IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0849

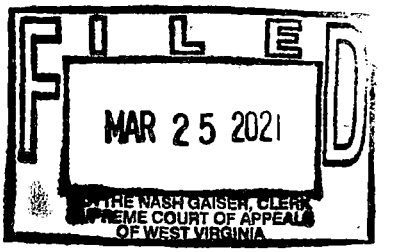
MYRA KAY REILLEY, AS ADMINISTRATRIX
OF THE ESTATE OF FRANCIS E. REILLEY,
AND MYRA KAY REILLEY, INDIVIDUALLY

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

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

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INTRODUCTION

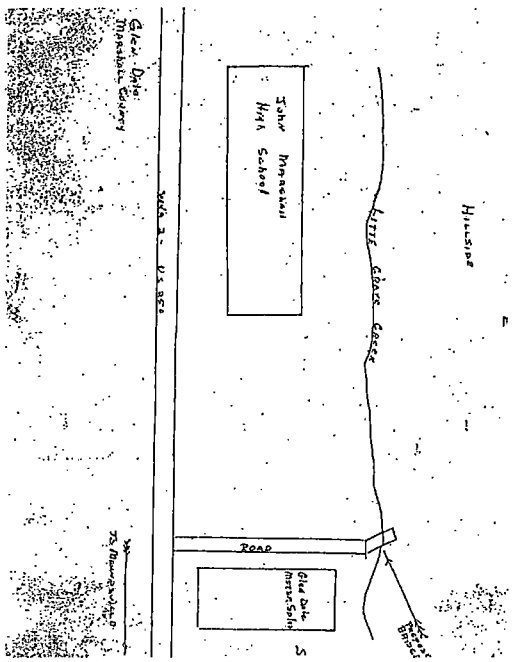
Myra Kay Reilley, the 89-year-old widow of Francis E. Reilley, appeals both individually and in her capacity as Administratrix of the Estate of Francis E. Reilley, from a series of orders entered by the Circuit Court of Marshall County arising out of flooding on low-lying property owned by the Marshall County Board of Education, flooding going as far back as 2004 and no more recently than 2010, which resulted in a substantial damage award as well as a mandatory injunction requiring Mrs. Reilley to remove the only access to the property on which she and others live. Mrs. Reilley had nothing to do with the installation of the bridge and did not own the property at the time of any the construction or any of the flooding sued upon – her late husband owned the property and built the bridge. Her opening brief generally raised four assignments of error. First, she challenged the lower's court's failure to dismiss the case because Mr. Reilley – the original defendant prior to his passing – was not timely served. Second, she challenged the lower court's failure to dismiss or grant summary judgment with respect to damage claims for two floods which occurred more than two years preceding the BOE's filing suit. Third, she seeks reversal of the lower court's failure to find that the BOE had failed to prove the presence of the bridge and embankment proximately caused the monetary damages sought by the Board. Finally, she challenged the procedural adequacy and the substantive merits of the mandatory injunction order. For the reasons stated below and in the opening brief, the lower court's decisions should be reversed.

SUPPLEMENTAL STATEMENT OF THE CASE

Mrs. Reilley stands on her prior briefing for the procedural posture of this case and the relevant facts. This Supplemental Statement is submitted solely to give this Court an

understanding of the property at issue, the location of the bridge, and to address a specific point raised in the Respondent's Brief regarding the construction of the bridge.

Francis Reilley and other members of his family purchased the property in 1984. (App. 1166-1167). In 1985, Mr. Reilley applied to the Public Land Corporation for the State of West Virginia for a permission to construct a bridge across Little Grave Creek. (App. 1779-1782, Plf. Ex. 4). The application was accompanied by a hand-drawn map (as allowed by the application), showing the properties and location of the bridge:



(App. 1782). Permission to construct the bridge was granted by letter dated April 11, 1985. (App. 1783, Plf. Ex. 5). The bridge is only access to the property Mrs. Reilley and others live on. (App. 1207-1208).

