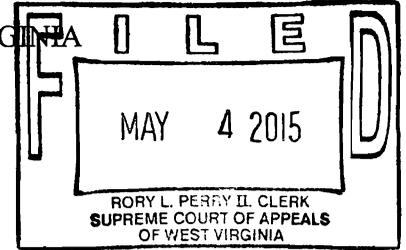


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 14-1334



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

Plaintiffs below, Petitioners,

vs.

Appeal from a final order of the  
Circuit Court of Harrison County  
(Case No. 12-C-161-3)

BENEDUM AIRPORT AUTHORITY,

Defendant/Third-Party Plaintiff below, Respondent,

and

THE THRASHER GROUP, INC.,

Third-Party Defendant below, Respondent.

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**RESPONDENTS' BRIEF**

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Frank E. Simmerman, Jr. (WVSB# 3403)  
Chad L. Taylor (WVSB# 10564)  
SIMMERMAN LAW OFFICE, PLLC  
254 East Main Street  
Clarksburg, West Virginia 26301  
Phone: (304) 623-4900  
Facsimile: (304) 623-4906  
[clt@simmermanlaw.com](mailto:clt@simmermanlaw.com)  
*Counsel for The Thrasher Group, Inc.*

Harry F. Bell, Jr. (WVSB# 297)  
Stacy A. Jacques (WVSB# 9677)  
The Bell Law Firm, PLLC  
P.O. Box 1723  
Charleston, WV 25326-1723  
Phone: (304) 345-1700  
Fax: (304) 345-1715  
[sajacques@belllaw.com](mailto:sajacques@belllaw.com)  
*Counsel for Benedum Airport Authority*

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## STATEMENT OF THE CASE

While generally accurate, Petitioners' recitation of the factual and procedural history of this matter is wholly inadequate for the Court's consideration of the Circuit Court's decision - particularly when the Circuit Court awarded Respondents summary judgment based upon the doctrines of *res judicata* and collateral estoppel which require a comparison of two actions. Accordingly, Respondents supplement Petitioners' Statement of the Case as follows:

### **A. The 2006 Action.**

On or about October 24, 2006, Respondent Benedum Airport Authority (hereafter "BAA") initiated Civil Action No. 06-C-480-3 in the Circuit Court of Harrison County by filing its Petition for Condemnation (hereafter referred to as "2006 Action"). R. 000008. The case was assigned to the Honorable James A. Matish. BAA, a public corporation, initiated the 2006 Action for purposes of acquiring by way of eminent domain a hilltop comprised of 26.79 + - acres of real property near the BAA runway which encroached upon the airport's runway safety area. BAA also sought a 3.19 acre temporary construction easement. The subject 26.79 +- acres of real property which the BAA sought to condemn/acquire was part of a larger tract of land owned by Petitioner Mary Lola Ryan. R. 000008. This larger tract of land owned by Mary Lola Ryan contained approximately 161 acres and is referred to in Petitioners' Complaint as "Mary Lola Ryan's farm." *Id.*

As part of the condemnation process, on October 24, 2006, the BAA paid into Court the sum of \$98,000.00 which was estimated to be the fair value of Mary Lola Ryan's property to be taken by way of condemnation and adjacent property to be used for a temporary construction easement, including the damages, if any, to the residue beyond the benefits, if any, to such residue by reason of the taking. R. 000643. By *Order Permitting Immediate Entry On Land To*

*Be Condemned For Public Use*, entered on October, 24, 2006, the BAA and its agents/contractors were authorized to immediately enter upon the subject 26.79 acres and adjoining 3.19 acres construction easement to begin construction. R. 000643. In early 2007, BAA moved to amend its Petition for Condemnation as it became necessary to acquire an additional 1.96 acres of Ms. Ryan's real property for purposes of completing the FAA-mandated excavation project. In or about March 2007, the Circuit Court granted BAA leave to amend its Petition for Condemnation, and BAA deposited an additional \$16,000.00 with the Clerk of the Circuit Court as reasonable compensation for the additional 1.96 acres condemned. R. 000644.

During the 2006 Action, Mary Lola Ryan was represented at all times by counsel - initially by James D. Gray, Esquire, and later by Lori A. Dawkins, Esquire, of the firm Steptoe & Johnson PLLC. R. 000644. The 2006 Action developed into protracted litigation which lasted over three (3) years.

A principle issue of contention between the BAA and Mary Lola Ryan in the 2006 Action was the amount of compensation which Ms. Ryan should receive for not only the value of the property taken by condemnation (~28.76 acres + 3.19 acre construction easement), but also for the damage to the remaining portion of her farm (approx. 132.26 acres) caused by alleged erosion and sediment issues. The remaining portion of Mary Lola Ryan's farm not taken by the BAA is formally referred to as the "residue" of the condemnation take. R. 000163.

To support her damage allegations in the 2006 Action, Mary Lola Ryan retained two expert witnesses who were disclosed by a filing on August 1, 2008. Ms. Ryan's experts were Patrick E. Gallagher, P.E., of CTL Engineering of WV, Inc., and certified real estate appraiser Larry M. McDaniel of Metro Real Estate Services, LLC. R. 000156-157. Mr. Gallagher was retained by/on behalf of Mary Lola Ryan to evaluate her property at issue to determine, among

other things, the potential for stormwater impacts to the residue areas of Mary Lola Ryan's property adjacent to the portion of property taken by way of the BAA's condemnation. R. 000157. Mr. Gallagher issued a letter to Mary Lola Ryan's counsel, Lori Dawkins, dated June 13, 2008, with the findings from his evaluation. R. 000167, 157. Page 2 of Mr. Gallagher's June 13, 2008, letter contains a section titled "Post Project Stormwater Issues". In this portion of his letter, Mr. Gallagher expressed, among others, the following opinions:

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

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

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

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

R. 000168.

Also as part of the 2006 Action, Mary Lola Ryan retained Larry M. McDaniel to calculate appropriate damages and/or compensation for the BAA's condemnation of a portion of Mary Lola Ryan's farm. R. 000157. Larry M. McDaniel completed his appraisal analysis of Ms. Ryan's property and issued his appraisal report on or about June 11, 2008. R. 000159; Mr. McDaniel's "Real Property Appraisal of Mary Lola Ryan Property" found at R. 000205. Mr. McDaniel's appraisal calculated the total "Just Compensation" to which he believed Mary Lola Ryan was entitled for (a) the value of the land actually taken by BAA, (b) the severance damages to the residue, and (c) the temporary construction easement utilized by BAA during construction. Mr. McDaniel calculated this total Just Compensation to be \$292,100.00. R. 000211.

Mr. McDaniel's appraisal report defined Severance Damage as "damage to the residue [which] may occur during a partial property taking of real estate." R. 000265, 291, 293. The "residue" of Mary Lola Ryan's farm at issue in the 2006 Action (i.e. the portion of Mary Lola Ryan's farm remaining after the BAA's condemnation take of approximately 28.76 acres), is the same real property at issue in the instant civil action. R. 000157. In arriving at the amount of Severance Damages to which he believed Mary Lola Ryan was entitled, Mr. McDaniel expressly relied upon Pat Gallagher's findings expressed in his June 13, 2008, letter, and attached Mr. Gallagher's opinion letter to the appraisal report. R. 000293, 294. According to Mr. McDaniel, the \$292,100.00 Just Compensation was comprised in part by \$161,100.00 for Severance Damages - of which \$92,000.00 was related to watershed concerns identified by Pat Gallagher's June 13, 2008, letter. *Id.* Mr. McDaniel's \$92,000.00 watershed damages figure may be broken down to \$62,000.00 for the diminution in value to Mary Lola Ryan's residual property, and \$30,000.00 for the cost of improving/remediating Mary Lola Ryan's farm pond as identified in Pat Gallagher's June 13, 2008, letter. Mr. McDaniel based his diminution in value of the residue property upon the fact that the BAA's project increased the watershed onto Mary Lola Ryan's residue property by 10.57 acres, thus, "dedicating land areas with viable utility for watershed purposes." R. 000293.

