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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: YEAGER AIRPORT LITIGATION **CIVIL ACTION NO. 16-C-7000**

THIS DOCUMENT APPLIES TO:

BROTHERHOOD MUTUAL INSURANCE COMPANY, and THE KEYSTONE APOSTOLIC CHURCH f/k/a THE PENTACOSTAL ASSEMBLY OF JESUS CHRIST,

Plaintiffs

v. **Civil Action No. 16-C-293 KAN**

CENTRAL WEST VIRGINIA REGIONAL AIRPORT AUTHORITY, *et al.*,

Defendants

ORDER REGARDING THE KEYSTONE APOSTOLIC CHURCH'S MOTION FOR A DETERMINATION ON THE MEASURE OF RECOVERABLE DAMAGES

The Presiding Judges have reviewed and maturely considered *The Keystone Apostolic Church's Motion for a Determination on the Measure of Recoverable Damages* (Transaction ID 61344464), Defendants' *Joint Response* (Transaction ID 61396025) and Keystone's *Reply Memorandum* (Transaction ID 61420420). The Presiding Judges find the facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument.

Keystone argues it is entitled to recover the full replacement cost to rebuild and restore its facilities from Defendants, without limitation to the appraised value (*i.e.*, depreciated fair market value) of the facilities before the loss. Defendants contend Keystone is only entitled to recover the appraised value of the facilities immediately before the loss. However, Keystone argues Defendants' measure of damages would only allow the church to rebuild to about one-half the

size of its previous facilities, which would not accommodate its congregation and is not fair or reasonable. Mot. pp. 1-2.

Keystone relies upon *Brooks v. City of Huntington*, 234 W.Va. 607, 768 S.E.2d 97 (2014) to support its argument that: 1) the West Virginia Supreme Court reevaluated and modified its holding in *Jarrett v. E.L. Harper & Sons, Inc.*, 160 W.Va. 399, 235 S.E.2d 362 (1977) to allow a plaintiff to recover the cost of restoring property to its pre-damaged condition, even if the cost exceeds the fair market value of the property immediately before the loss; and 2) "[w]hile *Brooks* involved residential property, the same rationale applies to any type of property, especially property of a religious and philanthropic entity such as the Church" because "[a] church is not a corporate building; a church is a special-purpose property for the personal and religious use of the congregation and the community as a whole, and in that sense it is more akin to residential real estate than it is to corporate real estate." Mot. pp. 7-9.

Keystone further contends that courts in other jurisdictions have found churches to be like residential property for purposes of damages analyses, awarding damages in excess of fair market value or diminution of value, and that the West Virginia Supreme Court relied upon *Roman Catholic Church v. Louisiana Gas Serv. Co*., 618 So.2d 874, 879 (La. 1993)(holding that restoration damages were appropriate where church maintained property for philanthropic purpose) in *Brooks* for the proposition that limiting a plaintiff's recovery to appraised value of property may be "painfully inadequate" when the property is used as a residence. *Id.* pp. 9-10

Defendants argue the damages available to Keystone under West Virginia law arising from the total loss of its church building are limited to the fair market value of the non-residential real property, plus expenses and loss of use. They also argue the same measure of damages applies to Keystone's gymnasium only if it is determined to be a total loss. Resp. pp. 1-

2 However, they contend Keystone's gymnasium was not damaged in the partial slope failure or in the subsequent flooding, and would have had no damage whatsoever had it been maintained by Keystone. *Id.* footnote 1 and p. 4 Defendants dispute the necessity of Brotherhood Mutual Insurance Company's payment of policy limits for Keystone's gymnasium, asserting that Brotherhood's own inspection revealed the gymnasium was not structurally affected by the incident. While mold is present in the gymnasium, Defendants contend it is due to Keystone's failure to maintain the gymnasium, and the mold can be remediated for substantially less than the cost to rebuild the gymnasium. Resp. p. 5

