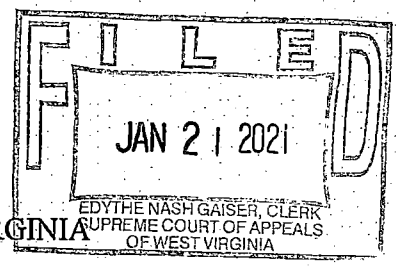


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0849

MYRA KAY REILLEY, AS ADMINISTRATRIX
OF THE ESTATE OF FRANCIS E. REILLEY,
AND MYRA KAY REILLEY, INDIVIDUALLY

Defendant Below, Petitioner

vs.) No. 20-0849

THE BOARD OF EDCATION OF THE
COUNTY OF MARSHALL,

Plaintiff Below, Respondent.

UNDERLYING MARSHALL COUNTY
CIVIL ACTION NO. 10-C-180

Opening Brief of Petitioner, Myra Kay Reilley, as Administratrix of the Estate of Francis E. Reilley, and Myra Kay Reilley, Individually

Jeffrey A. Holmstrand (#4893)
GROVE, HOLMSTRAND & DELK, PLLC
44 ½ Fifteenth Street
Wheeling, West Virginia 26003
(304) 905-1961
jholmstrand@ghdlawfirm.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

ASSIGNMENTS OF ERROR

STATEMENT OF THE CASE

SUMMARY OF ARGUMENT

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

ARGUMENT

I. THE LOWER COURT ERRED IN FAILING TO GRANT THE MOTION TO DISMISS FOR FAILURE TO TIMELY SERVE BASED ON ITS FINDING OF UNSPECIFIED "GOOD CAUSE."

II. THE LOWER COURT ERRED IN ULTIMATELY PERMITTING THE JURY TO CONSIDER PLAINTIFF'S CLAIMS FOR MONETARY DAMAGES ARISING OUT OF THE TWO FLOOD EVENTS WHICH OCCURRED MORE THAN TWO YEARS BEFORE SUIT WAS INITIALLY FILED.

III. THE LOWER COURT ERRED IN DENYING PETITIONER'S MOTON FOR SUMMARY JUDGMENT, FOR JUDGMENT AS A MATTER OF LAW OR FOR A NEW TRIAL BECAUSE THE EVIDENCE WAS INSUFFICIENT FOR THE JURY TO FIND THAT THE CONSTRUCTION OF THE DUCK LANE BRIDGE AND THE INSTALLATION OF THE CULVERTS PROXIMATELY CAUSED THE MONETARY DAMAGES CLAIMED.

IV. THE LOWER COURT'S AWARD OF INJUNCTIVE RELIEF FAILED TO COMPLY WITH RULE 65 BECAUSE IT FAILED TO CONTAIN APPROPRIATE FINDINGS OF FACT OR CONCLUSIONS OF LAW AND WAS OTHERWISE UNSUPPORTED BY THE EVIDENCE OF IRREPARABLE HARM OR ANY OTHER BASIS FOR THE AWARD OF INJUNCTIVE RELIEF.

CONCLUSION

TABLE OF AUTHORITIES

CASES

Aetna Cas. & Sur. Co. v. Pitrolo, 176 W. Va. 190, 195, 342 S.E.2d 156, 161 (1986) 34

Alberti v. Cruise, 383 F.2d 268, 271 (4th Cir. 1967) 33, 34

Ashland Oil v. Kaufman, 181 W. Va. 728, 733, 384 S.E.2d 173, 178 (1989) 33

Bansbach v. Harbin, 229 W. Va. 287, 728 S.E.2d 533 (2012) 37

Board of Dental Examiners v. Storch, 146 W. Va. 662, 122 S.E.2d 295 (1961) 32

Bonney v. MTM Family Ltd. Partnership, 2013 Conn. Super. LEXIS 203, at *19 (Super. Ct. Jan. 28, 2013) 36

Burkes v. Fas-Chek Food Mart Inc., 217 W.Va. 291, 298, 617 S.E.2d 838, 845 (2005) 15

Camden-Clark Mem'l Hosp. Corp. v. Turner, 212 W. Va. 752, 575 S.E.2d 362, 2002 W. Va. LEXIS 240 (2002) 32

CPC Int'l, Inc. v. Skippy Inc., 214 F.3d 456, 459 (4th Cir. 2000) 33

Davis-Wilson v. Hilton Hotels Corp., 106 F.R.D. 505 (E.D. La. 1985) 15

DeRocchis v. Matlack, Inc., 194 W. Va. 417, 423 n.4, 460 S.E.2d 663, 669 n. 4 (1995) 22, 24

Eastern Refractories Co. v. Forty Eight Insulations, Inc., 187 F.R.D. 503 (S.D.N.Y. 1999) 15

Ewing v. Bd. of Educ., 202 W. Va. 228, 503 S.E.2d 541 (1998) 16

Fredeking v. Tyler, 224 W. Va. 1, 680 S.E.2d 16 (2009) 26

G Corp. v. MackJo, Inc., 195 W. Va. 752, 754, 466 S.E.2d 820, 822 (1995) 32

Gartin v. Par Pharm. Cos., 289 F. App'x 688, 692 (5th Cir. 2008) 15

Graham v. Beverage, P.C., 211 W.Va. 466, 476-77, 566 S.E.2d 603, 613-14 (2002) 21, 23, 24

Hall's Park Motel v. Rover Constr., 194 W. Va. 309, 312, 460 S.E.2d 444, 447 (1995) 19

Handley v. Town of Shinnston, 169 W.Va. 617, 289 S.E.2d 201 (1982) 23, 24

Healthcare Compare Corp. v. Super Solutions Corp., 151 F.R.D. 114 (D. Minn. 1993) 15

Hess v. W. Va. Div. of Corr., 227 W. Va. 15, 17, 705 S.E.2d 125, 127 (2010) 16

Holmes v. Coast Transit Auth., 815 So. 2d 1183, 1186-87 (Miss. 2002) 14

Hook v. Hook & Ackerman, Inc., 213 F.2d 122, 130 (3 Cir. 1954) 33

Horizon Pers. Communications, Inc. v. Sprint Corp., 2006 Del.Ch. LEXIS 141, at *96 (Del.Ch. Aug. 4, 2006) 35

Humphries v. Pearlwood Apartments Partnership, 70 So. 3d 1133 (Miss.App. 2011) 23

Imagine Medispa, LLC v. Transformations, Inc., 999 F. Supp. 2d 862, 868-69 (S.D. W. Va. 2014). 32

Jones v. Trustees of Bethany College, 177 W.Va. 168, 351 S.E.2d 183 (1986) 20

Kelley v. Toyota, 210 W. Va. 261, 264, 557 S.E.2d 315, 318 (2001) 13

Kosnoski v. Rogers, 2014 W. Va. LEXIS 151, at *5 (Feb. 18, 2014) 16, 26

Lambert v. United States, 44 F.3d 296, 299 (5th Cir. 1995) 15

Landmark Land Co. v. Office of Thrift Supervision, 990 F.2d 807, 811 (5th Cir. 1993) 32

Lemley v. Stevenson 104 Ohio App.3d 126, 136, 661 N.E.2d 237 (1995) 35

Midkiff v. Shepherd Univ., 2016 W. Va. LEXIS 420, at *10-12 n. 6 (May 25, 2016) 15

Milam v. Kelly, 282 So. 3d 682 (Miss.App. 2019) 22, 23

Moss v. Erie Ins. Prop. & Cas. Co., 2020 U.S. Dist. LEXIS 42521, at *16 (S.D. W. Va. Mar. 12, 2020) 22

Muffoletto v. Towers, 244 Md. App. 510, 528, 223 A.3d 1169, 1179 (2020) 23

Ohio Gas Co. v. Walker, 59 Ohio App. 2d 216, 394 N.E.2d 348 (Ohio Ct. App. 1978) 36

Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994) 16

Ricottilli v. Summersville Mem. Hosp., 188 W. Va. 674, 677, 425 S.E.2d 629, 632 (1992) 20

Roberts v. W. Va. Am. Water Co., 221 W. Va. 373, 655 S.E.2d 119 (2007) 12, 19, 20, 21, 22, 24

Rockenbaugh v. Barron, 2013 W. Va. LEXIS 202, at *9 n.10 (Mar. 8, 2013) 36

State v. Redman, 213 W.Va. 175, 178, 578 S.E.2d 369, 372 (2003) 34

Stephens v. Rakes, 235 W. Va. 555, 565, 775 S.E.2d 107, 117 (2015) 31

Stringer v. Town of Jonesboro, 2020 U.S. Dist. LEXIS 28648 14 (W.D. La. Feb. 3, 2020) 23

Tabb v. Jefferson Cty. Comm'n, 2017 W. Va. LEXIS 419, at *11 (June 2, 2017) 15

Terlecki v. Stewart, 278 Mich. App. 644, 657-58, 754 N.W.2d 899, 909 (2008) 23

Tri-State Petroleum Corp. v. Coyne, 240 W. Va. 542, 546, 814 S.E.2d 205, 209 (2018) 26

Wickland v. Am. Travelers Life Ins. Co., 204 W.Va. 430, 513 S.E.2d 657 (1998) syllabus point 2) 16

