

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MYRA KAY REILLEY, AS
ADMINISTRATRIX OF THE
ESTATE OF FRANCIS E.
REILLEY, AND MYRA KAY
REILLEY, INDIVIDUALLY,
(Defendants below),

Petitioner,

v.

THE BOARD OF EDUCATION
OF THE COUNTY OF
MARSHALL,
(Plaintiff below),

Respondent.

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NO. 20-0849
(Appealed from the
Circuit Court of Marshall County,
Civil Action No. 10-C-180)

RESPONDENT'S BRIEF ON APPEAL

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Petitioner, Myra Kay Reilley, as Administratrix of the Estate of Francis E. Reilley, and Myra Kay Reilley, individually (collectively “Petitioner,” “Mrs. Reilley” or “the Reilleys”), appeals two (2) interlocutory orders of the Circuit Court of Marshall County denying a motion to dismiss and motion for summary judgment, appeals a jury verdict in favor Respondent Marshall County Board of Education (“the Marshall Co. BOE” or “the board”) and appeals an order of the Circuit Court of Marshall County entered after the jury verdict granting Marshall Co. BOE injunctive relief.

I. INTRODUCTION

The matter below involves an action by the Marshall Co. BOE against the Reilleys seeking injunctive relief to remove obstructions to the flow of Little Grave Creek and seeking damages for water the Reilleys caused to impound upon property belonging to the Marshall Co. BOE. As the Marshall Co. BOE proved at trial, Mrs. Reilley’s husband, sons and family friends built a bridge and embankment over and in the stream channel and floodway surrounding Little Grave Creek. The bridge and embankment obstruct the flow of Little Grave Creek – especially after a heavy rain -- and cause water to back up on and flood the area behind John Marshall High School – including the baseball field. Before the bridge and embankment were built, the baseball field did not flood. For many years after construction of the bridge and embankment, the baseball field did not flood. However, since 2004, when the baseball field first experienced flooding, floods have impacted the baseball field more frequently and more severely. This is due to the repeated deposition of sand, gravel and mud in the stream channel and floodway which fills in the drainage area and pushes the impounded water onto the baseball field.

After a three (3) day trial, the jury in the matter below found that the Reilley bridge and embankment obstructed the flow of Little Grave Creek and returned a verdict in favor of the Marshall Co. BOE for damages. After the verdict of the jury, upon motion by the Marshall Co.

BOE, the Circuit Court of Marshall County entered an order granting the Marshall Co. BOE injunctive relief that required the Reilleys to remove the obstructions. Because the Circuit Court of Marshall County committed no reversible error in its denial of the Reilleys' motion to dismiss, motion for summary judgment, posttrial motions and in entering the order awarding the Marshall Co. BOE injunctive relief, the decisions of the lower court and jury should be affirmed by this Honorable Court.

II. STATEMENT OF THE CASE

A. Statement of Facts

Little Grave Creek generally flows from north to south through Glen Dale, West Virginia before emptying into the Ohio River. AR 2156.¹ Importantly, Little Grave Creek is the boundary between the Marshall Co. BOE's property and the Reilley property at issue in this case. The Marshall Co. BOE's property contains thirty-seven (37) acres, more or less, and the Reilley property contains one hundred ninety-eight (198) acres, more or less. AR 1163-1168, 1768-1776 (Deed from Paula K. Woodburn, as Personal Representative of the Last Will and Testament of Paul E. Reilley, deceased, to Francis E. Reilley, dated March 27, 1997, recorded May 8, 1997 and of record in the office of the County Clerk of Marshall County in Deed Book 595 at page 528² and Deed from John B. Cockayne and Lieselotte Cockayne, his wife, to The Board of Education of the County of Marshall, dated September 1, 1965, recorded September 3, 1965 and of record in the office of the County Clerk of Marshall County in Deed Book 379 at page 136). The Reilleys

¹ References to the Appendix will be denoted as "AR" and the page number referenced.