Defendants contend *Brooks* is expressly limited to situations involving residential real property, and even if *Brooks* does apply here, it does not support an award of replacement cost damages to Keystone. They argue *Brooks* modified long-standing property damage law only as it pertains to the cost of repair of residential real property, not where there is a total loss. *Id.* Defendants point out that footnote 12 of *Brooks* expressly acknowledges that, "[w]ith respect to non-residential real property, however, *Jarrett* is still controlling authority and we leave for another day the determination as to whether *Jarrett* should be revisited with respect to such properties." See also footnote 1 of the unpublished opinion in *Closson v. Mountaineer Grading Co.*, 2016 WL 6651581,

> Petitioners do not refer to *Brooks*, and consequently, do not argue that the concepts springing from that case should extend to commercial property or be applied retroactively. They suggest, without citation to the appendix record on appeal, that the "property was . . . in essence, their retirement," but otherwise offer no evidence of a "personal" purpose behind the use of their commercial property. **We thus leave the question about the application of *Brooks* to commercial property for another day.**

(emphasis supplied)

Defendants also argue that because the evidence shows Keystone was looking to move to another location for years prior to the loss, Keystone cannot now maintain that its facilities were so unique and special that no comparable properties are available. *Id.* at p. 3 If Defendants are found liable, they should only be required to pay for the property damaged – a 34 year old, 9,700 square foot church building built on slightly less than 2 acres of property—and nothing more. Keystone wants Defendants to pay for the replacement cost of a church that is twice the size of the structure destroyed, on land five times larger than the prior location – a windfall for Keystone that does far more than make Keystone whole.

Having conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges unanimously FIND that Keystone's property is non-residential real property. Therefore, the measure of recoverable damages is controlled by *Jarrett v. E.L. Harper & Sons, Inc.*, 160 W.Va. 399, 235 S.E.2d 362 (1977), as recognized in footnote 12 of *Brooks v. City of Huntington*, 234 W.Va. 607, 768 S.E.2d 97 (2014), and as discussed in West Virginia Pattern Jury Instructions, § 804 Damage to Non-Residential Real Property (2017), including Notes and Sources.

Applying § 804 of the West Virginia Pattern Jury Instructions to this case, if the jury finds that Keystone has proven its claim against the Defendants for damages to its property, Keystone may recover any of the following elements of damage which Keystone has proven by a greater weight of the evidence:

1. The cost of repairing the property.
   If the property cannot be repaired, or if the cost of repair exceeds the property's market value before it was damaged, then Keystone may recover the property's reduction in value. To determine the reduction in value, the jury should determine the market value immediately before the damage to the property and subtract the market value immediately after the damage occurred.

2. Reasonable expenses incurred by Keystone as a result of the damage to the property.

3. Reasonable compensation for any lost profits/lost rental value during the time Keystone was deprived of its property that have been proven to a reasonable degree of certainty by Keystone.

If lost profits/lost rental value are not an appropriate measure of damages for loss of use of Keystone's real property, then annoyance and inconvenience can be considered as elements of proof in measuring damages for loss of use. Syl. Pt. 3, *Jarrett.* Therefore, to prove damage for loss of use, Keystone must show either: (1) lost profits/rental value during the time Keystone was deprived of its property; or (2) annoyance and inconvenience during the time Keystone was deprived of its property proven to a reasonable degree of certainty.

The Presiding Judges further FIND that, although Brotherhood Mutual Insurance Company has reimbursed Keystone for its gymnasium on a theory of total loss, Keystone's gymnasium remains standing. While the gymnasium may not have been accessible to Keystone for a period of time, and may have diminished in value since the partial slope failure and subsequent flooding it does not appear to be a total loss. As discussed above, Keystone would be entitled to recover the cost of repairing the gymnasium. If the gymnasium cannot be repaired or the cost of repair exceeds the market value of the gymnasium before it was damaged, Keystone may recover the property's reduction in value, reasonable expenses incurred by Keystone as a result of damage to the property, and reasonable compensation for loss of use proven to a reasonable degree of certainty. Furthermore, Defendants will be able to argue Keystone had a duty to mitigate any damage to the gymnasium.

It is so **ORDERED.**

ENTER: January 16, 2018.

/s/ John A. Hutchison
Lead Presiding Judge
Yeager Airport Litigation