Ziler v. Contractor Servs., 2017 W. Va. LEXIS 243 (W.Va. Apr. 10, 2017) 20, 21, 22, 24, 25

STATUTES AND COURT RULES

West Virginia Rule of Civil Procedure 4(k) 13

West Virginia Rules of Civil Procedure 50(b) 26

West Virginia Rules of Civil Procedure 52(a) 33, 37

W. Va. R. Civ.P. 65(d) 33, 37

West Virginia Code § 56-6-31(b) 17, 18, 19

INTRODUCTION

Myra Kay Reilley, the 89-year-old widow of Francis E. Reilley, appeals both individually and in her capacity as Administratrix of the Estate of Francis E. Reilley, from a series of orders entered by the Circuit Court of Marshall County arising out of flooding on low-lying property owned by the Marshall County Board of Education, flooding going as far back as 2004 and no more recently than 2010. The BOE contended that Mr. Reilley's 1985 construction of a bridge, an embankment, and the installation of two culverts over a creek resulted in sporadic flooding of property on which John Marshall High School's baseball field sits. Despite the BOE not filing suit until 2010, more than two years after two of the four flood events for which it sought monetary damages, the trial court permitted the jury to make findings with respect to all four and ultimately entered judgment of almost $240,000, much of which was prejudgment interest because the 2019 damages trial took place some 13 and one-half years after the first flood event. In September of 2020, the trial court entered a mandatory injunction requiring removal of the bridge, etc., at a cost estimated by Plaintiff's expert to exceed $200,000. Mrs. Reilley seeks review.

ASSIGNMENTS OF ERROR

I. THE LOWER COURT ERRED IN FAILING TO GRANT THE MOTION TO DISMISS FOR FAILURE TO TIMELY SERVE BASED ON ITS FINDING OF UNSPECIFIED "GOOD CAUSE."

II. THE LOWER COURT ERRED IN ULTIMATELY PERMITTING THE JURY TO CONSIDER PLAINTIFF'S CLAIMS FOR MONETARY DAMAGES ARISING OUT OF THE TWO FLOOD EVENTS WHICH OCCURRED MORE THAN TWO YEARS BEFORE SUIT WAS INITIALLY FILED.

III. THE LOWER COURT ERRED IN DENYING PETITIONER'S MOTON FOR SUMMARY JUDGMENT, FOR JUDGMENT AS A MATTER OF LAW OR FOR A NEW TRIAL BECAUSE THE EVIDENCE WAS INSUFFICIENT FOR THE JURY TO FIND THAT THE CONSTRUCTION OF THE DUCK LANE BRIDGE AND THE INSTALLATION OF THE CULVERTS PROXIMATELY CAUSED THE MONETARY DAMAGES CLAIMED.

IV. THE LOWER COURT'S AWARD OF INJUNCTIVE RELIEF FAILED TO COMPLY WITH RULE 65 BECAUSE IT FAILED TO CONTAIN APPROPRIATE FINDINGS OF FACT OR CONCLUSIONS OF LAW AND WAS OTHERWISE UNSUPPORTED BY THE EVIDENCE OF IRREPARABLE HARM OR ANY OTHER BASIS FOR THE AWARD OF INJUNCTIVE RELIEF.

STATEMENT OF THE CASE

Plaintiff initiated this action on September 2, 2010 by filing its "Verified Complaint for Injunctive, Declaratory & Monetary Relief" with the Circuit Court of Marshall County, West Virginia, where it was initially assigned to Judge Karl. (App. 21-55). This suit arises from flooding which occurred four times between 2004 and 2010 on a low-lying piece of property owned by Respondent, The Board of Education of the County of Marshall ("BOE") where it built John Marshall High School ("JMHS") and certain of its athletic fields. The property is bordered on one side by the Little Grave Creek. The original complaint named Frances E. Reilley, the City of Glen Dale, and the County Commission of Marshall County as defendants. The Civil Case Information Sheet with accompanied the Plaintiff's original complaint indicated that Mr. Reilley would be served by private process server. (App. 56-57). Despite the September, 2010 filing, Plaintiff did not request that a summons issue until January 28, 2011 (App. 58) and Mr. Reilley was personally served that day. (App. 65).

Because service was not effected upon Mr. Reilley within 120 says of the complaint's filing as required by Rule 4(k) of the West Virginia Rules of Civil Procedure, on Mr. Reilley moved to dismiss (App. 59-61) and supported his motion with a memorandum, both served on February 25, 2011. (App. 62-71). That same motion also argued that two of the flood events for which the BOE sought monetary damages– one on September 17, 2004 during the wide-spread flooding that accompanied Hurricane Ivan[1] and the other on February 1, 2008 – occurred more

---

[1] Indeed, as Plaintiff admitted in the course of arguing that the motion to dismiss should be denied, "The Court, of course, could take notice that the 2004 flood occurred when the remnants of Hurricane Ivan passed through West Virginia and areas of West Virginia – Marshall County included – received as much as seven or more inches of rain in short time periods." (App. 76).

than two years preceding the filing of the complaint and the damages claims were therefore barred by the statute of limitations. (App. 68-71).

Plaintiff responded to the motion on March 30, 2011 by admitting it failed to effect timely service (App. 73) but argued that good existed for the failure due to the wrapping up of its then-counsel's law practice and transition to a new firm. (App. 73-75). With respect to the statute of limitations claims, the BOE argued that because it could not necessarily have determined what caused the flooding in 2004 and 2008, the discovery rule alone precluded the statute from running. (App. 75-77). It further argued that the "continuing tort" applied to those discrete damage claims such that the statute of limitations had not run. (App. 77-78).

Over a year later, with Judge Karl still pondering the dismissal motion, Francis E. Reilley passed away on April 14, 2012 from cardiac arrest. (App. 96). After Myra Kay Reilley was appointed as Administratrix of the Estate of Francis E. Reilley on June 15, 2012, she filed a motion in that capacity to be substituted in his place. (App. 87-92). That motion was granted on September 28, 2012. (App. 97). Despite the fact the 2011 Motion to Dismiss was still pending, the substituted Defendant served an answer – raising the same and other defenses – on April 12, 2013. (App. 98-121).

On November 18, 2013 – with the dismissal motion still pending – Plaintiff filed a motion to amend the Complaint (App. 122-126) to "clarify the allegations made against each Defendant and to ensure its request for injunctive relief names the property party." (App. 122). Asserting that Myra Kay Reilley now owned the property in question (it had been owned solely by Mr. Reilley prior to his death), the BOE asserted that "[t]o name the proper party to pursue injunctive relief, then, the Board must proceed against Mrs. Reilley individually, not the Estate of Francis E. Reilley." (App. 124). On January 2, 2014, Judge Karl entered an Agreed Order

permitting the amendment (App. 127-128) and the First Amended and Verified Complaint for Injunctive, Declaratory & Monetary Relief ("Amended Complaint") was filed on January 30, 2014. (App. 129-164).

There was no allegation in that pleading that Mrs. Reilley had any ownership interest in the properties at issue prior to the death of Francis E. Reilley or that she played any role in the construction of the bridge or the installation of the culverts at issue. To the contrary, Plaintiff alleged in the Amended Complaint that Mr. Reilley owned the properties, constructed Duck Lane, the Duck Lane Bridge over Little Grave Creek, and installed culverts below the road. (App. 131-132, 133-134). Mrs. Reilley, individually and as Administratrix of the Estate of Francis E. Reilley filed an answer on March 5, 2014 admitting that Mr. Reilley owned the properties, constructed the Duck Lane Bridge over Little Grave Creek, constructed Duck Lane, and installed culverts below the road. (App. 167-168, 170).

In addition to the activity (and inactivity) noted above, the record reflects that the parties were engaged in various discovery efforts and that Judge Karl had entered various scheduling orders. On April 11, 2014, more than three years after the original motion to dismiss had been filed by the late Mr. Reilley, Judge Karl *sua sponte* vacated an April 18, 2014 Pretrial Conference and instead set a status conference for April 24, 2014. (App. 191). The May 3, 2014 Order following that status conference indicated that discovery was to be completed by September 30, 2014 with a new Pretrial Conference for October 17, 2014 "at which time the Court will set a trial date if all discovery is completed." (App. 192). Shortly before that date, the parties jointly requested an extension of the discovery completion deadline and the rescheduling of the pretrial conference, in part to allow time for an attempt to resolve the case. (App. 194-198). That joint motion was granted, and the Pretrial Conference reset for January 30, 2015.

(App. 199). The parties subsequently advised Judge Karl that additional time was need for discovery and, on January 20, 2015, he continued generally the January 30, 2015 Pretrial Conference. (App. 200-201).

The record does not reflect any activity in the case for the next 18 months. In the meantime, Judge Karl retired in June of 2015 without ever ruling on the motion to dismiss and Judge Cramer was appointed in his place. On August 11, 2016, Judge Cramer transferred the case to Judge Hummel due to Judge Cramer's prior involvement in the case in his capacity as Marshall County Prosecuting Attorney. (App. 202). Shortly afterwards, on August 24, 2016, the original Reilley defense counsel moved to withdraw (App. 203-207), and that motion was granted on September 15, 2016. (App. 209).