On June 23, 2008, a hearing was held before the condemnation commissioners appointed for the 2006 Action. These commissioners issued a report finding that \$140,000.00 constituted just compensation for the property taken and any damage to the residue. During the discovery phase of the 2006 Action, Thrasher engineer Chad Biller was deposed by Mary Lola Ryan's counsel (Lori Dawkins) on September 30, 2008. Part of the examination questioned Mr. Biller specifically about Pat Gallagher's watershed opinions outlined in Mr. Gallagher's June 13, 2008,

letter, and Plaintiffs' erosion claims. Chad Biller's depo. transcript pages 67-81, found at R. 000390-393.

In March of 2009, a site visit to Mary Lola Ryan's property was conducted and attended by Mary Lola Ryan's co-guardian Claude J. Ryan, III, representatives of the BAA, and perhaps others, whereat Mr. Ryan expressed concerns about perceived damage to his mother's property caused by the flow of water from the property taken by the BAA through condemnation. R. 000161. On or about September 25, 2009, in the 2006 Action, Mary Lola Ryan filed a Statement of Contentions. In this filing, Ms. Ryan contended that she

is entitled to receive the cost of improving a water retention pond located on her property as the expansion project increased the size of the watershed and the amount of water runoff the pond was required to facilitate. These changes precipitated a need to increase the spillway systems of the pond in order to safely control the storm water volume. Ms. Ryan contends that she should be awarded \$30,000.00 as compensation for improving the pond.

R. 000396, 000161. On October 1, 2009, Mary Lola Ryan disclosed 33 photos as anticipated trial exhibits in further support of her erosion damage claims in the 2006 Action. R. 000156, 000315-347. On or about October 21, 2009, in the 2006 Action, Mary Lola Ryan filed a *Response to [BAA's] Objections to First Supplemental Disclosure of Exhibits*, in which she asserted that

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

*Emphasis added*, R. 000401.

At some point during the pendency of the 2006 Action, Petitioners Claude J. Ryan, III, and Heather E. Ribel provided the BAA and its contractors and representatives with a handwritten authorization to enter Mary Lola Ryan's property to inspect multiple concerns they had

regarding water runoff from the property taken by the BAA's condemnation including: "1. wet spot in meadow", "2. Rip rap behind the pond", "3. Silt in the pond", "4. Close rip rap ditch to the right of the pond", "5. Red Substance", and "6. Ruts near Silt Fence". R. 000406.

Per Order of the Circuit Court, Mary Lola Ryan and the BAA submitted the 2006 Action to mediation on or about November 16, 2009. R. 000418. Mediation was unsuccessful and the parties engaged in settlement discussions at the pre-trial conference in the 2006 Action on November 17, 2009. R. 000162. On or about November 18, 2009, the parties reached a settlement whereby the BAA accepted Mary Lola Ryan's demand for \$250,000.00 "as just compensation for the property or the estates, rights, or interests therein, condemned in this proceeding, as described in the Amended Petition for Condemnation, **including the damages, if any, to the residue** beyond the benefits, if any, to such residue, by reason of the taking."

*Emphasis added*, R. 000421. The settlement was reflected by letter dated November 18, 2009, from BAA counsel Norm Farley to Mary Lola Ryan's counsel Lori Dawkins. *Id.*, and 000162.

The parties' settlement of the 2006 Action was further memorialized by an Agreed Order of Dismissal entered by the Circuit Court on December 11, 2009. Order found at R. 000424.

The Agreed Order of Dismissal states that

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

*Emphasis added, Id.* Petitioners admit that the term "residue" as used in the Agreed Order of Dismissal of the 2006 Action refers to the approximately 132.26 acres of the Mary Lola Ryan farm remaining after the BAA's condemnation take. R. 000163. The December 11, 2009, Agreed Order of Dismissal dismissed the 2006 Action, with prejudice. R. 000424.

Since settling the 2006 Action for \$250,000.00, the only remediation work performed by

or on behalf of Petitioners was the installation of two culverts in May 2011 and spring of 2012. R. 000408. The cost of these two culverts, and all labor utilized to install the same, totaled less than \$488.56. *Id.*, and p. 51 of Claude Ryan depo - R. 000186. Petitioners performed no other remediation efforts post-settlement (R. 000186), even though Petitioner Claude Ryan “wholeheartedly” agrees that a portion of the settlement proceeds from the 2006 Action was for remediation of the erosion issues. *Id.* at depo. page 52. No outside contractors have been hired to remediate Petitioners’ stormwater concerns. R. 000409.

**B. The Instant Action.**

Petitioners initiated the instant civil action by Complaint filed on or about April 4, 2012, against the BAA. R. 000007. Petitioners’ Complaint:

- references the 2006 Action (¶ 7);
- alleges that the earthwork and vegetation removal performed on the property taken from Ms. Ryan by the 2006 Action changed the drainage pattern of the take area, diverted the majority of the water runoff onto Mary Lola Ryan’s farm, and directed an additional 10 acres of water runoff onto Ms. Ryan’s property (¶ 14);
- alleges that the water runoff has eroded Mary Lola Ryan’s property (¶ 15);
- alleges that such water drainage had continued to the present time (¶ 16);
- alleges that such water runoff has created deep ditches on Mary Lola Ryan’s farm (¶ 17);
- alleges that trees have been deprived of topsoil and had their roots exposed and uncovered (¶ 18); and,
- alleges that topsoil, silt, vegetation, and other debris have collected in a pond on Mary Lola Ryan’s farm (¶ 19).

Further, Petitioners admittedly relied upon Mr. Gallagher’s June 2008 letter - drafted for purposes of the 2006 Action - in drafting the Complaint in this action. More specifically, Petitioners admit that the allegations of paragraph no. 14 of their Complaint in this action are

based, at least in part, on Pat Gallagher's opinions expressed in his June 13, 2008, letter. R. 000158. Also, paragraph no. 19 of Petitioners' Complaint in the instant action referenced alleged damage to a pond situate on Mary Lola Ryan's farm, which Petitioners admit is the same pond referenced in Pat Gallagher's June 1, 2008, letter. *Id.*

In the current case, Petitioners once again retained and disclosed Pat Gallagher as an expert witness. R. 000363. For his opinions in this matter, Mr. Gallagher issued a letter dated April 9, 2014 (found at R. 000367). Mr. Gallagher's 2014 opinion letter identifies four areas of concern which are labeled on an attached aerial image of the site similar to the areas identified by Claude Ryan in his deposition. R. 000369. Mr. Gallagher estimates that a total of \$31,000.00 is required to remediate these four erosion areas. *Id.*

On May 27, 2014, Respondent The Thrasher Group, Inc. (hereafter simply "Thrasher") deposed Petitioner Claude J. Ryan, III. R. 000173. This was the only deposition taken in this action. During direct examination, Mr. Ryan was asked to identify all of the property issues for which he/his mother is seeking damages in this case. Depo. p. 10, R. 000176. To aid his testimony, an aerial map was utilized on which Mr. Ryan identified four general areas of concern. *Id.*, and R. 000203. Mr. Ryan agreed that these four general areas were the only areas for which Petitioners are seeking damages in this case. R. 000178. Mr. Ryan agreed that Areas 1-3 were known to Petitioners in 2008, and their concerns for these areas were raised in the 2006 Action. R. 000179.<sup>1</sup> Mr. Ryan acknowledged that Pat Gallagher was retained as an expert witness on behalf of Mary Lola Ryan in the 2006 Action. R. 000180. Mr. Ryan further

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<sup>1</sup>Mr. Ryan also raised, for the first time, a new area of concern (Area 4) at his deposition, but that issue has been waived insofar as Petitioners failed to even mention it in their Response to Thrasher's Motion for Summary Judgment, and submitted no evidence, witnesses nor exhibits to support it during the pendency of this action.

acknowledged that Pat Gallagher examined three general issues, one of which concerned post-project stormwater issues on Mary Lola Ryan's property - which are the same issues identified as Areas 1-3 on Mr. Ryan's deposition exhibit 1. *Id.*, and R. 000203.

