STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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) No. 14-1334 (Harrison County 12-C-161)

BENEDUM AIRPORT AUTHORITY,
Defendant/Third-Party Plaintiff Below,
and THE THRASHER GROUP,
Third-Party Defendant Below,
Respondents

FILED
February 26, 2016
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners, Mary Lola Ryan and her co-guardians, Claude J. Ryan, III, and Heather E. Ribel, by counsel James N. Riley, Michael D. Crim, and Richard R. Marsh, appeal a summary judgment order entered November 21, 2014, by the Circuit Court of Harrison County. Petitioners filed this action against Respondent Benedum Airport Authority ("Airport") seeking to recover damages to their real property they alleged occurred because the Airport failed to properly reclaim its site following a runway improvement project. The Airport filed a third party complaint against its engineer, The Thrasher Group ("Engineer"). Following discovery, the circuit court found Petitioners' claims of property damages were identical to the damages previously litigated and settled by the parties in a condemnation action. Petitioners assert that summary judgment was improper because genuine issues of material fact exist regarding the Airport's breach of duty to reclaim the site. The Airport, by counsel Harry F. Bell, Jr., Stacy A. Jacques, and its Engineer, by counsel Frank E. Simmerman, Jr., and Chad L. Taylor, filed a joint response in support of the circuit court's order.

This Court has considered the parties' briefs, the appendix record, the pertinent authorities, and oral argument. We find no new or significant questions of law, and, upon application of the standard for our review, we find no prejudicial error. For these reasons, a memorandum decision affirming the order of the circuit court is appropriate under Rule 21 of the West Virginia Rules of Appellate Procedure.

I. FACTUAL AND PROCEDURAL HISTORY

In this case we are asked to determine whether Petitioners may proceed with the instant action against the Airport, filed three years after the parties settled a condemnation action. To understand the controversy, it is necessary to revisit the previous suit between Petitioners and the Airport.

A. The Condemnation Action

The Airport is a public corporation which operates the North Central West Virginia Airport in Bridgeport, West Virginia. In 2006, the Airport filed a petition for condemnation for purposes of acquiring by way of eminent domain a hilltop comprised of twenty-six acres near the runway which encroached upon the Airport's safety area. *See* W.Va. Code § 54-2-2 (2008). The Airport also sought a three-acre temporary construction easement. This property was part of a larger tract of a one-hundred-sixty acre farm owned by Petitioner Mary Lola Ryan which was adjacent to the Airport.

The condemnation action developed into protracted litigation, which spanned more than three years. One of the major issues of contention involved the storm water impact to the property and pond adjacent to the lands taken by the Airport as a result of the major excavation work. Petitioners provided the Airport and its contractors with a hand-written authorization to enter their property to inspect multiple concerns they had regarding water runoff. The condemnation commissioners appointed to hear this matter issued a report finding that $140,000 constituted just compensation for the property taken and any damage to the residual property.

Petitioners retained two expert witnesses: Patrick E. Gallagher, an engineer, and Larry M. McDaniel, a real estate appraiser. In his June 2008 report, Mr. Gallagher expressed concerns that the Airport's project was causing an increase in the contributing watershed onto Petitioners' farm pond; he opined the pond would receive twenty percent more runoff water as a result of the project. Mr. Gallagher determined the additional watershed contributing to the pond would result in a need to increase the spillways systems of the pond in order to safely control the volume of storm water. He estimated the cost of improving the pond at $30,000.

In his June 2008 report, Mr. McDaniel calculated Petitioners' just compensation for the action at $292,100. He considered (1) the value of the land actually taken, (2) the severance damages to the residue, and (3) the temporary construction easement. According to Mr. McDaniel, the $292,100 was comprised in part of $161,100 for severance damages – of which $92,000 was related to watershed concerns. This $92,000 figure represented $62,000 for the diminution in value to Petitioners' residual property and $30,000 for the cost of improving the pond to accommodate the increased storm water runoff.

In 2009, the parties reached a settlement agreement; this agreement was not reduced to writing. However, the circuit court entered an Agreed Order of Dismissal which set forth the terms of the settlement agreement. The order provided that "all matters and differences between the parties in this case have been adjusted, compromised, and settled" and that $250,000 was "just compensation for the lands and all interest in real estate taken by [the Airport] . . . as well as damages to the residue of said real estate."[1] Relevant to our analysis below, the Agreed Order of Dismissal does not address the Airport's obligations regarding post-project site reclamation.

Petitioners and the Airport generally agree that a portion of the settlement proceeds was intended to cover Petitioners' anticipated costs to remediate the additional storm water issues affecting their farm's pond. However, since receiving the proceeds of the settlement, Petitioners performed almost no remediation; they installed two culverts to the farm pond at a cost of less than

[1]The term "residue" referred to the approximately one hundred thirty-two acres of the farm remaining after the condemnation.

