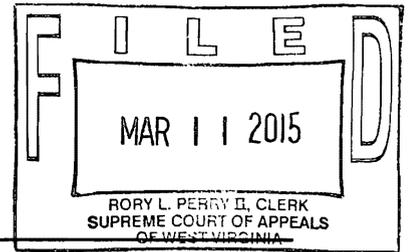


No. 14-1105



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

**REGINALD S. GRIMMETT, Defendant Below,
Petitioner**

v.

**WILLIAM D. SMITH, Individually, and
KELLY L. SMITH, Individually,
Plaintiffs below,
Respondents**

**From the Circuit Court of
Wood County, West Virginia
Civil Action No. 11-C-216**

**RESPONSE OF RESPONDENTS, WILLIAM D. SMITH AND KERRY L.
SMITH, TO BRIEF ON BEHALF OF PETITIONER,
REGINALD S. GRIMMETT**

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I. STATEMENT OF THE CASE

Respondents, Bill and Kerry Smith, and Petitioner, Reginald S. Grimmett, own and occupy the lower and upper portions, respectively, of a hollow located in Mineral Wells, West Virginia. (App. 00560:4-17; 01060). The Respondents filed their Verified Complaint against the Petitioner, seeking compensation for damages to their real property and injunctive relief relating to the development and excavation of the Petitioner's lands, in the Circuit Court of Wood County, West Virginia, on May 20, 2011. (App. 00001-00032). The Petitioner filed his Answer to said Complaint, generally denying the allegations that the Petitioner's conduct damaged the Respondents' real estate. (App. 00036-00038). More than three years later, a jury trial was conducted in this matter on the 9th, 10th, and 11th days of July, 2014. The jury was asked, *inter alia*, to determine whether the Respondents had proved, by a preponderance of the evidence: (1) that the Petitioner unreasonably caused silt, dirt, or other pollutants to come onto the property of the Respondents; (2) that the Petitioner was negligent in the construction and development of his property which caused silt, dirt, rocks, chemicals, or water in unnatural quantities to come onto the property owned by the Respondents; and (3) that the Petitioner, by his construction work, caused silt to accumulate in the pond owned by the Respondents. (App. 00275-00276). On July 11, 2014, after closing statements and deliberation, the jury verdict form was returned with a finding for the Petitioner on all three of the foregoing counts. *Id.* Although presented to the jury was the question of the existence and extent of damages to the Respondents' property, the jury did not reach a decision with respect to the same as it found no liability on the part of the Petitioner. *Id.*

On September 2, 2014, the Respondents filed their motion for a new trial pursuant to Rule 59(a) of the West Virginia Rules of Civil Procedure on the grounds that the jury's July

11, 2014, verdict was: (a) against the clear weight of evidence; (b) was based on false evidence; and (c) would result in a miscarriage of justice. (App. 00406-00434). A hearing was held before the Hon. Judge J.D. Beane on the Respondents' Motion for a New Trial on September 12, 2014. (App. 00440). On September 23, 2014, the Trial Court issued an Order granting the Respondents' Motion for New Trial and set aside the jury verdict on the grounds that said verdict was against the clear weight of the evidence, clearly wrong, and would result in a miscarriage of justice. *Id.* It is from said Order that the Petitioner brings this appeal.

II. SUMMARY OF ARGUMENT

In light of documentary evidence of the repeated permit violations concerning the construction, maintenance, and repair of sediment erosion control methods, coupled with the testimonial and demonstrative evidence of the effects of said violations, the Circuit Court of Wood County, West Virginia, did not err in vacating the jury verdict finding no liability on the part of the Petitioner, Reginald S. Grimmitt, and granting the Respondents' Motion for New Trial pursuant to Rule 59(a) of the West Virginia Rules of Civil Procedure, on the grounds that such verdict is against the clear weight of the evidence introduced at trial, was clearly wrong, and would result in a miscarriage of justice. Furthermore, the Respondents' witness concerning the damages at issue in this case did not impact the verdict of "no liability" on the part of the Petitioner.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rules of Appellate Procedure 18(a)(4), the Respondent submits that the facts and legal arguments are adequately presented in the briefs and record on appeal such that this matter could be resolved without oral argument; however, should this Honorable Court determine that the decisional process would be significantly aided by oral argument, the Respondent is prepared to proceed accordingly.

