



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: YEAGER AIRPORT LITIGATION

Civil Action No. 16-C-7000

THIS DOCUMENT APPLIES TO:

**JAMES JOHNSON and
DONNA JOHNSON,**

Plaintiffs,

v.

Civil Action No. 16-C-1826 KAN

**CAST & BAKER CORPORATION,
TRIAD ENGINEERING, INC. and
CENTRAL WEST VIRGINIA REGIONAL
AIRPORT AUTHORITY,**

Defendants.

ORDER GRANTING “DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT”

The Presiding Judges have reviewed and maturely considered *Defendants’ Motion for Summary Judgment* and *Memorandum of Law in Support of Defendants’ Motion for Summary Judgment* (Transaction ID 61637018). 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 make the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**:

FINDINGS OF FACT

1. In 2003, Yeager Airport undertook plans to construct a 500-foot extension of the 5 end of Runway 5-23 in order to create a Runway Safety Area. The runway extension is adjacent to part of Keystone Drive. Plaintiffs’ Complaint ¶ 7, 13.

2. Plaintiff James Johnson owns four properties on Keystone Drive. The addresses of these properties are:

a) 270 Keystone Drive (Tax Map 44 Parcels 78.1 and 79.1)

b) 239/240 Keystone Drive (Tax Map 44M Parcel 20) and

c) 212½ Keystone Drive (Tax Map 44M Parcel 11)

3. On March 15, 2015, the Runway Safety Area suffered a partial slope collapse.

4. Plaintiffs James Johnson and Donna Johnson are not residents of Keystone Drive.

They live in Marmet, West Virginia, and have lived there since 2010, five years prior to the partial slope collapse. (Depo. J. Johnson at 17:20-18:20.)

5. Donna Johnson has never lived on Keystone Drive. (Depo. D. Johnson at 13:15.)

6. On August 14, 2014, prior to the events in question, the Kanawha County Commission declared the structure on the property located at 270 Keystone Drive to be a “nuisance and possible health hazard.” Ultimately, the Kanawha County Commission demolished the structures on the properties located at 270 Keystone Drive and 212½ Keystone Drive and placed a lien on the properties for demolition and asbestos abatement. (Notices of Lien.)

7. The properties in question are located on the uphill side of Keystone Drive from Elk Two Mile Creek.

8. None of these four parcels of land suffered any flooding or physical damage as a result of the March 12, 2015 slide. (Depo. D. Johnson 52:4-5.)

9. Any personal property of James Johnson contained in any of the former structures was either stolen, or destroyed with the structures when the Kanawha County Commission removed the buildings. (Depo. J. Johnson 119.)

10. James Johnson and Donna Johnson have not had their property appraised and are unable to testify as to the value of their property. (Depo. J. Johnson 46:1-4). Mr. Johnson

specifically testified that no permanent damage to his properties arose from the partial slope collapse. (Depo. J. Johnson 138-40).

11. James Johnson and Donna Johnson were not present on their Keystone Drive properties or in the Keystone Drive vicinity at the time of the March 12, 2015 partial slope collapse. Mr. Johnson was unable to state when he became aware that the March 12, 2015 slide occurred since he moved away from Keystone Drive in 2010 and did not visit the Keystone properties on a daily basis. (Depo. J. Johnson 48:1).

12. James Johnson and Donna Johnson were never displaced from their properties or forced to stay in a hotel as a result of the events of March 12, 2015. (Depo. J. Johnson 51:12).

13. James Johnson stayed away from the properties on Keystone Drive following the March 12, 2015 event because he did not consider himself a resident of Keystone Drive. (Depo. J. Johnson 65:16-19).

14. Neither of the Johnsons sought medical or psychological treatment as a result of the March 12, 2015 partial slope collapse. (Depo. J. Johnson 67:16-19) (Depo. D. Johnson 32:1).

15. On February 20, 2018, Plaintiffs James Johnson and Donna Johnson were served with a copy of *Defendants' Motion for Summary Judgment* and a copy of the Court's *Notice of Hearing* via U.S. Mail, First Class, and Certified Mail, Return Receipt Requested. See Notice of Hearing (Transaction ID 61708037) and Certified Mail Receipt (Transaction ID 61757524).¹ Plaintiffs did not file a response or otherwise object to *Defendants' Motion for Summary Judgment*.

