo. 16:10-11); R. 000179 (C. Ryan Depo. 21:9-16); R. 000183 (C. Ryan Depo. 38:15-21).

On or about August 29, 2014, Thrasher filed its motion for summary judgment and supporting memorandum. Id. at R. 000109. Said motion was based upon the assertion that the doctrines of *res judicata* and collateral estoppel barred the instant action based upon the settlement and resolution of the 2006 Action. See generally id. at R. 000109. That motion was set for hearing on October 14, 2014. Id. at R. 000649. The BAA joined that motion. Id. at R. 000446. The Petitioners filed their response to the motion for summary judgment on October 10, 2014. Id. at R. 000450. The circuit court held the hearing on the motion for summary judgment on October 14, 2014, and that hearing has been transcribed and made part of the appendix herein. Id. at R. 000474.

At the October 14, 2014 hearing, the circuit court instructed the parties to submit proposed Orders containing findings of fact and conclusions of law. Id. at R. 000510. Both the Petitioners, id. at R. 000547, and the Respondents, id. at R. 000514, submitted such proposed Orders on October 21, 2014. Further, on October 21, 2014, the Petitioners filed a motion to file a supplement to the Petitioners' response to the motion for summary judgment. Id. at R. 000556.

On November 13, 2014, the Court entered an Order from the October 14, 2014 hearing. Id. at R. 000592. In that Order, "the Court stated that out of an abundance of caution, it would review Plaintiffs' Response" Id. The parties next attended the final pre-trial conference on November 14, 2014. That hearing was also transcribed and made a part of the appendix herein. Id. at

R. 000597. During that hearing, the Court heard additional discussion and/or argument regarding the Respondents' motion for summary judgment. Id. at R. 000620-623. On November 21, 2014, the circuit court entered its Order Granting Summary Judgment. Id. at R. 000655. The Petitioners appeal therefrom.

SUMMARY OF THE ARGUMENT

This case arises from a grant of summary judgment in favor of the Respondents. The Petitioners had brought a claim against the BAA for negligence and trespass arising from water and sediment runoff from the BAA's property onto Petitioner Mary Lola Ryan's farm.

During the 2006 Action, the parties disputed the amount of damages to the residue that would be caused by the increased water runoff and erosion. The BAA and Petitioner Mary Lola Ryan ultimately settled the 2006 Action in December 2009.

After settlement, the BAA continued to trespass on the Mary Lola Ryan farm. This occurred because although the BAA had caused the destruction of vegetation, it never restored said vegetation as part of the reclamation process. Obviously without the vegetation, water and sediment runoff increased and traveled directly from the BAA's property onto the Mary Lola Ryan farm. Over the years since the December 2009 settlement, the damage to the Mary Lola Ryan farm increased significantly, causing damage to the farm via the creation of trenches from the erosion and the filling-in of a pond.

The Respondents ultimately sought to dismiss the action on summary judgment based upon *res judicata* and collateral estoppel due to the previous settlement. The circuit court granted that motion. The Petitioners appeal from that decision on the basis that the circuit court was incorrect in its conclusion that the Petitioners did not provide evidence sufficient to generate a genuine issue of material fact. Further, the circuit court was incorrect in its conclusion that *res judicata* and collateral estoppel applied based upon the settlement in the previous action.

Specifically, the Petitioners contend that the BAA was negligent in failing to properly reclaim its site or it breached an implied obligation to reclaim pursuant to the settlement of the condemnation action. Such implied obligation exists because at the time of the settlement, the BAA intended to reclaim its site by establishing vegetation and the Petitioners believed that the BAA would in fact reclaim the site and establish vegetation. Further, the BAA has a common law duty to minimize the water runoff created by its use of its site. Morris Assoc. v. Priddy, 181 W. Va. 588, 383 S.E.2d 770, syl. pt. 2 (1989).

The Petitioners presented sufficient evidence to create a genuine issue of material fact as to the BAA's breach of its duties. The Petitioners presented evidence that a site inspection by the West Virginia Department of Environmental Protection yielded a violation based upon improper sediment controls. They also presented evidence from a representative from the West Virginia Conservation Agency about his observations about the lack of vegetation on the site. Further, the record reveals deposition testimony from Petitioner Claude Ryan and from Chadwick Biller regarding damage to the Mary Lola Ryan farm and the associated problems with lack of vegetation.

The arguments of *res judicata* and collateral estoppel also fail because the claims contained herein are not identical to the claims in the earlier action. Such claims had not yet arisen because the BAA had not yet been negligent and still had the time and opportunity to reclaim its site. Further, as set forth in Buckhannon & N.R. Co. v. Great Scott Coal & Coke Co., 75 W. Va. 423, 83 S.E. 1031 (1914), the eminent domain action was not the proper forum in which to collect damages for negligence. Rather, the Petitioners could have and did seek compensation for those damages that were expected to arise if the BAA conducted its construction in a reasonable and workmanlike manner. It is illogical to require the defendant in an eminent domain case to seek damages for negligently performed work when the work has not yet been performed or is still ongoing. Rather,

such damages should be sought after the negligence occurs and that is what the Petitioners request to do herein.

That is the thrust of the Petitioners' argument: that they suffered damages above and beyond what either party contemplated at the time of the settlement agreement because of the failure of the BAA to establish vegetation on the site. Such failure was negligence and created a cause of action separate and apart from claims in the eminent domain case. Further, sufficient evidence has been presented for a jury to consider whether the BAA did not establish vegetation and, if so, whether such failure was unreasonable and therefore negligent. Based upon those reasons and the reasons contained herein, the Petitioners request that the Court reverse the granting of summary judgment and remand this action for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT

The Petitioners do not request oral argument in this appeal as they believe "the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument." W. Va. R. App. P. 18(a)(4).

ARGUMENT

I. Standard of Review

In this action, the circuit court granted summary judgment in favor of the Respondents and the Petitioners appeal therefrom. "Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is required when the record shows that there is 'no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Messer v. Runion, 210 W. Va. 102, 104, 556 S.E.2d 69, 71 (2001). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Id. (quoting Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York, 148 W. Va. 160, 133 S.E.2d 770, syl. pt.

3 (1963)). The Court reviews the circuit court's decision *de novo* and reviews "all facts and reasonable inferences in the light most favorable to the nonmoving party." Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996).

II. The circuit court's decision to grant summary judgment in favor of the BAA and Thrasher should be overturned because there is a question of material fact and the conclusions of law on which the circuit court reached its ultimate decision granting summary judgment were incorrect.

In deciding to grant summary judgment in favor of the Respondents, the circuit court relied upon a number of incorrect conclusions of law. First, it wrongly concluded that the Petitioners did not provide any response to the Respondents' motion for summary judgment. Second, it wrongly concluded that the Petitioners did not provide any evidence upon which to establish the BAA's negligence, violation of environmental law, or the implied terms of the settlement agreement in the 2006 Action. Such conclusion was wrong because the settlement from the 2006 Action clearly included an implied obligation on the part of the BAA to properly reclaim its site. Further, the BAA had the same duty to reclaim its site via common law, regulations, and the conditions of its NPDES permit. The BAA clearly violated such duty because it has not established vegetation on its site and, therefore, the water runoff continues to intrude upon the Mary Lola Ryan farm.