IV. ARGUMENT

a. **Standard of Review**

Pursuant to Rule 59(a) of the West Virginia Rules of Civil Procedure, the Circuit Court of Wood County, West Virginia, has the authority to grant a new trial. The trial judge may:

weigh the evidence and consider the credibility of the witnesses, *Id.* at Syl. Pt. 3, in relevant part. In doing so, the trial judge does not invade the function of the fact finder because the trial judge granting a new trial is simply sending the issue back to the fact finder.

Gonzalez v. Conley, 199 W. Va. 288, 292, 484 S.E.2d 171, 175 (1997)(citing *In re State Public Bldg. Asbestos Litigation*, Syl. Pt. 3, 193 W. Va. 119, 454 S.E.2d 413 (1994), *cert. denied* 515 U.S. 1160 (1995)). If the trial judge finds the verdict is against the clear weight of the evidence, is based upon false evidence, or will result in the miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. *Sayre v. Roop*, 205 W. Va. 193, 196, 517 S.E.2d 290, 293 (1999)(citing *In re State Public Bldg. Asbestos Litigation*, Syl. Pt. 3, 193 W. Va. 119, 454 S.E.2d 413 (1994), *cert. denied* 515 U.S. 1160 (1995)). Furthermore, a case based on oral testimony which is inconsistent with physical facts admitted to be true or established by uncontradicted evidence should be set aside as being contrary to the weight of evidence. *Bronson v. Riffe*, Syl. Pt. 1, 148 W.Va. 362, 135 S.E.2d 244 (1964).

This Honorable Court “review[s] the rulings of the circuit court concerning a new trial and its conclusions as to the existence of reversible error under an abuse of discretion standard, and [it] review[s] the circuit court’s underlying factual findings under a clearly erroneous standard.” *Williams v. Charleston Area Med. Ctr.*, 215 W. Va. 15, 18, 592 S.E.2d 794, 797 (2003)(citing *Tennant v. Marion Health Care Found., Inc.*, 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995)). “[U]nder the abuse of discretion standard, [this Court] will not disturb a

circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances.” *Graham v. Wallace*, 214 W. Va. 178, 182 , 588 S.E.2d 167, 171 (2003). To prevail on appeal, the Petitioners must demonstrate that the trial court’s decision was “a clear error of judgment or exceed[ed] the bounds of permissible choices in the circumstances,” and leave this Court with a “firm conviction that an abuse of discretion has been committed.” *Graham*, 214 W. Va. at 182, 588 S.E.2d at 171; *Covington v. Smith*, 213 W. Va. 309, 322-323, 582 S.E.2d 756, 769-770 (2003). The Petitioners have not made such a showing.

b. On the Issue of Liability, the Weight of Evidence was so Overwhelming that the Trial Court did Not Abuse Its Discretion in Granting Respondents’ Motion for New Trial:

Petitioner’s brief cites the testimony of Garland S. Roberts, inspector for the West Virginia Department of Environmental Protection (“WVDEP”), in support of the contention that somehow his testimony was a determining factor in the finding of no liability. One of the points relied upon is that Garland S. Roberts did not know that sediment from the Petitioner’s development ended up in the Respondents’ pond. (App. 00664-00665). During his testimony, Garland S. Roberts, testified that sediments were leaving the Petitioner’s property, crossing the property line dividing the Petitioner’s property from the Respondents’ property, and entering into the stream channel on the Respondents’ adjoining property. (App. 00634:14-00644:3). This property line is situate, topographically, at an elevation above the Respondents’ pond. (App. 00560, 01060). The jury was shown video of said stream channel feeding directly into said pond. (App. 00764:11-00766:22; 00767:2-00769:22; 00795:19-00798:2; 01057). These pieces of evidence, testimonial and demonstrative, taken together lead one to the only conclusion a reasonable juror could make in this instance – that any silt not reasonably prevented from leaving the worksite owned by the Petitioner, would migrate down to the property line and into stream

channel on the Respondents' adjoining property and then deposit in the pond owned by the Respondents. The testimony by Garland S. Roberts concerning where the silt migrated after being deposited into the stream channel owned by Respondents was not critical to the Respondents' case as demonstrative evidence was used to show migration of silt from the stream channel to the pond. Accordingly, any credibility issue arising therefrom should not be entitled to great weight.