Mrs. Reilley had no knowledge of the application, the granting of permission, or of any of the specifics as to the construction of the bridge. (App. 1170, 1175-1177, 1179, 1181, 1183, 1203, 1204, 1206, 1207). Mrs. Reilley was cross-examined by the BOE's counsel regarding the plans and qualifications of Mr. Reilley regarding the design and construction of the bridge, as

well as who Mr. Reilley may have consulted with in constructing the bridge, to which she had no knowledge. [See, e.g., App. 1170, 1175-1176). Its brief, the BOE flatly asserts that "the Reilleys did not consult with the soil conservation district, an engineer or a hydrologist." (*Respondents' Brief On Appeal* at 3 *citing* App. 1221). In fact, that witness referenced simply testified he did not have knowledge about who Mr. Reilley may have consulted with in constructing the bridge. (App. 1228). This line of questioning highlights the unfairness of allowing the BOE to sit on its rights for more than 2 decades after the bridge was constructed and then take the case to trial 8 years after Mr. Reilley, who could have answered these questions and more generally addressed the design and construction), had died.

ARGUMENT

I. PLAINTIFF FAILED TO DEMONSTRATE GOOD CAUSE FOR FAILING TO TIMELY SERVE THE LATE MR. REILLEY AND THE CASE SHOULD HAVE BEEN DISMISSED.

The BOE admits that it failed to timely serve the late Mr. Reilley. Once served, Mr. Reilley promptly moved to dismiss the claims for lack of timely service. Almost 7 years after that motion was filed (and almost six years after Mr. Reilley died), the lower court denied the motion finding that "good cause" existed for the lack of timely service, citing generally to an affidavit attached to the BOE's response to the dismissal motion. (App. 6-10). The BOE attempts to defend that good cause finding (*Respondent's Opening Brief On Appeal* at 12 – 15) but fails to cite a single case which supports the lower court's finding of "good cause" based on circumstances such as those set forth in the affidavit of counsel. In contrast, Mrs. Reilley's Opening Brief cited to a number of cases supporting its argument that "good cause" did not exist and she stands on those arguments here.

II. THE CONTINUING TORT DOCTRINE DOES NOT SAVE PLAINTIFF'S TWO CLAIMS FOR MONETARY DAMAGES WHICH OCCURRED MORE THAN TWO YEARS BEFORE IT FILED SUIT.

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). There was no assertion below that ALL of Plaintiff's claims were barred by the statute of limitations. In other words, there was no argument raised below that the statute of limitations barred all the BOE's claims simply because the first flood event occurred in 2004. Had the trial court granted either of the statute of limitations motions, Plaintiff's claims for the two flood events which occurred less than two years before it filed suit, as well as its claims for injunctive relief, would have still remained (subject of course to adequate proof). This result would have consistent with general statute of limitations jurisprudence, as well as with the proper contours of the continuing tort doctrine. The lower court erred in allowing the jury to consider the two damage claims flowing from flood events (9/17/2004 and 3/4/2008) which occurred more than two years prior to the filing of the lawsuit (9/2/2010). Ultimately, the damages awarded (including prejudgment interest) from those two floods constituted approximately $142,000 of the total damages of $238,637.03 (that is, approximately 60%).

Mr. Reilley first moved to dismiss those two damage claims on statute of limitations grounds in 2011. (App. 68-70). The BOE's briefing in response to that motion focused almost exclusively on the potential application of the discovery rule[1] and devoted only 2 paragraphs to the continuing tort doctrine.[2] The lower court denied the motion to dismiss in 2018 stating:

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1 (App. 75-77).

2 (App. 77-78).

> 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).[3] As directed by the trial court, the statute of limitations motion was renewed in Mrs. Reilley's summary judgment motion. (App. 260-261). The was no written order denying the summary judgment motion and the record does not reflect any articulated basis for denying the summary judgment motion other than to say it was denied. (App. 1019).