Mr. Ryan conceded that he has no evidence that the Airport violated any specific statute or regulation as alleged by Count III of Petitioners' Complaint. R. 000179, Claude Ryan depo. p. 23. Mr. Ryan acknowledged that in the 2006 Action, his mother sought \$292,100.00 in total compensation (as calculated by appraiser Larry McDaniel), and she ultimately settled the case for \$250,000.00. R. 000182. Mr. Ryan testified that he and his sisters authorized that settlement, and they were in no way forced into it. *Id.* Mr. Ryan identified the images depicted in the 33 photographs disclosed as trial exhibits by Petitioners in the 2006 Action on October 1, 2009, as all corresponding with areas of concern 1-3 identified in his deposition. R. 000183-185. Mr. Ryan acknowledged that Petitioners sought damages for the watershed issues depicted in the these 33 trial exhibit photographs in the 2006 Action. R. 000185.

On or about August 29, 2014, Thrasher filed a Motion for Summary Judgment and supporting Memorandum of Law. R. 000109. Specifically, Thrasher sought an award of summary judgment with respect to all of Petitioners' claims in favor of Defendant BAA and Third-Party Defendant Thrasher, based upon the doctrines of *res judicata* and/or collateral estoppel. *Id.* On September 2, 2014, a hearing date for Thrasher's Motion for Summary Judgment was scheduled with the Court, approved by the parties, and noticed for October 14, 2014. R. 000649. On or about September 24, 2014, BAA filed notice of its Joinder in Third-Party Defendant The Thrasher Group, Inc.'s Motion for Summary Judgment, "adopt[ing] and incorporat[ing] the arguments set forth therein to the extent they are not expressly limited in application to Third-Party Defendant The Thrasher Group, Inc." R. 000446.

On October 10, 2014, Petitioners filed their Response to Thrasher's Motion for Summary Judgment and to BAA's Joinder in Thrasher's Motion (hereafter "Plaintiffs' Response"). R. 000450. Petitioners' Response was served upon counsel for BAA and Thrasher by facsimile after 3:00 pm on Friday, October 10, 2014. The Court did not receive a copy of Petitioners' Response prior to hearing of Thrasher's Motion for Summary Judgment on October 14, 2014. Monday, October 13, 2014, was Columbus Day, a legal holiday specifically identified by Rule 6 of the West Virginia Rules of Civil Procedure. R. 000650. On Tuesday, October 14, 2014, the Circuit Court heard argument regarding Thrasher's Motion for Summary Judgment.

On November 21, 2014, the Circuit Court granted Respondents summary judgment. R. 000642. From this Order Petitioners appeal.

#### SUMMARY OF ARGUMENT

Though masked by Petitioners' Assignment of Error, and relegated to only four pages at the end of Petitioners' Brief, the Circuit Court granted Respondents summary judgment based upon the doctrines of *res judicata* and collateral estoppel. There are no genuine issues of material fact concerning the Circuit Court's application of the doctrines of *res judicata* and collateral estoppel. In no way did Petitioners' attempt to distinguish their damage claims asserted in this action from the stormwater/erosion claims asserted in the 2006 Action until after the filing of Thrasher's Motion for Summary Judgment.

Most basically, Petitioners' response (written and oral) to Thrasher's Motion for Summary Judgment suffered from the fatal flaw of presenting the Court insufficient evidence to prevent *res judicata* and/or collateral estoppel from dismissing the action. In opposing Thrasher's Motion for Summary Judgment, Petitioners' submitted no affidavits, cited no deposition testimony, alleged that the BAA breached state and federal law - but cited no such

law(s), and attempted to create a completely new cause of action never before mentioned in the 2 ½ years of this litigation.

Just as the doctrines of *res judicata* and collateral estoppel preclude a party from re-litigating issue previously decided, Petitioners should not receive the benefit of a “re-do” in responding to the motion for summary judgment granted below, particularly when this Court “will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion.” *Powderidge Unit Owners Ass’n v. Highland Props.*, 196 W.Va. 692, 700, 474 S.E.2d 872 (1996). According, the Circuit Court’s Order granting Respondents summary judgment, and dismissing this action with prejudice, should be affirmed.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Respondents submit that oral argument is unnecessary because the dispositive issues have been authoritatively decided by this Court, and the facts and legal arguments are adequately presented in the briefs and record on appeal. Accordingly, Respondents respectfully submit that the decisional process would not be significantly aided by oral argument, and this case is appropriate for memorandum decision.

#### **STANDARD OF REVIEW**

This Court reviews “a circuit court’s grant of summary judgment *de novo*. . . and, therefore, [applies] the same standard as a circuit court, reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party.” *Powderidge Unit Owners Ass’n v. Highland Props.*, 196 W.Va. 692, 698, 474 S.E.2d 872 (1996) (internal citations omitted). Although this Court’s review of a summary judgment order is *de novo*, “this Court. . . will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion.” *Id.* at 700. Moreover, “Rule 56 does not impose upon a circuit court a

duty to sift through the record in search of evidence to support a party's opposition to summary judgment. Nor is it [this Court's] duty to do so on appeal." *Id.*

## ARGUMENT

**I. The Circuit Court committed no error in granting Respondents summary judgment by finding that the necessary elements of *res judicata* and collateral estoppel were satisfied (addressing Petitioners' argument paragraphs G. and H.).**

Respondent Thrasher based its Motion for Summary Judgment on *res judicata* and collateral estoppel, and the Circuit Court's finding that the elements of one or both of these doctrines are satisfied is determinative of this appeal, without the Court having to address the other seven argument paragraphs in Petitioners' Brief. Accordingly, Respondents address these issues first and respectfully submit that this Court can begin, and end, its analysis of this appeal by considering the doctrines of *res judicata* and collateral estoppel, and should then affirm the ruling below.

The doctrines of *res judicata* (a.k.a. claim preclusion) and collateral estoppel (a.k.a. issue preclusion) are closely related. *State v. Miller*, 194 W.Va. 3, 9, 459 S.E.2d 114 (1995). With respect to *res judicata*, the this Court has held that

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

*Emphasis added*, Syl. Pt. 4, *Blake v. CAMC, Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997). This Court has observed that the rationale behind *res judicata* includes

[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation

attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

*Conley v. Spillers*, 171 W.Va. 584, 588, 301 S.E.2d 216 (1983), quoting *Montana v. U.S.*, 440 U.S. 147, 153-54 (1979).

These same policy considerations also support the related doctrine of collateral estoppel. *Id.* “Collateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit.” *Id.* Collateral estoppel will bar a claim if four conditions are met:

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

*Emphasis added*, Syl. Pt. 1, *Miller*, 194 W.Va. 3 (1995). Collateral estoppel “serves to estop the relitigation by parties and their privies of any right, fact or legal matter which is put in issue and had been once determined by a valid and final judgment of a court of competent jurisdiction.”

*Id.* quoting *State v. Wilson*, 180 Conn. 481, 485 (1980).

As recognized by the Circuit Court (R. 000653), the undisputed facts demonstrated that Petitioners’ claims are barred by both the doctrine of *res judicata* and collateral estoppel. On appeal, Petitioners do not dispute that there was a final adjudication of the 2006 Action, or that both the 2006 Action and the instant case involve the same parties. Rather, with respect to *res judicata* and collateral estoppel, Petitioners challenge the Circuit Court’s finding that both cases involve the same claims/issues, and finding that Petitioners had a full and fair opportunity to litigate their claims in the 2006 Action. The evidence presented to the Circuit Court, however,

does not support Petitioners' assertions.