In fact, Garland S. Roberts testified that elevation of the Petitioner's property was such that it required distinct considerations relating to the Petitioner's use of, and compliance with, best management practices concerning sediment control. (App. 00599:23-00602:23; 00608:5-00612:5; 00666:2-00667:13). Of import to the case was the necessity of a sediment trap to prevent silt from being carried off of the Petitioner's property. (App. 000607:23-00612:10). Although not explicitly set forth in the permit itself, best management practices - *which are required by the permit* - should have led the Petitioner to the install an appropriately sized sediment trap. (App. 00666:2-00667:13). No evidence was introduced by the Petitioner at trial which contradicts Garland S. Roberts' testimony on this point. To the contrary, Petitioner merely points to the testimony of Garland S. Roberts where he states that the WVDEP did not dictate for the Petitioner precisely what the unique best practices would be required by the permit under Petitioner's development circumstances. (App. 00649). As explained by Garland S. Roberts, the provision of consultation to a permittee from the regulator's perspective is necessarily limited to broad suggestion and the appropriate method - if a developer does not know what they are doing - is for said developer to obtain the consultation of independent professionals who can better "tell them how to install things" because the WVDEP is "not allowed to do those types of things." (App. 00657:6-20; 00670:5-24; 00671:8-21).

Petitioner also argues in his brief that WVDEP inspections of the site were: (1) not made at the construction site until July of 2012; (2) were made at the invitation of the Petitioner; (3) did not result in violations for improper erosion control until January 2013; and (4) did not require him to stop work. At trial Garland S. Roberts explained that attempts were made in December of 2011 to reach the site of the Petitioner, however in Petitioner's permit he identified a piece of property "somewhere between Rockport and Mineral Wells" which is a considerable distance from the location of the actual property at issue in the lawsuit. (App. 00649:8-11; 01082-01084). Additionally, an inspection was made by John King, inspector for WVDEP, on September 9, 2009, resulting in a cease and desist order issued on October 5, 2009, in which it was found that the Petitioner had "minimal sediment and erosion control measures installed at [the construction] site." (App. 01072-1078). With respect to the timing of inspections and violations arising therefrom, the suggestion that because the WVDEP did not come out and inspect while the Petitioner was doing work in some way relieves him of a legal obligation is patently untrue. The Petitioner had a duty to abide by the law whether he was being inspected or not. However, despite the Petitioner's argument that he was not cited for improper erosion control until January of 2013, as set forth in his brief, the record shows that on October 5, 2009, the Petitioner was cited for lacking a proper permit and "minimal sediment and erosion control measures [being] installed at the site" and was ordered by the WVDEP to cease and desist further land development activity, obtain a permit, and "immediately install and maintain necessary storm water and sediment/erosion control devices to prevent the release of sediment-laden water into the waters of the State." (App. 01072-01078). Moreover, on July 25, 2012, Garland S. Roberts cited the Petitioner for "improper use of [silt fencing]", noting that the Petitioner's "channel requires proper stabilization and proper erosion and sediment controls at point where [the] stream leaves the site" and the Petitioner was ordered to "stabilize the stream

channel and install appropriate erosion and sediment controls to contain sediments”. (App. 01116-01117). Garland S. Roberts also noted that the Petitioner “has failed to inspect all erosion control devices at least once every seven days and within 24 hours after any storm event of greater than 0.5 inches of rain per 24-hour period.” (App. 01118). The Petitioner did not even keep records of his inspection and maintenance of the constructions site and did not introduce any such record at trial despite requests by counsel for the same. (App. 01110; 00668:16-00669:24). On January 22, 2013, the Petitioner was cited, *inter alia*, for improper use of stone material and silt fencing, lack of silt fence maintenance, lack of stabilization of the site, and a grossly undersized sediment trap with unstable inlets and outlets. (App. 01134, 01140). As to whether the WVDEP violations required the Petitioner to stop work, it is also a point of common sense that, for violations issued relating to *the failure to properly stabilize the disturbed site*, the WVDEP would not issue a complete cease and desist activity order as it would frustrate a critical purpose of the regulations in place - e.g., to keep disturbed earth from entering the waters of the state. *See* W.Va. Code § 22-11-1, et seq.