Although the BOE asserts on appeal that Mrs. Reilley's position "ignores the continuing tort doctrine and application of the discovery rule to the facts of the case" (*Respondent's Brief On Appeal* at 16),[4] it does not make any real argument regarding the discovery rule beyond noting it in a footnote.[5] In contrast to its briefing on the motion to dismiss below which primarily addressed the discovery rule, its brief here focuses on the continuing tort doctrine, arguing that its application saves its claim for monetary damages arising from those two floods. As noted in Mrs. Reilley's Opening Brief, this Court specifically recognized the possibility of "continuing tort" in *Graham v. Beverage, P.C.*, 211 W.Va. 466, 476-77, 566 S.E.2d 603, 613-14

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[3] The record does not reflect whether the trial court was relying on the discovery rule, the continuing tort doctrine, neither, or both, to deny the motion, stating only that the motion was denied "for the for the reasons set forth in Plaintiff's response in opposition to the Defendant's dispositive motion." (App. 6).

[4] It makes this assertion even though the vast majority of the section of Mrs. Reilley's opening brief addressing the statute of limitations specifically discussed the "continuing tort" doctrine. (*See, Opening Brief of Petitioner Myra Kay Reilley, as Administratrix of the Estate of Francis E. Reilley and Myra Kay Reilley, Individually,* at 19 – 25).

[5] *Respondent's Brief On Appeal* at 20 n. 9. It did not address the discovery rule at all in its response to the summary judgment motion filed below. (App. 958-960).

(2002) without specifically outlining its contours. The BOE heavily relies on that decision to argue that the doctrine saves its untimely monetary damage claims. This Court should reject its argument.

First, this Court and other have recognized that the "continuing tort" doctrine does not save monetary damage claims which fall outside the statutory period, even if the plaintiff also has claims accruing within that period. Specifically, the BOE cited *Taylor v. Culloden Public Service Dist.*, 214 W. Va. 639, 591 S.E.2d 197 (2003) syllabus point 4 in support of its continuing tort argument. (*Respondent's Opening Brief On Appeal* at 17). There, the Court concluded the Plaintiffs had alleged a nuisance claim that fell within the scope of *Graham* and then addressed the question of appropriate damages:

> While the issue of recoverable damages is not properly before us, we note that the damages that the [Plaintiffs] can recover in connection with a temporary nuisance are limited to the two-year period in time prior to the filing of their cause of action. *See generally State ex rel. Cutlip v. Sawyers,* 147 W.Va. 687, 691, 130 S.E.2d 345, 348 (1963). We further observe that successive actions can be filed to recover additional damages for temporary nuisances that occur subsequent to the filing of the initial nuisance suit.

Taylor, 214 W. Va. at 647 n.21, 591 S.E.2d at 205 n. 21. This is precisely the result that Mrs. Reilley urges here.

This aspect of the "continuing tort" doctrine was well-explained in *Davis v. Laclede Gas Co.*, 603 S.W.2d 554, 556 (Mo. 1980):

> [I]f the wrong done is of such a character that it may be said that all of the damages, past and future, are capable of ascertainment in a single action so that the entire damage accrues in the first instance, the statute of limitation begins to run from that time. If, on the other hand, the wrong may be said to continue from day to day, and to create a fresh injury from day to day, and the wrong is capable of being terminated, a right of action exists for the damages suffered within the statutory period immediately preceding suit.

Here, the statute of limitations motions fell squarely within this framework and Plaintiff's claims for monetary damages falling outside the prescriptive period should have been precluded by the trial court.

Likewise, in *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007), the court outlined the relationship of the "continuing tort" doctrine to claims for damages falling within and outside the statute of limitations:

> We ... conclude that a claim for damages caused by a continuing tort can be maintained for injuries caused by conduct occurring within the statutory limitations period. Seen in this light, the 'continuing tort doctrine' is not a separate doctrine, or an exception to the statute of limitations, as much as it is a straightforward application of the statute of limitations: It simply allows claims to the extent that they accrue within the limitations period. A 'continuing tort' ought not to be a rationale by which the statute of limitations policy can be avoided. But when there are continuing or repeated wrongs that are capable of being terminated, a claim accrues every day the wrong continues or each time it is repeated, the result being that the plaintiff is only barred from recovering those damages that were ascertainable prior to the statutory period preceding the lawsuit.

