

No. 14-1334

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,

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

**REPLY 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 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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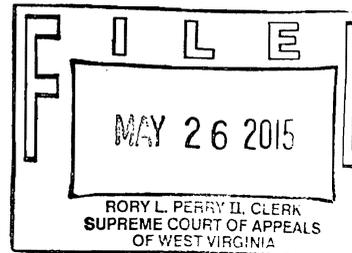


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STATEMENT OF THE CASE

The Petitioners rely upon their statement of the case as presented in their opening brief.

ARGUMENT

I. The necessary elements of collateral estoppel and res judicata are not satisfied; rendering summary judgment inappropriate.

Although the Petitioners do not agree that this Court's analysis can begin and end with this argument, the Petitioners will address the argument first, so as to render the reply more concise.¹ Obviously, the Petitioners settled the 2006 Action² and provided a release to the Benedum Airport Authority ("BAA") for damages to the residue. Despite the Respondents' desire to characterize the 2012 action, the instant civil action, as the same claim, it is without question that the claim is not the same, as the Petitioners could not have anticipated when they settled the 2006 Action in 2009 that the BAA would create additional damages by its failure to properly reclaim the site.

Chapter 54, Article 2 of the West Virginia Code governs the procedure for eminent domain proceedings. Pursuant to West Virginia Code § 54-2-14,

[b]efore entry, taking possession, appropriation, or use, the applicant shall pay into court such sum as it shall estimate to be the fair value of the property, or estate, right, or interest therein, sought to be condemned, including, where applicable, the damages, if any, to the residue beyond the benefits, if any, to such residue, by reason of the taking....

W. Va. Code § 54-2-14.

The damage to the residue compensation in the 2006 Action related to the cost of improving the water retention pond on the property. Although it was anticipated that there would be additional

¹ Further, the Petitioners have responded to each of the Respondents' positions by combining those positions into five headings to condense the reply brief.

² Reference to the "2006 Action" is reference to the civil action styled: Benedum Airport Authority v. Mary Lola Ryan, Circuit Court of Harrison County, Civil Action No. 06-C-480-3.

runoff, necessitating the improvement to the pond, it was certainly not foreseeable that the BAA would fail to reclaim the site, as required, and that such failure would cause additional damages unrelated to the pond. *See R. 000391* (C. Biller Depo. 73:1-9); *R. 000183* (C. Ryan Depo. 39:2-12). Despite the Respondents' attempt to characterize the additional increased runoff as being resolved during the 2009 settlement, the damages sought herein are more than the pond improvement. The damages sought herein have to do with the significant damage to the property as a result of the additional runoff. *See R. 000010-11*.

As this Court has noted, three elements must be satisfied in order to bar prosecution of a lawsuit based upon res judicata. *Syl. Pt. 4, Blake v. CAMC, Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997). It is the third element with which the Petitioners take issue. Specifically, in order to bar a claim based upon res judicata, 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, had it been presented in the prior action. *Id.*

As noted previously, the 2006 Action was initiated with the filing of a Petition for Condemnation by the BAA for the purposes of acquiring additional land to expand the safety area for the airport's runway. *R. 000376, 000643*. Included within the settlement of the condemnation proceeding was payment to Mary Lola Ryan for damages, if any, to the residue, beyond the benefits, by reason of the taking. *R. 000427*. As noted within the Respondents' brief, the Petitioners sought thirty thousand dollars for damages to the pond. The distinction, however missed by the Respondents, is that the thirty thousand dollars was specifically attributed to the cost of improving the pond, so as to permit the pond to safely control storm water volumes, after remediation by BAA. *R. 000168*.

The 2012 Action was not a condemnation proceeding. Rather, the Complaint contained three causes of action: negligence, trespass, and violations of state and federal regulations. The premise behind the negligence action was that the BAA's directing of surface runoff toward Mary Lola Ryan's farm without creating and implementing a reasonable drainage and erosion plan to minimize the effects of such runoff was unreasonable. *R. 000010-11*. 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.

It has been stated that the rationale behind res judicata is to preclude the parties from contesting matters that they have had a full and fair opportunity to litigate. *See Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983) (citing *Montana v. U.S.*, 440 U.S. 147 (1979)). A review of the facts in the case at hand, as well as the documented evidence, presented to the circuit court clearly establishes that the Petitioners did not have a full and fair opportunity to litigate the damage to Mary Lola Ryan's farm caused by excess runoff as a result of BAA's failure to remediate.

Although "Post Project Stormwater Issues" were addressed in Patrick Gallagher's letter dated June 13, 2008, those issues were premised upon BAA's regrading and extension of a gutter and suggesting a need to improve the pond as a result of a 45% increase in the contributing watershed. *R000168*. This action, however, is premised upon BAA's failure to complete the remediation project and its performance of the work done in a negligent manner. See *R. 000007-000013*.