$500. This issue is one of the major points of contention between the parties. The Airport argues that Petitioners failed to use the $30,000 to improve the pond and this failure is causing excessive erosion to their farm. On the other hand, Petitioners argue that it would be futile to improve the pond because sediment continues to fill the pond due to the Airport's failure to establish vegetation on the property condemned.

B. The Instant Action

In April 2012, Petitioners filed suit against the Airport and asserted (1) negligence, (2) trespass, and (3) violations of state and federal regulations.[2] Petitioners alleged that water runoff from the Airport's property eroded their property and created deep ditches on the farm, and that topsoil, silt and other debris have collected in their farm pond. Petitioners presented the October 2011 letter of Bradley Durst, a Conservation Specialist with the West Virginia Conservation Agency. Without mentioning the Airport, Mr. Durst discussed the problems he observed on Petitioners' farm "due to the land changes made to the adjoining property." He concluded, in part, "that approximately 10 acres of drainage has been modified and directed to the south, the Ryan Farm, rather than to the north where it originally drained. The control of this additional runoff appears to have not been accounted for when the engineering of the site was made." He made several recommendations, including the installation of water management practices on both properties.

Petitioners relied on the same expert witness as they used in the condemnation action, Mr. Gallagher. In a letter dated April 2014, Mr. Gallagher identified four areas of concern he labeled on an aerial image of the site. Mr. Gallagher stated those problems were a direct result of the water runoff from the Airport's project site being directly discharged onto Petitioners' farm without any erosion control measures. He estimated it would cost $31,000 to remediate the areas.

In August 2013, the circuit court permitted the Airport to file a third party complaint against its Engineer on the runway improvement project.[3] Counsel for the Engineer deposed Mr. Claude J. Ryan, III, (the son of Mary Lola Ryan) in May 2014. In the only deposition taken in this suit, Mr. Ryan testified there were four general areas for which Petitioners were seeking damages. He agreed that areas one, two and three were known to Petitioners in 2008, and that their concerns for these areas were raised in the condemnation action. However, he believed the damages were worse now. Mr. Ryan discussed a fourth area, and stated that no expert had examined that area. Mr. Ryan testified that it was his belief that the Airport would establish grass and vegetation as part of its reclamation work, but he could not point to any specific obligation of the Airport to do this work.

In August 2014, the Engineer filed a motion for summary judgment and the Airport joined its motion. Although Petitioners' response to the motion was filed late, the circuit court stated at the hearing that it would consider their brief. Petitioners attached a Notice of Violation issued to the Airport by the West Virginia Department of Environmental Protection ("WVDEP") in October 2011. The WVDEP inspector stated the site was unsatisfactory; the Airport was cited for "[h]aving allowed sediment-laden water to leave the site without going through an appropriate device."

[2]In their complaint, Petitioners failed to specify the violation of any specific state or federal regulations as the basis for their relief.

[3]Petitioners did not amend their complaint to add the Engineer as a defendant nor did they assert any claims against the Engineer pursuant to Rule 14 of the West Virginia Rules of Civil Procedure.

The circuit court granted summary judgment in favor of Respondents and found that Petitioners provided no evidence through which they could prove the Airport acted negligently, or breached the implied terms of the settlement agreement reached in the condemnation action. The circuit court also held that the elements of res judicata and collateral estoppel were met. The circuit court specifically found the issue of damages in the previous action was "identical to the one presented in the instant action[.]"[4]

II. STANDARD OF REVIEW

Our review in this case is unquestionably plenary as we are examining the grounds upon which the circuit court relied in granting summary judgment. *See* Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*."). This Court also reviews questions of law de novo. *See* Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."). And "[t]he determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law." Syl. Pt. 5, *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000).

With these principles in mind, we consider the arguments of the parties.

III. DISCUSSION

On appeal, Petitioners raise one assignment of error. They argue the circuit court erred in awarding summary judgment because a genuine issue of material fact exists as to whether the Airport complied with the agreed order of dismissal entered in the condemnation action. Petitioners assert the previous condemnation action "clearly included an implied obligation on the part of the [Airport] to properly reclaim its site."

Petitioners advocate an approach to resolve this appeal that is based on a false premise: that they put forth evidence to establish that the parties reached an agreement regarding the Airport's site reclamation obligations. To the contrary, the Agreed Order of Dismissal is silent on this issue. While conceding that a breach of contract claim was never pled, Petitioners inappropriately make this contractual-based claim the focus of their appeal. It should go without saying, however, that we cannot embrace this argument. *See* Syl. Pt. 13, *W.Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014) ("The Court takes the pleadings and record as it finds them and the adversarial process makes it incumbent on the parties to plead the causes of action and present the requisite evidence necessary to maintain viability of their case. Courts cannot concoct or resurrect arguments neither made nor advanced by the parties.").