**A. Petitioners' claims asserted and pled in this action are the same as those they asserted in the 2006 Action.**

Though the 2006 Action was a condemnation suit brought by the BAA, the litigation involved the same issues which Petitioners asserted in the instant action: the amount of compensation to which Ms. Ryan is entitled for the alleged erosion issues experienced on her remaining (i.e. residue) property.

Most basically, Petitioners' claims in this action can be summed up as stated in the closing paragraph of each of Petitioners' three counts - Petitioners have suffered "extensive damages from erosion and sediment, including, but not limited to, the death of trees, the loss of use of a farm pond, and the creation of trenches throughout the farm." R. 00011, 12. As outlined in the Statement of the Case section above, these are precisely the damages Mary Lola Ryan alleged in the 2006 Action, precisely the damages Mary Lola Ryan supported with expert witnesses and photographs in the 2006 action, and precisely the damages Mary Lola Ryan compromised, settled, and for which she received compensation - for once and for all - in the 2006 Action.

With respect to the *res judicata* element that both actions involve the same causes of action, or causes of action which could have been resolved had they been asserted in the prior case, Petitioners' erosion damage claims asserted in the 2006 Action were akin to counterclaims. Though not formally plead as such, Petitioners' *Statement of Contentions* filed in the 2006 Action (R. 000396) evidences that in addition to a claim for what she believed was "just compensation" for the property actually taken by the BAA, she asserted claims of "intentional trespass" against the BAA with respect to coal and in-ground aggregates, as well as a damage

claim for the allegedly increased water runoff placed upon her farm as a result of the BAA's excavation project. *Id.* This Court has held that

[a]n adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the *status* of the suit was such that the parties might have had the matter disposed of on its merits.

*Emphasis added*, Syl. Pt. 1, *Conley*, 171 W.Va. 584 (1983); Syl. Pt. 3 of *Slider v. State Farm Mut. Auto. Ins. Co.*, 210 W.Va. 476, 557 S.E.2d 883 (2001). Thus, “*res judicata* may operate to bar a subsequent proceeding even if the precise cause of action involved was not actually litigated in the former proceeding so long as the claim could have been raised and determined.” *Blake*, 201 W.Va. at 477 (1997). Insofar as Petitioners' ‘counterclaims’ for erosion damages were raised and settled in the 2006 Action, the Circuit Court was correct in granting Respondents summary judgment.

With respect to the collateral estoppel doctrine element that the issue previously decided be identical to the one presented in the current action, the picture is even more clear. The 2006 Action was litigated over the course of three years before entry of the *Agreed Dismissal Order* on December 11, 2009. During that time, the FAA-mandated excavation project on the condemned hilltop was substantially completed and the erosion issues of which Petitioners complain in this action were known to them and any subsequent damage could have been reasonably anticipated. Petitioners' actual knowledge of these issues is clearly evidenced by expert reports and pleadings filed in the 2006 Action and deposition testimony of Petitioner Claude Ryan in the instant matter. Perhaps Petitioners' appreciation for these same erosion issues in 2009 is best demonstrated by the 33 photographs they disclosed as supplemental trial

exhibits in the 2006 Action on October 1, 2009. R. 000315-347. As substantiated by the deposition testimony of Claude Ryan, these photographs (taken by Mr. Ryan and/or his sister) unequivocally depict the erosion for which Petitioners sought compensation in the 2006 Action, and similarly for which Petitioners seek compensation in the instant case. Claude Ryan depo. pages 40-47, found at R. 000183-185. Notably, as mentioned above, Judge Matish handled the 2006 Action, as well as the instant action. Thus, the Circuit Court was intimately familiar with the issues and claims asserted in the 2006 Action, and the current litigation, in finding that these two actions were sufficiently similar to satisfy the elements of *res judicata* and collateral estoppel.

**(1) Petitioners attempt to assert a new, un-pled claim merely to prevent summary judgment failed below, and should similarly fail on appeal** (*also addressing Petitioners' argument paragraph B.1.*).

Petitioners concede that in settling the 2006 Action, they released the BAA from expected damages to the residue (Petitioners' Brief p. 30), but now allege that they filed this case in 2012 based upon (a) the BAA's alleged negligence committed after the November 2009 settlement of the 2006 Action and (b) the BAA's breach of implied terms of that settlement agreement. The principal problem with Petitioners' position, however, is that such claims were never pled, asserted, or even mentioned in this action prior to the close of discovery and filing of Thrasher's Motion for Summary Judgment. Most basically, such claims were the best kept secret in this litigation.

In their October 10, 2014, Response to Thrasher's Motion for Summary Judgment, and only in an effort to resist an appropriate award of summary judgment (by attempting to distinguish the claims asserted in this action from those previously asserted by Petitioners in the 2006 Action), Petitioners *for the first time* raised the "claim" that the BAA breached *implied*

terms of the settlement agreement entered with Petitioners in November 2009. Petitioners continue to rely upon this un-asserted claim by making it the focus of their Assignment of Error on appeal (i.e. the Circuit Court committed reversible error “because a genuine issue of material fact exists as to whether the [BAA] complied with the agreed order of dismissal entered in [the 2006 Action]” Petitioners’ Brief, p. 1). Petitioners’ eleventh-hour attempt to cobble together an entirely new claim in order to defeat Thrasher’s Motion for Summary Judgment failed before the Circuit Court, and should also fail on appeal.

Though this action had been pending for over 2 ½ years, Petitioners mentioned this new claim for the first time twenty-one (21) days after the close of discovery. Such a claim is not found in Petitioners’ Complaint filed April 4, 2012 (R. 000007), nor in Petitioners’ pre-trial memo filed October 18, 2012 (R. 000025), nor in Petitioners’ proposed jury instructions filed September 6, 2013<sup>2</sup>, nor in Petitioners’ proposed verdict form filed September 6, 2013, nor in Petitioners’ pre-trial memo filed December 16, 2013 (R. 000084). Quite the contrary, Petitioners’ initial proposed jury instruction number 1 (filed Sept. 6, 2013), titled “Theory of the Case” clearly represented that “[t]he Plaintiffs have only asserted that Benedum Airport Authority has been negligent and trespassed on the Plaintiffs’ property.” *Emphasis added*, R. 000479-480.

Moreover, Petitioners made no effort to seek leave from the Court to assert this new claim that the BAA breached the settlement agreement, whether pursuant to Rule of Civil Procedure 15 or otherwise. If they had, any such effort should have been denied as this entirely

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<sup>2</sup> This action was on the eve of trial in 2013 when on August 2, 2013, the Circuit Court granted BAA leave to name Thrasher as a Third-Party Defendant. Subsequently, a new scheduling order was entered with attendant litigation deadlines. Thus, Petitioners prosecuted this case through not one, but two full civil action timelines without taking a single deposition, nor ever asserting a claim that the BAA breached the settlement agreement for the 2006 Action.

new cause of action had been sprung on the defendants on the eve of trial solely in a futile effort to preserve Petitioners' case. This Court has held that while "leave [to amend] shall be freely given when justice so requires" (W.Va. R.Civ. Pro. 15(a)),

[t]he liberality allowed in the amendment of pleadings to Rule 15(a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in asserting claims or to neglect his or her cause for a long period of time. Lack of diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his or her neglect and delay.

*State ex rel. Packard v. Perry*, 221 W.Va. 526, 562, 655 S.E.2d 548 (2007)(finding no abuse of discretion in Circuit Court's denial of plaintiff's motion for leave to amend Complaint two years and nine months later with no valid reason), see also *State ex rel. Vedder v. Zakaib*, 217 W.Va. 528, 618 S.E.2d 537 (2005)(finding no abuse of discretion in Circuit Court's denial of leave to amend a complaint to a plaintiff who for no valid reason waited at least ten months after becoming aware of the existence of an additional cause of action before making her motion).