The violations contained within the WVDEP inspection file show that the preventative sediment and erosion control measures taken by the Petitioner relating to his development of the property known as “The Wagon Wheel Amphitheatre” were inadequate both prior to, and after, the Petitioner received his permit from the WVDEP in June of 2011. (App. 01072-01160). The Notice of Violations issued by the WVDEP corroborate the position of inadequacy maintained by the WVDEP from the time period beginning with Petitioner’s initial violations in 2009 through the termination of his WVNPDES permit as late as September of 2013. *Id.* These repeated violations, which speak to the unreasonableness of the Petitioners’ sediment control measures, including the grossly inadequate size of his silt-trapping structure, lack of sediment control plan, and failure to properly maintain silt-fencing clearly indicate that

the Petitioners' efforts to prevent silt, dirt, or other pollutants from leaving his work-site were found to be inadequate - and thus unreasonable - numerous times. *Id.*

The Petitioner argues, by footnote in part, that the damage to the Respondents' property and pond was the result of "weather, severe and otherwise, [which] caused some silt and debris from the Petitioner's property to find its way into the Smith's pond", and alludes to other properties depositing debris and silt into Respondents' pond as another justification for the jury's verdict in this matter. However, the jury was instructed that it was the Petitioner's burden, by clear and convincing evidence, to show the nature and extent of alternative contributing sources of damage to the Respondents' property pursuant to *In re Flood Litigation*, Syl. Pt. 10, 216 W.Va. 534, 607 S.E.2d 863 (2004). (App. 00954:24-00956:11). The Petitioner offered no persuasive evidence pointing to such sources. The Petitioner also claims that "the most compelling piece of evidence" was a video of the Respondents' pond as taken by the Petitioner approximately nine and one-half (9 1/2) months following the official finding by the WVDEP that his construction site was stable on September 20, 2013. (App. 01054; 01159). Notwithstanding the WVDEP finding, the Respondents offered video taken on June 20, 2014, showing the extent to which the increased volumes of water were rushing into the pond at issue. (App. 00795:19-00798:2; 01057). Between the video offered by the Respondent and the video offered by the Petitioner, approximately seventeen (17) days passed during which the silt from the Petitioner's work-site had the opportunity to settle and return the Respondents' pond closer to its proper coloring. (App. 00821:20-00822:22). By his argument, the Petitioner seeks to claim the benefits of gravity and its aesthetic effect on the siltation of the Respondents' pond in order to claim that the trial court abused its discretion in granting a new trial. The Petitioner's video evidence is lacking credibility as it is merely of assistance in evaluating the color of a pond - on a single day - rather than the years of siltation lying below the surface.

Accordingly, sufficient facts, uncontroverted and otherwise, were before the jury which should have dictated a finding of liability on the part of the Petitioner and, as a consequence, it is the Respondents' position that the Order of the trial court, vacating the jury verdict and granting a new trial pursuant to West Virginia Rule of Civil Procedure 59(a), was a reasonable exercise of the discretion afforded a trial judge.

c. The Jury Verdict of “No-Liability” Rendered in the Trial Court was Not Impacted by the Credibility of the Respondents’ Damages Witness.

