

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-1105

REGINALD S. GRIMMETT

Petitioner,

Appeal from a final order
of the Circuit Court of Wood

v.

**WILLIAM D. SMITH,
Individually and
KERRY L. SMITH,
Individually,**

County (11-C-216)

Respondents.

**BRIEF
ON BEHALF OF PETITIONER,
REGINALD S. GRIMMETT**

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Reginald S. Grimmatt**

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ASSIGNMENT OF ERROR

The Circuit Court of Wood County, West Virginia, erred when it granted the Respondents' motion for a new trial pursuant to Rule 59(a) of the West Virginia Rules of Civil Procedure.

STATEMENT OF THE CASE

The Respondents, **WILLIAM D. SMITH and KERRY L. SMITH**, brought suit against the Petitioner, **REGINALD S. GRIMMETT**, alleging that the development of Mr. Grimmer's property, which is adjacent to their property, damaged their pond and other portions of their real estate and affected their enjoyment of their property (App. 1). The Petitioner responded by denying the Respondents' accusations (App. 36). A jury trial was held on July 9 through July 11, 2014. The jury returned a verdict in favor of the Petitioner on July 11, 2014 (App. 275). On September 2, 2014, the Respondents filed a motion for a new trial (App. 406). A hearing was held before the Honorable Judge J.D. Beane on the Respondents' motion for a new trial on September 12, 2014. On September 23, 2014, the Court issued an order granting the Respondents' motion for a new trial and setting aside the jury verdict (App. 440). It is from said order that the Petitioner presents this appeal.

STATEMENT REGARDING ORAL ARGUMENT

The Petitioner believes that oral argument in this matter is necessary, to-wit: the order which is the basis for the appeal involves a case claiming insufficient evidence or a result against the weight of the evidence.

ARGUMENT

Rule 59 of the West Virginia Rules of Civil Procedure states in pertinent part:

A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons in which new trials have heretofore been granted in actions at law; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion. Syl.Pt. 3, *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. 119, 454, S.E.2d 413 (1994), *cert. denied*, 515 U.S. 1160, 115 S.Ct. 2614, 132 L.Ed.2d 857 (1995). The evidence presented to the jury in this case was conflicting and subject to a determination of credibility.

The Petitioner, **REGINALD S. GRIMMETT**, has resided in Elizabeth, West Virginia, for twenty (20) years. (App. 00851). In 2002, he bought eleven (11) acres of real estate in Wood County, West Virginia, and in February, 2003 developed a mobile home rental community known as Skyview Acres, which currently accommodates twenty-five (25) mobile homes. (App. 00852-00853). Exhibit No. 1 (App. 01058) is an aerial photograph of Skyview Acres taken in April, 2005.

In or around July 2003, the Respondents, **WILLIAM D. SMITH and KERRY L. SMITH**, purchased the real estate located adjacent to the Petitioner's eleven (11) acre tract for \$168,000. (App. 00800). The real estate purchased by the Respondents had a pond on the property. The pond was important to the Respondents as it brought back memories for Mr. Smith about his boyhood days in rural Jackson County, which he hoped to recreate for his children. (App. 00753-00754). Exhibit 18, admitted into evidence at trial showed a picture of the pond as it appeared on July 18, 2003. (App. 01164). The pond was muddy and had a reddish-brown color. (App. 00756). Mrs. Smith described the color of the pond as "off-putting". (App. 00811). Before purchasing the property, the Respondents knew the pond was at the lowest point of all the surrounding properties including Mr. Grimmert's. They never had the pond inspected. (App. 00810). Mr. Smith described the pond as rich in sediment. A pond that he wouldn't want to swim in or eat a fish from. (App. 00812). He never measured the depth of the pond. (App. 00839). He observed some ongoing development on the Grimmert tract, but made no investigation regarding the development or the purpose of same. (App. 00814). Despite all of the foregoing, Mr. and Mrs. Smith decided to purchase the real estate. (App. 00813).

Shortly after the Respondents moved into their home, the Petitioner stopped by to introduce himself and explained his plans to develop his property. The Smiths immediately objected and Mr. Grimmert became concerned. (App. 00856-00858).