² The recitations in the March 27, 1997 Deed indicate that Francis Reilley originally purchased the property on the east side of Little Grave Creek on February 16, 1984 with his two (2) brothers – Bernard J. Reilley and Paul E. Reilley – as tenants in common with each brother owning an undivided one-third (1/3rd) interest in the property. In 1986, Francis Reilley and Paul E. Reilley jointly acquired Bernard J. Reilley's one-third (1/3rd) interest in the property from Bernard J. Reilley's children. In the March 27, 1997 Deed, Francis Reilley acquired Paul E. Reilley's interest in the property making Francis E. Reilley the owner of a 100% interest in the property.

access their property on the eastern side of Little Grave Creek by use of a thirty-six (36) feet wide private roadway³ reserved in their Deed as a right of way and laid out along the southern boundary line of the Marshall Co. BOE's property. AR 1168-1169, 1777-1778.

In 1984, prior to the construction of any homes on the Reilley property, Francis Reilley – with the help of his brother Paul, some friends and his sons – built a bridge across Little Grave Creek and constructed an embankment along the private roadway/right of way to access the western approach to the bridge. The Reilleys named the elevated roadway and bridge “Duck Lane.” AR 1169-1176, 1209-1211, 1779-1782. In constructing the bridge and the embankment that supports Duck Lane, the Reilleys did not consult with the soil conservation district, an engineer or a hydrologist. AR 1221.

Before construction of the Reilley bridge and embankment, Little Grave Creek did not impact the Marshall Co. BOE's property – particularly the baseball field. AR 1264. Instead, during heavy flows, the drive-in property further downstream flooded; not the baseball field. AR 1271, 1457. From 1985 through the early 2000s, while flood waters would occasionally leave the banks of Little Grave Creek, those waters did not impact the baseball field. AR 1274. In September of 2004, for the first time, and for heavy rain events thereafter, flood waters from Little Grave Creek covered the baseball field. In each of the four (4) flood events at issue in this matter, heavy flows from Little Grave Creek overwhelmed the opening under the Reilley bridge, water started backing up against the roadway embankment, first traveling along the embankment towards State Route 2, then traveling north along State Route 2 towards and then over the baseball field. AR 1271, 1325-1327, 1422-1425, 1444, 1455-1456.

³ Agreed to by the predecessors in the chains of title to the affected properties by Indenture between Emily V. Riggs and S. A. Cockayne and Beulah Cockayne, his wife, dated March 2, 1925, recorded March 10, 1925 and of record in the office of the County Clerk of Marshall County in Deed Book 178 at page 288. AR 1777-1778.

As a result of the obstruction to the flow of Little Grave Creek caused by the Reilley bridge and roadway embankment, the velocity of the water slowed and sand, gravel and mud settled out of the flood waters and collected through-out the creek channel, floodway and on the property of the Marshall Co. BOE – including the baseball field. After the rains from the remnants of Hurricane Ivan in 2004, six (6) to eight (8) inches of sand, gravel and mud settled on the baseball field, floodway and creek channel. AR 1339-1340, 1797-1799. Each subsequent flooding event – after September 2004 – impacted the baseball field and left additional sand, gravel and mud on the baseball field, in the floodway and creek channel. AR 1360, 1364-1365, 1388, 1825-1828, 1829, 1842-1864.

The settling out of sand, gravel and mud from slowed or impounded flood waters is called the process of “deposition”. Over time, deposition fills in the creek channel and floodway. The effect of repeated flooding and deposition overtime is to make flooding in the area more severe and more frequent. AR 1504-1505, 1514. Ultimately, the expert witnesses for the Marshall Co. BOE and the Reilleys agreed that the Reilley bridge and embankment are causing water to back up onto the property and baseball field behind John Marshall High School. Mr. Michael Kearns served as the Marshall Co. BOE’s expert witness who performed a hydrologic and hydraulic analysis of Little Grave Creek behind John Marshall High School in 2009. AR 1913-2156. In his report, Mr. Kearns noted “a large amount” of deposition in the stream bed. AR 1919. Mr. Kearns concluded in his study that the bridge and embankment are causing additional water to impound on the property of the Marshall Co. BOE behind John Marshall High School – including the baseball field. Mr. Kearns analyzed four (4) scenarios – 1965 conditions (no bridge or

embankment); 2008 conditions assuming no bridge or embankment; 2008 conditions with bridge and embankment; and 2008 conditions with bridge, embankment and two 48 inch culverts.⁴