In his letter dated April 9, 2014, the Petitioners' expert, Patrick Gallagher noted,

The project included excavation and filling of 440,000 cy³ of soil and rock on approximately 40 acres. The resultant project included installation of numerous drainage structures that have resulted in severe erosion to the Ryan farm. Specifically, there are 4 areas of erosion impacts that must be stabilized and are identified on exhibit A:

1. The existing drain way that traverses 900 If across the Ryan meadow that is below the area shown as #1 on the attachment,

2. The existing drain way that traverses approximately 300 If of the Ryan's property shown on the attachment as #2 that leads to the existing farm pond,
3. The area in the vicinity of #3 on the attachment is approximately 2 acres of sediment, silt fence and barren soils that needs to be repaired, and
4. The existing farm pond shown on the attachment as #5 must be dredged of the accumulated sediment that has been deposited from all of the upland erosion.

The plans that were prepared for the Airport facility by Thrasher shows that the final regarding plans included regarding (sic) and extension of the dumped rock gutter down to the existing farm pond, this was not done. As a result severe erosion is present that is nearly 5 feet deep and the subsequent sediment has filled the existing farm pond. Additionally, the area below point #1 has been significantly eroded and the subsequent sediment has filled the pastureland swale.

Each of these impacts are a direct result of the runoff from the project site being discharged directly onto the Ryan farm without any erosion control measures being considered to prevent future scouring of the drainage systems across the Ryan farm.

R. 000103-104. Significant to this Court's analysis should be that the damage to the residue contemplated in the 2006 Action was premised upon certain conditions being met by BAA. Upon the presumption of the completion of those conditions, Gallagher was able to estimate that increase to the watershed. As BAA failed to regrade and extend the dumped rock gutter to the pond, as was promised, additional unanticipated damages were sustained that could not have been contemplated, or litigated, in the 2006 Action. For this reason, this 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 application of the doctrine of *res judicata*.

For the same reason that summary judgment was inappropriate based upon the application of *res judicata*, summary judgment is also inappropriate on the application of collateral estoppel. Requiring four elements to be satisfied in order to preclude litigation based

upon the application of collateral estoppel, the instant action should not be subject to such application as at least two of the four elements are clearly not satisfied.

Collateral estoppel involves four conditions:

(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, 459 S.E.2d 114 (1995). As has been argued above, given the nature of the damages and how they arose, similar to the *res judicata* analysis, the Petitioners did not have a full and fair opportunity to litigate in the prior action, as the damages and cause of action did not arise until after the resolution of the 2006 Action and are based upon the BAA's failure to complete its promised reclamation. Thus, the fourth collateral estoppel factor is not met.

Despite their best effort to do so, the Respondents cannot establish that the issues raised in the 2006 Action are **identical** to the ones presented in the 2012 action. It is without question that water runoff was addressed in the 2006 action as damage to the residue. What was not addressed, however, was the massive water runoff created by BAA's failure to regrade the property as promised, as well as its failure to extend the gutter down to the pond. *See R. 000103-104*. Had BAA performed as it was required, and as it promised, the 2012 action would not have likely been filed. But, it did not. Instead, BAA failed to do as it represented that it would do, did what it did do in a negligent manner, and now seeks immunity from this Court for that conduct.

Because collateral estoppel does not apply, this 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.

II. The Petitioners' claims were not a secret at all.

The Petitioners' complaint contained claims for negligence, trespass and violations of state and federal statutes. *R. 000010-12*. Negligence is premised upon duty, breach, causation and damages. *Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 115, 118, 2 S.E.2d 898, 899 (1939). It is inexplicable for the Respondents to argue that they were not aware of the premise behind the Plaintiffs' claims. The claims, and the basis therefore, were laid out in the Complaint. Included within the complaint was specific reference to the 2006 Action, as well as to the resolution of that lawsuit. *R. 000008*. Moreover, the Complaint specifically pled within the negligence count:

24. As part of its construction project, Benedum Airport Authority owed a duty to Mary Lola Ryan to manage the surface runoff of water from its real property.

25. Benedum Airport Authority negligently designed a drainage plan because such drainage plan directed the surface runoff solely toward Mary Lola Ryan's farm and not toward any other direction and failed to take into consideration the massive amounts of water that would flow across Mary Lola Ryan's farm.

26. Such drainage plan failed to adequately address and manage the surface runoff and rake into consideration the fact that it purposefully and greatly increased the surface runoff that was directed toward Mary Lola Ryan's farm.

27. Such drainage plan failed to incorporate proper management practices for surface runoff, such as culverts, ditches, silt fences, and rip-rap lined drainage.