In 2009, the Petitioner began construction on a walking track around the perimeter of his property to mark his boundary and provide an exercise outlet for his tenants at Skyview Acres. (App. 381). After two (2) months of work, the pond on the Respondents' property remained clear. (App. 00861).

In May, 2011, the Petitioner began construction of another project. He was going to construct a small amphitheater and a picnic shelter. (App. 00865). The Petitioner attempted to comply with all regulations of the West Virginia Department of Environmental Protection (DEP) and during the course of the project was cited for some infractions. However, as of the date of the trial, Mr. Grimmert had never been sanctioned or fined. (App. 00884-00885). Defendant exhibits 9-21 demonstrates Mr. Grimmert's efforts at erosion control and attempts to comply with DEP regulations. (App. 00876).

At trial, the Smiths called Garland Roberts as a witness, who is the inspector for the Southwest Region of West Virginia encompassing an area from Mingo County to Wood County. (App. 00644-00645). While Mr. Roberts testified that the Petitioner had not met certain obligations imposed by DEP regulations, including the use of a larger sediment trap to catch runoff of silt and debris, he admitted the following: that the permit originally issued to Mr. Grimmert did not require Mr. Grimmert to have a sediment trap (App. 00649); that no inspections were made at the construction site until July, 2012 (App. 00649); that the inspection in July, 2012 was at the invitation of Mr. Grimmert, who was attempting to close his project down and was required to remove all evidence of erosion control prior to the inspection (App. 00651-00652); that the

regulations issued by the DEP are confusing and even though Mr. Grimmatt asked for assistance and advice to insure compliance, he was never given such assistance (App. 00656-00660); that although Mr. Roberts was at the Grimmatt site in July, 2012 and November, 2012, he was not cited for improper erosion control until January, 2013 (App. 00661); none of the citations issued to Mr. Grimmatt required him to stop work (App. 00662); that Mr. Grimmatt did everything he was asked to do to terminate his project in accordance with DEP regulations (App. 00663); that it is not unusual for developers to be cited for violation of DEP regulations (App. 00664); and, he had never been to the Smith property and had no idea if sediment from the Petitioner's development ended up in the Respondents' pond (App. 00664-00665).

Despite the description of the condition of the pond by Mr. Smith at the time he purchased the property, *supra* and his acknowledgment that runoff from other surrounding properties deposited silt and other debris into his pond (App. 00823-00824), he initiated litigation against the Petitioner for damages to his pond as a result of the development of the Grimmatt property.¹

In order to prove damages, the Respondents called Terry Lane Smith (no relation). Mr. Smith has been in the excavating business for thirty-two (32) years and had some experience in cleaning out farm ponds (App. 00674-00675). What impacted Mr. Smith's credibility with the jury was his connection to the Smith's attorney, Robert Bays. Mr. Smith acknowledged that Mr. Bays had been his attorney for 18 – 20 years (App. 00702). He also acknowledged that he had been fined by the DEP for improper erosion control during a job he performed at a McDonald's restaurant (App. 00702).

Mr. Smith first visited the Respondents' property to evaluate the damage to their pond in October, 2010. The Respondents wanted an estimate to clean out the pond (App. –6777).

¹ It is acknowledged by the Petitioner that weather, severe and otherwise, caused some silt and debris from his property to find its way into the Smiths' pond.

During that visit, which took one-half hour, Mr. Smith did not take measurements, photos or notes. He has never measured the depth of the pond, but relied on Respondent Smith's estimation of ten (10) feet (App. 00705-00709). Mr. Smith gave the Respondents an estimate of \$96,000 (App. 00679) [The Respondents had three (3) estimates to clean out the pond, one for \$7,300 from Mr. Bosley (App. 00827) and one from AIA for \$81,300 (App. 00841)]. When Mr. Smith gave his initial deposition in the case, he testified that he was not hired to give an expert opinion as to the cost to clean out the Respondents' pond even though he was listed as an expert in pretrial disclosures (App. 00709).