The results of Mr. Kearns' study are summarized in Table 1 which shows the flood elevations for varying storm events—from a one year to a 100 year storm event—for each of the four scenarios at a point (called Station 200) just upstream of the bridge, embankment and culverts. AR 1924-1926. As Table 1 demonstrates, comparing Scenario 1 (1965 conditions) to Scenario 3 (current conditions with bridge and embankment) for all storm events shows an increase in the depth of the water impounded on the property behind John Marshall High School from 2.29 feet (1 year storm event) to 7.7 feet (100 year storm event). Comparing Scenario 2 (2008 conditions assuming no bridge or embankment) with Scenario 3 (current conditions with bridge and embankment) for all storm events still shows an increase in the depth of the water impounded on the property behind John Marshall High School from .22 feet (1 year storm event) to 1.17 feet (100 year storm event) with more water being impounded by a 10 and 25 year storm event—2.28 feet and 1.6 feet respectively. Importantly, the difference in stream channel and floodway elevation from Scenario 1 (1965 conditions) and Scenario 2 (2008 conditions assuming no bridge or embankment) is attributable to the process of deposition. AR 1518.

Critically, the hydrologic analysis of the Reilleys' expert—Mr. Spurlock—agreed that the bridge and embankment are causing additional water to impound on the property behind John Marshall High School. AR 1607-1608, 1615-1616, 1624-1625. Also critically, Mr. Spurlock's hydrologic analysis did not take into account the effect of deposition of sand, gravel and mud over 23 years on the creek channel and floodway. AR 1618-1619.

⁴ At some point shortly after the 2004 flood event, the Reilleys installed two 48 inch culverts through the embankment. Mr. Kearns analysis agreed that the "... two 48" culverts have minimal effect on the peak flood elevations..." AR 1926.

In addition to the flooding caused by the bridge and embankment, the Marshall Co. BOE has incurred damages as a result of the Reilleys' unlawful conduct. Those damages consisted of the cost to repair the baseball field after each flood event and totaled more than \$115,000 exclusive of interest. The Marshall Co. BOE and the Petitioner stipulated at trial as to the amount of the monetary damages following each of the flooding events at issue. AR 2157-2160.

B. Procedural History

On September 2, 2010, the Marshall Co. BOE filed its Complaint against Francis E. Reilley, the City of Glendale and the County Commission of Marshall County, alleging claims for declaratory judgment against the City and County regarding who had jurisdiction over the floodplain at issue and against the Mr. Reilley for continuing trespass, interference with riparian rights, private nuisance and injunctive relief. AR 21-53. Counsel for the Marshall Co. BOE provided counsel for Reilley with a copy of the Summons and Complaint and asked counsel for Reilley if Reilley was interested in trying to amicably resolve the situation. AR 85. Counsel for Reilley acknowledged receipt of the letter and Complaint but did not otherwise communicate regarding resolution of the matter. AR 81-82. In the meantime, the circumstances of counsel for the Marshall Co. BOE required that he restructure his law practice which consumed a substantial amount of counsel's time and attention. AR 81.

On January 11, 2011, counsel for the Marshall Co. BOE inquired of counsel for all defendants if they would accept service of process. Counsel for the City and County agreed and were served. Counsel for Reilley did not agree or refuse to accept service. On January 27, 2011, counsel for the Marshall Co. BOE again asked counsel for Reilley if Reilley would accept service. Late that same day, counsel for Reilley indicated Reilley would not accept service. In response, counsel for the Marshall Co. BOE hired a private process server and had Mr. Reilley served the next day. AR 83.

On February 25, 2011, Mr. Reilley filed a Motion to Dismiss the Marshall Co. BOE's Complaint on the grounds that service was not made within 120 days as required by Rule 4(k) of the West Virginia Rules of Civil Procedure and upon statute of limitation grounds. AR 59-71. The Marshall Co. BOE opposed the motion by response filed March 31, 2011. In its response, the Marshall Co. BOE argued that good cause existed to excuse the failure to serve Mr. Reilley with the Summons and Complaint within 120 days as required by Rule 4(k) of the West Virginia Rules of Civil Procedure and that the statute of limitations had not run on the first two (2) flood events under either the continuing tort doctrine or the discovery rule. AR 72-86. By Order entered February 14, 2018, the Circuit Court of Marshall County denied the motion – expressly finding that the Marshall Co. BOE's counsel had “clearly” shown good cause for the delay in serving Mr. Reilley and that the Complaint plead plausible claims that survive dismissal but that could be challenged after discovery at the summary judgment stage. AR 8-10.