In the instant case, Petitioners had actual knowledge of the subject settlement with BAA at the time it was entered into (November 2009), and actual knowledge of the Circuit Court's December 11, 2009, Agreed Order of Dismissal which memorialized the terms of Petitioners' agreement with the BAA and dismissed, with prejudice, the 2006 Action. Nevertheless, Petitioners' dilatorily and unreasonably failed to raise any claim regarding the settlement agreement with BAA until the filing of Thrasher's Motion for Summary Judgment. Perhaps most telling, Petitioners' counsel admitted as much during the October 14, 2014, hearing of Thrasher's Motion for Summary Judgment, when the Circuit Court asked:

THE COURT: So where did this theory of breach of the settlement agreement come up – when did it come up?

[PETITIONERS' COUNSEL]: Your Honor, it came up after Thrasher noticed its

position in this motion for summary judgment.

R. 000492. Petitioners' counsel reiterated this point (that Petitioners first tried to assert their breach of settlement agreement claim against the BAA *after* the filing of Thrasher's Motion for Summary Judgment) at the final pretrial conference. R. 000621. Further, Thrasher put Petitioners on notice well in advance of the filing of its Motion for Summary Judgment of its position that Petitioners' claims were barred as a result of the settlement of the 2006 Action. Specifically, on December 24, 2013, Thrasher filed its *First Amended Answer to Third-Party Complaint*, which modified Thrasher's Eleventh Affirmative Defense to state:

Plaintiffs' claims, and thus BAA's claims against Thrasher, are barred by accord and satisfaction, estoppel, and/or waiver insofar as Plaintiff Mary Lola Ryan previously compromised and settled a condemnation action with the BAA concerning the subject real property, as evidenced by Agreed Order of Dismissal entered December 11, 2009, in the Circuit Court of Harrison County. Such settlement included Ms. Ryan's receipt of payment from BAA for damage to the residue of the property taken by the condemnation - such residue being, upon Thrasher's information and belief, the same real property for which Plaintiffs' claim damages in this action.

R. 000092.

Courts have recognized that "[i]t is well settled that a defendant cannot be found liable under a theory that was not specifically pled." *Bloom v. Dora-Duque*, 743 So. 2d 1202 (Fla. 3d DCA 1999), citing *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris v. Bowmar Instrument Corp.*, 537 So. 2d 561 (Fla 1988). This Court has held similarly, recognizing that "[i]t is a well-settled rule of pleading that a judgment or decree can only be entered on the case as made by the pleadings; and evidence of matter not noticed in the pleadings will be of no avail, though it might show a right to a further judgment or decree." *Bringardner v. Rollins*, 102 W.Va. 584, 586, 135 S.E. 665 (1926). More recently, this Court held that it

takes the pleadings and record as it finds them and the adversarial process make

it incumbent on the parties to plead the causes of action and present the requisite evidence necessary to maintain the viability of their case. Courts cannot concoct or resurrect arguments neither made nor advanced by the parties.

Syl. pt. 13, *W.Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 766 S.E.2d 751 (2014).

Therefore, Petitioners' claim on appeal that the instant action is distinguishable from the 2006 Action must fail, as it did before the Circuit Court, because *no* such attempt to distinguish the two cases was made in the pleadings by Petitioners prior to the filing of Thrasher's Motion for Summary Judgment.

**(2) Petitioners are bound by the settlement agreement reached in the 2006 Action.**

What is evident from the record is that Petitioners settled their claims for the same erosion damages plead in this case in 2009, receiving \$250,000 or 86% of their own expert appraiser's \$292,000 "just compensation" figure. Petitioners openly admit that a portion of the \$250,000 settlement proceeds were based upon Petitioners' cost-to-remediate claims (i.e. Pat Gallagher's \$30k remediation estimate). R. 000186, Claude Ryan depo. p. 52. Since receiving the settlement proceeds, however, save for installation of a couple of culverts costing less than \$486.00, Petitioners made no effort to utilize the settlement monies to actually remediate anything. Now, five (5) years later, Petitioners are attempting to litigate the same damage claims they asserted in 2009. This is exactly the kind of expense and vexation which the *res judicata* doctrine is intended to prevent. *See e.g. State ex rel. Connellsville By-Product Coal Co. v. Continental Coal Co.*, 117 W.Va. 447, 449, 186 S.E. 119 (1936)(*res judicata* doctrine intended to prevent a person from being "twice vexed for one and the same cause").

The 2006 Action was concluded by way of Agreed Order of Dismissal entered by this Court on December 11, 2009. R. 000424. As the opening paragraph to this Agreed Order of

Dismissal states, it was based upon the joint announcement of Petitioner (Benedum Airport) and Respondent (Mary Lola Ryan) “that **all matters and differences between the parties in this case have been adjusted, compromised, and settled.**” *Emphasis added, Id.* The only potential future issue which the Agreed Dismissal Order excepted from the full and final resolution of all claims regarded a very specific type of environmental pollution, described as follows:

Counsel for the parties further reported to the Court, as part of the settlement and compromise of this case, the Petitioner has agreed that, in the event of any environmental pollution or discharge of any hazardous substances, as defined in the applicable Rules and Regulations of the West Virginia Department of Environmental Protection, originating in or from the real estate owned by the Petitioner, Benedum Airport Authority, in, upon, or under the real estate owned by the Respondent, Mary Lola Ryan, which environmental pollution or discharge of hazardous substances is a violation of said Rules and Regulations of the West Virginia Department of Environmental Protection, such environmental pollution or discharge of hazardous substances is the responsibility of the Petitioner, Benedum Airport Authority, and will be remediated by the Petitioner, Benedum Airport Authority, as required by the Rules and Regulations of the West Virginia Department of Environmental Protection.

R. 000426. This lone exception to the full and complete release of liability for claims asserted in the 2006 Action is not at issue in the current action, however. More specifically, Petitioners admitted that they are not asserting a claim for damages from alleged environmental pollution or discharge of any hazardous substances, as defined in the applicable Rules and Regulations of the W.Va. DEP, and further admit that they have no evidence to support such an allegation. R. 000163, 164.

Petitioners are thus bound by the bargain they struck in the 2006 Action. A similar situation came before this Court in 1963. The case of *State ex rel. Queen v. Sawyers*, 148 W.Va. 130, 133 S.E.2d 257 (1963), involved two landowners who had a portion of their property acquired by the state road commission through eminent domain proceedings for the construction

of Interstate 64. *Id.* at 131. In August 1960, the state road commission filed its petitions to condemn the subject property which referenced the highway construction plats and plans and disclosed the locations of two proposed culverts to carry surface drainage water to the residue property of one landowner named Queen. *Id.* at 133. Thereafter, commissioners were appointed to go upon the Queen premises and ascertain just compensation for the land taken, “as well as for damages to the residue of the said real estate beyond all benefits which will be derived in respect to such residue from the work to be constructed.” *Id.* at 134. Both Queen and the state road commission were represented by counsel in the proceeding. *Id.* Thereafter, Queen and the state road commission compromised and settled all claims, as embodied in an order entered by the circuit court in the condemnation case on July 27, 1961. *Id.* Such circuit court order stated

that the parties hereto had agreed upon the settlement for the matters in difference as set forth in the Petition heretofore filed and that the Petitioners and the Defendants have agreed upon a compromise settlement whereby the Petitioners agree to pay for the land, easements and rights of access as described in said Petition the sum of FOUR THOUSAND FIVE HUNDRED (\$4,500.00) DOLLARS. . . and that the Defendants have agreed to accept as full compensation for the land proposed to be taken, the easements and rights of access thereto, as described in said Petition. . .