Alston, 730 N.W.2d at 383-84.[6] Under this rationale, even if the "continuing tort" doctrine would have precluded outright dismissal of all of Plaintiff's claims (as result not sought by counsel below), it would bar the monetary damage claims for the 2004 and 2008 floods.

Second, the underlying premise of a continuing tort claim is the existence of "a situation where events, which for all practical purposes are identical, occur repeatedly, at short intervals, in a consistent, connected, rhythmic manner." *DeRocchis v. Matlack, Inc.*, 194 W. Va. 417, 423 n.4, 460 S.E.2d 663, 669 n. 4 (1995), *see also*, *W. W. McDonald Land Co. v. EQT Prod. Co.*,

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[6] In fact, in connection with this discussion, the *Alston* Court noted this Court's decision in *Taylor v. Culloden Public Service Dist.*, 214 W. Va. 639, 591 S.E.2d 197 (2003) in support of this statement: "But other courts have concluded, in various contexts, that even if claims based on tortious conduct outside the statutory limitations period are time barred, claims based on subsequent tortious activity are not." *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 428, 730 N.W.2d 376, 382 n. 18 (2007).

F.Supp.2d 790, 811 (S.D.W.Va. 2013) ("The continuing tort theory will not apply to toll the statute of limitations, even though the plaintiff brings tort actions, where the injuries were multiple and periodic, not continuing."). In this instance, the bridge and embankment were built in 1985, while the two damage claims addressed by the motions occurred in 2004 and 2008, making them more like the "multiple and periodic" injuries rather than ones which were "identical, occur[red] repeatedly, at short intervals, in a consistent, connected rhythmic manner."

Third, the damage claims at issue flow from specific and discrete flood events which occurred 19 and 23 years after Mr. Reilley built the bridge and embankment in 1985. There is no allegation or evidence of any action taken by Mr. Reilley after construction of the bridge and embankment in 1985. The BOE asserts on appeal that "the continuing tort is [Mr. Reilley's] failure to modify or replace the bridge and embankment to prevent flooding on the Marshall Co. BOE's property." (Respondent's Brief On Appeal at 17). With respect to a "continuing tort" claim, however, "[t]he necessary tortious act cannot be the failure to right a wrong committed outside the limitation period. *See Fitzgerald v. Seamans*, 180 U.S. App. D.C. 75, 553 F.2d 220, 230 (D.C. Cir. 1977). If it were, the tort in many cases would never accrue because the defendant could undo all or part of the harm." *Gettis v. Green Mt. Econ. Dev. Corp.*, 179 Vt. 117, 127, 892 A.2d 162, 170 (2005).[7]

Regardless of how one slices it – applying the continuing tort doctrine with the limitations on recoverable damages specifically recognized by this Court in *Taylor* and by any number of other courts or rejecting application of the continuing tort doctrine entirely, the BOE

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[7] Judge Johnston recently cited to *Fitzgerald* in *Brevard v. Racing Corp.*, No. 2:19-cv-00578, 2020 U.S. Dist. LEXIS 63881, at *20-21 (S.D. W. Va. Apr. 13, 2020) for the proposition that there is a difference between "an act causing injury with an injury that continues because of a failure to remedy it."

was not entitled to monetary damages for the two floods which occurred more than two years prior to its filing suit. As such the lower court's judgment should be reduced to remove the monetary damages for the 2004 and 2008 floods, along with the prejudgment interest on those damages.

III. THE BOE FAILED TO INTRODUCE ANY EVIDENCE THAT THE DAMAGES FOR WHICH IT CLAIMED ENTITLEMENT WOULD NOT HAVE OCCURRED IN THE ABSENCE OF THE CONTRUCTION OF THE EMBANKMENT AND BRIDGE, SO THE LOWER COURT ERRED IN FAILING TO GRANT SUMMARY JUDGMENT, THE MOTION FOR JUDGMENT AS A MATTER OF LAW, AND THE POST-TRIAL MOTION.