Third, the circuit court wrongly concluded as a matter of law that the Petitioners did not provide any evidence establishing that the BAA's negligence caused more damages than what were anticipated during the 2006 Action. Such conclusion of law is incorrect because the Petitioners provided evidence of negligence and a jury could conclude on its own that because the BAA did not properly reclaim its site, the water runoff was increased and such increase would have created more erosion and accompanying damages.

Fourth, the circuit court wrongly concluded that the Petitioners needed to present expert testimony to establish the BAA's negligence in its reclamation of its site. Such conclusion was

wrong because experts are not needed to establish negligence except in limited circumstances, such as medical malpractice actions.

Fifth, the circuit court also wrongly concluded that the Petitioners needed to present an expert to discuss the difference in damages that occurred as a result of the BAA's negligence as opposed to the damages that would have occurred if the BAA had not acted negligently. Once again, such conclusion is incorrect because an expert is not needed in that situation. Further, the experts available to the parties could have testified and discussed such differences in damages.

Sixth, the circuit court wrongly discounted the BAA's violation of the Water Pollution Control Act. In its consideration of such violation, the circuit court did not take into account that the violation of a statute is negligence per se.

Seventh, the circuit court wrongly concluded that the doctrine of *res judicata* applied as a result of the 2006 Action. Such conclusion is incorrect because the 2006 Action and the instant action are not identical actions. Rather, the 2006 Action was an action for eminent domain and related damages. The instant action is for damages resulting from the negligence and poor workmanship of the BAA. Without identical actions in both cases, the doctrine of *res judicata* does not apply.

Eighth, the circuit court wrongly concluded that the doctrine of collateral estoppel applies as a result of the 2006 Action. For collateral estoppel to apply, the issues have to be identical. The issues in the two cases are not identical. Rather, the issues involved are eminent domain and related damages in the 2006 action and damages resulting from negligence in the instant action. Without identical issues, collateral estoppel does not apply.

A. The circuit court’s conclusion of law that the Petitioners did not respond to the Respondents’ motion for summary judgment constitutes reversible error.

In Paragraph 8 of its Order Granting Summary Judgment, the circuit court found as a matter of law “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, Plaintiffs' only response was assertions made by counsel at oral argument, which is insufficient to defeat a properly supported motion for summary judgment.” R. 652 (Order Granting Summary Judgment ¶ 8). Such conclusion is incorrect based upon the fact that a response was filed, the Court stated at the October 14, 2014 hearing that it would consider such response, the Court confirmed that statement in the Order from the October 14, 2014 hearing, and the Court incorporated findings of fact set forth in the Petitioners’ response in its findings of fact.

The Petitioners clearly filed a response to the motion for summary judgment, albeit an untimely response,² and the circuit court twice indicated that it would consider such response in its analysis of the motion for summary judgment. The Petitioners filed their response on October 10, 2014, prior to the October 14, 2014 hearing. R. 000450, 000466. During that hearing, the circuit court stated, “The Court will – even though the response is late by the plaintiffs the Court will nevertheless review the same.” *Id.* at R. 000505 (Trans. Oct. 14, 2014 hearing 32:16-17). Additionally, in its Order from the October 14, 2014 hearing, “the Court stated that out of an abundance of caution, it would review Plaintiffs’ Response” *Id.* at R. 000592.

The circuit court also heard additional argument at the final pre-trial conference held on November 14, 2014. At that hearing, the parties revisited the issue of summary judgment and the

² The response was filed on October 10, 2014, a Friday. The hearing was on October 14, 2014, a Tuesday. The intervening Monday was Columbus Day, a state holiday, which counsel for Petitioners failed to recognize as said holiday was not an office holiday.

Court further considered such matter. Id. at R. 000620-623. Therefore, there was a clear indication on the part of the Court that it would consider all evidence that was part of the record.

In its Order Granting Summary Judgment, the Court also incorporated arguments and evidence from the Petitioners' response. In Paragraphs 42 through 45 of the findings of fact section in the Order Granting Summary Judgment, the circuit court adopted facts set forth in the Petitioners' response. In Paragraph 42, the circuit court adopted findings of fact related to the DEP's site inspection and issuance of a Notice of Violation. Id. at R. 000648; see also id. at R. 000467-468. In Paragraph 43, it adopted findings of fact related to the transmission of that Notice of Violation and Thrasher's response thereto. Id. at R. 000648; see also id. at R. 000469-000472. In Paragraph 44, it adopted a finding of fact that "[t]he 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." Id. at R. 000648; see also id. at R. 000550. Then in Paragraph 45, it adopted a finding of fact setting forth information from Claude Ryan's deposition highlighted in the Petitioners' proposed order and in its supplement to its response. Id. at R. 000648; see also id. at R. 000550-551.

The adoption of those findings of fact clearly indicate that the Court considered the Petitioners' response in formulating its decision. Therefore, it should not be concluded that the Petitioners did not issue a response. Such a conclusion would ignore the record and what actually occurred. Therefore, to the extent that the circuit court did not consider the Petitioners' response to the motion for summary judgment or indicated that it did not consider such response, then the Court should reverse such conclusion of law and the incorporated granting of summary judgment.

The Petitioners have interpreted the conclusion of law in Paragraph 8 of the Order Granting Summary Judgment as indicating that their response was not considered. However, that conclusion of law may also mean that the circuit court considered the response and found that it did not set forth

a genuine issue of material fact. If that is the case, then such conclusion of law is incorrect because the response clearly raises a genuine issue of material fact.

As explained more thoroughly in Section (II)(2)(b), the Petitioners' response to the motion for summary judgment sets forth a genuine issue of material fact. Specifically, it sets forth an issue of material fact as to whether the BAA negligently reclaimed its site. It does this by providing evidence of the BAA's violation of DEP regulations in October 2011. Id. at R. 000468. It also does this via Thrasher's acknowledgment of such violation. Id. at R. 000471. Pursuant to such violation, it is clear that the BAA had not established vegetation and adequate sediment controls more than two years after entering into the settlement agreement to resolve the 2006 Action. Such fact raises a genuine issue of material fact as to whether the BAA acted reasonably when it made major modifications to its property.

The remainder of this brief also brings up other evidence that is part of the record that raises a genuine issue of material fact. All of this evidence relates to the BAA's lack of efforts to reclaim its site. Such evidence all supports a finding that summary judgment was inappropriate in this case.

Based upon the foregoing and the remaining arguments set forth herein, the Petitioners request that the Court reverse the conclusion of law set forth in Paragraph 8 of the Order Granting Summary Judgment and reverse the grant of summary judgment.

B. The circuit court's conclusion of law that the Petitioners had provided no evidence to establish the BAA's negligence, violation of any state or environmental law, or breach of the implied terms of the settlement agreement from the 2006 Action constitutes reversible error.