*Id.* at 135. The order made no “exception or reservation concerning the embracing and inclusive nature of the compromise.” *Id.*

Subsequently, landowner Queen filed a mandamus proceeding seeking the Circuit Court of Cabell County to compel the State Road Commissioner to institute a new eminent domain proceeding to ascertain just compensation for damage to his residue property he alleged resulted from the construction of the highway. *Id.* at 131. Specifically, Queen claimed that in building I-64, the state road commission gathered surface water in ditches and cast such water and sediment, via the two culverts, onto his land causing erosion. *Id.* This Court noted that:

“[a] judgment by consent is binding and conclusive and operates as res judicata and as an estoppel to the same extent as judgments after contest”;

“[a]n order dismissing a case agreed is a bar to another suit on the same cause of action”;

“[a] valid agreement of compromise and settlement is a merger and bar of all preexisting claims”; and ultimately held that:

“the parties compromised and settled all matters and issues which were properly embraced by and litigable in the two proceedings in eminent domain which were pending in the circuit court when the compromise settlements were made.”

*Id.* at 136, internal citations omitted.

In their appellate brief, Petitioners, *for the first time*, cite this Court’s decision in *Buckhannon & N.R. Co. v. Great Scott Coal & Coke Co.*, 75 W.Va. 423, 83 S.E. 1031 (1914), for the proposition that the 2006 Action was not the proper forum in which to collect damages for the BAA’s alleged negligence. The *Buckhannon* decision is not applicable to the instant matter, however, for several reasons.

First, the *Buckhannon* case involved a condemnation case which was tried by a jury. *Id.* at 429. The fourth assignment of error raised by the petitioner railroad company concerned defendant coal company’s jury instruction 14, and more particularly the extent of damages which the jury could properly consider in rendering judgment. Within this context, this Court issued the syllabus point 6 cited by Petitioners at the top of page 18 of the Brief (concerning damages recoverable in a condemnation action include those contemplated damages to the residue, but not those damages caused by trespass or negligence).

As noted above, the *Buckhannon* case concerned what damages were appropriate for a jury in a condemnation suit to consider. In the 2006 Action, however, Petitioners did not try their case to a jury, but *settled* their claims. The point being, regardless of what damages were

appropriate for the jury to consider, Petitioners were free to craft their settlement with the BAA however they saw fit, including whatever claims the parties wished to include. Petitioners settled all such claims in November 2009 and the same were dismissed, with prejudice, by the Agreed Order of Dismissal entered by the Circuit Court in December 2009. Petitioner Mary Lola Ryan was the beneficiary to the Agreed Order of Dismissal to the tune of \$250,000.00. Accordingly, she cannot now challenge its authority or the comprehensive release of all claims for damages concerning her residue property. *Mr. Klean Car Wash v. Ritchie*, 161 W.Va. 615, 623, 244 S.E.2d 553 (1978)(“We have consistently held as a general rule that a litigant who enforces or otherwise accepts the benefit of a judgment, order or decree, cannot afterward have it reviewed for error or deny the authority which granted it.”).

Because Petitioners settled their damage claims in the 2006 Action, the instant circumstance is much more akin to the scenario to *State ex rel. Queen v. Sawyers* (outlined above), than *Buckhannon*. Therefore, this Court should hold Petitioners to the bargain they struck in November 2009, and affirm the Circuit Court’s grant of summary judgment.

Second, the damages claimed by Petitioners in the instant action could reasonably have been anticipated. As evidenced by Petitioners’ pleadings in the 2006 Action referenced herein, as well as the 33 photos of erosion/sediment issues which the Petitioners designated as trial exhibits in the 2006 Action, it is clear that they sought damages for the BAA’s alleged negligence in constructing the FAA-mandated project on the property taken from Mary Lola Ryan. Most basically, the damages of which Petitioners now complain are simply the result of the logical, natural, and reasonably anticipated progression of erosion if left uncorrected. In settling the 2006 Action, Petitioners were paid tens of thousands of dollars to remediate the erosion and sediment issues on Mary Lola Ryan’s property. Despite receiving those proceeds,

and having a duty to mitigate their damages (*Oresta v. Romano Bros., Inc.*, 137 W.Va. 633, 650, 73 S.E.2d 622 (1952)), Petitioners performed no such remediation (save for the installation of two culverts at an expense of less than \$488) and three years later, filed the instant action seeking a second bite at the apple. In support of its Motion for Summary Judgment, Thrasher used the following analogy:

Petitioners are akin to a car owner whose vehicle sustained damage in an accident. Petitioners brought suit against the other driver seeking compensation for the cost to repair their vehicle, and received acceptable damages in settling their lawsuit. Thereafter, despite receiving sufficient money to repair their car, Petitioners chose to simply keep the money and allow their damaged car to rust, corrode, and deteriorate in the damaged area for three (3) years. After three years, Petitioners decided to file another lawsuit against the same driver for the same original damage to their car, and for the exacerbation of the initial damage that Petitioners have allowed to occur in the subsequent three years because they chose to not fix their car with the money from the settlement of the first suit.

Respondents submit this analogy is still an accurate description of Petitioners' claims in the instant action. This is precisely the scenario which the doctrines of *res judicata* and collateral estoppel were intended to prohibit, and accordingly, the Circuit Court's award of summary judgment should be affirmed.

**B. Petitioners had a full and fair opportunity to litigate these erosion issues in the 2006 Action.**

In the 2006 Action, Ms. Ryan was represented by able counsel throughout. Expert witnesses to address the erosion claims were retained on Ms. Ryan's behalf, hearings were held, at least one deposition was taken, the parties engaged in discovery, the case was submitted to mediation, trial preparations were made, and, on the eve of trial - on the day of the final pretrial conference - the parties engaged in settlement discussions which led to the full compromise and settlement of all claims asserted therein. Therefore, no argument can be maintained that Petitioners were prohibited from a full and fair opportunity to litigate their erosion claims against

the BAA in the prior action.

In fact, the parties to the 2006 Condemnation Action moved for the continuance of the final pretrial conference based upon the representation to this Court that the BAA

had recently completed reclamation work on the property that is the subject of these proceedings and the parties desire to view the area, along with experts, in order to evaluate the effect of the reclamation work on issues that are the subject of this litigation.

R. 000438. Thereafter, on October 22, 2009, Mary Lola Ryan's counsel once again requested additional time to "evaluate the effect of the [recently completed] reclamation work on issues that are the subject of [the 2006 Condemnation Action]", and moved the Court to continue the trial of the matter scheduled to begin October 26, 2009. The Court granted Ms. Ryan's motion and continued the trial until November 30, 2009. R. 000442. Thus, Petitioners had a full and fair opportunity to litigate all post-reclamation erosion claims in the 2006 Action.

Further, as addressed above, this Court's decision in *Buckhannon & N.R. Co.*, is inapplicable to the current matter and did not limit the claims which Petitioners asserted and settled in the 2006 Action. Therefore, the doctrines of *res judicata* and collateral estoppel are satisfied - either one of which would result in an award of summary judgment to Respondents - and the Circuit Court's ruling should be affirmed.

**II. The Circuit Court committed no error in finding Petitioners' response in opposition to summary judgment untimely and insufficient to defeat summary judgment (addressing Petitioners' argument paragraph A.).**

Rather than tackling the real issue(s) head on (*res judicata* and collateral estoppel), Petitioners devote a majority of their Brief to challenging independent and ancillary legal conclusions of the Circuit Court. In their attempt, Petitioners fail to cite any authority reflecting that *even if* such independent conclusions of law were in error, they constitute reversible error. In

any event, Respondents will attempt to respond to Petitioners immaterial arguments in turn.

In paragraph no. 1 of its conclusions of law, the Circuit Court outlines Rule 6(d)(2) of the West Virginia Rules of Civil Procedure and concludes that Petitioners' response to Thrasher's Motion for Summary Judgment was untimely, and should not be considered in the Court's ruling on the matter. R. 000650. In their Brief, Petitioners concede that their response to Thrasher's Motion for Summary Judgment was untimely (p. 11). Petitioners further cite to numerous instances in the Circuit Court's Order Granting Summary Judgment which indicate its consideration of Petitioners' response in reaching its decision (p. 12 of Petitioners' Brief). Nevertheless, Petitioners, without citing any legal authority, assert that a single sentence in paragraph no. 8 of the Circuit Court's conclusions of law constitutes reversible error; namely, "[Petitioners'] only response was assertions made by counsel at oral argument, which is insufficient to defeat a properly supported motion for summary judgment." R. 000652.