The causation motions[8] were specific to the monetary damages sought by the BOE for specific flood events. In order to hold Mr. Reilley's estate liable for damages from those specific events, the BOE bore the burden of proving proximate cause. The issue below and on this appeal is not whether Little Grave Creek was simply obstructed by the embankment and bridge and could cause water to impound on the BOE property, but rather whether the BOE proved that the damages for which it sought recovery were proximately caused by the presence of the bridge and embankment. At best, the testimony it cites in its brief was to the effect that the water from Little Grave Creek backed up from the embankment and bridge on to the BOE property (which was, of course, already in a floodplain).[9] But that is not proof of the damages caused. After all,

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[8] Specifically, the summary judgment motion App. 256-273), the motion for judgment as a matter of law (App. 1564), and the post-trial motion. (App. 2162-2174).

[9] And, of course, the lower stated at trial: "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).

Noah would have needed the ark regardless of the presence or absence of the bridge and embankment.

Notably absent from the BOE's brief is any evidence, testimony, or argument that proximately links the damages claimed to the presence of the bridge and embankment. "'In this jurisdiction the burden of proving damages by a preponderance of the evidence rests upon the claimant[.]' Syllabus Point 4, in part, *Sammons Bros. Constr. Co. v. Elk Creek Coal Co.*, 135 W. Va. 656, 65 S.E.2d 94 (1951)." *Dickens v. Sahley Realty Co.*, 233 W. Va. 150, 154 n.14, 756 S.E.2d 484, 488 n. 14 (2014) (*quoting Taylor v. Elkins Home Show, Inc.*, 210 W.Va. 612, 619, 558 S.E.2d 611, 618 (2001)). Part of that burden is submitting sufficient evidence of proximate cause.

This Court recently reiterated in *Wal-Mart Stores E., L.P. v. Ankrom*, ___W.Va. ___, 854 S.E.2d 257 (W. Va. 2020) what it means for something to be a proximate cause:

> "'Proximate cause' must be understood to be that cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, **without which the wrong would not have occurred.**' *Syllabus Point 3, Webb v. Sessler*, 135 W.Va. 341, 63 S.E.2d 65 (1950)." *Syllabus Point 4, Spencer v. McClure*, 217 W. Va. 442, 618 S.E.2d 451 (2005).

Ankrom, syllabus point 7 (emphasis added). Under this formulation, it is not enough to say that some water impounded on the BOE property due to the presence of the bridge and embankment (which is at best what the BOE argues). Instead, it must show that it would not have sustained the damages for which it seeks recovery in the absence of that impoundment.[10] As another Court

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[10] Although the BOE argues that the testimony it relies on proves causation for the damages, it does no such thing. The best the BOE does is cite testimony that it claims proves that the creek backed up during the four flood events when it hit the embankment and/or bridge and the testimony that models suggested that the presence of the bridge and embankment may have increased the amount of water impounding on the property during the four floods. But that does not prove that its damages were caused by their presence. Notably missing from the BOE's brief is any reference to a piece of testimony from a lay witness or an expert that the additional

has stated, "'Proximate cause is a legal term of art that incorporates both cause in fact and legal (or proximate) cause. [A] plaintiff cannot satisfy this burden [of establishing proximate cause] by showing only that the defendant **may have** caused his injuries. A plaintiff must show more than a mere possibility or a plausible explanation." *Kava v. Van Wagner*, 2009 WL 2948490, 2009 U.S. Dist. LEXIS 78905, at *7 (W.D. Mich. Sep. 3, 2009) (internal quotations and citations omitted) (emphasis in original), *aff'd sub nom. Kava v. Peters*, 450 F. App'x 470 (6th Cir. 2011).