In the meantime, Judge Hummel appointed Timothy Linkous as a mediator on September 7, 2016 (App. 208) and mediation was originally set for November 3, 2016. (App. 84). That mediation was ultimately held on January 19, 2017, at which time all parties appeared by counsel. (App. 213-214). Although the case did not resolve, the mediator reported to the Court that:

> the parties were able to reach a tentative agreement as to some essential matters that may very well serve as the foundation for a complete resolution of their disputes. The parties' agreement requires some joint actions over the course of the next few months, an agreement to stay discovery pending those actions, and then a reconvening of the mediation in an effort to reach a full and final settlement.

(App. 213). Those efforts would ultimately prove unsuccessful and after the counsel who had appeared at the mediation for Mrs. Reilley moved to withdraw (App. 217-221), both she and the

Board of Education retained new counsel to represent them going forward. (App. 222-225, 226-228).[2]

On February 14, 2018, almost 7 years after Francis E. Reilley had sought dismissal of the complaint for failure to timely serve him with the complaint and to dismiss the claims for monetary damages arising from the 2004 and 2008 floods, Judge Hummel denied the dismissal motion. (App. 6-10). With respect to the Rule 4(k) motion, the Court found that "good cause clearly exists" for excusing the untimely service, citing the affidavit of the Board's former counsel. (App. 9). With respect to the statute of limitations portion of the motion, the Court stated:

> While Defendant's position may very well be spot-on correct relative to damages alleged to have resulted from the 2004 and 2008 flooding episodes, it is this Court's position that the parties should be given further opportunity for discovery to develop the facts. When discovery has sufficiently produced such facts, Defendant may reach the same issues by way of a Motion for Summary Judgment.

(App. 9). Two weeks later, on February 26, 2018, Judge Hummel entered an Agreed Order dismissing without prejudice the Plaintiff's claims involving the City of Glen Dale and the Marshall County Commission. (App. 235-236).

The Court held a telephonic scheduling conference on May 3, 2018 and entered on May 5, 2018 a Scheduling Conference Order setting, among other things, a September 19, 2018 discovery completion deadline, a dispositive motion hearing date of October 22, 2018, and a trial date of November 13, 2018. (App. 237-241). Unfortunately, the father of primary counsel for Mrs. Reilley passed away on August 17, 2018 in Virginia, necessitating a motion to continue the

---

[2] Even after the appearance of new counsel for both parties, the litigation remained stayed pending potential resolution. (*See* App. 233) (noting cancellation of an October 27, 2017 telephonic status conference due to the agreement to stay litigation).

trial date by Mrs. Reilley (App. 242-244) which was granted by an Agreed Order entered on September 20, 2018. (App. 245-246).

The trial court converted the previously scheduled dispositive motion hearing into a new pretrial conference and thereafter entered an order on October 22, 2018 setting certain deadlines and a trial date of March 18, 2019. (App. 247-248). Subsequently, following a February 5, 2019 telephone hearing, that October order was amended to add additional deadlines for the briefing of dispositive motions. (App. 254-255). Both parties briefed their dispositive motions in accordance with those deadlines. (App. 256-273, 274-953, 954-978, 979-988, 989-994, and 995-997). The record reflects that the trial court never entered a written order on either motion. It nonetheless, apparently indicated at a March 5, 2018 pretrial conference that the motions would be denied and that oral ruling was restated prior to trial. (App. 1019).

Instead, the case proceeded to trial as scheduled on March 18, 2019. At the close of Plaintiff's case-in-chief, the following colloquy took place:

> [Mrs. Reilley's trial counsel]: I believe I have a motion to make outside the presence of the jury.
>
> THE COURT: You're going to get emotional outside of the jury? Okay.

(App. 1563). He then excused the jury (*id.*) and after counsel for Plaintiff indicated he too had a motion, the trial court stated, "Okay. Very good. Let me hear them and then I can deny them." (App. 1564). After hearing arguments from counsel considering the two motions for judgment,[3] the Court – as he indicated he would – denied them. (App. 1574-1575).

---

[3] Mrs. Reilley argued the Plaintiff had failed to prove proximate causation for any of the damages claimed from the four flood events and Plaintiff asserted that under the doctrine of riparian rights, any impoundment of water was sufficient to establish liability. (App. 1564-1574).

Following a three-day trial, the jury answered "yes" to interrogatories asking whether Plaintiff "has proven its case against Defendants" as to the each of the four flooding events at issue (9/17/2004, 2/1/2008, 6/17/2009, and 6/5/2010). (App. 1767). Pursuant to a stipulation entered into during trial and announced to the jury at to the amount of monetary damages sustained during each of the four floods (App. 1474-1475, 2157-2160), the Court entered judgment on April 16, 2019 awarded judgment for Plaintiff in the amount of $122,861.79 for its damages claims,[4] $127,111.74 in prejudgment interest, along with post-judgment interest and costs. (App. 11-13). The jury was not asked about future harm or the potential for such; it was not asked to make a determination about any other flood events (or even heard any evidence about them); and was only asked to address the BOE's assertion of liability for the four specific flood events.

Defendant filed a timely post-trial motion seeking judgment as a matter of law on the damage claims based on the Plaintiff's failure to prove that the so-called "improvements" proximately caused any of the monetary damages sought by Plaintiff for each of the four flooding events at issue. (App. 2162-2177). That same motion alternatively sought a new trial on the same grounds. (*Id.*). Finally, it sought amendment of the April 16, 2019 Judgment Order

---

[4] Specifically, the stipulated amounts were $54,992.72 for the September 17, 2004 flood, $7,555.97 for the March 4, 2008 flood, $58,038.65 for the June 18, 2009 flood, and $2,274.45 for the June 5, 2010 flood. (App. 2157-2160). In other words, the two floods which occurred more than two years prior to the filing of the suit accounted for slightly more than half of Plaintiff's claimed monetary damages.

to reduce or eliminate the $127,111.74 award of prejudgment interest. (*Id.*). Plaintiff responded on May 31, 2019 (App. 2178-2193).

The trial court heard arguments on the motion on June 5, 2019 and denied in part and granted in part the motion by Order entered August 8, 2019. (App. 14-18). Specifically, the trial court denied the motion to the extent it sought judgment as a matter of law or a new trial (App. 15-16). With respect to the motion to amend, the trial court reduced the prejudgment interest award to $115,775.24 by concluding that prejudgment interest should "be measured from the date of such flood event until February 13, 2018" (a period of 400 days). (App. 16). Finally, recognizing that the order was not appealable "because the Order does not adjudicate all issues between the parties as the injunction count remains to decided by the Court." (App. 16).

Despite that recognition, the record does not reflect any action taken over the next four months to address the injunctive relief issue. Instead, the next item of record was a December 9, 2019 motion to withdraw filed by Mrs. Reilley's trial counsel due to his planned January 31, 2020 retirement from the practice of law. (App. 2194-2203). That motion was granted by Order entered December 20, 2019. (App. 2204-2205).

The record does not reflect that Mrs. Reilley obtained new counsel. Eventually, on June 4, 2020 – more than 9 and one-half years after filing the original complaint and almost ten years to the day from when the last flooding event at issue considered by the jury took place,[5] Plaintiff filed its motion for injunctive relief and attached to it an engineering study performed by Mr. Kearns after the trial. (App. 2206-2224). That motion was set for hearing on September 15,

[5] In fact, the trial court precluded Plaintiff's counsel from introducing evidence of any flooding it claimed had occurred after the filing of the Complaint and had to reiterate that ruling during trial. (See, App. 1133-1135).

2020. (App. 2225-2226). The hearing took place as scheduled, some eighteen months after the trial. (App. 2227-2243).

At the hearing, the Plaintiff introduced no witnesses and specifically did not call Mr. Kearns. (App. 2234). Instead, according to the argument presented by Plaintiff's counsel, its position was that the jury's verdict necessitated the conclusion that the jury found "that the certain obstruction to the bridge, the embankment, the fill caused Little Grave Creek to – back up and impound on the board's property." (App. 2234). From that position, he argued that "[u]nder the law of riparian rights and continuous trespass and nuisance, once you make that factual showing, once you established those factual predicates, you're entitled to have the obstruction removed, and that's really what we're requesting at this juncture." (App. 2234). Plaintiff then relied upon the report attached to its motion as the basis for the nature of the injunctive relief it then sought – "remove the obstruction consistent with the engineering study that was performed by Mr. Kearns." (App. 2235).

Accepting all of that argument, Judge Hummel indicated he would accept the report and order remediation be completed in accordance with that report. (App. 2241). At the Court's request, counsel for the Plaintiff prepared the order from the injunction hearing. (*Id.*). That order, entered on September 21, 2020, required the remediation be completed by April 1, 2021 "in accordance with the conceptual plan contained in the April 2, 2020 Engineering Study" attached to the motion. To reach that conclusion, the Order simply stated:

> In addition to the arguments of counsel, the Court incorporates the evidence introduced at and accepts the findings of the Jury in its Verdict from the trial of the damages phase of the case where the Jury found that the Reilley defendants have, in fact, placed obstructions in the stream channel, drainageway and floodway of Little Grave Creek that cause water to impound upon the upstream property of the Marshall Co. BOE. Based upon the trial evidence and Jury Verdict finding that the Reilley Defendants have obstructed the flow of Little Grave Creek, the Court finds as a matter of law under each of the alternative

> theories of continuing trespass, violation of riparian rights and nuisance, that the Marshall Co. BOE is entitled to entry of an Order directing that the obstructions be removed or abated and that the stream channel, drainageway and floodway of Little Grave Creek be remediated.