Thereafter, the parties engaged in discovery. During discovery, Mr. Reilley passed away and Mrs. Reilley, as the Administratrix of the Estate of Francis E. Reilley, was substituted as a party-defendant. AR 87-97. The Complaint was amended by agreement of the parties to name Mrs. Reilley individually as and additional party-defendant. AR 122-164. Mrs. Reilley, as the Administratrix of the Estate of Francis E. Reilley and individually answered the Amended Complaint. AR 165-190. Ultimately, the City of Glendale and the Marshall County Commission were dismissed from the suit. AR 235-236.

At the conclusion of discovery, Petitioner and Respondent each moved for summary judgment. Petitioner moved for Partial Summary Judgment as to Count Two of the Amended Complaint alleging a continuing trespass. Petitioner did not seek a summary judgment on any other counts in the Amended Complaint. As her bases for summary judgment, Mrs. Reilley

argued that the Marshall Co. BOE needed but lacked expert testimony of causation and Mrs. Reilley argued—without citing any law—that the first two (2) flooding events were barred by the statute of limitations. In her Motion for Summary Judgment, Mrs. Reilly did not mention or attempt to refute application of the discovery rule or continuing tort doctrine. AR 256-273. The Marshall Co. BOE responded in opposition to the Motion arguing that expert testimony was not required to prove the cause of flooding and that the continuing tort doctrine tolled the statute of limitations applicable to the continuing trespass count. AR 954-978. Immediately prior to the start of trial, the lower court denied the pending motions for summary judgment. AR 1019.

The instant matter came on for a jury trial on March 18, 2019. Evidence was presented to the Jury on March 18 and 19. The Marshall Co. BOE called nine (9) witnesses in its case-in-chief—Myra K. Reilley, Brent Reilley, Elliott Grissel, Robert Montgomery, Sabrina Montgomery, Charles Duckworth, Roger Simmons, Dave McCombs and Michael Kearns, P.E., who was qualified as an expert witness on behalf of the Marshall Co. BOE. The Marshall Co. BOE also introduced a dozen or so exhibits consisting of deeds, a permit application, the response letter to the permit application, pictures of the bridge and roadway embankment as it approached the bridge, pictures of the flooding events complained about and a hydrologic study prepared by Mr. Kearns. Additionally, the Marshall Co. BOE cross-examined Derrick Spurlock who was qualified as an expert witness on behalf of the Reilleys. AR 998-2161.

Petitioner moved for judgment as a matter of law at the close of the Marshall Co. BOE's case-in-chief. The Circuit Court of Marshall County heard then denied Petitioner's motion. AR 1563- 1575. Importantly, Petitioner did not renew her motion for judgment as a matter of law at the close of all evidence. AR 1631-1636. Petitioner also did not seek to instruct the jury on a statute of limitations defense. AR 1755-1766. At the conclusion of the trial, the Jury returned a

Verdict in favor of the Marshall Co. BOE and against the Reilleys as to liability on all four (4) flooding events. A Judgment Order was entered on the Jury's Verdict on April 16, 2019 and the stipulated monetary damages were added and pre and post judgment interest was calculated and assessed. AR 11-13. Petitioner filed post judgment motions seeking a judgment as a matter of law or a new trial and argued that the Marshall Co. BOE did not present sufficient evidence of proximate cause to support the Jury Verdict. AR 2162-2177. The Marshall Co. BOE opposed the Petitioner's post judgment motions and argued that there was legally sufficient evidence of causation presented to the jury and that Petitioner had waived her right to challenge the sufficiency of the causation evidence because the motion for judgment as a matter of law was not renewed at the close of all evidence. AR 2178-2193.

By Order entered August 8, 2019, the Circuit Court of Marshall County denied Petitioner's post-trial motions for judgment as a matter of law or for a new trial finding that the Marshall Co. BOE had presented legally sufficient evidence to support the Jury's Verdict. Because the count for injunctive relief remained pending before the Court, the August 8, 2019 Order expressly stated that it was not a final appealable order. AR 14-18. Thereafter, the Marshall Co. BOE commissioned an engineering study to identify and establish construction plans for the removal of all obstructions in the stream channel and floodway. When the study was complete, the Marshall Co. BOE moved for entry of an order awarding it a mandatory injunction ordering the Petitioner to remove the obstructions placed in the stream channel and floodway. AR 2206-2224. The Motion was heard on September 9, 2020 and the injunction was awarded by the Court. AR 2227-2242, 19-20. Petitioner's instant appeal followed.