After his initial deposition, Mr. Bays sent Mr. Smith back out to the Respondents' property to re-evaluate the pond and to prepare a new estimate. On December 17, 2012, Mr. Smith prepared a new estimate to clean out the Respondents' pond in the amount of \$126,000 (App. 00681). The new estimate was completely different from the first, in that, Mr. Smith was going to use vacuum trucks to remove the silt and debris, use tankers to haul it away and deposit the material on property rented from Mr. Bosley before disposal. The problem with this testimony was that he never got prices from any of the companies or individuals who were going to rent the equipment and property to formulate his estimate (App. 00721-00726).

Mr. Smith also admitted that he never measured the depth of the pond or made a determination as to the depth of the pond when the Respondents purchased the property. He had no baseline that could tell him how much debris in the pond was the result of Mr. Grimmett's development, or how much came from other sources (App. 00716-00717). All of the foregoing impacted the credibility of Mr. Smith, including his expert witness fee of \$400 per hour to testify (App. 00727) and the estimate of his expert witness fee of \$5,000 (App. 00803).

It is the belief of the undersigned that although the jury may have believed that silt and

debris from Mr. Grimmatt's property travelled to the Smith's pond, they has no basis, at all, to aware damages.

Finally, the most compelling piece of evidence introduced at trial was a video taken by Mr. Grimmatt two (2) days prior to the trial. The video (Defendant's exhibit 25) showed the Smith's pond. The pond was clear, has lily pads and looked pristine (App. 00888-00890).

It is the peculiar and exclusive province of a jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting and the finding of the jury upon such facts will not ordinarily be disturbed. Syllabus Point 2, *Skeen v. C and G Corporation*, 115 W.Va. 547, 185 S.E.2d (1971). Syl. Pt. 4, *Young v. Ross*, 157 W. Va. 548, 202 S.E.2d 622 (1974).

Where, in the trial of an action at law before a jury, the evidence is conflicting, it is the province of the jury to resolve the conflict, and its verdict thereon will not be disturbed unless believed to be plainly wrong. Styl.Pt. 2, *French v. Sinkford*, 132 W.Va. 66, 54 S.E.2ed 38 (1948).

A jury is better able to judge the circumstances of a case, the wright of the testimony, and the peculiar hardships and aggravations attendant upon an injury, and its verdict, which is not so excessive as to indicate, as a matter of law, passion, prejudice, partiality, mistake, or lack of due consideration, will not be set aside by this Court on that ground. Syllabus, *Williams v. Penn Line Service, Inc.*, 147 W.Va. 195, 126 S.E.2d 384 (1962). Syl. Pt. 14, *Abdulla v. Pittsburgh and Weirton Bus Co.*, 158 W. Va. 592, 213 S.E.2d 810 (1975).

When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the wright of the evidence or without sufficient evidence to support it. Point 4, Syllabus, *Laslo v. Griffith*, 143 W.Va. 469, 102 S.E.2d 894. Syl.Pt. 2, *Walker v. Monongahela Power Co.*, 147 W.Va. 825,

131 S.E.2d 736 (1963).

In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true. Syl.Pt. 3, *Walker v. Monongahela Power Co., Supra*.

CONCLUSION

Based upon the foregoing, the Petitioner, **REGINALD S. GRIMMETT**, respectfully requests the Court to reverse the order of the Circuit Court of Wood County granting the Respondents' motion for a new trial and reinstate the verdict of the jury in favor of the Petitioner.

Dates this 26ⁿ day of January, 2015.



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CERTIFICATE OF SERVICE

The undersigned counsel for Defendant, **REGINALD S. GRIMMETT**, hereby certifies that he served the foregoing **BRIEF ON BEHALF OF THE PETITIONER, REGINALD S GRIMMETT** on the Plaintiffs, **WILLIAM D. SMITH, Individually AND KERRY L. SMITH, Individually**, by depositing a true copy thereof in the United States mail, postage prepaid, addressed to: **ROBERT L. BAYS**, counsel for Respondents, at Bowles Rice McDavid Graff & Love, LLP, United Square, Fifth Floor, 501 Avery Street, P.O. Box 49, Parkersburg, WV 26102 on this 26th day of January, 2015.


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