(App. 19. Mrs. Reilley then obtained appellate counsel and this appeal follows.

SUMMARY OF ARGUMENT

Mrs. Reilley challenges first the lower court's failure to dismiss the case as untimely served. Rule 4(k) of the West Virginia Rules of Civil Procedure requires service within 120 days and the BOE admittedly failed to meet that deadline. The lower court's finding of "good cause" was unsupported by the record or the law.

Mrs. Reilley next challenges the lower court's refusal to dismiss or grant summary judgment with respect to the monetary damage claims which flowed from flood events occurring more than two years prior to the filing of the lawsuit. Under *Roberts v. W. Va. Am. Water Co.*, 221 W. Va. 373, 655 S.E.2d 119 (2007), those claims should have been dismissed.

Mrs. Reilley also challenges the lower court's decision to allow any of the monetary damage claims to reach the jury on the grounds that there was no showing that the conduct of Mr. Reilley in building the bridge, etc., proximately caused the damages claimed. In other words, the BOE could just say it had flood damage – it had to prove that the damages it claimed proximately flowed from the additional flooding it claims were caused by the bridge. Pouring a cup of water into an ocean increases the amount of water in the ocean, but it does not cause it to rise over a shoreline.

Finally, Mrs. Reilley challenges the lower court's award of a mandatory injunction. The order fails to meet the requirements of Rule 65 and 52 and was otherwise unsupported by the evidence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Among other things, this appeal raises question related to the use of the "continuing tort" doctrine as an exception to the traditional tort statute of limitations for monetary damage claims as well as the appropriate standards for awarding permanent injunctive relief, both issues of public importance and, at least in the case of the standards for permanent injunctive relief, issues of first impression. To the extent those issues have not been previously addressed by this Court, Petitioner requests that the case be set for Rule 20 oral argument.

ARGUMENT

I. THE LOWER COURT ERRED IN FAILING TO GRANT THE MOTION TO DISMISS FOR FAILURE TO TIMELY SERVE BASED ON ITS FINDING OF UNSPECIFIED "GOOD CAUSE."

Standard of Review: This Court reviews factual "good cause" findings for abuse of discretion but determines the legal questions *de novo*. *Kelley v. Toyota*, 210 W. Va. 261, 264, 557 S.E.2d 315, 318 (2001) (per curiam).

There was no dispute that service on Francis Reilley – the person who constructed the bridge, installed the culverts, and owned the property at the time of the four flood events – was not even attempted until after the expiration of the 120-period required by Rule 4(k) of the West Virginia Rules of Civil Procedure.[6] (App. 58). Once Mr. Reilley was served, he sought dismissal under Rule 4(k) and also sought dismissal of the claims for monetary damages based on flood events occurring more than two years prior to the filing of the suit. (App. 59-61). That

---

[6] That rule provides: "If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effective within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period." W.Va.R.Civ.P. 4(k).

motion remained pending for almost seven years after its filing and almost six years after Mr. Reilley had died. The trial court (technically the third judge on the case) eventually denied the motion based its finding that "good cause" existed for the failure to serve, citing generally to an affidavit attached to the BOE's response to the dismissal motion. (App. 6-10).

Plaintiff admitted it made a conscious decision to withhold service after filing of the complaint, ostensibly to attempt to resolve its claims by sending a letter shortly after suit was filed to counsel for Mr. Reilley. (App. 81, Affidavit in Opposition to Motion to Dismiss of Defendant, Francis E. Reilley ¶ 2-3). There were no such discussions and Plaintiff could have just as easily attempted resolution without the expense of filing suit.[7] Regardless, the BOE contended in response to the motion that both its single letter, sent shortly after filing suit (to which it said it received no substantive response)[8] and its counsel's months-long effort to wrap up his existing law practice and transition to a new firm constituted "good cause" under Rule 4(k). It supported that response with the affidavit (App. 81-84) that Judge Hummel cited in denying the Rule 4(k) motion. (App. 9). Neither reason qualifies and the lower court error in so holding.

Courts have held that even on-going settlement discussions did not constitute "good cause" for failing to timely serve absent an agreement of defendant or some action on the part of the defendant which induced the failure to serve. *See e.g., Holmes v. Coast Transit Auth.*, 815 So. 2d 1183, 1186-87 (Miss. 2002) (good faith negotiations do not constitute good cause for

---

[7] Alternatively, prior to the expiration of the 120 days, the BOE could have – as it did after the time limit for service of process had expired (App. 83) – sought waiver of service or some other agreement to allow additional time.

[8] There was no claim that the delay in service was induced or otherwise the result of an action or inaction on the part of Mr. Reilley.

failure to effect timely service of process); *Healthcare Compare Corp. v. Super Solutions Corp.*, 151 F.R.D. 114 (D. Minn. 1993); *Davis-Wilson v. Hilton Hotels Corp.*, 106 F.R.D. 505 (E.D. La. 1985). Likewise, courts have held that "good cause" under the equivalent federal rule requires "at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice." *Gartin v. Par Pharm. Cos.*, 289 F. App'x 688, 692 (5th Cir. 2008) (*quoting Lambert v. United States*, 44 F.3d 296, 299 (5th Cir. 1995); *see also Eastern Refractories Co. v. Forty-Eight Insulations, Inc.*, 187 F.R.D. 503 (S.D.N.Y. 1999).

This Court has also addressed the standards applicable to the "good cause" determination under Rule 4(k) and stated:

> In considering whether good cause exists pursuant to Rule 4(k), a circuit court should consider the following: (1) length of time to obtain service of process; (2) activity undertaken to attempt to perfect service; (3) knowledge of the location of the party to be served; (4) the ease with which that party's location could be known; (5) actual knowledge of the proceeding by the party to be served; and (6) special circumstances.

Burkes v. Fas-Chek Food Mart Inc., 217 W.Va. 291, 298, 617 S.E.2d 838, 845 (2005); *see also Tabb v. Jefferson Cty. Comm'n*, 2017 W. Va. LEXIS 419, at *11 (June 2, 2017) (memorandum decision); *Midkiff v. Shepherd Univ.*, 2016 W. Va. LEXIS 420, at *10-12 n.6 (May 25, 2016) (memorandum decision). Of the listed factors, the only one weighing in favor of the BOE is the fifth – knowledge of the proceeding by Mr. Reilley. As for the others, all favored Mr. Reilley's position.

The failure to effect timely service was particularly critical here as Mr. Reilley died in early 2012 and the service motion was not even addressed until 2018, almost six years after he died. Under the circumstances, the lower court erred in concluding "good cause" existed for the failure to timely serve Mr. Reilley.

II. THE LOWER COURT ERRED IN ULTIMATELY PERMITTING THE JURY TO CONSIDER PLAINTIFF'S CLAIMS FOR MONETARY DAMAGES ARISING OUT OF THE TWO FLOOD EVENTS WHICH OCCURRED MORE THAN TWO YEARS BEFORE SUIT WAS INITIALLY FILED.

Standard of Review: This Court reviews the lower court's decision to deny a dismissal motion under a *de novo* standard of review. *Hess v. W. Va. Div. of Corr.*, 227 W. Va. 15, 17, 705 S.E.2d 125, 127 (2010) ("The Court reviews a circuit court's denial of a motion to dismiss a complaint under a de novo standard.") (*citing* Ewing *v. Bd. of Educ.*, 202 W. Va. 228, 503 S.E.2d 541 (1998) syllabus point 4 ("When a party, as part of an appeal from a final judgment, assigns as error a circuit court's denial of a motion to dismiss, the circuit court's disposition of the motion to dismiss will be reviewed *de novo*.").

Likewise, this Court has stated that the standard of review for the grant or denial of a summary judgment motion is *de novo*. *Kosnoski v. Rogers*, 2014 W. Va. LEXIS 151, at *5 (Feb. 18, 2014) (memorandum decision) ("Petitioners appeal the circuit court's grant of summary judgment to respondent and the denial of their motion for summary judgment. Our standard of review for such is *de novo*.") (*citing Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) syllabi point 1 and *Wickland v. Am. Travelers Life Ins. Co.*, 204 W.Va. 430, 513 S.E.2d 657 (1998) syllabus point 2).

The four flood events for which the BOE sought monetary damages are described in Count II of the Amended Complaint. (App. 145-148). Those flood events took place in 2004, 2008, 2009, and 2010. (*Id.*). More than half the monetary damages sought by the BOE (therefore the bulk of the prejudgment interest award) arose from its claims based on the 2004 and 2008 floods. As noted below, the judgment below, even as amended, awarded around $142,000 in damages and prejudgment interest (out of a total award of $238,637.03) just for those two flood

events.[9] As a result, permitting the BOE's claims arising from those two events significantly increased the monetary damages awarded.

Mr. Reilley sought dismissal of the monetary damage claims from the 2004 and 2008 floods in his motion to dismiss. (App. 68-70). In denying the motion to dismiss those claims, the lower court stated:

> While Defendant's position may very well be spot-on correct relative to damages alleged to have resulted from the 2004 and 2008 flooding episodes, it is this Court's position that the parties should be given further opportunity for discovery to develop the facts. When discovery has sufficiently produced such facts, Defendant may reach the same issues by way of a Motion for Summary Judgment.