Significantly, the great weight of emphasis in Petitioner’s brief is spent on the issue of the credibility of the Respondents’ witness, Terry L. Smith, of TL Smith Excavating, who was produced at trial to speak exclusively to the reasonableness of the *amount* of damages (i.e., the cost to clean the pond) rather than the issue of the cause of damages. Terry L. Smith is a practical skills expert, not a professional trial witness, with approximately thirty-two (32) years of experience in excavation methods and real property development techniques. (App. 00674). Although initially disclosed as an expert on both the cause and effect of the damages at issue in the underlying lawsuit, his testimony on the former point was not necessary in light of the testimony of Garland S. Roberts, coupled with the WVDEP records and demonstrative evidence set forth herein. (App. 00046-00047). While there were no exact measurements of pond depth with respect to the testimony introduced at trial, it is clear that there is a significant amount of silt in the Respondents’ pond as evidenced by the three estimates introduced at trial. (App. 01161-01163; 01035-01037; 01180). These three estimates, prepared by Respondents’ expert Terry L. Smith, by J.C. Bosley Construction, Inc., and by A1A Home Improvement, LLC, respectively, were entered into evidence and speak to the cost of removing this silt and repairing the pond to its natural condition. *Id.* It was the Petitioner’s burden, by clear and convincing evidence, to show the extent of those costs attributable - wholly or partially - to other alleged sources. *In re*

Flood Litigation, Syl. Pt. 10, 216 W.Va. 534, 607 S.E.2d 863 (2004). The Petitioner did not meet this burden. However, the jury did not address the reasonableness of any of said estimates as it did not reach the question of damages. (App. 00275-00276). Rather, the jury found for the Petitioner on the ground that there was no liability for his actions. *Id.* This finding, in light of the evidence introduced at trial, lacks any reasonable foundation.

In *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994), this Court addressed the issue of whether a trial judge improperly vacated a jury verdict and awarded a new trial. *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. at 124. In that case, the State brought a products liability action against manufacturers of building materials containing asbestos which were used in the construction of state buildings. *Id.* at 123. Following a directed verdict granted upon motion of the State as to liability, the jury returned with a verdict of zero damages. *Id.* In affirming the lower court's grant of a new trial, this Court discussed the evidence in the case, as described in the order of the trial judge, as being so overwhelming that there was asbestos in the buildings and that there would be damages to either encapsulate it or remove it. *Id.* at 126-127. Much like *In re State Public Bldg. Asbestos Litigation*, the evidence in the record here is overwhelming insofar as silt is clearly coming from the Petitioner's property development and depositing itself into the pond owned by the Respondents.

In *Bronson v. Riffe*, 148 W.Va. 362, 135 S.E.2d 244 (1964), another case addressing the issue of whether a trial judge improperly vacated a jury verdict and awarded a new trial, the following legal standard was announced:

A verdict based on oral testimony which is inconsistent with physical facts admitted to be true or established by uncontroverted evidence should be set aside as being contrary to the weight of evidence. This rule of law is applicable only when oral testimony

is in conflict with and is overcome by some plain law of nature, the result of a simple mathematical calculation or uncontroverted facts.

Bronson v. Riffe, 148 W.Va. at Syl. Pt. 1. Accordingly, if the physical facts are contrary to the jury verdict and they're uncontroverted then the verdict should be set aside. In *Bronson*, a case involving a motor vehicle accident, the only question involved in the trial was whether the accident occurred on the Plaintiff's or Defendant's side of the highway. *Id.* at 364. As a result of the accident, a hole was gouged from the pavement approximately ten (10) to eighteen (18) inches from the center line on the Plaintiff's side of the highway. *Id.* The jury rendered a verdict on liability in favor of the Defendant, but said verdict was vacated and the Plaintiff's motion for new trial was granted. *Id.* The trial court reasoned that the evidence greatly preponderated to the conclusion that the gouge mark was caused by the truck at the point of impact and that the oral evidence to the effect that the point of impact was on the Defendant's side of the highway was clearly inconsistent with the physical facts. *Id.* Although there was no dispute as to the location of the gouge mark, there was conflicting evidence introduced at trial as to its cause. *Id.* at 367. Accordingly, because there was a conflict in the evidence concerning its cause, this Court held that the trial judge had abused their discretion in vacating the jury verdict and granting the motion for new trial. *Id.* at 367-369. It is the Respondents' position that the *Bronson* case is instructive insofar as oral testimony in contravention of established physical facts justifies the discretion afforded a trial judge in granting a motion for new trial under Rule 59(a). The case *sub judice* may be distinguished from *Bronson* insofar as the physical facts that were in evidence in this case are not controverted with respect to the silt and sediment that came onto the Respondents' property and there isn't any other credible explanation based upon the testimony and evidence offered by the Petitioner. The video introduced at trial by Respondents shows the silt and sediment leaving the Petitioner's property and migrating all the way down to