Framed another way, "a plaintiff cannot recover damages by proving only that the defendant has unlawfully violated some duty owing to the plaintiff, leaving the trier of fact to speculate as to the damages; he must go further and prove the nature and extent of the damage suffered by the plaintiff and that the breach of duty was the legal cause of that damage. Leaving either of these damage questions to speculation on the part of the trier of fact will prevent recovery." *Food Lion v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 960-61 (M.D.N.C. 1997) (*quoting People's Center, Inc. v. Anderson*, 32 N.C. App. 746, 233 S.E.2d 694, 696 (N.C. Ct. App. 1977)). "[O]one event cannot be the proximate cause of another if, had the first event not occurred, the second would have occurred anyway..." *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E.2d 641, 648 (N.C. 1966) (citations omitted). Thus, any alleged additional impoundment from the presence of the bridge and embankment (first event) would not be a proximate cause if the plaintiff's flood damages (the second event) would have occurred anyway.

Although not cited in Respondent's Brief, counsel for Petitioner wishes to direct the Court's attention to *In re Flood Litig.*, 216 W. Va. 534, 607 S.E.2d 863 (2004), syllabus point 10:

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impoundment it claims resulted from their presence caused flood damages that would not have otherwise occurred.

> Where a rainfall event of an unusual and unforeseeable nature combines with a defendant's actionable conduct to cause flood damage, and where it is shown that a discrete portion of the damage complained of was unforeseeable and solely the result of such event and in no way fairly attributable to the defendant's conduct, the defendant is liable only for the damages that are fairly attributable to the defendant's conduct. However, in such a case, a defendant has the burden to show by clear and convincing evidence the character and measure of damages that are not the defendant's responsibility; and if the defendant cannot do so, then the defendant bears the entire liability. To the extent that our prior cases such as *State ex rel. Summers v. Sims,* 142 W.Va. 640, 97 S.E.2d 295 (1957); *Riddle v. Baltimore & O. R. Co.,* 137 W.Va. 733, 73 S.E.2d 793 (1952), and others similarly situated held differently, they are hereby modified.

Although the situation described in *In re Flood Litigation* (combination of unusual and unforeseeable rainfall with defendant's actionable conduct resulting in damages) is not what was alleged or proven in this case, the Court's attention is drawn to this case out of an abundance of caution.

Here, the real property already in the floodplain and there was no evidence introduced at trial, or cited to on this appeal, that the **damages** claimed as was the result of the presence of the embankment and bridge or that even that the water combined with the expected flooding resulted in **damages**.[11] Instead, Plaintiff asserted that if any water impounded on the property during the flood event, regardless of whether the property would have flooded anyway, results in liability. Under the circumstances, the BOE should retain the burden of proving – as plaintiffs must in every other case – that the damages for which they seek recovery were caused by the defendant's conduct.

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[11] In fact, the Plaintiff's expert testified that even in the absence of the bridge and embankment, the creek would have seen flooding at that location of between 3 and 8 feet based on different rainfall scenarios (App. 1538) and that factoring in the bridge and embankment would have only increased the flooding by between .19 and 1.17 feet, again depending on the which rainfall scenario he modeled. (App. 1540). In other words, the creek was flooding under the various rainfall scenarioes even before the construction of the bridge and embankment.

The BOE does not contend that the Rule 50 motion for judgment as a matter of law on causation during trial was untimely, nor could it since it was made at the close of Plaintiff's case. Citing cases under the old rule, however, Plaintiff argues that the trial counsel's failure to renew the Rule 50 motion after introducing evidence resulted in a waiver to challenge the pre-verdict motion. Recall that when the parties indicated they had motions after the Plaintiff rested, the lower 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, the Court – as he indicated he would – denied them. (App. 1574-1575). Renewing the motion based on the sufficiency of the evidence would have been futile and, presumably in recognition of this fact, the trial court addressed the merits of the post-trial motion for judgment as a matter of law or for a new trial based on its view of the merits and not on a procedural default. (App. 15-16).

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.

Mrs. Reilley's final assignment of error was that the lower court's injunction order failed to comply with Rule 65 of the West Virginia Rules of Civil Procedure and was otherwise unsupported by the evidence before the trial court at that hearing. As to the first point, the basis for reversal was straight-forward:

1) Rule 65 requires that "[e]very 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."