28. Benedum Airport Authority's act of diverting and channeling runoff to Mary Lola Ryan's farm without also creating and implementing a reasonable drainage and erosion plan to minimize the effects of such runoff was unreasonable.

R. 0000010.

Contrary to the Respondents' argument, the Petitioners did not raise the issue of breach of contract, as the Petitioners have not filed a breach of contract claim. Rather, the Respondents raised the issue of breach of contract by asserting it as an affirmative defense. The Petitioners merely responded to the affirmative defense. The central issue of the Petitioners' Complaint is negligence against BAA for its failure to remediate the property that they condemned, or do the remediation in a negligent manner, such that significant water runoff damages occurred and continue to this date.

As evidence in support of their claims, and how the same could not have been contemplated within the 2009 settlement, the Petitioners presented the October 21, 2011 letter of Bradley Durst, an employee of the West Virginia Conservation Agency. *R. 000106*. In that letter, Durst 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.* (emphasis added). 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. *R. 000107*. This evidence clearly supports the Petitioners' negligence claims and establishes that the claims could not have been contemplated during the 2006 Action, nor were they a secret, as the Respondents have contended.

Moreover, as the Petitioners have noted, the West Virginia Department of Environmental Protection ("DEP") conducted an inspection of the site. *R. 000467*. In its evaluation, the DEP made a number of findings and subsequently issued a Notice of Violation. *R. 000468*. The DEP found that the silt fence, sediment traps, maintenance, permanent seed and mulch, and vigor of grass were all unsatisfactory. *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.* This evidence clearly establishes the necessary support for the negligence claim. It does not suggest a breach of contract claim, but rather a breach of the duty by the BAA, a necessary element of the Petitioners' negligence claim.

In further support of this position, Petitioner Claude Ryan testified that it was the Petitioners' belief that the BAA would reclaim the property, specifically establishing grass and other vegetation. *R. 000180* (C. Ryan Depo. 25:4-7). That did not happen. The BAA never restored vegetation as part of the reclamation process: that fact cannot be disputed. Given the restored vegetation was a necessity, as noted above, the evidence is sufficient to establish that BAA acted in a negligent manner in failing to restore the vegetation. Without the vegetation, water and sediment runoff increased and traveled directly from BAA's property onto the Mary Lola Ryan farm in a method and manner that would not have occurred had the BAA performed its actions in a reasonable manner.

In deciding to grant summary judgment in favor of the Respondents, the circuit court wrongly concluded that the Petitioners did not provide any evidence upon which to establish BAA's negligence. Such conclusion was clearly wrong in light of the evidence noted above.

In support of its argument that the Petitioners are bound by the 2009 settlement agreement, the Respondents rely upon the case of *State ex rel. Queen v. Sawyers*, 148 W. Va. 130, 133 S.E.2d 257 (1963). Although *Sawyers* involved an eminent domain proceeding for a subsection of Interstate 64 and subsequent water runoff, thus, on its face appearing to be factually similar to the case at hand, the crux of *Sawyers* is not in accord with the facts herein. *Id.* at 131-32, 133 S.E.2d at 259. In *Sawyers*, the landowners were notified by means of the

eminent domain petitions that the proposed construction would be in accordance with the plans and plats which were filed in the office of the clerk of the county court, and which provided for two culverts. *Id.* at 133-34, 133 S.E.2d at 260. Moreover, the Court noted that “it is common knowledge that highway construction necessarily involves drainage problems and that surface water from highway rights of way is necessarily discharged on adjacent areas by means of gravity flow.” *Id.* at 140, 133 S.E.2d at 263. “None of this erosion and consequent washing of sediment resulted from the highway construction itself or from surface water originating on the right of way.” *Id.* at 141, 133 S.E.2d at 264. Rather, the Court determined that the damage resulted from acts done pursuant to private contracts or arrangements to which the state road commission was not a party. *Id.* As such, the Court denied the writ of mandamus.

Such is not the case herein. As the Petitioners have established, the damages herein resulted from the negligence of BAA. It was not a third party that created the substantial damages and waterflow onto the Mary Lola Ryan property. Rather, it was the failure of BAA that created the damages. Thus, liability should attach.

Seeking to distinguish this Court’s holding in *Buckhannon & N.R. Co. v. Great Scott Coal & Coke Co.*, 75 W. Va. 423, 83 S.E. 1031 (1914), the Respondents assert that *Buckhannon & N.R.* is inapplicable as it concerned what damages were appropriate for a jury in a condemnation proceeding to consider and because the Petitioners settled their claims, those damages should not be considered. The fact that the Petitioners settled their claims is of no consequence to the law on the type of damages recoverable in a condemnation proceeding. Nowhere in *Buckhannon & N.R. Co.* is it suggested that condemnation damages are only recoverable if awarded by a jury. Such an assertion is illogical.