As part of its conclusions of law contained in the Order Granting Summary Judgment, the circuit court found that the Petitioners had not provided any evidence to support a claim that the BAA had acted negligently, violated any state or environmental laws, or breached the implied terms of the settlement agreement from the 2006 Action. R. 00653. Specifically, the Court found:

10. The [C]ourt 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.

Id. Such conclusions of law do not account for the evidence in the record.

The central theme of the Petitioners' case is that the BAA had a duty to properly reclaim its site, failed to do that, and, as a result, the Mary Lola Ryan farm suffered significant damages from water runoff and erosion. It is the Petitioners' contention that reclamation was, at the very least, an implied term of the settlement agreement reached in the 2006 Action and the BAA breached its duty to reclaim, both negligently and as an implied contract term. The record contains evidence supporting both contentions and creates a genuine issue of material fact as to each.

1. **The settlement agreement arising from the 2006 Action contained an implied term that the BAA would properly reclaim its site, specifically that the BAA would establish vegetation to reduce erosion.**

In 2006, the BAA sought to take a portion of the Mary Lola Ryan farm. To do that, it filed an eminent domain action against Petitioner Mary Lola Ryan, said action being Benedum Airport Authority v. Mary Lola Ryan, Circuit Court of Harrison County, Civil Action No. 06-C-480-3, said lawsuit being referred to herein as the 2006 Action. In the 2006 Action, the BAA sought to take and did in fact take 28.76 acres plus a 3.19 acre temporary construction easement. R. 000352. This take was not the entirety of the Mary Lola Ryan farm. See R. 000352-360. The BAA sought this take to expand its runway safety area. R. 000376 (C. Biller Depo. 12:9-19). To construct the runway safety area, the BAA would have to engage in significant earthmoving activities by lowering a hillside on the site. Id. at R. 000377 (C. Biller Depo. 13:10-19).

One of the Petitioners' main concerns in the 2006 Action was the effect of the earthmoving activities on the water runoff and additional erosion that would affect the remainder of the Mary Lola Ryan farm. In terms of geography, the portion of the Mary Lola Ryan farm that the BAA took was hillside or was developed into hillside. A portion of the remainder of the Mary Lola Ryan farm was the bottom of that hillside and an adjacent meadow. Obviously, water runs downhill, see id. at R. 000391 (C. Biller Depo. 72:8-11), so an increase in erosion on the BAA's property (on either the take or its previous property), left unchecked,³ could cause increased damage to the remainder of the Mary Lola Ryan farm.

The BAA and the Petitioners ultimately settled the 2006 Action. R. 000349. The parties did not enter into a written settlement agreement. Rather, the sole writing confirming the settlement is the Agreed Order of Dismissal from the 2006 Action (hereinafter, "2006 Order of Dismissal"). In that 2006 Order of Dismissal, the circuit court stated:

the Court finds that just compensation for the lands and all interests in real estate taken by the Petitioner herein, as well as damages to the residue of said real estate beyond the benefits which will be derived in respect to said residue from the work to be constructed or the purposes to which the land to be taken is to be appropriated
.....

R. 000352. The circuit court and the Respondents have relied upon that language as part of the reasoning for the granting of summary judgment. R. 000129; 000648. The problem with that reasoning is the fact that the BAA had an implied duty to properly reclaim its site as part of the settlement agreement and that is what the parties envisioned when they entered into that agreement.

The implied duty arises from the BAA's representations and the Petitioners' beliefs based upon those representations and their understanding of the BAA's NPDES permit. Specifically, the representations revolve around the BAA's duty, obligation, and plan to establish vegetation on the site and otherwise stabilize the site.

³ For example, by failing to establish vegetation to act as a buffer and to secure the soil.

The key to this argument is that the BAA planned on establishing vegetation as part of its reclamation and this plan was communicated to the Petitioners during the course of the 2006 Action. Chadwick D. Biller was the project manager for Thrasher on the runway safety area expansion project at issue. See R. 000375-376. The Petitioners deposed him as part of the 2006 Action. Id. at R. 000374. During that deposition, as part of a number of questions about sediment ponds and silt, Mr. Biller discussed his goal of ensuring that vegetation grew so as to stabilize the site and minimize erosion:

- Q. And what's going to happen once the pond is removed? Where is the silt and the erosion going to go?
- A. The reason why I've left [Sediment Pond No. 3] in there longer is to try to get the vegetation better established, to get the vegetation to grow, to get the site to stabilize. The site will stabilize and there should not be anymore silt and anything running off. . . .

R. 000391 (C. Biller Depo. 73:1-9). During his deposition, Mr. Biller, as project manager for Thrasher on the BAA's runaway expansion project, clearly envisioned and planned on ensuring that vegetation was growing. Id. Further, per Mr. Biller, if such vegetation grew, then "there should not be anymore silt and anything running off." Id. at R. 000393 (C. Biller Depo. 75:7-9). The ultimate problem is that such vegetation never did grow. See R. 000187.

In entering into the settlement agreement regarding the 2006 Action, the Petitioners specifically relied upon the belief that the BAA would get the vegetation to grow on the site which would in turn minimize the erosion issue. Although Petitioner Claude Ryan knew that there would be increased water runoff, he believed the BAA had a plan and intent to minimize it: "We thought it would be much smarter, and we were assured that there would be adequate controls put in to handle the water, and I don't feel like that's been done." Id. at R. 000180 (C. Ryan Depo. 25:4-7). He also believed that the BAA would establish vegetation: "I mean, when you do any kind of construction project, you have to establish vegetation" Id. at R. 000182 (C. Ryan Depo. 33:24-34:21). Petitioner Claude Ryan emphasized: "There's no doubt in my mind when it's a federally

funded project that they have to establish vegetation on it, you know, and to go four or five years and not establish vegetation is absurd.” Id. at R. 000182 (C. Ryan Depo. 35:6-14).

One of the issues is that the Petitioners, in entering into the settlement agreement, were anticipating reasonable, future damages that would occur as a result of the BAA’s reasonable, workmanlike actions. Their assertion is that there has to be some method of predicting those future damages and here, their method was based upon their belief that the BAA would establish vegetation and the additional damages would thus be minimized. As Petitioner Claude Ryan explained:

We sought damages for reasonable – Reasonable damages is what any reasonable person would do. Yes, we sought damages for the disturbance of the property and the use of the property, the amount of coal that was taken and the amount of rock that was taken, and that’s what we agreed to. There’s no possible way that we could have sought damages for what occurred when they didn’t establish vegetation. There’s no way you could know that. And I think this morning when we walked up there, you can see that it’s still – This project started in 2006. . . .

Id. at R. 000183 (C. Ryan Depo. 39:2-12).

The Petitioners also relied upon the belief that at the time they entered into the settlement agreement, the BAA’s NPDES permit was still open and there would have to be sufficient reclamation completed before it could be closed. In fact, they were surprised when the NPDES permit was not closed for years after the Petitioners and the BAA entered into the settlement agreement: “It may very well be. I mean, I don’t know how long you’re allowed to keep an NPDES Permit open, maybe indefinitely, but it was certainly open much longer than I ever anticipated.” See id. at R. 000179 (C. Ryan Depo. 23:17-20).