III. SUMMARY OF THE ARGUMENT

The Circuit Court of Marshall County correctly denied the Reilleys' Motion to Dismiss, correctly denied the Reilleys' Motion for Partial Summary Judgment, correctly denied

the Reilleys' post-trial motions and correctly awarded the Marshall Co. BOE a mandatory injunction requiring that the Reilleys remove all obstructions they placed or caused to be placed in the stream channel and floodway of Little Grave Creek. Both the Record below and applicable legal authorities show that each of the Petitioner's four (4) assignments of error lacks merit. Accordingly, this Honorable Court should affirm the Circuit Court.

First, the Circuit Court did not abuse its discretion in finding that good cause excused the failure of counsel for the Marshall Co. BOE to serve the Summons and Complaint on Mr. Reilley within 120 days as required by Rule 4(k) of the West Virginia Rules of Civil Procedure. The Record indicates that the Circuit Court did not abuse its discretion in finding "good cause," as counsel, at the time, was restructuring his law practice and requested that opposing counsel accept service on behalf of his client. Having found good cause in its discretion, the Circuit Court properly allowed the Marshall Co. BOE additional time—here twenty-eight (28) days—to serve the Summons and Complaint and properly denied Petitioner's Motion to Dismiss.

Second, the Circuit Court did not err in denying the Petitioner's Motion to Dismiss and Motion for Summary Judgment regarding Petitioner's statute of limitations defense to the continuing trespass count of the Marshall Co. BOE's Complaint. At the dismissal stage, the Circuit Court properly found that the Complaint stated a claim for relief and that the Reilleys' Motion to Dismiss did not show that the Marshall Co. BOE could "prove no set of facts in support of [its] claim that would entitle [them] to relief."⁵ Similarly, the Circuit Court did not err in denying Petitioner's Motion for Summary Judgment on statute of limitations grounds. The Record contains sufficient evidence of a continuing tort and of the fact that the Marshall Co. BOE did not

⁵ At the motion to dismiss stage, Petitioner argued that the continuing tort doctrine did not extend the statute of limitations to cover the 2004 and 2008 flood events but ignored the issue of whether the discovery rule tolled the accrual of the statute of limitations for the 2004 and 2008 flood events.

understand the cause of the flooding until after Mr. Kearns did his hydrologic study. Accordingly, under either the continuing tort doctrine or the discovery rule, the accrual of the statute of limitations for the 2004 and 2008 flood events was tolled until at least early 2010. Accordingly, the Circuit properly denied Petitioner's Motion to Dismiss and Partial Motion for Summary Judgment.⁶

Third, the Circuit Court did not err in denying Petitioner's Motion for Partial Summary Judgment and post-trial motions for Judgment as a Matter of Law and for a New Trial. The trial Record supports and the Circuit Court properly denied Petitioner's Motion for Partial Summary Judgment and found that there was a legally sufficient evidentiary basis for the jury to find in favor of the Marshall Co. BOE on the issue of causation. Additionally, because Petitioner did not renew her Motion for Judgment as a Matter of Law at the close of all evidence, Petitioner waived her right to challenge the sufficiency of the evidence. In either event, the Circuit Court properly denied Petitioner's post-trial motions.

Fourth, the Circuit Court did not abuse its discretion in awarding the Marshall Co. BOE a mandatory injunction requiring that the Reilleys remove all obstructions they placed or caused to be placed in the stream channel and floodway of Little Grave Creek. As a riparian owner, the Marshall Co. BOE has an absolute right to have any obstructions to Little Grave Creek placed by the Reilleys removed. The Marshall Co. BOE presented legally sufficient evidence of the fact that the Reilleys obstructed the flow of Little Grave Creek during trial of the damages phase of the case. The Circuit Court's Order awarding the Marshall Co. BOE injunctive relief