the Respondents' pond. (App. 00764:11-00766:22; 00767:2-00769:22; 00795:19-00798:2; 01057). There isn't any doubt where the silt at issue in this civil action came from, and the oral testimony of the Petitioner that his development did not cause the siltation and increased water flow is controverted, not only by the physical video and photographic evidence introduced at trial, but by the plain law of nature that water runs downhill and carries along with it any loose sediment. (App. 01058-01071; 01164-01179; 00764:11-00766:22; 00767:2-00769:22; 00795:19-00798:2; 01057). More importantly, the WVDEP violations occurring over a period of time, both before and after the permit was issued, show that the material that was coming onto the site was by virtue of the Petitioner's failure to take the appropriate action to prevent it. (App. 01072-01160). As a result, the Trial Court was acting within the permissible boundaries of its discretion in vacating the jury verdict finding no liability on the part of the Petitioner and the Order granting the Respondents' Motion for New Trial should remain undisturbed.

d. The Evidentiary Basis for the Trial Court's Grant of Respondents' Motion for New Trial was such that the Trial Court was acting within its discretion in evaluating the evidence and assessing the credibility of witness testimony.

The testimony of Garland S. Roberts and the video and photographic evidence introduced at trial, taken together, lead one to the only conclusion a reasonable juror could make in this instance – that any silt not reasonably prevented from leaving the worksite owned by the Petitioner, would migrate down to the property line and into stream channel on the Respondents' adjoining property. With respect to the migration of this silt and water from the property line to the pond owned by the Respondents, during the course of the trial multiple photographs and two separate videos were shown to the jury which depicted the flow of water from the property line directly into the pond owned by the Respondents in this action. (App. 01167-01169; 01171; 01173; 01175-01176; 01178-01179; 00764:11-00766:24; 00795:19-00800:5; 01057). Video evidence shown from December 25, 2009, showing the path of water flow from the aforesaid

property line to the Respondents' pond shows a vastly different channel of runoff and sedimentation when compared with the subsequent video evidence shown from June 20, 2014, which shows a shockingly increased channel of waterflow and orange/brown silt rushing directly from said property line into the pond owned by the Respondents. (App. 00764:11-00766:24; 00795:19-00800:5; 01057). Accordingly, it cannot be a reasonable determination that the Petitioner, by his construction work, did *not* cause silt to accumulate in the pond owned by the Respondents. As a result, the jury verdict was so contrary to the clear evidence put forth before them that the Trial Court was within the scope of permissible discretion in granting Respondents' Motion for New Trial.

V. CONCLUSION

Because the Trial Court properly exercised its authority under Rule 59(a) of the West Virginia Rules of Civil Procedure, the Respondents respectfully request that this Court affirm the Trial Court's grant of the Respondents' Motion for New Trial.

WILLIAM D. SMITH and KERRY L.
SMITH, Respondents,

By counsel,



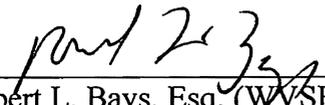
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CERTIFICATE OF SERVICE

The undersigned, counsel for Respondents, William D. Smith and Kerry L. Smith, hereby certifies that he has served the foregoing and hereto-annexed ***Response of Respondents, William D. Smith and Kerry L. Smith, to Brief on Behalf of Petitioner, Reginald S. Grimmett***, upon the following individuals by forwarding a true and exact copy thereof to:

George J. Cosenza, Esquire
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Counsel for Petitioner

in a properly addressed envelope, postage prepaid, by depositing the same in the regular course of the United States mail, this the 10th day of March, 2014.



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Counsel for Respondents