The final support for the conclusion that the settlement agreement contained implied terms regarding reclamation is the caselaw regarding condemnation proceedings themselves and a limitation on the damages recoverable in such actions. The damages recoverable in a condemnation action include contemplated damages to the residue, but do not include those damages caused by trespass or negligence:

Damages resulting to the residue of the land not taken, from trespass thereon, or from the negligent or unskillful manner of doing a proposed work of internal improvement on the part taken, as the building of a railroad, or the like, are not recoverable in condemnation, but constitute the basis of a separate and independent action; but all such damages to the residue as might have been reasonably anticipated from doing such work carefully and skillfully, and as proposed by the applicant, are the proper subject for consideration by commissioners or jury in a condemnation proceeding.

Buckhannon & N.R. Co. v. Great Scott Coal & Coke Co., 75 W. Va. 423, 83 S.E. 1031 (1914). “As a general rule damages in condemnation are to be assessed on the basis that the work of construction will or has been done in a skillful and proper manner, not negligently done.” Id. (citing Watts v. Norfolk & W. R. Co., 39 W. Va. 196, 19 S. E. 521 (1894)). Based upon that caselaw, the 2006 Action would not have encompassed damages arising from the BAA’s negligence or from improperly completing its work because the 2006 Action was based upon eminent domain and the presumption that the BAA would conduct its excavation activities in a workmanlike manner.

There are, therefore, three grounds upon which to find that the BAA had an implied duty to properly reclaim its site pursuant to the settlement agreement in the 2006 Action. First, the project manager, Thrasher’s Mr. Biller, stated that he intended and planned on vegetation to increase before removing sediment ponds. R. 000391 (C. Biller Depo. 73:1-9). Such statement clearly envisions additional reclamation, i.e., encouragement of vegetation growth. Second, the Petitioners clearly believed and understood that the BAA, as part of its construction project, would properly reclaim the site and ensure proper vegetation growth. R. 000183 (C. Ryan Depo. 39:2-12). Third and finally, the caselaw for condemnation actions only encompasses those damages that are contemplated and not those damages that occur as a result of negligence or improper workmanship. Buckhannon & N.R. Co., 75 W. Va. 423, 83 S.E. 1031. To the extent that the circuit court found that no such implied term existed, the Court should reverse such conclusion of law and reverse the grant of summary judgment.

The next issue becomes whether there is sufficient evidence to find that there is a genuine issue of material fact as to whether the BAA breached the implied term of the settlement agreement or acted negligently.

2. The BAA breached the implied terms of the settlement agreement from the 2006 action, breached its duty to reasonably control the surface water runoff from its property and/or its site, and acted negligently in failing to properly reclaim the site.

The Petitioners' claim is that the BAA had a duty to properly manage the water runoff from the site. There are three sources for this duty. First, as set forth *supra* in Section II(2)(a), the BAA had an implied duty to properly reclaim its site as a result of the settlement agreement in the 2006 Action.

Second, the BAA has a common law duty to reasonably control the flow of surface water from its property. "Generally, under the rule of reasonable use, the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility." Morris Assoc. v. Priddy, 181 W. Va. 588, 383 S.E.2d 770, syl. pt. 2 (1989). The Petitioners contend that it is not reasonable to destroy one of the main managers of the velocity of surface runoff, i.e., vegetation, and then not replace it with new vegetation or some other water runoff management device or strategy.

Third, the BAA had a common law duty to reasonably engage in construction and earthmoving activities on the runway safety area expansion project and such reasonableness encompasses the obligation to properly reclaim the site. See generally Buckhannon & N.R. Co. v. Great Scott Coal & Coke Co., 75 W. Va. 423, 83 S.E. 1031 (1914). Further, said duty is also statutorily imposed pursuant to West Virginia Code of State Regulations § 47-10-5.1 and the conditions of the BAA's NPDES permit for the runway safety area expansion project.

Those three duties are, of course, highly similar and it is likely that if one is breached, then all are breached. By the same token, if one is satisfied, then all three are likely satisfied. Further, all three duties focus on reclamation, specifically the management and minimization of water runoff after major modifications to the Earth. Therefore, the evidence regarding the BAA's reclamation, or rather the lack thereof, directly affects the determination of whether the BAA has satisfied the three duties as a matter of law.

The evidence establishes that to this day, the BAA still has not fulfilled its duty to properly reclaim and reasonably minimize the water runoff to the Mary Lola Ryan farm. The Petitioners and the BAA resolved the 2006 Action on December 11, 2009. R. 000361. Since that time, the BAA still has not established vegetation on the site. Petitioner Claude Ryan discussed this fact during his May 27, 2014 deposition: “[T]his is 2014 and we still don’t have good vegetation on the side of the hill? I mean, you know, after three or four seedings.” R. 000183 (C. Ryan Depo. 39:16-18). Further, “they didn’t establish vegetation for five years on this project.” Id. at R. 000182 (C. Ryan Depo. 33:24-34:21). In fact, Petitioner Claude Ryan’s deposition occurred on the same day that the parties had a site inspection of the property. Id. at R. 000183. Regarding the lack of vegetation, he pointed out to counsel that they themselves had seen that there was little to no vegetation: “There’s no possible way that we could have sought damages for what occurred when they didn’t establish vegetation. There’s no way you could know that. And I think this morning when we walked up there, you can see that it’s still – This project started in 2006.” Id. at R. 000183 (C. Ryan Depo. 39:2-12).

The third-party evidence along with Thrasher’s own admissions also establish that the BAA had problems with water runoff and reclamation post-December 11, 2009. The DEP conducted a permit/site evaluation of the site on October 20, 2011. Id. at R. 000467. At that time, the DEP made a number of findings and issued a notice of violation. Id. at R. 000467-468. It found that the silt

fence, sediment traps, maintenance, permanent seed and mulch, and vigor of grass were all unsatisfactory. Id. at R. 000467. Further, the DEP found that all downslope areas were not protected and devices were not installed in a timely manner. Id. As a result of these findings, the DEP issued a Notice of Violation that the BAA had “allowed sediment-laden water to leave the site without going through an appropriate device.” Id. at R. 000468.

Thrasher agreed, in part, with the Notice of Violation. By letter dated December 12, 2011, it agreed “that there are areas of the project where vegetation has not been established.” Id. at R. 000471. To correct the Notice of Violation, Thrasher recommended a number of corrective actions and a timeline for completing those actions:

1. Reestablish silt fence and ditch checks in the eroded areas. December 30, 2011;
2. Correct washed out areas so water will drain into the rock lined ditch. December 30, 2011
3. Take soil samples of the sloped areas and determine proper seed/lime/fertilizer mixture. February 1, 2012
4. Regrade if necessary any slope without established vegetation and reseed/mulch unvegetated areas. March 1, 201[2]
5. Submit a final NOT for this permit. May 1, 2012

Id. at R. 000471-472. Thrasher then stated that it would issue a change order to have these corrective actions implemented. Id. at R. 000472.