16. On March 12, 2018, the Court heard *Defendants' Motion for Summary Judgment*. Prior to hearing Defendants' motion, the Court directed the Bailiff to go into the hallway outside

¹ Counsel for Defendant Cast & Baker Corporation also confirmed service of *Defendants' Motion for Summary Judgment* on Plaintiffs via U.S. Mail and Certified Mail at the March 12, 2018 hearing.

the courtroom and call Plaintiffs James Johnson and Donna Johnson three times. The Bailiff called Plaintiffs James Johnson and Donna Johnson, as directed. Plaintiffs James Johnson and Donna Johnson did not respond to the Bailiff's call, and did not appear at the March 12, 2018, hearing.

CONCLUSIONS OF LAW

1. This issue is properly before this court to be determined as a matter of law. "Summary judgment is warranted if the available evidence demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." W.Va. R.C.P. Rule 56; *Jochum v. Waste Management of West Virginia, Inc.*, 224 W.Va. 44, 48, 680 S.E.2d 59 (2009).

2. In a negligence suit, a plaintiff is required to show four basic elements: duty, breach, causation, and damages. Syl. Pt. 3 *Aetna Casualty v. Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Furthermore, "[a]n injured party bears the burden of proving damages with proper evidence. A negligent party cannot be held to respond in compensatory damages for that which was not the proximate result of his tort." *Abdulla v. Pittsburgh & Weirton Bus Co.*, 158 W.Va. 592, 609, 213 S.E.2d 810, 822 (1975).

3. There is no genuine issue of material fact regarding the cause of Plaintiffs' alleged property damages. Plaintiffs were not living on any of the properties in question at the time of the March 12, 2015 partial slope collapse. At that time, all of the Plaintiffs' properties either did not have a structure on them, or Plaintiffs were in the process of removing existing structures by order of the Kanawha County Commission.

4. As early as August 4, 2014, the Kanawha County Commission had determined that the structure located at 270 Keystone Drive was a nuisance due to "[t]he continued existence

of the abandoned dilapidated structure and trash and debris.” (First Notice letter dated August 4, 2014, from David H. Armstrong of the Kanawha County Planning and Community Development Office to James and Donna Johnson). The Kanawha County Commission filed liens against the properties located at 212½ Keystone Drive and 270 Keystone Drive for the cost incurred by the County to remove the dilapidated structure from those properties.

5. Because the destruction and removal of any structure or personal property on the properties in question was done either by Plaintiffs themselves or by order of the Kanawha County Commission, Defendants’ actions were not the proximate cause of Plaintiffs’ alleged property damages and, therefore, Defendants are entitled to summary judgment as a matter of law.

6. Plaintiffs also have failed to offer evidence sufficient to support their claims for loss of use, annoyance, inconvenience, aggravation, and mental distress. If lost profits/lost rental value are not an appropriate measure of damages for loss of use of real property, annoyance and inconvenience can be considered as elements of proof in measuring damages for loss of use. See Syl. Pt. 3, *Jarrett v. E.L. Harper & Son, Inc.*, 160 W. Va. 399, 399, 235 S.E.2d 362, 363 (1977), holding modified by *Brooks v. City of Huntington*, 234 W. Va. 607, 768 S.E.2d 97 (2014).

7. Plaintiffs are not entitled to damages for loss of use for three reasons. First, Plaintiffs did not live at any of the properties in question at the time of the slope failure. Second, Plaintiffs were not deprived of the use of their property after the partial slope collapse. James Johnson testified that Plaintiffs were not at their properties at the time of the slope failure; nor did they or anyone else live at the properties. Thus, Plaintiffs were not evacuated from their home, they did not have to move into a hotel, and their access to their properties was not restricted in any way that was different from the rest of the general public. At no time were

Plaintiffs deprived of the use of the property after the partial slope collapse. Third, Mr. Johnson testified that Plaintiffs did not rent or use the properties to generate any income prior to the slide. Thus, there is no loss of rental income or other income post-slide.

8. The evidence in this case is clear that Plaintiffs suffered no loss of use of their properties. Plaintiffs' properties consisted of four non-income generating lots prior to the partial slope collapse and are the same non-income generating lots after the partial slope collapse. Because Plaintiffs suffered no quantifiable loss in the aftermath of the partial slope collapse they are not entitled to recovery for annoyance and inconvenience as a matter of law.