Pursuant to the holding in *Buckhannon & N.R. Co.*, 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 the BAA 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.

The Petitioners presented evidence supporting these claims. Specifically, 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). Next, the Petitioners 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). Finally, condemnation actions only encompass 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. For this

reason, the circuit court's order granting summary judgment in favor of the Respondents should be reversed.

III. The Petitioners' Response was sufficient to defeat summary judgment.

This Court has routinely held that, "it is the policy of the law to favor the trial of cases on their merits." *See Syl. Pt. 6, Grey v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005). The Petitioners do not dispute that their response to Thrasher's Motion for Summary Judgment was untimely. The one day lapse, however, should not serve as the death knell for the Petitioners' claims.

That timeliness issue aside, the record contains sufficient evidence establishing the Petitioners' damages and a jury could have reasonably concluded that such damage was created by the Respondents' negligence.

Bradley Durst's letter 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" *R. 000107*. Moreover, Biller's testimony establishes a causation between the proposed Thrasher plan, which BAA did not carry out, and an end to the erosion. *R. 000392-393*. Petitioner Claude Ryan's testimony ties the BAA's negligence, specifically its inability to establish vegetation, to the damages in the present action. *R. 000183*. Despite being in the record, such testimony was clearly rejected by the circuit court.

The evidence presented to the circuit court was clearly sufficient to establish the existence of a genuine issue of material fact. The facts are very clear. The BAA's negligence increased the amount of the water runoff. *See R. 000106-107*. The increase in the water runoff caused additional erosion and thus additional damages.

A review of the Petitioners' response certainly establishes a genuine issue of material fact. The response provided evidence of BAA's violation of DEP regulations in October 2011. *R. 000468*. This violation establishes 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. This alone is sufficient to establish the negligence of BAA. As such, summary judgment should not have been granted.

IV. BAA violated a statutorily imposed duty.

The BAA had a statutorily imposed duty 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, to engage in reasonable construction and earthmoving activities on the project and such reasonableness encompasses the obligation to properly reclaim the site. Petitioner Claude Ryan testified "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." *R. 000183*.

It is without question that the DEP issued a notice of violation. *R. 000467-468*. It found that the silt fence, sediment traps, maintenance, permanent seed and mulch, and vigor of grass were all unsatisfactory. *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." *R. 000468*. This citation is sufficient to establish the Respondents' violations and send this case to the jury. Rather than address this

issue head on, the BAA has relied upon the application of *res judicata* and collateral estoppel to deflect its negligence.

V. An expert is not required for a plaintiff to establish negligence in a water runoff or property damage case.

Much ado is made about the Petitioners' lack of an expert witness to testify as to value. Although the Respondents do not contest well-settled law that an owner can testify to a change in the fair market value of the property as a result of the defendant's conduct, the Respondents contend that Claude Ryan, a co-guardian of Mary Lola Ryan, cannot testify as to its value. *See Evans v. Mutual Mining*, 199 W. Va. 526, 485 S.E.2d 695 (1997). Claude Ryan is not a random person foreign to the property at issue. Rather, Claude Ryan is a co-guardian for his incompetent mother, Mary Lola Ryan. As the law of this State recognizes Claude Ryan as being an appropriate person to bring a suit on his mother's behalf, as she is incapable, Claude Ryan, being knowledgeable about the property and the industry, should be permitted to testify as to the change in value of the land. A strict application otherwise would deprive Mary Lola Ryan of her recognized right to testify to the value of her property.

The circuit court's conclusion of law regarding the requirement for the Petitioners to present expert witnesses in this case is simply incorrect. 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 failure of BAA as to the site. In that letter, Durst discussed how a portion of the site is void of vegetation. *R000106*. He also opined that the site had not been engineered to account for the **additional runoff**. *Id.* (emphasis added). 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

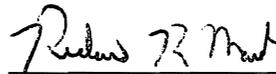
on the BAA's site. R. 000107. Durst, an employee of the West Virginia Conservation Agency, is clearly qualified to provide the testimony necessary to establish the Petitioners' negligence claim.

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.

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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CERTIFICATE OF SERVICE

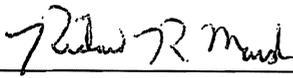
This is to certify that on the 26th day of May, 2015, the undersigned counsel served the foregoing **“REPLY BRIEF ON BEHALF OF PETITIONERS, MARY LOLA RYAN, a protected person; CLAUDE J. RYAN, III and HEATHER E. RIBEL, as co-guardians of MARY LOLA RYAN, IN SUPPORT OF APPEAL”** upon counsel of record by depositing true copies thereof in the United States Mail, postage prepaid, in envelopes addressed to them as follows:

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