(App. 9). As directed by the trial court, the statute of limitations motion was renewed in Mrs. Reilley's summary judgment motion. (App. 260-261). The record does not reflect any articulated basis for denying the summary judgment motion other than to say it was denied. (App. 1019) ("Renewed motion; dispositive motion denied.").

In response to the dismissal motion, Plaintiff argued that the BOE's claims were not "clearly barred" by the relevant statute of limitations. (App. 74). She initially argued the statute had not even begun to run "because the cause of action against Defendant had not accrued in

---

[9] Specifically, the stipulated damages were $54,992.72 (App. 2157) arising from the 2004 flood and $7,555.97 (App. 2158) from 2008 flood. Though not explicitly stated, the original Judgment Order (App. 11-13) included prejudgment interest in accordance with West Virginia Code § 56-6-31(b) (2006) from the date each flood event through the date of the verdict (3/20/2019). The calculations a little murky, but the approximate amount of prejudgment interest originally awarded for the 2004 and 2008 floods was $79,413.01 (2004) and $6,853.76 (2008). After Judge Hummel reduced the calculation date by 400 days from March 20, 2019 to February 13, 2018 (App. 17-18), the final prejudgment awards on those two floods appears to be $73,386.41 and $6,170.62, respectively. As a result, the total award of monetary damages for the 2004 and 2008 flood events, including prejudgment interest, was $142,105.72 out of the total monetary judgment of $238,637.03.

2004 or 2008." (App. 75).[10] The basis for this argument was that the "discovery rule" precluded application of the statute of limitations. (App. 75-76). With respect to the 2004 flood, the BOE stated:

> A jury could certainly determine that reasonably prudent individuals in the position of the Board of Education may not have been aware that the flood damages of which the Board of Education complains were caused or exacerbated by the Defendant's conduct, as opposed to the adverse weather conditions that affected the entire area. Thus, the Board of Education would not have been able to identify the tortfeasor or that its damages were caused by some other party's acts, and the statute would not have accrued at that time.

(App. 76). With respect to the 2008 argument, the BOE asserted, "A reasonably prudent person could continue to believe that two floods, three years apart, were entirely weather-related, and not a result of the Defendant's conduct." (App. 76). In addition, the BOE briefly argued that the "continuing tort" theory precluded the statute of limitations from running. (App. 77-78).

Mrs. Reilley's dispositive motion renewed the argument "that Plaintiff's claims for damages allegedly the result of the September 17, 2004 and February 1, 2008 flood events are barred by the applicable statute of limitations," (App. 260). In response to the summary judgment motion raising the statute of limitations issue, the BOE asserted that "Mrs. Reilley next invites the Court to revisit and reverse its ruling denying Mrs. Reilley's Motion to Dismiss,"[11] and asserted, "Mrs. Reilley's position assumes that Marshall Co. BOE's cause of action for continuing trespass for the September 17, 2004 and February 1, 2008 flood events **accrued** more than two (2) years before the original Complaint was filed in 2010." (App. 959) (emphasis in original). To the extent the BOE asserted below or asserts here that the statute of limitations

---

[10] This conflicts entirely with its position as to prejudgment interest, which by statute is payable from when the cause of action accrues. *See*, West Virginia Code § 56-6-31(b)(1).

[11] Precisely the course suggested by Judge Hummel, of course.

never runs because no cause of action **accrues** so long as the bridge and culverts remain, then it cannot simultaneously assert any right to prejudgment interest as West Virginia Code § 56-6-31(b)(1) and (b)(2) tie the appropriate prejudgment interest rate to the "year the right to bring the action accrued."

Plaintiff argued that the "continuing tort" doctrine precluded granting summary judgment. (*see, e.g.*, App. 959). Presumably recognizing that its efforts to prove causation for the monetary damages from the flooding events largely on the testimony of its employees as to their contemporaneous observations, the BOE did not renew the discovery rule arguments it raised opposition to the dismissal motion.

As a general proposition, the limitations period begins to run from the date of the injury. *Hall's Park Motel v. Rover Constr.*, 194 W. Va. 309, 312, 460 S.E.2d 444, 447 (1995). Applying this general rule would mean that Plaintiff's claims for monetary damages arising from the floods of 2004 and 2008 are time-barred as Plaintiff immediately knew of the injury. This Court has recognized an exception to that easily-applied rule in cases involving so-called "continuing torts." In *Roberts v. W. Va. Am. Water Co.*, 221 W. Va. 373, 655 S.E.2d 119 (2007), this Court examined the contours of that doctrine in a case where the Defendants construction caused the Plaintiff's property to "slip" at various times. *Roberts*, 655 S.E.2d at 122. Minor slips occurred in 1999 and 2000 and a major slip occurred in 2002 which rendered a roadway hazardous for trucks and larger vehicles. *Id.* Slips continued to happen over the next two years and he filed suit in 2004. Rejecting application of the "continuing tort doctrine," the trial court "essentially found no continuing tort was alleged as the only activity Appellant claimed as continuing was the progressive erosion of the land stemming from the work Appellees performed in or around 1999." *Id.* at 623.

On appeal, this Court discussed the origin and reasoning for the continuing tort doctrine and easily disposed of the challenge to the lower court's rejection of the argument:

> Appellant is claiming damages for the single, discrete act of constructing and installing the waterline and not for any continuing malfunction of the installation or further misconduct of Appellees. Thus, the last tortious act or omission alleged by Appellant to have been committed by any Appellee was in 1999 when the waterline installation was completed. Without demonstration of a continuing duty or further misconduct on the part of any Appellees, there is no reason why the continuing tort doctrine should apply. Thus, the general rule governs and "[t]he statute of limitations . . . begins to run when the right to bring an action . . . accrues." Syl. Pt. 1, in part, *Jones v. Trustees of Bethany College,* 177 W.Va. 168, 351 S.E.2d 183 (1986).

Roberts, 221 W. Va. At 378-79, 655 S.E.2d at 124-25. In other words, "The distinguishing aspect of a continuing tort with respect to negligence actions is continuing tortious conduct, that is, a continuing violation of a duty owed the person alleging injury, rather than continuing damages emanating from a discrete tortious act." *Roberts*, syllabus point 4.

Subsequently, in *Ziler v. Contractor Servs.*, 2017 W. Va. LEXIS 243 (W.Va. Apr. 10, 2017) (memorandum decision), applied *Roberts* to a claim involving the defendant's leaving "timber and vehicle parts buried in the ground" which the plaintiffs contended caused land slippage resulting in property damage and prevented their use of an easement to access their property. They filed suit more than two years after they first learned of their claim. The lower court granted the defendant's motion for summary judgment, rejecting plaintiffs' contention that the continuing tort doctrine applied.

On appeal, this Court affirmed. Beginning with the observation that "the concept of a continuing tort requires the showing of repetitious, wrongful conduct," *Ziler*, 2017 W. Va. LEXIS 243 at *5, and distinguished that from "a wrongful act with consequential damages" which is not a continuing tort. *Id.* (*citing Ricottilli v. Summersville Mem. Hosp.*, 188 W. Va. 674, 677, 425 S.E.2d 629, 632 (1992)). Turning to *Roberts*, the Ziler

Court stated that even "[w]here a tort involves a continuing or repeated injury, the cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the **tortious overt** acts or omissions cease." *Ziler* at *6 (*citing, Roberts v. W.Va. Am. Water*, 221 W.Va. 373, 655 S.E.2d 119 (2007) syl. pt. 2) (emphasis added). With those observations in place, the Court turned to the case before it and found first that the plaintiffs' claim was the defendant's "alleged single, wrongful act of burying vehicles and timber in the ground" *Id.* Thus, it held that the record on appeal clearly supports the circuit court's conclusion that petitioners' claims "amount to consequential damages arising from an alleged single, discrete act of negligence and do not constitute a continuing tort and the applicable statute of limitations is not tolled." *Id.*

In *Ziler*, plaintiffs attempted to salvage their untimely claim by arguing the defendant had a continuing duty to repair the damage to the real property such that its failure to do so "violated a continuing duty to petitioners and created a 'new tort daily.' In rejecting that claim, this Court stated that "[w]e have previously determined that where the cause of the injuries was a 'discrete and completed act of negligent commission, not [ ] a continuing negligent act of omission' . . . 'the statute of limitations begins to run and is not tolled because there may also be latent damages arising from the same traumatic event.' *Id.* at *7 (*citing Graham v. Beverage, P.C.*, 211 W.Va. 466, 476-77, 566 S.E.2d 603, 613-14 (2002)). Concluding that "the cause of their injury was a discrete and completed act of negligence committed by respondent," the alleged failure to remedy or remove the vehicles and timber from petitioners' property does not constitute a continuing breach of duty. Since they did not file suit within two years of learning of the completed "act," their claims were time-barred. *Id.* at *8.