⁶ Petitioner's Partial Motion for Summary Judgment was expressly limited to Count Two of the Amended Complaint—stating a claim for continuing trespass. At the summary judgment stage, Petitioner argued that under the discovery rule, the 2004 and 2008 flood events were barred by the statute of limitations but ignored the import of the continuing tort doctrine on the issue. In any event, Petitioner abandoned the statute of limitations defense at trial and did not instruct on or submit the issue to the jury for consideration.

properly found as a matter of fact that the Reilleys had obstructed the flow of Little Grave Creek and properly found as a matter of law that the Marshall Co. BOE was entitled to entry of an order awarding them a mandatory injunction requiring that the Reilleys remove all obstructions they placed or caused to be placed in the stream channel and floodway of Little Grave Creek. Moreover, the Circuit Court is not required to balance the equities as part of its analysis. As such, the Circuit Court properly awarded the Marshall Co. BOE injunctive relief.

IV. STATEMENT REGARDING ORAL ARGUMENT

The Respondent submits that review of the Record should allow this matter to be disposed of without oral argument. The specific findings of the Circuit Court on each of the Petitioner's Assignments of Error fully illustrate the propriety of the Circuit Court's decision. However, if oral argument is deemed necessary by this Honorable Court, the Respondents submit that the argument should proceed under Rule 19.

V. DISCUSSION

- A. The Circuit Court correctly extended the time for service of the Summons and Complaint and found that good cause excused the late service of the Summons and Complaint.**

Standard of review: This Court reviews the extension of time to file the summons and complaint and good cause findings of a Circuit Court under an abuse of discretion standard. Syl. Pt. 1, *Burkes v. Fas-Chek Food Mart*, 217 W. Va. 291, 617 S.E.2d 838 (2005). An abuse of discretion review is limited for "[u]nder abuse of discretion review, we do not substitute our judgment for the circuit court's." *State v. Taylor*, 215 W. Va. 74, 83, 593 S.E.2d 645, 654 (2004) (citing *Burdette v. Maust Coal & Coke Corp.*, 159 W. Va. 335, 342, 222 S.E.2d 293, 297 (1976) (per curiam). "In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them."

State v. Hedrick, 204 W. Va. 547, 553, 514 S.E.2d 397, 403 (1999) (quoting *Gentry v. Mangum*, 195 W. Va. 512, 520 n. 6, 466 S.E.2d 171, 179 n. 6 (1995)).

Rule 4(k) of the West Virginia Rules of Civil Procedure requires that the summons and complaint be served within 120 days of filing. If the plaintiff fails to serve the summons and complaint within 120 days, the court can dismiss the complaint without prejudice or direct that service be made within a specified period of time. Additionally, the plaintiff can show good cause for the failure to timely serve the complaint. If the plaintiff shows good cause for the failure to timely serve the summons and complaint, the court shall extend the time for service of the summons and complaint. *Burkes v. Fas-Chek Food Mart*, 217 W. Va. 291, 297, 617 S.E.2d 838, 844 (2005). Accordingly, even in the absence of a showing of good cause, a court may extend the time period for service in its discretion. *Id.* at Syl. Pt. 3.

The factors considered in determining whether a plaintiff have established good cause to extend the date for service include: “(1) the length of time used to obtain service; (2) the activities of the plaintiff; (3) the plaintiff’s knowledge of the defendant’s location; (4) the ease with which the defendant’s location could have been ascertained; (5) the actual knowledge by the defendant of the pendency of the action; and (6) special circumstances which would affect plaintiff’s efforts.” *State ex rel. Charleston Area Medical Center, Inc. v. Kaufman*, 197 W. Va. 282, 288, 475 S.E.2d 374, 380 (1996). Moreover, “[f]actors circuit courts should consider in determining whether to extend the time for service, in the absence of a showing of good cause by the plaintiff, include, but are not limited to: (1) whether the defendant evaded service; (2) whether the defendant knowingly concealed a defect in service; (3) whether the statute of limitations has expired, and (4) whether the defendant had been prejudiced by the failure to serve. *Burkes*, at Syl. Pt. 4.