[4]In dismissing Petitioners' third cause of action, the circuit court determined that as private citizens, Petitioners lack standing to bring a claim against the Airport stemming from the notice of violation issued by the WVDEP. We agree that the statute is clear that only the Director of the WVDEP may institute a civil claim for violations of the Water Pollution Control Act. *See* W.Va. Code § 22-11-22(a) (2014). In their brief before this Court, Petitioners concede this point.

Petitioners further challenge a number of the circuit court's conclusions of law. Respondents counter that it is unnecessary for this Court to address all those arguments because the elements of res judicata and/or collateral estoppel are satisfied and determinative of this appeal. We agree. Although the same result would be reached under either doctrine, we find the doctrine of res judicata is more applicable to this dispute.

"The purpose of *res judicata*, also referred to as 'claim preclusion,' is to 'preclude the expense and vexation attending relitigation of causes of action which have been fully and fairly decided.'" *Antolini v. W. Va. Div. of Nat. Res.*, 220 W.Va. 255, 258, 647 S.E.2d 535, 538 (2007) (quoting *Sattler v. Bailey*, 184 W.Va. 212, 217, 400 S.E.2d 220, 225 (1990)). In syllabus point four of *Blake v. Charleston Area Medical Center, Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997), we held:

> Before 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.

Applying the res judicata factors to the instant proceeding, the first two criteria, i.e., final adjudication on the merits and identity of parties, are plainly fulfilled. Therefore, the only remaining issue is whether the third element, namely identity of the cause of action or the ability to have previously resolved the cause of action, has been met in this case.

Petitioners argue the instant action is not barred by res judicata because they could not have litigated their tort claims in the condemnation proceeding. Petitioners maintain they could not have anticipated when they settled that suit that the Airport would create additional damages by its failure to properly reclaim the site. Petitioners resort to their breach of contract argument on this point and state that at the time of the settlement, the Airport "intended to reclaim its site by establishing vegetation" and Petitioners "believed" that the Airport would do so. If this was in fact the agreement, however, it would behoove Petitioners to produce more than Mr. Ryan's ill-defined expectancies.[5]

We agree with Petitioners' general line of reasoning that damages recoverable in a condemnation action do not include tort damages.[6] "If the damage for which recovery is sought is the

---

[5]Petitioners did not depose Chad Biller, the Engineer's project manager in this action. Therefore, we find their argument -- that Mr. Biller would support their claim had this case gone to trial – mere speculation. Petitioners cite portions of Mr. Biller's 2008 deposition testimony in the condemnation action wherein he discussed general efforts to stabilize the site and establish vegetation. However, at the time Mr. Biller testified, the Engineer was still "waiting on the FAA to approve [its] final plans" for reclamation.

[6]This Court has held:

> Damages resulting in the residue of the land not taken, from trespass thereon, or from the negligent or unskillful manner of doing a proposed work of internal improvement on the part taken, as the building of a railroad, or the like, are not

result of improper, unlawful or negligent construction or maintenance, recovery may not be had therefor in the [condemnation] proceeding. The owner is relegated in such case to a common-law action for damages." 4A Julius L. Sackman & Patrick J. Rohan, *Nichols' The Law of Eminent Domain* § 14.16[1], at 14-372-76 (Rev. 3d ed. 1990). Under proper circumstances, proof of a state or local government authority's breach of duty to use reasonable care to avoid injury to private property when undertaking a public improvement may support a negligence claim for property damages proximately caused by the government's breach. *See generally* Mark S. Dennison, *Governmental Liability for Injury to Landowner's Property from Road Construction Activities on Neighboring Land*, 65 Am. Jur. Proof of Facts 3d 311, § 10 Negligence Claim (2002).[7]

Nevertheless, Petitioners' attempt to proceed with this independent action collapses for two fundamental reasons. First, "before one can recover under a tort theory of liability, he or she must prove each of the four elements of a tort: duty, breach, causation, and damages." *Carter v. Monsanto Co.*, 212 W.Va. 732, 737, 575 S.E.2d 342, 347 (2002). Petitioners allege the Airport acted negligently in completing the reclamation work at the conclusion of the runway project. However, they provided no evidence whatsoever on the first two elements of such claim. Although their argument lacks clarity, Petitioners appear to assert that the Airport's *duty* to perform reclamation work was contractual. However, as discussed above, they submitted no evidence that this was a term of the settlement. Furthermore, Petitioners never established what the plans and specifications were for the Airport's site reclamation following the project.[8] Without evidence establishing what the Airport's duty was regarding site reclamation, it would be impossible for one to take the next step to determine if it *breached* that duty. Accordingly, Petitioners' claims fail as a matter of law. Their "implied obligation" theory of duty is wholly lacking in proper evidentiary support.[9] This Court has

---

> recoverable in condemnation, but constitute the basis of a separate and independent action; but all such damages to the residue as might have been reasonably anticipated from doing such work carefully and skillfully, and as proposed by the applicant, are the project subject for consideration by commissioners or jury in a condemnation proceeding.