This single sentence in the Circuit Court's conclusion of law paragraph no. 8 does not constitute reversible error for several reasons. First, as Petitioners' concede, their response to Thrasher's motion for summary judgment was untimely, and thus, the Circuit Court had sufficient justification to disregard it entirely. Second, as Petitioners' concede, it is readily apparent that the Circuit Court *did* consider Petitioners' response to Thrasher's Motion for Summary Judgment.

Third, the Circuit Court's conclusion of law no. 8 should be read as a whole. More specifically, the Circuit Court found that Petitioners failed to produce *any competent evidence of a genuine issue of material fact*. Thus, while evident that the Circuit Court considered Petitioners' untimely response, it nonetheless found it insufficient as a matter of law to defeat summary judgment. As this Court has held, "[s]ummary judgment cannot be defeated on the

basis of factual assertions contained in the brief of the party opposing a motion for such judgment.” Syl. pt. 5, *City of Morgantown v. West Va. Medical Corp.*, 193 W.Va. 614, 457 S.E.2d 637 (1995). Further, “when a motion for summary judgment ‘is properly documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists. Otherwise, Rule 56 empowers the trial court to grant the motion.” *Id.* at 620, citing *Hanks v. Beckley Newspapers Corp.*, 153 W.Va. 834, 172 S.E.2d 816 (1970). By way of their belated response, Petitioners attempted to defeat Thrasher’s Motion for Summary Judgment solely by way of factual assertions and argument of counsel, which the West Virginia Rules of Civil Procedure, and this Court, deem insufficient. The only sworn testimony that was presented to the Circuit Court regarding the Motion for Summary Judgment was submitted by Thrasher in support of summary judgment; the only on-point caselaw regarding settlement of a condemnation suit and subsequent litigation of the same claims was submitted by Thrasher in support of summary judgment; and the only discovery responses - particularly, responses to requests for admissions - were submitted by Thrasher in support of summary judgment. Therefore, it is clear that when conclusion of law no. 8 is read as a whole, the Circuit Court was speaking to the inadequacy of Petitioners’ response to Thrasher’s motion for summary judgment more so than the fact that no written response was filed timely.

Petitioners’ lack of an adequate response was further evidenced at oral argument.

Petitioners’ counsel:

- admitted that Petitioners submitted no counter affidavit to Thrasher’s Motion for Summary Judgment (R. 000490);
- conceded that Petitioners should have cited deposition testimony in their response (R. 000491); and,

- acknowledged that Petitioners should have cited to the record at the time they filed their response to Thrasher's Motion for Summary Judgment (R. 000635).

As referenced by the Circuit Court at the final pretrial conference (R. 000636), this Court has said many times that "[a] skeletal argument, really nothing more than an assertion, does not preserve a claim. . . Judges are not like pigs, hunting for truffles buried in briefs." *State v. Ladd*, 210 W.Va. 413, 557 S.E.2d 820, 831 FN1 (2001)(citations omitted). Moreover, at the time of Petitioners' response, the discovery period had closed (deadline of September 19, 2014), and Petitioners made no effort to advise the Court that they needed more time to adequately oppose Thrasher's Motion. Rule 56(f) of the West Virginia Rules of Civil Procedure states

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Petitioners, however, submitted no affidavit of counsel evidencing that they required additional time to respond to Thrasher's Motion.

Accordingly, it is clear that the Circuit Court found Petitioners' response to Thrasher's Motion for Summary Judgment inadequate, and devoid of any affirmative evidence demonstrating that a genuine issue of material fact existed to prevent an award of summary judgment. Therefore, the Circuit Court's conclusion of law no. 8 does not constitute reversible error, and the Circuit Court's ruling should be affirmed.

**III. The Circuit Court committed no error in finding that Petitioners failed to provide sufficient evidence that BAA acted negligently, violated any state or environmental law, or breached the implied terms of the settlement agreement (*addressing Petitioners' argument paragraph B.*).**

**A. Petitioners' request for this Court to re-write their settlement agreement with the BAA must fail.**

As discussed above in section I.A.(1) of Respondents' Brief, in November 2009, Petitioners settled, compromised, and dismissed all claims concerning erosion/sediment damage to Mary Lola Ryan's residue property, as memorialized by the Circuit Court's December 11, 2009, Agreed Order of Dismissal. R. 000423. The sole exception to Petitioners' complete release of erosion/sediment claims against the BAA concerned a specific type of environmental pollution which is not at issue in this action. R. 000426, 163, 164. Petitioners admit that was the only potential future damage claim excluded by the 2009 settlement agreement. R. 000495, line 23. Similarly, Petitioners admit that the 2009 settlement agreement (as memorialized by the Circuit Court's Agreed Order of Dismissal) includes no provision that the BAA comply with the terms of its NPDES permit for the project on the property taken from Mary Lola Ryan. R. 000502, line 22. Therefore, any attempt to re-write the terms of the settlement reached by Petitioners and the BAA in 2009 - as assisted by competent legal counsel - to impose an *implied duty* upon the BAA, is inappropriate. Regardless of what Petitioners now, nearly six years after the fact, claim they envisioned, contemplated, relied upon, or believed when settling the 2006 Action, Petitioners are bound by the deal they struck in 2009. *See e.g. State ex rel. Queen v. Sawyers*, 148 W.Va. 130 (1963).

**B. Petitioners failed to present the Circuit Court with any evidence that the BAA violated a statutorily imposed duty to reclaim its project site.**

In their Brief, Petitioners assert the BAA had, and breached, statutorily imposed duties to reclaim the project site, citing the W.Va. Code of State Regulations and referencing the BAA's NPDES permit for the project. Petitioners' appellate Brief is the first time they have ever cited a particular statute/regulation/law in support of their claims. In responding to Thrasher's Motion for Summary Judgment, Petitioners attached several documents concerning violations issued by

the W.Va. Department of Environmental Protection regarding the BAA's property, but made no connection between those documents and Petitioners' claimed damages. When the Circuit Court asked Petitioners' counsel what authority he had to support Petitioners' claim that they had standing to assert violations of environmental regulations, counsel had none. R. 000616, line 4. Further, Petitioner Claude Ryan conceded that he had no evidence that the Airport violated any specific statute or regulation as alleged by Count III of Plaintiffs' Complaint. R. 000179, Claude Ryan depo. p. 23.

Accordingly, the Circuit Court was correct in issuing conclusions of law nos. 10 and 11, and its award of summary judgment to Respondents should be affirmed.

**IV. The Circuit Court committed no error in finding that Petitioners presented insufficient evidence that the BAA negligently allowed further damage to Mary Lola Ryan's property by failing to reclaim its land (*addressing Petitioners' argument paragraph C.*).**

Petitioners challenge the Circuit Court's conclusion of law no. 12 and finding that "no supporting evidence was submitted to show that Defendants negligently allowed further damage to reclaim the land." Petitioners assert that the record contains evidence sufficient for the jury to have reasonably concluded that such further damage occurred. Pets.' Brief, p. 23. Petitioners further represent that their experts *could have* provided supporting testimony, speak of information which can be *inferred* from a letter written from expert Bradley Durst, and cite to deposition testimony of Thrasher's Chad Biller and Petitioner Claude Ryan.

The principal problem with Petitioners' argument, however, is that such evidence was not submitted to the Circuit Court below. While Petitioners claim their experts *could have* testified to certain points, no affidavits nor sworn testimony was submitted by such experts in opposition to Thrasher's Motion for Summary Judgment. Further, no deposition testimony was

cited by Petitioners in their response to Thrasher’s Motion for Summary Judgment. Accordingly, the Circuit Court accurately held that “no supporting evidence was submitted to show [Defendants’ negligence]”, and insofar as this Court limits its review to the evidence presented to the Circuit Court below, this Court should disregard any new arguments made by Petitioners for the first time on appeal.