This lack of vegetation and its effect on the Mary Lola Ryan farm was discussed by one of the Petitioners’ experts, Bradley A. Durst, in a letter dated October 21, 2011. Id. at R. 000106-107. Mr. Durst visited the Mary Lola Ryan farm and the BAA’s site on October 4, 2011. Id. at R. 000106. During that visit, he saw “graded fill slopes that are nearly devoid of vegetation . . .” along with another area that had the “absence of a good stand of vegetation . . .” Id. at R. 000106. Further, he observed that “[t]he control of [the] additional runoff appears to have not been accounted for when the engineering of the site was made.” Id. Based upon the additional runoff, the type of soil, the “failure to establish a proper stand of vegetation to prevent erosion and slow the runoff, and the

failure to use practices to manage flow velocities and direction[,]” the Mary Lola Ryan farm has suffered the ramifications of the work on the BAA’s site. Id. at R. 000107.

One of the Petitioners’ key contentions is that the BAA went years without establishing vegetation and Thrasher admits that this has not been done as of December 2011. Id. at R. 000471. The establishment of vegetation is a basic goal in ensuring the minimization of runoff and erosion. See generally R. 000391 (C. Biller Depo. 73:1-9); see also id. at R. 000107 (wherein Mr. Durst recommends additional vegetation to manage erosion and runoff and indicating that a “failure to establish a proper stand of vegetation” caused the lack of prevention of erosion and runoff). Further, at no point does Thrasher deny the BAA’s obligation to establish vegetation.

Although the record establishes this information, the BAA did not provide any evidence that it had fulfilled its obligation to reclaim the property. The record contains no mention or argument that the BAA fulfilled its duties to reclaim. Rather, the BAA relies upon the 2006 Order of Dismissal and associated settlement, basically asserting that all damages had been released. As discussed *supra*, there is no indication that such settlement or the 2006 Order of Dismissal would have relieved the BAA from its duty to reclaim, under either an implied duty, its duty as a landowner to control surface water runoff, or its duty to complete its runway safety area expansion project in a reasonably prudent manner.

The circuit court’s conclusions of law set forth in Paragraphs 10 and 11 of the Conclusions of Law section of the Order Granting Summary Judgment are incorrect. The Petitioners provided evidence and established a genuine issue of material fact that the BAA acted negligently and in violation of the implied terms of the settlement agreement. Specifically, the Petitioners provided evidence establishing that the BAA did not generate sufficient vegetation on the site to minimize water runoff. This was done through the testimony of Petitioner Claude Ryan, see R. 000182, and the documentation from the DEP, id. at R. 000106-107, along with Thrasher’s admission that the

BAA had not established vegetation, *id.* at R. 000471-472. Further, the record reflects that Bradley Durst, the Petitioners' expert, also viewed the lack of vegetation during his visit to the site. Such evidence clearly raises a genuine issue of material fact as to whether the BAA acted reasonably in the fulfillment of its duty to reasonably reclaim its site. Therefore, the Court should reverse such conclusion of law and reverse the grant of summary judgment.

C. The circuit court's conclusion of law that there was no supporting evidence that the BAA "negligently allowed further damage by failing to reclaim the land" is factually incorrect and constitutes reversible error.

In its conclusions of law, the circuit court found that "[i]n 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." R. 000653 (Order Granting Summary Judgment at ¶ 12). The problem with this conclusion is that the record contains evidence showing the damage and the jury could have reasonably concluded that such damage would have been lessened by proper reclamation.

It would also be a reasonable conclusion for a jury to reach, without any additional information, that additional water runoff will create additional erosion. The fact that additional water runoff can cause additional erosion is certainly within a jury's inherent knowledge. Further, either of the Petitioners' experts could have provided testimony to that effect. Bradley Durst's letter touches on the fact that additional vegetation can reduce the erosion and the lack of vegetation has caused the additional erosion. *Id.* at R. 000107. It can be inferred from Mr. Durst's letter that the opposite would be true: had there been adequate vegetation, then the erosion (and therefore the damages) would have been lessened. In fact, Durst states that part of the reason that the Petitioners are suffering the damages they are is because of a "failure to establish a proper stand of vegetation to prevent erosion and slow the runoff[]" and the failure to use practices to manage flow velocities

and direction” Id. Thus, a jury can conclude that the Petitioners’ damages were increased because the BAA failed to establish vegetation and use practices to reduce the water flow.

Chadwick Biller’s testimony provides another link between the lack of proper reclamation and vegetation as a cause of the Petitioners’ damages. Mr. Biller clearly envisioned that vegetation would grow and the site would stabilize. As he explains:

The reason why I’ve left [Sediment Pond No. 3] in there longer is to try to get the vegetation better established, to get the vegetation to grow, to get the site to stabilize. The site will stabilize and there should not be anymore silt and anything running off.
...

R. 000391 (C. Biller Depo. 73:4-8). Further, Thrasher intended to remove the sediment ponds and diversion ditches. R. 000392-393 (C. Biller Depo. 77:23-78:2). Until those sediment ponds were removed, Mr. Biller admitted that the area would be wet. Id. The inverse of that is that once those sediment ponds were removed, it was expected that the water would not pool and create the same problems. Mr. Biller believed that once Thrasher’s plan was accomplished, the erosion issues would end:

- Q. Was [the increase in the additional waterflow] enough to cause the existing erosion that’s not present?
- A. In my opinion, no, it will not. It’s a negligible amount. And I don’t believe that we’ll ever have any problems once that pond and those diversion ditches are removed.

Id. at R. 000392-393.

Mr. Biller’s testimony establishes a causation between the proposed Thrasher plan, which admittedly was not carried out, and an end to the erosion. Had Thrasher’s plan been carried out, that is, had the vegetation grown, then the erosion would have largely stopped. As Mr. Biller stated, Thrasher’s position is that the increased water runoff would not cause large amounts of erosion once the site stabilized. See id. at R. 000392-393 (C. Biller Depo. 76:23-78:2). A jury, upon hearing that the plan had not worked because of the lack of vegetation, could find causation between not carrying out the plan and an increase in the amount of damages. As previously noted, the BAA had a duty

to reasonably control water runoff and intended to do that per Thrasher's plan, but did not. See R. 000471-472. Hence, a jury could find that such breach caused an increased amount of damage to the Mary Lola Ryan farm.