Based upon an affidavit presented by counsel for the Marshall Co. BOE that explained the circumstances surrounding the late service of Mr. Reilley, the Circuit Court found that plaintiff had made a showing of good cause and denied the Motion to dismiss for late service. According to the affidavit: Counsel for the Marshall Co. BOE provided counsel for Reilley with a copy of the Summons and Complaint and asked counsel for Reilley if Reilley was interested in trying to amicably resolve the situation. AR 85. Counsel for Reilley acknowledged receipt of the letter and Complaint but did not otherwise communicate regarding resolution of the matter. AR 81-82. In the meantime, the circumstances of counsel for the Marshall Co. BOE required that he restructure his law practice which consumed a substantial amount of counsel's time and attention. AR 81. On January 11, 2011, counsel for the Marshall Co. BOE inquired of counsel for all defendants if they would accept service of process. Counsel for the City and County agreed and were served. Counsel for Reilley did not immediately respond—e.g., did not agree or refuse to accept service. On January 27, 2011, counsel for the Marshall Co. BOE again asked counsel for Reilley if Reilley would accept service. Late that same day, counsel for Reilley indicated Reilley would not accept service. In response, counsel for the Marshall Co. BOE hired a private process server and had Mr. Reilley served the next day. AR 83.

Based upon the events set out in the affidavit, the Circuit Court found that the Marshall Co. BOE had “clearly” shown good cause for the late service. To be sure, the time and attention that counsel for Marshall Co. BOE was required to dedicate to the restructuring of his law practice is the type of “special circumstance” affecting plaintiff's service efforts that the Circuit Court may base a good cause finding upon. The “special circumstance” described in the affidavit is a material factor in the finding good cause analysis that was properly weighed by the Circuit Court. In other words, there is no contention from Petitioner that the Circuit Court relied

upon an improper factor or mistakenly weighed a proper factor. As such, the Circuit Court's denial of the Petitioner's Motion to Dismiss on service of process grounds and allowing service of the Summons and Complaint twenty-eight (28) days after the 120 period was not an abuse of discretion but; rather, the proper exercise of discretion under the circumstances.⁷ Accordingly, Petitioner's first assignment of error lacks merit and the Circuit Court's decision should be affirmed.

B. The Circuit Court correctly denied Petitioner's Motion to Dismiss and Motion for Summary Judgment regarding Petitioner's statute of limitations defense.

Standard of review: "When a party . . . 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." Syl. Pt. 4, *Ewing v. Bd of Educ of Cty. of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998). "For purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 (2015). "Dismissal for failure to state a claim is only proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the complaint." *Id.* A complaint must "at minimum . . . set forth sufficient information to outline the elements of [the plaintiff's] claim." *Id.*

Reviewing de novo, the Supreme Court of Appeals "appl[ies] the same standard as a circuit court" in reviewing summary judgment. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). "A motion for summary judgment should be granted *only when it is clear* that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Id.* at 192, 758. "[T]he underlying facts and all inferences are viewed in the light most favorable to the nonmoving party" and "the nonmoving party

⁷ Additionally, any dismissal would have been without prejudice and West Virginia's savings statute—West Virginia Code § 55-2-18—would have allowed for the refiling of the action without affecting any statute of limitations defense.

must . . . offer some ‘concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . its favor.’ *Id.* (citing *Anderson v. Liberty Lobby*, 447 U.S. 242, 256 (1986)).

Petitioner next complains that the Circuit Court committed reversible error by failing to dismiss the Complaint or grant Petitioner a summary judgment on statute of limitations grounds. In her Motion to Dismiss and Motion for Partial Summary Judgment, Mrs. Reilley argues that a two (2)-year statute of limitations applies to the continuing trespass claim and that both the September 17, 2004 and February 1, 2008 flood events occurred more than two (2) years before the original Complaint was filed in 2010 so that any claims related thereto are now time barred. Mrs. Reilley’s position ignores the continuing tort doctrine and application of the discovery rule to the facts of the case. Moreover, her position assumes that the Marshall Co. BOE’s cause of action for continuing trespass for the September 17, 2004 and February 1, 2008 flood events accrued when the floods occurred – i.e., more than two (2) years before the original Complaint was filed in 2010.