In this case, the "discrete and completed act of negligent commission" was the building of the bridge and installation of the culverts in 1985. There is simply no allegation of any "overt" act after that date. Regardless of how the BOE dresses up its negligence claims, its assertion Mr. Reilley had a "continuing duty" remove the bridge and culverts is simply no different that the similar allegations unsuccessfully leveled against the defendants in *Roberts* and *Ziler*.[12]

In *Milam v. Kelly*, 282 So. 3d 682 (Miss.App. 2019), plaintiff's home suffered from intermittent flooding over a period of years, starting in 2009. He initially filed suit against his municipality alleging claims sounding in "negligence, trespass, and nuisance." *Milam*, 282 So.3d at 686. Sometime later, he amended his complaint to add similar claims against his neighbors, "asserting that they interrupted and altered downstream storm-water flow by replacing a chain link fence with a wooden fence, by changing the landscaping in their back yard, and by filling in an open drainage ditch." *Id.* On appeal from a trial court decision granting the neighbors' statute of limitations motion, he asserted that his "claims of injunction, negligence, nuisance, and trespass were continuing torts that tolled the statute of limitations" and that "new claims for injunction, negligence, nuisance, and trespass accrued each time [his] house flooded. *Milam*, at 685. The appellate court rejected that those assertions, finding that regardless of how he framed the claims, plaintiff's damages "all stem from the flooding of his home, and [he]

---

[12] As Judge Copenhaver recently noted, "[t]he 'continuing tort' doctrine pertains to 'events, which for all practical purposes are identical, occur repeatedly, at short intervals, in a consistent, connected, rhythmic manner.'" *Moss v. Erie Ins. Prop. & Cas. Co.*, 2020 U.S. Dist. LEXIS 42521, at *16 (S.D. W. Va. Mar. 12, 2020) (*quoting*, *DeRocchis v. Matlack, Inc.*, 194 W. Va. 417, 423 n.4, 460 S.E.2d 663, 669 n. 4 (1995)). In the latter case, the plaintiff had "sporadic and non-consistent" exposure to isocyanate fumes, which this Court held constituted separate causes of action against his employer. *Id.*

alleges that the flooding is caused by the placement of [neighbor's] wooden fence, which altered the flow of the storm water. We find that like *Humphries*[13], the flooding of Milam's home constitutes a continual ill effect, not a continual unlawful act. Therefore, the continuing torts doctrine does not apply." *Milam*, 282 So. 3d at 692. *See also*, *Muffoletto v. Towers*, 244 Md. App. 510, 528, 223 A.3d 1169, 1179 (2020) ("Maryland appellate courts have consistently held that the continuing harm doctrine rests on a new affirmative act."); *Stringer v. Town of Jonesboro*, 2020 U.S. Dist. LEXIS 28648 14 (W.D. La. Feb. 3, 2020); *Terlecki v. Stewart*, 278 Mich. App. 644, 657-58, 754 N.W.2d 899, 909 (2008).

Plaintiff argued *Graham v. Beverage* supported it "continuing tort" claim. *Graham* is distinguishable. In *Graham*, the plaintiffs brought a negligence action against a developer arguing its negligent construction of a housing development's storm-water management system altered the flow of surface water to their property, causing damages. They argued the negligence claim was a continuing tort such that damages were recoverable even though they filed suit more than two years after the first flooding.

The *Graham* court began its analysis by looking first to a prior *per curiam* decision in *Handley v. Town of Shinnston*, 169 W.Va. 617, 289 S.E.2d 201 (1982) where the town had installed a water transmission line on the plaintiff's property. When the plaintiff's noticed that the water line was leaking, they notified the town. Its efforts to repair the leak were inadequate and the leaking continued, as did the damage to the plaintiff's property. In *Handley*, this Court concluded that "where a tort involves a continuing or repeated injury, the cause of action accrues

---

[13] *Humphries v. Pearlwood Apartments Partnership*, 70 So. 3d 1133 (Miss.App. 2011). The court in *Milam* rejected plaintiff's argument it was distinguishable because *Humphries* involved the cutting of trees and not the "diversion or obstruction of an existing drainage ditch and pathway or raising the elevation of one's property." *Milam* at 692.

at, and limitations begin to run from the date of the last injury, or when the tortious overt acts cease." *Id.* at 619, 289 S.E.2d at 202. This ruling is consonant with the rulings discussed above where repetitious, wrongful conduct occurred which, as the district court stated in *Moss*, involved events, "which for all practical purposes are identical, occur repeatedly, at short intervals, in a consistent, connected, rhythmic manner."

Turning to the claims before it in *Graham*, this Court stated that the thrust of the plaintiffs' complaint was "that the construction of the infiltration system as well as the continuing wrongful conduct of the Parkers in negligently failing to take action with regard to correcting the alleged inadequacies of that system is causing continuing injuries to their real and personal property. As such, we find that the present case presents a much more comparable situation to that found in [*Handley*]." *Graham*, 211 W.Va. at 477; 566 S.E.2d at 614. *Handley*, of course, involved a constantly leaking water line and it appears the allegations in *Graham* involved a storm water management system which had the effect of diverting surface water, presumably constantly. In this case, the allegedly wrongful conduct was completed in 1985. Almost thirty years passed from the conduct to the trial. The four flood events for which damages sought spanned six years and the last one was eight years before trial. Under the circumstances, this case much more resembles *Roberts* and *Ziler* (and the sporadic nature of the claims makes it more like the sporadic exposures at issue in *DeRocchis*) than what appears to have been at issue in *Graham*.

If the BOE's reading of *Graham* is correct – that the assertion of a duty to correct completed construction constitutes "continuing wrongful conduct" then there is no real way to reconcile *Graham* (decided in 2002) with the later decisions in *Roberts* (2007) and *Ziler*

(2017).[14] In both cases, the claims arose from actions originally taken by defendants and known by the plaintiff prior to the expiration of the statute of limitations. In both cases, the defendant did not correct or repair the conditions they had allegedly caused resulting in continuing damage to the plaintiff. In *Ziler*, there was specific allegations of a continuing duty on the part of the defendant, allegations insufficient to allow their claims to survive.

Here the BOE did not claim that the property constantly flooded or that water constantly impounded on its property. It does not claim any additional affirmative or overt acts by Mr. Reilley during his lifetime beyond the construction of the bridge and installation of the culverts in 1985. As a result, for purposes of determining the appropriate statute of limitations for plaintiff's monetary damages claims, the Court should hold that the statute of limitations begins to run on the date of each flood event. The lower court's refusal to dismiss the monetary damage claims for those two floods and therefore its allowance of the jury to consider them was error. As such, the judgment should be reduced to remove the monetary damages for the 2004 and 2008 floods, along with the prejudgment interest on those damages. Alternatively, if the Court adopts the BOE's position that its monetary damages causes of action do not accrue because the Duck Lane Bridge and culverts still exist, then the prejudgment interest award cannot stand.

III. THE LOWER COURT ERRED IN DENYING PETITIONER'S MOTON FOR SUMMARY JUDGMENT, FOR JUDGMENT AS A MATTER OF LAW OR FOR A NEW TRIAL BECAUSE THE EVIDENCE WAS INSUFFICIENT FOR THE JURY TO FIND THAT THE CONSTRUCTION OF THE DUCK LANE BRIDGE AND THE INSTALLATION OF THE CULVERTS PROXIMATELY CAUSED THE MONETARY DAMAGES CLAIMED.

Standard of Review: As noted above, this Court has stated that the standard of review for

---

[14] As *Ziler* was a Memorandum Decision issued under Rule 21, the Court must have found that one of the 3 conditions listed in Rule 21(c) existed.

the grant or denial of a summary judgment motion is *de novo*. *Kosnoski v. Rogers*, 2014 W. Va. LEXIS 151, at *5 (Feb. 18, 2014) (memorandum decision). The "standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the *West Virginia Rules of Civil Procedure* [1998] is *de novo*." *Tri-State Petroleum Corp. v. Coyne*, 240 W. Va. 542, 546, 814 S.E.2d 205, 209 (2018) syllabus point 1 (citing *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009) syllabus point 1). Petitioner recognizes, of course, that "When this Court reviews a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial under Rule 50(b) of the *West Virginia Rules of Civil Procedure* [1998], it is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party." *Coyne*, syllabus point 2.

Defendant's motion for summary judgment specifically challenged the evidentiary basis for a finding of proximate cause with respect to the specific monetary damages claimed from each of the four flood events. (App. 256-260). That motion was again renewed prior to the start of trial as a result of the trial court's order on a motion in limine stating that Plaintiff's expert could testify consistent with his report and his deposition testimony. (App. 1009). That motion was denied as well. (App. 1007, 1019. At the close of Plaintiff's case, Defendant again raised the causation argument noting that there was simply no causation evidence that bridge, the embankment, or the culverts caused the damages – that is, that the flooding was sufficiently worse than it would have otherwise been to cause the damages because of the bridge. (App.

1563-1567; 1571-1574). After further argument, the lower court stated:

> Circumstantial evidence is as lawful as direct evidence, and I think that's, at best, what the board has and -- in the way of supporting its case, and that is lawful evidence that may support a verdict as to the cause of action asserted.
>
> With that, it gets to the jury.

(App. 1574). Significantly, the lower court added, "And now what I didn't hear from this fellow, the expert; I didn't hear that a single teaspoon of water got on -- impounded on John Marshall's property. I heard about flood levels, and he didn't tell me where the hell that water went, and to hear an expert read a report is boring. But anyway, the expert didn't tell me whether this water is eight foot, three foot or .17 or whatever it was, Mr. Miller. I didn't hear where a tablespoon of that went onto the John Marshall property to impound. And maybe you did, and maybe the jury did, but I don't take things for granted, and I didn't hear it." (App. 1574-1575).