Petitioner Claude Ryan's deposition also describes the additional damages that have occurred and ties those damages to the BAA's negligence. In his deposition, Petitioner Claude Ryan discussed how in photographs you cannot see any trenches. Id. at R. 000179 (C. Ryan Depo. 21:9-16). At the time of the deposition, in May 2014, there were seven-foot trenches in the location of the photographs. Id. As Petitioner Claude Ryan explained in relation to the runoff, "I knew it was going to, or I felt that it would become a problem at some time or another, but, you know, to what extent, I had no idea." Id. (C. Ryan Depo. 21:14-16). He elaborates on the entire situation when he discusses reasonable damages that he expected as compared to what occurred:

Nowhere in here in his Report does any reasonable person assume or even think that five years later, the Airport would not establish grass on their property or that they would not do anything to remediate the job. I mean, when you do any kind of construction project, you have to establish vegetation, so when we settled with this original agreement, that was well and fine, had they done what they should have done, but when they leave the property go, this many acres for four or five years and create such additional horrendous damages to the person, you don't have any choice in the matter, and I don't think any reasonable person could possibly walk out there and look at that and say, "Well, we agreed to this, that you're going to damage us in this respect." There's no one that could have foreseen that, and my contention is if a person settles an action like we did, we assumed they would provide due diligence and do their -- But they didn't establish vegetation for five years on this project. So when you sit and do that to a landowner, the landowner really doesn't have a lot of recourse, other than to get to where we're at now, and the original agreement, to me, is worthless if you don't do what you're supposed to do. The Airport certainly didn't do due diligence on this.

Id. at R. 000181-182 (C. Ryan Depo. 33:24-34:20). He revisits the issue shortly thereafter:

We sought damages for reasonable -- Reasonable damages is what any reasonable person would do. Yes, we sought damages for the disturbance of the property and the use of the property, the amount of coal that was taken and the amount of rock that was taken, and that's what we agreed to. There's no possible way that we could have sought damages for what occurred when they didn't establish vegetation. There's no way you could know that. And I think this morning when we walked up there, you can see that it's still -- This project started in 2006. . . .

Id. at R. 000183 (C. Ryan Depo. 39:2-11). Petitioner Claude Ryan's testimony ties the BAA's negligence, specifically its inability to establish vegetation, to the damages that are over and above what were expected by all parties.

In terms of the comparison of the damages themselves, had this case gone to trial, the jury would have had access to the same photos that Petitioner Claude Ryan did during his deposition. Then, a jury view of the Mary Lola Ryan farm and the BAA's site was planned, so the jury could have seen the extent of the damage. Id. at R. 000632. Such information would have allowed the jury to view the extent of the damages and, at that point, they could have decided if the BAA's actions (or inactions) contributed to the damages suffered by the Petitioners.

The evidence in the record establishes a direct line from the BAA's negligence to the Petitioners' increased damages upon which a jury could have found in favor of the Petitioners. The BAA had a duty to properly reclaim the site, in part by establishing vegetation. The BAA failed to do that as admitted by Thrasher. See R. 000471-472. The BAA's failure increased the amount of the water runoff. See R. 000106-107. The increase in the water runoff caused additional erosion and thus additional damages. It is within the purview of the jury, based upon the record, to conclude that the BAA's negligence increased the Petitioners' damages above what was expected at the time of the settlement agreement. Therefore, the circuit court's conclusion of law as contained in Paragraph 12 of the Conclusions of Law section of the Order Granting Summary Judgment is incorrect and the Petitioners ask the Court to reverse that conclusion and the incorporated granting of summary judgment.

D. The circuit court's conclusion of law that expert testimony is required to establish that the BAA was negligent in its actions at the site is incorrect because an expert is not required for a plaintiff to establish negligence in a water runoff or property damage case.

In its Order Granting Summary Judgment, the circuit court found "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.” R. 000654 (Order Granting Summary Judgment ¶ 13). No caselaw is cited for this conclusion and such conclusion is in conflict with the Court’s historical findings regarding the need for experts.

Except in limited circumstances, affidavits of expert witnesses are not needed to defeat summary judgment. “[W]e have never held that a respondent must, in order to defeat a motion for summary judgment, submit affidavits of an expert.” Cunningham v. W. Virginia-Am. Water Co., 193 W. Va. 450, 455, 457 S.E.2d 127, 132 (1995) (holding modified by Foster v. City of Keyser, 202 W. Va. 1, 501 S.E.2d 165 (1997)). The limited circumstances are cases involving medical malpractice. Id., at n. 5. Obviously, this case does not invoke those limited circumstances. The Petitioners can find no caselaw where an affidavit of an expert witness was required to defeat summary judgment in a negligence action involving improper reclamation.

The circuit court’s conclusion of law regarding the requirement for the Petitioners to present expert witnesses in this case is incorrect. There is no requirement that the Petitioners provide affidavits from expert witnesses in regards to whether reclamation was improperly conducted. Therefore, the circuit court’s conclusion of law as contained in Paragraph 13 of the Conclusions of Law section of the Order Granting Summary Judgment is incorrect and the Petitioners ask the Court to reverse that conclusion and the incorporated granting of summary judgment. The same is true of the circuit court’s conclusion that an expert was needed to establish the difference in damages had the BAA not been negligent in its reclamation of its site.

- E. The circuit court’s conclusion of law that expert testimony was necessary to establish that the damages suffered exceed what the damages would have been had the BAA not acted negligently and that the Petitioners provided no expert to testify on such issue was incorrect because no such expert was required and the Petitioners could have provided such expert.**

In relation to expert testimony regarding the increase in damages resulting from the BAA’s negligence, the circuit court made two conclusions of law. First, the circuit court held that “[e]xpert

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.” R. 000654 (Order Granting Summary Judgment ¶ 13). Second, the circuit court found “that the Plaintiff did not present an expert on the issue of additional or unanticipated damages.” Id. The Petitioners assert that both conclusions of law are incorrect.

The conclusion of law that an expert is needed to prove the difference in expected damages versus the amount of actual damages is incorrect. As discussed *supra* in Section II(4), expert witnesses are only required in limited circumstances, i.e., in medical malpractice actions. See Cunningham v. W. Virginia-Am. Water Co., 193 W. Va. 450, 455, 457 S.E.2d 127, 132 (1995). An expert is not required in this situation to provide an opinion as to additional or unanticipated damages.

The circuit court was also wrong to conclude that the Petitioners did not provide an expert to discuss the additional damages. In his letter, Bradley Durst discussed the failures to establish proper vegetation and to manage the flow velocities of water. R. 000106-107. Using the testimony and information gathered from Chadwick Biller regarding the damages in 2008, Mr. Durst could have discussed how vegetation would have reduced the damages. Further, Patrick Gallagher could have done the same. R. 000103-104.

In addition to the Petitioners’ experts, the jury would have heard from Mr. Biller and could have concluded, based upon his testimony, that had the BAA established vegetation and stabilized the site, the Petitioners would not have suffered the damages that they did. Mr. Biller clearly states in his deposition that he did not “believe that we’ll ever have any problems once that pond and those diversion ditches are removed.” Id. at R. 000392-393 (C. Biller Depo. 77:23-78:2). Further, once “the vegetation was better established” the site would stabilize. Id. at R. 000391 (C. Biller Depo. 73:4-9). Once the site stabilized, “there should not be anymore silt and anything running off.” Id.