**V. The Circuit Court committed no error in concluding that expert testimony was necessary, but lacking, to support Petitioners’ damage claims. (addressing Petitioners’ argument paragraphs D. and E.).**

Petitioners challenge the Circuit Court’s conclusion of law no. 13 finding that expert testimony was necessary to prove Respondents’ negligence, and the to prove “that the current damage significantly exceeds what that damage would have been had the defendants no acted negligently.” Petitioners argument fails to identify any reversible error.

First, Petitioners cite this Court’s decision in *Cunningham v. W.Va.-American Water Co.*, 193 W.Va. 450, 457 S.E.2d 127 (1995), in support of their position that expert affidavits are unnecessary to defeat a motion for summary judgment. Pets.’ Brief p. 27. While expert affidavits may not be required to defeat a motion for summary judgment, a non-moving party must respond with something more than unsupported speculation (*Gibson v. Little General Stores, Inc.*, 221 W.Va. 360, 655 S.E.2d 106 (2007), self-serving assertions without factual support in the record (*Id.*), or mere allegations of unsworn pleadings (*Powderidge Unit Owners Ass’n*, 196 W.Va. 692 (1996)). In *Cunningham*, the appellants did submit affidavits which disputed the moving party’s evidence in support of summary judgment. Petitioners submitted nothing of the sort in the instant matter and failed to satisfy the threshold of evidence required to defeat a motion for summary judgment.

Second, with respect to damages to real property, this Court has held that generally an

owner can testify to the change in fair market value as a result of the defendant's conduct. *Evans v. Mutual Mining*, 199 W.Va. 526, 531, 485 S.E.2d 695 (1997). In the instant matter, Mary Lola Ryan is the sole owner of the real property at issue - not co-guardian Claude J. Ryan, III, who Petitioners wish to opine as to the damages to his mother's property. The Court expressed its concern over this fact as the hearing of Thrasher's Motion for Summary Judgment. R. 000503-504. This Court has held that "[w]hether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." *Kiser v. Caudill*, 210 W.Va. 191, 197, 557 S.E.2d 245 (2001). Accordingly, to the extent the Circuit Court found Claude Ryan unqualified to testify to the damage to his mother's property, that decision should remain undisturbed.

Third, even if Claude Ryan were permitted to offer opinion testimony concerning the damage to the market value of Ms. Ryan's property, Petitioners never disclosed him as an expert witness, which they admit. R. 000504. As this Court has recognized, "[t]he failure to timely disclose an expert witness is serious conduct that may warrant the exclusion of that expert's testimony and ultimately lead to dismissal of the case." *Id.* In their Brief, Petitioners continue to suggest what their witnesses "could" testify to (i.e. expert Bradley Durst *could have discussed* how vegetation would have reduced the damages; expert Patrick Gallagher *could have* done the same - Pets.' Brief p. 28). The problem for Petitioners remains that they did not supply the Circuit Court with evidence that these experts actually held opinions which differentiate between the damages asserted, and recovered, in the 2006 Action versus those damages Petitioners allegedly claim in the instant action "above and beyond" those contemplated in December 2009. Quite the contrary, expert Pat Gallagher opined that it would cost \$30,000 to remediate the alleged

stormwater/erosion damage on Ms. Ryan's property in his June 13, 2008, letter (R. 000168), and in his April 2014, opinion letter, Mr. Gallagher estimates that it would cost \$31,000 to remediate the same erosion issues (R. 000103) which Petitioners failed to remediate in the five intervening years.

The Circuit Court committed no error in issuing conclusion of law no. 13.

**VI. The Circuit Court committed no error in concluding that Petitioners lacked standing to institute a claim for violation of the Water Pollution Control Act (addressing Petitioners' argument paragraph F.).**

Petitioners challenge the Circuit Court's conclusion of law no. 17 holding that they do not have standing to bring claims for issues identified in Notices of Violation issued by the WV DEP and attached to Petitioners' response to Thrasher's Motion for Summary Judgment.

*Petitioners concede that the Circuit Court is correct in this holding (Pets.' Brief, p. 29), but nonetheless claim that the Circuit Court's conclusion is misplaced because the BAA's violation of a statute/regulation could be used in support of Petitioners' negligence claim. Very simply, there is no indication that the Circuit Court misunderstood Petitioners' claims (however they evolved during the course of litigation) or solely relied upon W.Va. Code § 22-11-1 (the "Water Pollution Control Act") in finding insufficient evidence to support Petitioners' negligence cause of action. More likely, conclusion of law no. 17 was issued merely in response to an exchange between the Court and Petitioners' counsel at the final pretrial conference. R. 000615, 616. In any event, conclusion of law no. 17 does not constitute reversible error, and the award of summary judgment should be affirmed.*

**VII. The Circuit Court committed no error in finding that no genuine issue of material fact pertinent to Petitioners' claims against the BAA, and granting Respondents summary judgment. (addressing Petitioners' argument paragraph I.).**

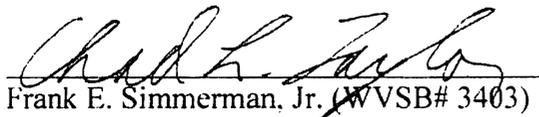
As discussed above, the Circuit Court's award of summary judgment to Respondents was well-founded based upon the facts of the 2006 Action and the instant matter, of which the

Circuit Court was intimately familiar, and considering the argument and authority presented to the Court by the parties. Most importantly, the necessary elements of *res judicata* and collateral estoppel were satisfied, and thus, summary judgment was appropriate.

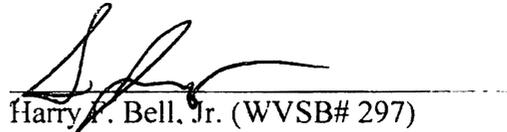
**CONCLUSION**

Respondents respectfully request that this Court affirm the award of summary judgment ordered by the Circuit Court of Harrison County, preserving the dismissal of this action, with prejudice.

Respectfully submitted,  
Respondents.  
By Counsel:



Frank E. Simmerman, Jr. (WVSB# 3403)  
Chad L. Taylor (WVSB# 10564)  
SIMMERMAN LAW OFFICE, PLLC  
254 East Main Street  
Clarksburg, West Virginia 26301  
Phone: (304) 623-4900  
Facsimile: (304) 623-4906  
[clt@simmermanlaw.com](mailto:clt@simmermanlaw.com)  
*Counsel for The Thrasher Group, Inc.*



Harry P. Bell, Jr. (WVSB# 297)  
Stacy A. Jacques (WVSB# 9677)  
The Bell Law Firm, PLLC  
P.O. Box 1723  
Charleston, WV 25326-1723  
Phone: (304) 345-1700  
Fax: (304) 345-1715  
[sjacques@belllaw.com](mailto:sjacques@belllaw.com)  
*Counsel for Benedum Airport Authority*

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 14-1334

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

Plaintiffs below, Petitioners,

vs.

Appeal from a final order of the  
Circuit Court of Harrison County  
(Case No. 12-C-161-3)

BENEDUM AIRPORT AUTHORITY,

Defendant/Third-Party Plaintiff below, Respondent,

and

THE THRASHER GROUP, INC.,

Third-Party Defendant below, Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that the attached "RESPONDENTS' BRIEF" was served upon the following counsel of record, by U.S. Mail, on May 4, 2015:

James N. Riley  
Michael D. Crim  
Richard R. Marsh  
McNeer Highland McMunn & Varner, LC  
P.O. Drawer 2040  
Clarksburg, West Virginia 26302-2040  
*Counsel for Petitioners*



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Stacy A. Jacques (WVSB# 9677)  
The Bell Law Firm, PLLC  
P.O. Box 1723  
Charleston, WV 25326-1723  
Phone: (304) 345-1700  
Fax: (304) 345-1715