Turning to the evidence introduced at trial, neither Plaintiff's expert witness, Mr. Kearns nor Defendant's expert witness Mr. Spurlock offered opinion testimony that the Bridge, embankment, or culvert proximately caused the damages sought by Plaintiff at trial.[15] Likewise, none of plaintiff's lay witnesses were permitting to offer opinion testimony. As described by the BOE's attorney, those lay witnesses "Your Honor, the lay witnesses will testify about their observations, factual observations, of the four rain events and how the water came down the floodway and how it impacted the embankment and the narrow opening under the bridge and backed up on the board's property, and that's observation. That's not scientific, technical. And so

[15] The issue at trial was not whether the Bridge, embankment, and culverts could result in flooding of the JMHS property in some generic scenario but rather whether Mrs. Reilley – either as Administratrix or individually – was liable for the actual damages claimed by the Plaintiff because the Bridge, embankment, and culverts proximately caused those damages.

they will -- they absolutely will demonstrate causation through their own personal observations and testimony." (App. 1012). The five fact witnesses were Robert Montgomery, Sabrina Montgomery, Charles Duckworth, Roger Simmons and David McCombs.

September 17, 2004 Flood

Robert Montgomery testified that 8 to 10 inches of rain fell the day of the 2004 flood. (App. 1282). He further testified the field had not previously flooded since Mr. Reilley installed the bridge in 1985. (App. 1282). Mr. Montgomery did not observe the creek during the 2004 storm. (App. 1285). Sabrina Montgomery similarly testified she did not observe the creek backing up during the 2004 flood. (App. 1395).

Mr. Duckworth testified that his observations of that flood were limited to what he briefly observed from the third floor of the John Marshall High School building. (App. 1432-1433).

Mr. Duckworth also testified that during the September 17, 2004 flood, the entire Marshall County Board of Education property behind John Marshall High School extending all the way to the northern limits of said property was flooded, and the flooding was not limited to just the John Marshall High School baseball field. (App. 1431-1432).

Roger Simmons testified he was not in the area during that flood and therefore could offer no observations regarding that flood event. (App. 1454). He observed the effects of the flood the next day. (App. 1459).

David McCombs. testified stated that his only observation of that flood was when he briefly drove past the front of John Marshall High School on West Virginia State Route 2. At that point, the flood waters had already covered the John Marshall High School baseball field. (App. 1464-1465).

February 1, 2008 Flood

Mr. Montgomery testified that he did observe water come down the drainage way, impact or encounter the bridge, swirl around, and back up into the ballfield during the 2008 flood. (App. 1294). He offered no testimony – as he could not – that the damages claimed by the BOE were caused by the bridge.

Mrs. Montgomery testified during the trial that she did not recall make any observations with regard to the February 1, 2008 flood. (App. 1407-1408, 1413).

Mr. Duckworth testified he could see water coming up on the JMHS baseball field during the 2008 flood. (App. 1433). He did not testify that he saw it hitting the bridge or coming back up the creek. He just saw the field starting to flood. (App. 1433-1434).

Mr. Simmons testified during trial that he thought he might have observed the February 1, 2008 flood, but he could not be sure. (App. 1456).

Finally, Mr. McCombs testified at the trial that he did not make any observations at all with regard to the February 1, 2008 flood. (App. 1466).

June 17, 2009 Flood

Mr. Montgomery testified that he did observe water come down the drainage way, impact or encounter the bridge, swirl around, and back up into theballfield during the 2009 flood. (App. 1294).

Mrs. Montgomery testified that she did not recall making any observations with regard to the June 17, 2009 flood when it was occurring. (App. 1410; 1413).

Mr. Duckworth testified that he did not make any observations with regard to the June 17, 2009 flood. (App. 1435)

Mr. Simmons testified during trial that he thought he might have observed the February 1, 2008 flood, but he could not be sure. (App. 1456).

Finally, Mr. McCombs testified that he did not make any observations with regard to the June 17, 2009 flood. (App. 1466)

June 5, 2010 Flood

Mr. Montgomery testified that he did observe water come down the drainage way, impact or encounter the bridge, swirl around, and back up into theballfield during the 2008 flood. (App. 1294). He did not testify that he was there in the middle of the night.

Mrs. Montgomery testified that she did not make any observations with regard to the June 5, 2010 flood. (App. 1413)

Mr. Duckworth testified during the trial that he did not make any observations with regard to the June 5, 2010 flood. In fact, he testified that the June 5, 2010 flood happened overnight and when everybody woke up, the field was already flooded." (App. 1439). He went on to agree that unless someone was there in the middle of the night of June 5, 2010, "no one would have been able to observe the water coming down the creek, hitting the bridge, backing up, and flooding onto the field." (App. 1439).

Mr. Simmons testified there was a nighttime flood (App. 1463), but that he thought it was in 2004 even though every other witness testified that flood occurred during the day (as it did). He nonetheless testified he may have observed the June 5, 2010 flood. (App. 1456).

Mr. McCombs testified during the trial that he did not make any observations with regard to the June 5, 2010 flood. (App. 1466)

Based on this "observational" testimony – which to the extent the BOE argues is proof of proximate cause of the damages sustained as a result of the four floods – is directly at odds the BOE's position on the application of the discovery rule it argued in opposition to the motion to

dismiss. Beyond that, and as importantly for this part of the appeal, is insufficient to create a genuine issue of material fact on proximate causation for the damages.

West Virginia follows the rule that "A plaintiff's burden of proof is to show that a Petitioner's breach of a particular duty of care was a proximate cause of the plaintiff's injury, not the sole proximate cause." *Stephens v. Rakes*, 235 W. Va. 555, 565, 775 S.E.2d 107, 117 (2015). Even under that formulation, however, the Plaintiff must prove that without the defendant's negligence, the injury would not have resulted. Indeed, the jury was so charged:

> An act or failure to act is the 'proximate cause' of an injury if it was one of the efficient causes thereof, without which the injury would not have resulted. It is a cause that contributes directly to the injury and resulting damages, and is distinguished from a mere incidental circumstance, not in the direct line of causation. If you find that the negligence of the defendant was the proximate cause of Plaintiffs alleged injuries, you may award the Plaintiff damages. The Plaintiff may recover only for those elements of damages that they have proven to be present by a preponderance of the evidence to have proximately resulted from the negligence of the Defendant.

(App. 1760). In this case, that simply means that Plaintiff was required to prove that had the Reilley bridge and embankment not been present during any of the four flood events at issue, then Plaintiff would not have sustained the damages that were caused by those four floods. The Defendants would submit that it was impossible, under any circumstances, for the jury to have reasonably concluded that the Reilley bridge or embankment were the proximate cause of any of the four flood events at issue because the Plaintiff offered absolutely no evidence at trial to support that conclusion.

IV. THE LOWER COURT'S AWARD OF INJUNCTIVE RELIEF FAILED TO COMPLY WITH RULE 65 BECAUSE IT FAILED TO CONTAIN APPROPRIATE FINDINGS OF FACT OR CONCLUSIONS OF LAW AND WAS OTHERWISE UNSUPPORTED BY THE EVIDENCE OF IRREPARABLE HARM OR ANY OTHER BASIS FOR THE AWARD OF INJUNCTIVE RELIEF.

Standard of review: "Unless an absolute right to injunctive relief is conferred by statute, the power to grant or refuse or to modify, continue, or dissolve a temporary or a permanent injunction, whether preventive or mandatory in character, ordinarily rests in the sound discretion of the trial court, according to the facts and the circumstances of the particular case; and its action in the exercise of its discretion will not be disturbed on appeal in the absence of a clear showing of an abuse of such discretion." *G Corp. v. MackJo, Inc.*, 195 W. Va. 752, 754, 466 S.E.2d 820, 822 (1995) syllabus point 1. Whether a trial court's order complies with the requirements of the applicable rules, however, is a question of law reviewed *de novo*. Moreover, "The denial or granting of an injunction by a trial court is discretionary and will not be disturbed upon an appeal unless there is an absolute right for an injunction or some abuses shown in connection with the denial or granting thereof." *Board of Dental Examiners v. Storch*, 146 W. Va. 662, 122 S.E.2d 295 (1961) syllabus point 6. At the federal level, a district court's abuses its discretion in awarding injunctive relief by failing to apply the appropriate criteria for such. *See, e.g., Landmark Land Co. v. Office of Thrift Supervision*, 990 F.2d 807, 811 (5th Cir. 1993) (preliminary injunction).

It is important to note, as well, that the burden of proof lies with the party seeking the injunction. *Camden-Clark Mem'l Hosp. Corp. v. Turner*, 212 W. Va. 752, 575 S.E.2d 362, 2002 W. Va. LEXIS 240 (2002). In the federal system, an award of injunctive relief requires "The party seeking the injunction bears the burden of providing a sufficient factual basis by offering some proof beyond the unverified allegations in the pleadings." *Imagine Medispa, LLC v.*

Transformations, Inc., 999 F. Supp. 2d 862, 868-69 (S.D. W. Va. 2014).