No expert is needed to determine the difference in damages that would have occurred with proper reclamation versus without. However, the experts in the case are clearly able to discuss that issue. In fact, Thrasher's expert has done just that. Additionally, testimony from Petitioner Claude Ryan also establishes such fact. The circuit court's conclusions of law that the Petitioners needed to have an expert testify as to the differences in damages based upon reclamation versus non-reclamation and that the Petitioners did not have such expert was incorrect. Based on such error, the Petitioners ask the Court to reverse those conclusions and the incorporated granting of summary judgment.

F. The circuit court's conclusion of law regarding claims under the Water Pollution Control Act is misplaced because violation of such Act could be considered negligence per se.

The circuit court, in its conclusions of law, discounted the Notice of Violation issued by the DEP to the BAA because the Petitioners could not bring a private cause of action for the violation, specifically the BAA's violation of the Water Pollution Control Act. W. Va. Code § 22-11-1, *et seq.* The problem with this conclusion is that the violation of the Water Pollution Control Act could have been used to establish the BAA's negligence. "Violation of a statute is prima facie evidence of negligence. In order to be actionable, such violation must be the proximate cause of the plaintiff's injury." Anderson v. Moulder, 183 W. Va. 77, 79, 394 S.E.2d 61, 63 (1990).

As discussed *supra*, the Petitioners' claim is built upon the negligence of the BAA in either reclaiming its site or reasonably managing the water runoff. See Section II(2). The compliance with or violation of a statute directly pertaining to the management of sediment specifically relates to whether negligence occurred in reclaiming property so as to avoid sediment runoff.

Although the circuit court was correct in that it appears that no private cause of action arises from a violation of the Water Pollution Control Act, the fact remains that the BAA still owes a duty to the Petitioners as adjoining landowners to reasonably manage its water runoff and prevent trespass

of sediment. Morris Assoc. v. Priddy, 181 W. Va. 588, 383 S.E.2d 770, syl. pt. 2 (1989). Compliance with the Water Pollution Control Act would assist in fulfilling that duty. Pursuant to the familiar doctrine that “[v]iolation of a statute is prima facie evidence of negligence[,]” the violation of the Water Pollution Control Act is relevant and assists in establishing the Petitioners’ claims against the BAA. Anderson, 183 W. Va. at 79, 394 S.E.2d at 63.

To the extent that the circuit court did not rely upon the BAA’s violation of the Water Pollution Control Act as evidence of the BAA’s negligence, the Court should reverse the circuit court’s granting of summary judgment, remand this action for further proceedings, and direct the circuit court to consider the violation in its analysis of the Petitioners’ claims.

G. The circuit court’s conclusion of law that the elements of *res judicata* were met was incorrect because this action does not involve the same damages or claims as set forth in the 2006 Action.

In granting summary judgment, the circuit court concluded that *res judicata* applied in relation to the 2006 Action. R. 000653 (Order Granting Summary Judgment ¶ 9). Such conclusion is incorrect because the cause of action set forth in this action is not identical to and could not have been resolved in the 2006 Action. Blake v. Charleston Area Med. Ctr., Inc., 201 W. Va. 469, 472, 498 S.E.2d 41, 44 (1997).

It is admitted that at the time the Petitioners settled the 2006 Action, they released the BAA from the expected damages to the residue. However, the Petitioners are not currently seeking recovery for those expected damages. Rather, they are seeking to recover for those damages that occurred because of the BAA’s failure to properly reclaim its site. That failure by the BAA creates a different cause of action.

The Petitioners’ belief that the BAA was going to reclaim its site and the BAA’s failure to do so is well-documented in Section II(2). As discussed therein, Chadwick Biller, the project manager for Thrasher, testified as to the need to establish vegetation to stabilize the site. R. 000391

(C. Biller Depo. 73:4-8). That was Thrasher's plan moving forward and there is no evidence that such plan would have changed as a result of the settlement agreement in the 2006 Action. Then, Petitioner Claude Ryan's testimony revealed that the Petitioners fully believed and understood that the BAA was going to establish vegetation. Id. at R. 000182 (C. Ryan Depo. 33:24-34:21). This belief was based upon Mr. Biller's testimony as well as the BAA's duties under its NPDES permit. See id. at R. 000179 (C. Ryan Depo. 23:17-20).

The problem of course is that the BAA never established vegetation. In fact, Thrasher admits that in December 2011, two years after the settlement agreement, the vegetation had not been established. See id. at R. 00471-472. This failure to establish vegetation and otherwise reclaim the site led to additional damages that are above and beyond what the parties expected at the time of the settlement agreement.

The 2006 Action and the current action are different because they involved two different causes of action. The 2006 Action was an eminent domain case involved with the settlement of those damages expected to result from the runway safety area expansion project when the work was done reasonably and prudently. Buckhannon & N.R. Co. v. Great Scott Coal & Coke Co., 75 W. Va. 423, 83 S.E. 1031 (1914); see also R. 000349. Such damages could be safely settled because everyone believed that vegetation would be established and the site would settle. In fact, during that case, Thrasher expected that the site would stabilize and there would be little to no additional damage as a result of the runway safety area expansion project. R. 000392-393 (C. Biller Depo. 77:23-78:2). This of course did not happen due to the improper reclamation.

The instant case is a negligence action based upon those damages that arose due to the BAA's improper reclamation and is based upon the BAA's negligence and breach of the implied terms of the settlement agreement. The Petitioners could not have brought that claim in the 2006 Action because the BAA had not yet acted negligently in its efforts at the site.

The circuit court ignored the difference in the two cases and how one case had not even arisen until sometime after the BAA and the Petitioners settled the 2006 Action. The 2006 Action was an eminent domain case involving damages expected to arise from the BAA's reasonable and prudent work on the runway safety area expansion project. The instant case is a negligence action that arose from the BAA's negligence in carrying out that runway safety area expansion project. Such negligence continued on for years after the 2006 Action ended. The circuit court made no effort to compare these two claims, but rather lumped them in as one and completely ignored the BAA's actions (or rather, inactions) over the years since the settlement of the 2006 Action.

The Court should overturn the circuit court's conclusion of law contained in Paragraph 9 of the Conclusions of Law section of the Order Granting Summary Judgment as to the doctrine of *res judicata* applying to this case. Such decision to overturn should be based upon the fact that there are two distinct and different claims in the 2006 Action and the instant action and that one of those claims did not even arise until after the 2006 Action had concluded. Based upon such decision, the Court should reverse the conclusion of law contained in Paragraph 9 of the Conclusions of Law section of the Order Granting Summary Judgment and the granting of summary judgment in favor of the Respondents and remand this action for further proceedings.

H. The circuit court's conclusion of law that the elements of collateral estoppel were met was incorrect because the 2006 Action does not involve identical issues and the Petitioners did not have a full and fair opportunity to litigate the current issues in the 2006 Action.

In granting summary judgment, the circuit court found that the doctrine of collateral estoppel applied. R. 000653 (Order Granting Summary Judgment ¶ 9). Collateral estoppel exists when:

(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.

State v. Miller, 194 W. Va. 3, 6, 459 S.E.2d 114, 117, syl. pt. 1 (1995). In this case, the circuit court was incorrect when it concluded as a matter of law that elements one and four were satisfied. R. 000653.