2) West Virginia Rule of Civil Procedure 52, likes its federal counterpart, applies to injunction hearings. *Alberti v. Cruise*, 383 F.2d 268, 271 (4th

Cir. 1967); *Hook v. Hook & Ackerman, Inc.*, 213 F.2d 122, 130 (3rd Cir. 1954). 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 S.E.2d 173, 178 (1989).

3) Rule 52 requires the trial court to find the facts specifically and state separately its conclusions of law thereon.

4) The lower court's two-page Injunction Order contains no findings of fact, nor does it contain conclusions of law. (App. 18-19).

5) Although the standard of review for injunction order is generally "abuse of discretion," the requirements of Rule 65 and 52 are mandatory and without the requisite finding of fact and conclusions of law, there is nothing upon which this Court to base its review. *State v. Redman*, 213 W.Va. 175, 178, 578 S.E.2d 369, 372 (2003); *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 195, 342 S.E.2d 156, 161 (1986).

6) As a result, the lower court's Injunction Order must be reversed.

(*Respondent's Opening Brief On Appeal* at 33 – 35).

The BOE's response to this argument was two-fold. First, it asserted that the "Injunction Order **and hearing transcript** meet the minimum requirements of Rule 65(d) and 52(a)..." (Respondent's Brief On Appeal at 36) (emphasis added). Second, without citing any specific cases but only a handbook, it asserted that because this Court has a "complete appellate record of the trial of the damages phase of the case, strict adherence with Rule 52(a) is not required." (*Id.*).

As to its first argument, this Court has repeatedly held that a trial court speaks through its orders. *Legg v. Felinton*, 219 W. Va. 478, 483, 637 S.E.2d 576, 581 (2006) ("It is a paramount principle of jurisprudence that court speaks only through its orders"); *State v. White*, 188 W.Va. 534, 536 n. 2, 425 S.E.2d 210, 212 n. 2 (1992) ("[H]aving held that a court speaks through its orders, we are left to decide this case within the parameters of the circuit court's order"); *State ex rel. Erlewine v. Thompson*, 156 W.Va. 714, 718, 207 S.E.2d 105, 107 (1973) ("A court of record speaks only through its orders"). And the Injunction Order standing alone is insufficient to meet

the requirements of Rule 52(a).[12] This means this Court is reviewing the sufficiency of the order and the BOE does not assert that the Injunction Order, standing alone, meets the minimum requirements of Rules 65(d) and 52(a).

As to the second argument, the record reflects that – during the trial – the trial court felt that there were disputed facts as to whether there was even an obstruction, as evidenced by his denial of the BOE's Rule 50 motion, which argued that as a matter of law that bridge and/or embankment constituted an obstruction for the four discrete flood events under consideration by the jury (all of which occurred 10 years or more prior to the injunction hearing). (App. 1569-1571, 1575). In fact, during the argument at trial on the Rule 50 motions, the trial court specifically addressed the testimony of the BOE's expert:

> 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]. There was no evidence introduced at trial or during the injunction hearing as to other floods (such as flooding within the ten years preceding the Injunction Hearing). Under the circumstances, there is simply no basis for this Court to determine the basis for the lower

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[12] Even if the Court did consider the transcript, it is clear the trial court stated it was not making any findings of his own. After noting the jury's verdict, he stated: "Really today's – in moving forward the issue is – frankly, it's – it's issue preclusion. I mean, it's already been decided." (App. 2233). But, as previously noted, the jury was considering whether the BOE had "proven its case" at the four specific points in time for which it sought damages and the BOE called no witnesses or introduced any other evidence at the injunction hearing and the jury's finding at the damage stage were most certainly not issue preclusion for the injunction hearing. Plus, as discussed below, the party seeking a mandatory injunction faces a higher burden than in a suit seeking ordinary damages.

court's Injunction Order and the case should be remanded for specific findings of fact and conclusions of law, as required by Rule 52.