Plaintiff sought injunctive relief pursuant to Rule 65 of the West Virginia Rules of Civil Procedure. Rule 65(d) provides:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

West Virginia Rule of Civil Procedure 65(d). This provision is substantially similar to Federal Rule of Civil Procedure 65(d) and indeed, is patterned on it. And the requirements of that rule "are mandatory and must be observed in every instance." *Alberti* 383 F.2d 268 at 272 (4th Cir.1967); *CPC Int'l, Inc. v. Skippy Inc.*, 214 F.3d 456, 459 (4th Cir. 2000).

In addition, Courts have generally held that a hearing awarding a permanent or mandatory injunction constitutes a trial to the court on that claim. In West Virginia, Rule 52 (also based on its equivalent federal counterpart) apply to such trials. That rule states:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing preliminary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review.

West Virginia Rules of Civil Procedure 52(a).[16] Here, the lower court made not findings of fact nor did it issue conclusions of law, thus depriving this Court of the opportunity to properly

---

[16] As the Fourth Circuit stated in *Alberti v. Cruise*, 383 F.2d 268, 271 (4th Cir. 1967), "On its face, Rule 52(a) would appear to apply only to interlocutory injunctions. However, it has been held that the language of the Rule "in all actions tried upon the facts without a jury * * *" encompasses suits in which permanent injunctions are issued. *Hook v. Hook & Ackerman, Inc.*, 213 F.2d 122, 130 (3 Cir. 1954). *See* 5 Moore's Federal Practice ¶ 52.07, p. 2668 (2d ed. 1966) (1966 Supp.)." *See also, Ashland Oil v. Kaufman*, 181 W. Va. 728, 733, 384

review whether it abused its discretion. *See, e.g., State v. Redman*, 213 W.Va. 175, 178, 578 S.E.2d 369, 372 (2003) (internal citations omitted) (written orders "as a rule, must contain the requisite findings of fact and conclusions of law to permit meaningful appellate review"); *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 195, 342 S.E.2d 156, 161 (1986) (trial court's "failure in this case to make any findings of fact or conclusions of law ... gives this Court nothing upon which to base our review"). On this basis alone, the trial court's award of injunctive relief should be reversed.

Moreover, there was simply no evidence before the trial court that permitted the entry of a mandatory injunction. The motion for injunctive relief was filed almost a decade after the last flood event considered by the jury and more then 16 years after the first one considered by the jury. As the BOE argued in its motion: "under each of the related legal theories raised by the Marshall Co. BOE in this case – namely, continuing trespass, interference with riparian rights and creation of a private nuisance – the Marshall Co. BOE is entitled to entry of an order directing the defendants to abate the nuisance." (App. 2206). The motion relied primarily on the trial evidence in support, supplemented by an April 2, 2020 "engineering study" attached to the motion (App. 2216-2219) authored by Plaintiff's trial expert, Michael Kearns such set forth a "conceptual plan" which Plaintiff sought to have the lower court order "defendants" to implement. That "study" was unsworn and neither Mr. Kearns nor anyone else testified at the injunction hearing held on September 15, 2020.

In the unsworn study, Mr. Kearns stated that, "In the recent court findings in *Marshall County Board of Education v. Reilley,* it is our understanding that it was found that the installed

---

S.E.2d 173, 178 (1989) (noting interplay between Rule 52 and an award of injunctive relief even under the prior version of Rule 65). In *Alberti,* as in this case, "there were no findings of fact or statements of conclusions of law." *Id.*

bridge structure and associated abutments/embankments which were previously installed by Mr. Reilley for access to his property on the cast side of Little Grave Creek, increased the frequency and magnitude of flooding on the John Marshall High School property." (App. 2216). Of course, the jury made no such findings. It simply concluded that the BOE had "proven its case" with respect to the four flood events at issue and made no findings with regard to future flooding. In fact, any "evidence" of such flooding was specifically excluded from the trial. (App. 2234).

Under the circumstances, there was simply no **evidence** offered at the injunction hearing that supports the mandatory injunction awarded. The BOE offered no testimony, tendered no documents, or took any other steps to demonstrate to the trial court that the jury did anything other than what it was specifically asked to do – determine whether the BOE had "proven its case" with respect to flood events that occurred more than ten and as many at 16 years before the hearing.

This Court has never specifically spoken to the factors a circuit court must consider in awarding a permanent injunction. Other courts have been more specific. For example, one court has stated that "As the parties moving for permanent injunctive relief, Plaintiffs must prove 1) actual success on the merits, 2) that they will suffer irreparable harm if the Court declines to grant injunctive relief and 3) that "the harm that would result if an injunction does not issue outweighs the harm that would befall the opposing party if the injunction is issued." *Horizon Pers. Communications, Inc. v. Sprint Corp.*, 2006 Del.Ch. LEXIS 141, at *96 (Del.Ch. Aug. 4, 2006). As another court has put it: "A permanent injunction is an equitable remedy that will be granted only where there will be immediate and irreparable injury to the complaining party and there is no adequate remedy at law." *Lemley v. Stevenson* 104 Ohio App.3d 126, 136, 661 N.E.2d 237 (1995). Thus, "The purpose of an injunction is to prevent a future injury, not to

redress past wrongs." Id. As another stated, "The classic requirements for a permanent injunction are irreparable harm and the lack of an adequate remedy at law." *Bonney v. MTM Family Ltd. Partnership*, 2013 Conn. Super. LEXIS 203, at *19 (Super. Ct. Jan. 28, 2013). Under any of these formulations (or similar ones from any number of other jurisdictions), the BOE failed to meet its burden on the motion for injunctive relief.

First, it offered no evidence in its motion or at the hearing of irreparable harm. It – and the lower court when it entered the order prepared by the BOE's counsel – relied on the jury's verdict. As noted, however, that verdict was limited to the four questions posed to the jury which was simply whether the BOE had "proven its case" with respect to the four flood events, the last of which was ten years before the injunction hearing. Even assuming evidence at trial could be read to mean that – under some circumstances – future flood events could occur, there was no evidence introduced of "irreparable harm" or the lack of an adequate remedy at law. Indeed, the entire trial was about providing the BOE with a remedy at law for damages it alleged to have sustained as a result of flooding which predated the injunction hearing by more than ten to sixteen years.

Second, the unsworn "engineering study" is simply not sufficient "evidence" that the lower court could have considered in determining the scope of injunctive relief. *See, e.g., Rockenbaugh v. Barron*, 2013 W. Va. LEXIS 202, at *9 n.10 (Mar. 8, 2013) (*citing Ohio Gas Co. v. Walker*, 59 Ohio App. 2d 216, 394 N.E.2d 348 (Ohio Ct. App. 1978) for the proposition that "unsworn allegations of operative facts contained in a motion for relief from judgment or in a brief attached to the motion are not sufficient evidence upon which to grant a motion to vacate judgment"). Mr. Kearns did not testify at the hearing. As noted above, he specifically stated that his understanding was the jury concluded the "the installed bridge structure and associated

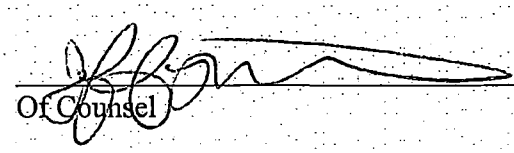
abutments/embankments ...increased the frequency and magnitude of flooding on the John Marshall High School property" even though there was no such finding by the jury.

Third, the Order granting injunctive relief contains no findings of fact or conclusions of law. It contains no discussion of the differences between the Reilley Estate and Petitioner individually. Although this Court applies a deferential standard of review when determining whether a lower court erred in awarding injunctive relief, *Bansbach v. Harbin*, 229 W. Va. 287, 728 S.E.2d 533 (2012), that standard presupposes there were such findings and conclusions for review. *See*, W. Va. R. Civ.P. 65(d) ("Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained"); W. Va. R.Civ.P. 52(a) ("In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon"). The award of injunctive relief should be reversed.

CONCLUSION

For the reasons stated above, the decision of the lower court should be reversed, the Plaintiff's claim for monetary damages should be stricken or reduced, the lower court's award of injunctive relief vacated, and the case remanded for further proceedings.

MYRA KAY REILLEY, AS ADMINISTRATRIX OF THE ESTATE OF FRANCIS E. REILLEY, AND MYRA KAY REILLEY, INDIVIDUALLY,

By: 
Of Counsel

Jeffrey A. Holmstrand (#4893)
GROVE, HOLMSTRAND & DELK, PLLC
44 ½ Fifteenth Street
Wheeling, West Virginia 26003
(304) 905-1961
jholmstrand@ghdlawfirm.com

CERTIFICATE OF SERVICE

Service of the foregoing Opening Brief of Petitioner, Myra Key Reilley, as Administratrix of the Estate of Francis E. Reilley, and Myra Kay Reilley, Individually was had upon the Respondent by forwarding a true copy thereof, postage pre-paid, to its counsel, this 21st day of January, as follows:

Kenneth E. Webb, Jr.
BOWLES RICE, LLP
600 Quarrier Street
Charleston, WV 25301

MYRA KAY REILLEY, AS ADMINISTRATRIX OF THE ESTATE OF FRANCIS E. REILLEY, AND MYRA KAY REILLEY, INDIVIDUALLY,

By: _____
Of Counsel

Jeffrey A. Holmstrand (#4893)
GROVE, HOLMSTRAND & DELK, PLLC
44 ½ Fifteenth Street
Wheeling, West Virginia 26003
(304) 905-1961
jholmstrand@ghdlawfirm.com