Syl. Pt. 6, in part, *Buckhannon & N.R. Co. v. Great Scott Coal & Coke Co.*, 75 W.Va. 423, 83 S.E. 1031 (1914).

[7]Similarly, corporations which are employed as independent contractors by a state or local government authority may be held liable for damage proximately caused to the property of landowners by their negligence in their performance of construction contracts. *See generally Ellison v. Wood & Bush Co.*, 153 W.Va. 506, 170 S.E.2d 321 (1969); *Sayre v. Stevens Excavating Co.*, 163 W.Va. 324, 256 S.E.2d 571 (1979).

[8]The appendix record does not contain the plans or specifications prepared by the Engineer regarding any post-project reclamation work. Likewise, the appendix record does not contain any information as to the actual work performed by the Airport's construction contractor(s) who completed the runway improvement project; no party filed suit against the contractor(s) or alleged the contractor(s) deviated from the project's plans or specifications.

[9]We reject Petitioners' argument that the October 2011 site inspection and notice of violation by the WVDEP was sufficient to establish the Airport's breach of *duty owed to Petitioners*. For the same reason, the Airport's regulatory duties pursuant to its WV/NPDES construction storm water permit do not go to the issue of the duty it owed to Petitioners. *See* Syl. Pt. 1, *Anderson v. Moulder*,

held that "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).[10]

Second, Petitioners' current damages flow naturally and proximately from the Airport's decision to condemn this property and devote it to expanding the runway. Regardless of whether Petitioners anticipated the extent of the damages, they were recoverable in the condemnation proceeding. In fact, as evidenced by the amount of the condemnation award, which was much greater than the commissioner's appraised value for the condemned tract, Petitioners did recover for such additional, consequential damages to their remaining property.

What is evident from the appendix record is that Petitioners previously settled their claims for the same erosion damages plead in this case. They admit that a portion of the 2009 settlement proceeds were based upon Petitioners' costs to remediate estimated by Mr. Gallagher at $30,000. However, since receiving the settlement proceeds, Petitioners made little to no effort to utilize those funds to effectuate remediation. In the instant case, Mr. Gallagher evaluated the site and again opined that the cost to remediate would be basically the same amount sought at the condemnation proceeding: $31,000. Therefore, it is clear that Petitioners are simply attempting to repackage their condemnation damages as tort damages to collect twice. "From a policy perspective, allowing this claim to proceed will permit unending inverse condemnation and damage claims from property owners who decide, after construction, that the [public] improvement's design impacts them in a way they did not anticipate." *Butler v. Gwinnett Cty.*, 479 S.E.2d 11, 13 (Ga. Ct. App. 1996).

Based upon the facts and circumstances of the instant appeal, we find that Petitioners' claims against the Airport are precluded by the prior settlement. "We wish to emphasize once again that the application of *res judicata* is dependent upon the distinctive characteristics of a particular case." *Beahm v. 7 Eleven, Inc.*, 223 W. Va. 269, 276, 672 S.E.2d 598, 605 (2008). In reaching this conclusion, we do not suggest that a landowner is forever precluded from proceeding with a negligence action following condemnation. As the above analysis confirms, a landowner may proceed with such suit in certain situations with proper evidentiary support.

---

183 W.Va. 77, 394 S.E.2d 61 (1990) ("Violation of a statute is *prima facie* evidence of negligence. In order to be actionable, such violation must be the proximate cause of the plaintiff's injury.").

[10]Similarly, we find summary judgment was proper as to Petitioners' trespass claim. A trespass generally refers to an unauthorized intrusion onto the land of another. *See Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 386 (4th Cir. 2013) ("In West Virginia, common law trespass is 'an entry on another man's ground *without lawful authority*, and doing some damage, however inconsiderable, to his real property.' *Hark v. Mountain Fork Lumber Co.*, 127 W.Va. 586, 591-92, 34 S.E.2d 348, 352 (1945) (emphasis added)."). Petitioners failed to submit evidence on the essential elements for a common law trespass because the Airport had lawful authority, as resolved in the condemnation proceeding, to redirect storm water onto their property and Petitioners received compensation for those resulting damages.

IV. CONCLUSION

For the reasons stated herein, we affirm the November 21, 2014, summary judgment order of the Circuit Court of Harrison County.

Affirmed.

ISSUED: February 26, 2016

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Allen H. Loughry II