The same issues are present with the application of collateral estoppel as they are with applying *res judicata*. In the *res judicata* context, the causes of action in the two proceedings must be identical. Blake v. Charleston Area Med. Ctr., Inc., 201 W. Va. 469, 472, 498 S.E.2d 41, 44 (1997). In a collateral estoppel context, “[t]he issue previously decided is identical to the one presented in the action in question” State v. Miller, 194 W. Va. 3, 6, 459 S.E.2d 114, 117, syl. pt. 1 (1995).

Similar to the non-application of *res judicata*, collateral estoppel does not apply either. The causes of action clearly are not the same: eminent domain versus negligence. See Section (II)(7). Hence, *res judicata* does not apply. Similarly, the issues in this action are also not the same as in the 2006 Action. As explained *supra* in Section II(7), the current action involves the negligence of the BAA and its breach of the implied terms of the settlement agreement between itself and the Petitioners. The 2006 Action involved the BAA’s taking of the site along with the damages to the residue. Such damages were limited to those that were “reasonably anticipated from doing such work carefully and skillfully, and as proposed by the” BAA. Buckhannon & N.R. Co., 75 W. Va. 423, 83 S.E. 1031. The current action involves the issue of damages associated with the BAA’s negligence. That claim could not even have been raised in the 2006 Action. See id. The issues in the 2006 Action and the instant action are not identical: rather the issues are compensation for damages reasonably anticipated versus damages arising from negligence and improper workmanship. Based upon the lack of identical issues, the doctrine of collateral estoppel does not apply.

The application of collateral estoppel also fails because the Petitioners did not have a full and fair opportunity to litigate their claim of negligence against the BAA in the 2006 Action. In fact,

such claim had not yet arisen. Because such claim had not yet arisen, the Petitioners clearly could not have litigated such a claim. Further, as set forth in Buckhannon & N.R. Co., claims for damages arising from improper workmanship or negligence are the subject of a separate action. Id. Such claims are not part of an eminent domain action. Id. Based upon those two reasons, it cannot be concluded that the Petitioners had a full and fair opportunity to litigate the claims they raised in this action in the 2006 Action. If the Petitioners did not have a full and fair opportunity to litigate the claims from the instant case in the 2006 Action, then there can be no collateral estoppel.

The circuit court's conclusion of law that the doctrine of collateral estoppel applied is incorrect. The Petitioners did not present an issue identical to the issues in the 2006 Action. Further, they could not have fairly and fully litigated their present claims in the 2006 Action. Without establishing that the issues are identical and the claim could have been fully and fairly litigated in the previous action, the doctrine of collateral estoppel does not apply. Because collateral estoppel does not apply, the Court should reverse the conclusion of law contained in Paragraph 9 of the Conclusions of Law section of the Order Granting Summary Judgment as to collateral estoppel and the granting of summary judgment in favor of the Respondents and remand this action for further proceedings.

I. The circuit court's conclusion of law that there is no genuine issue of material fact and that the Respondents were entitled to judgment as a matter of law was incorrect because the Petitioners presented a genuine issue of material fact as to whether the BAA was negligent or breached the implied terms of the settlement agreement associated with the 2006 Action.

In Paragraph 16 of the Conclusions of Law section of its Order Granting Summary Judgment, the circuit court found, "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." R. 000654. Such conclusion of law is incorrect for the reasons stated herein.

The Petitioners have established that a genuine issue of material fact exists. As explained *supra* in Section II(2), the Petitioners' claims are based upon the BAA's failure to properly reclaim its site. Such failure and associated claims are based upon the BAA's breach of duty in regards to its obligations pursuant to common law as a landowner and the conditions set forth in its NPDES permit. Further, such claim is based upon the BAA's failure to satisfy its implied obligation under the settlement agreement, namely the obligation to properly reclaim the site.

The Petitioners have provided evidence of this failure by the BAA. Such evidence comes from Chadwick Biller's and Petitioner Claude Ryan's depositions. See id. at R. 000173, 000374. It comes from the Notice of Violation issued by the DEP. Id. at R. 000468. It comes from Thrasher's acknowledgment of such violation. Id. at R. 000471. It comes from Bradley Durst's October 21, 2011 letter. Id. at R. 000106. Finally, had this matter gone to trial, it would have come from the jury view of the damages. Id. at R. 000632.

In its findings of fact, the circuit court recognized some of these issues. Specifically, it recognized the issues raised by the DEP. Id. at R. 000648 (Order Granting Summary Judgment ¶¶ 42-43). It recognized Thrasher's response and partial agreement with the notice. Id. at R. 000648 (Order Granting Summary Judgment ¶ 43). It also recognized that the BAA did not even file its Notice of Termination of its NPDES permit until September 28, 2012. Id. at R. 000648 (Order Granting Summary Judgment ¶ 44). Yet, the circuit court did not find that such facts raised a genuine issue of material fact as to the BAA's negligence and breach of implied obligations.

The circuit court's conclusion of law as to the lack of a presence of a genuine issue of material fact and its granting of summary judgment to the Respondents is incorrect. Because there is a genuine issue of material fact, the Court should reverse the conclusion of law contained in Paragraph 16 of the Conclusions of Law section of the Order Granting Summary Judgment and the

granting of summary judgment in favor of the Respondents and remand this action for further proceedings.

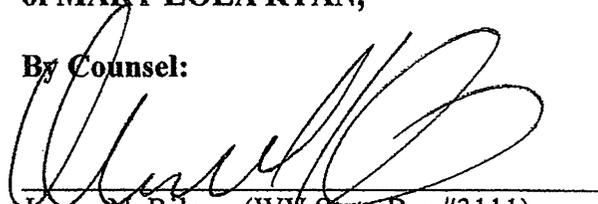
CONCLUSION

For the foregoing reasons, the Court should reverse the circuit court's Order Granting Third-Party Defendant The Thrasher Group, Inc. and Defendant Benedum Airport Authority's Motion for Summary Judgment, hold that the Respondents are not entitled to summary judgment in this action, and remand the action for further proceedings and ultimately trial in this action.

Respectfully submitted the 19th day of March, 2015.

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

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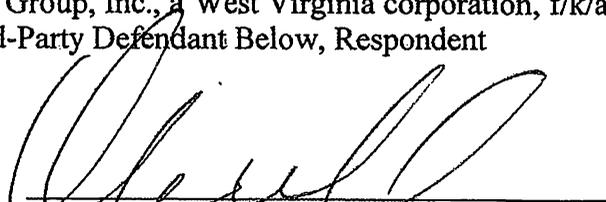
This is to certify that on the 19th day of March, 2015, the undersigned counsel served the foregoing **“BRIEF ON BEHALF OF PETITIONERS, MARY LOLA RYAN, a protected person; CLAUDE J. RYAN, III and HEATHER E. RIBEL, as co-guardians of MARY LOLA RYAN, IN SUPPORT OF THEIR PETITION FOR APPEAL”** upon counsel of record by depositing true copies thereof in the United States Mail, postage prepaid, in envelopes addressed to them as follows:

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