9. Additionally, Plaintiffs have presented no evidence that their properties suffered a diminution in value as a result of the partial slope collapse. To the contrary, Mr. Johnson testified that there was no permanent physical damage to any of his properties on Keystone Drive as a result of the partial slope collapse. (Depo. J. Johnson, at 138-40). Plaintiffs' claim for diminution of value is based entirely upon a speculative loss of future market value, which is not a sufficient basis for a diminution of value claim in West Virginia.

10. In Syllabus Point 6 of *Brooks*, the Supreme Court of Appeals of West Virginia recognized that:

Where the owner of residential real property which is damaged can establish that the pre-damage fair market value of the residential real property cannot be fully restored by repairs and that a permanent, appreciable residual diminution in value will exist even after such repairs are made, then the owner may recover both the cost of repair and for such remaining diminution in value.

However, allowing claims for diminution in value for property when there has been no actual physical damage to the property is an extraordinary remedy and should be "guarded with scrutiny" before submitting them to the jury. *Id.* 234 W.Va. at 618, 768 S.E.2d at 108. Recognizing this, the *Brooks* Court cautioned that "[m]ere cosmetic damage, speculative

decreased future market value, or damage which can be readily and fully remediated are an insufficient foundation for a claim of residual diminution in value.” *Id.*

11. Because James Johnson testified that there was no permanent damage to any of his properties on Keystone Drive, Plaintiffs’ diminution claim is based entirely upon a speculative loss in the future market value of the properties which, pursuant to *Brooks*, is not a sufficient foundation for such a claim. Plaintiffs have not provided any evidence, beyond mere conjecture and speculation, of any loss of value in their properties.

12. At the time of the partial slope failure, and for many years prior, Plaintiffs’ properties consisted of two entirely vacant lots and two vacant lots containing uninhabitable or semi-demolished, condemned structures. Plaintiff’s properties now consist entirely of vacant lots: 1) two vacant adjacent lots, upon which there is a \$7,935.20 lien for the demolition and removal of the condemned house; 2) a vacant lot that has not had a house on it since 2006; and, 3) a vacant lot upon which there is a \$8,251.20 lien for the demolition and removal of the condemned house.

13. Beyond James Johnson’s own speculation, Plaintiffs have provided no evidence regarding the current or future value of his properties. Because there is no genuine issue of material fact that the Plaintiffs’ have failed to provide a sufficient foundation to support their claim of residual diminution in value Defendants are entitled to summary judgment as a matter of law.

14. Plaintiffs’ final claim against the Defendants is for recovery of punitive damages. However, under West Virginia law, “to sustain a claim for punitive damages the wrongful act must have been done maliciously, wantonly, mischievously, or with criminal indifference to civil obligations.” *GMAC v. D.C. Wrecker Serv.*, 220 W.Va. 425, 431, 647 S.E.2d 861, 867 (2007).

15. The record is clear that all of the Plaintiffs' alleged damages and demands arise out of the destruction of the structures on their properties. However, the structures were condemned and destroyed by order of the Kanawha County Commission, not the Defendants. Therefore, the Defendants cannot be held to have maliciously, wantonly, mischievously, recklessly, or with criminal indifference caused Plaintiffs' alleged damages.

16. The Presiding Judges FIND that the evidence established in this case demonstrates there is no genuine issue of material fact, and that Cast & Baker Corporation, Triad Engineering, Inc. and Central West Virginia Regional Airport Authority are entitled to summary judgment as a matter of law.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that the claims asserted against Defendants Cast & Baker Corporation, Triad Engineering, Inc. and Central West Virginia Regional Airport Authority in the matter of *James Johnson and Donna Johnson v. Cast & Baker Corporation, Triad Engineering, Inc., and Central West Virginia Regional Airport Authority*, Civil Action No. 16-C-1826 KAN are hereby **DISMISSED WITH PREJUDICE**.

The Court directs the Mass Litigation Manager to send a copy of this Order to Plaintiffs James Johnson and Donna Johnson via U.S. Mail, First Class, and Certified Mail, Return Receipt Requested, to the following address: 313 99th Street, Marmet, West Virginia 25315. A copy of the Order has been electronically served on all counsel of record via File & ServeXpress this day.

It is so **ORDERED**.

ENTER: March 16, 2018.

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