Mrs. Reilley also argued that, on the merits, there was simply insufficient evidence available to the trial court at the Injunction Hearing to support the extraordinary relief it ordered. (*Respondent's Opening Brief On Appeal* at 35 - 37). Mrs. Reilley generally stands by the arguments there, but addresses the argument raised by the BOE that it need not show irreparable harm in order to obtain a permanent injunction (and makes no argument it did so). In sole support of its argument, the BOE cites to *McCausland v. Jerrell*, 136 W.Va. 569, 68 S.E.2d 729 (1951). That case says nothing about whether a trial court – in awarding injunctive relief – is excused from the general rules applicable to permanent injunctions. In fact, in a case decided only 7 years later, *Charleston National Bank v. Thomas*, 143 W.Va. 788, 105 S.E.2d 184 (1958), this Court held:

> Relief by mandatory injunction will be given only where the right of the applicant is clear and the necessity urgent.

Thomas, syllabus point 1. In its discussion of the applicable West Virginia law, the Court in *Thomas* looked to *Chafin v. The Gay Coal & Coke Co.*, 109 W.Va. 453, 156 S.E. 47 (1930) and, after noting the general requirement for irreparable harm, went on to state:

> Injunction is an extraordinary remedy, and to award it, a stronger and higher ground must be shown than is required for ordinary relief. When this extraordinary writ is asked for enforcement of a right respecting an easement, equity will consider the relative expense and inconvenience, to which the parties would be put, and deny it if there is a great disproportion against the defendant. If the issuance of the writ will operate oppressively or inequitably, the writ will be denied.

Chafin, 156 S.E. at 187. The trial court was required to balance the equities. And beyond that, *Chafin* demonstrates the error of the trial court's purported "acceptance" of the jury's verdict in

its Injunction Order because "a stronger and higher ground must be shown than is required for ordinary relief" such as damages.

CONCLUSION

The lower court's finding of "good cause" for the untimely service on the late Mr. Reilley was error because the circumstances – including the deliberate decision to withhold service – do not constitute good cause.

The monetary damages and prejudgment interest flowing from the 2004 and 2008 floods cannot be upheld because suit was filed more than two years after both events. Even if the continuing tort doctrine applies, this Court's decision in *Taylor v. Culloden Public Service Dist.,* 214 W. Va. 639, 591 S.E.2d 197 (2003) precludes an award of monetary damages for events occurring more than two years prior to filing suit. *Taylor*, 214 W. Va. at 647 n.21, 591 S.E.2d at 205 n. 21.

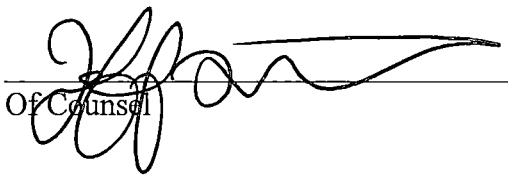
The lower court's decision finding that sufficient evidence existed to allow the jury to consider proximate cause is erroneous because there was admittedly no evidence tying any the claimed damages to increased flooding allegedly caused by the bridge and embankment.

Finally, the 2020 mandatory injunction order entered by the lower court failed to comply with Rules 65 and 52 because it does not contain the findings of fact and conclusions of law required for this Court to conduct appellate review and the ultimate extraordinary relief granted (the destruction of a bridge and embankment that have existed since 1985) was unsupported by the evidence introduced at the injunction hearing.

For all of these reasons, the lower court's orders challenged on this appeal should be reversed and the case remanded with instructions to dismiss the case as untimely served. Alternatively, the Court should remand to (1) direct the trial court to dismiss the damages claims

for flooding which occurred more than two years prior to the filing of this suit; (2) reverse the award of damages for the two remaining floods because the Plaintiff offered no evidence that the damages awarded were proximately caused by the presence of the bridge and embankment; (3) and reverse the mandatory injunction order and remand with instructions it be denied on the merits based on the lack of evidence introduced at the hearing or at least to have the lower court make sufficient findings and conclusions to allow for meaningful review by this Court.

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

By: 
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CERTIFICATE OF SERVICE

Service of the foregoing Reply 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 25th day of March, as follows:

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

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