In cases alleging a continuing tort where the tortious act can be remedied or discontinued, the statute of limitations does not accrue until the last injury or when the tortious act ceases. The Supreme Court of Appeals of West Virginia addressed the issue of when the statute of limitations accrues for property damage resulting from obstruction of the flow of water in *Graham v. Beverage*, 211 W. Va. 466, 566 S.E.2d 603 (2002). The *Graham* case involved allegations that the defendants negligently constructed a surface water drainage system that allowed water to periodically infiltrate a neighboring residence after heavy rains. *Id.* at 470-71, 607-08. When the plaintiff/neighboring homeowner complained, the defendants argued, *inter alia*, that the negligence claims were time barred. The lower court granted a motion for summary

judgment on statute of limitations grounds and the neighboring homeowner appealed. This Court reversed the lower court's finding that the negligence claim was time barred, holding that:

Where 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.

Syl. pt. 11, *Graham v. Beverage*, 211 W. Va. 466, 566 S.E.2d 603 (2002); *see also*, Syl. pt. 4, *Taylor v. Culloden Public Service District*, 214 W. Va. 639, 591 S.E.2d 197 (2003).

The overarching claim in the present case is that the Reilleys negligently constructed the bridge and embankment across Little Grave Creek so that the bridge and embankment periodically—during periods of heavy flow—obstructs the flow of Little Grave Creek and causes water to impound on property of the Marshall Co. BOE behind John Marshall High School including the baseball field. As the builder and owner of the bridge and embankment, the Reilleys have a continuing duty to ensure that the bridge and embankment do not obstruct the flow of Little Grave Creek. This Court held in Syllabus Point 3 of *Riddle v. Baltimore & O. R. Co.*, 137 W. Va. 733, 73 S.E.2d 793 (1952) that:

One obstructing a natural water course by the construction of bridges, trestles or culverts thereover must provide against floods which should be reasonably anticipated in view of the history of the water course and natural or other conditions affecting the flowage of the stream; and though reasonable care may have been exercised originally in the construction of such bridges, trestles or culverts, if changed conditions and subsequent developments prove that the bridges, trestles or culverts, as originally constructed, have become inadequate to serve the waters of the stream during its normal flowage and during storms which may reasonably be anticipated, there is a duty to meet the changed conditions and failure to perform that duty will ground an action instituted by one injured by such neglect of duty for recovery of damages resulting therefrom.

In the present case, the continuing tort is the Reilleys' failure to modify or replace the bridge and embankment to prevent flooding of the Marshall Co. BOE's property. This breach

of duty/tortious conduct is continuing in nature and results in a continuing or repeated injury to the Marshall Co. BOE. As a continuing tort, the statute of limitations does not accrue until the last injury or the tortious conduct ceases. The bridge and embankment have not been modified or replaced to protect the Marshall Co. BOE from future flooding. Flooding continues to this day as a result of the obstruction of Little Grave Creek caused by the Reilley bridge and embankment. The Reilleys remain in breach of their continuing duty. Because, under the continuing tort doctrine, the cause of action has not accrued, the statute of limitation has not run—even with respect to the 2004 and 2008 flood events.

The Petitioner's view that the flood events themselves are the tortious acts from which the statute of limitations accrues is misplaced. The flood events are the continuing or repeated injury caused by the ongoing tortious act. The tortious act is the Reilleys' failure to modify the bridge and embankment to prevent the flooding of the Marshall Co. BOE's property as required by *Riddle*. As such, the continuing tort doctrine is an exception to the general rule that the statute of limitations runs from the date of injury.⁸ Several cases cited by the Petitioner support the Marshall Co. BOE's application of the continuing tort doctrine to the instant case. Petitioner cites to *Roberts v. W. Va. Am. Water Co.*, 221 W. Va. 373, 655 S.E.2d 119 (2007). In *Roberts*, this Court rejected application of the continuing tort doctrine to a situation where repeated hillside slips were caused by the installation of a water line. In *Roberts*, this Court did not find a continuing duty on the part of the water company and refused to apply the continuing tort doctrine. *Id.* at 378-379, 124-125. Critically, this Court explained the importance of the continuing duty to an application of the continuing tort doctrine in Syllabus Point 4 of *Roberts* as follows:

The distinguishing aspect of a continuing tort with respect to negligence actions is continuing tortious conduct, that is, a

⁸ Petitioner recognizes this as well on page 19 of her Opening Brief.

continuing violation of a duty owed to the person alleging injury, rather than continuing damages emanating from a discrete tortious act.

Other cases cited by Petitioner are distinguishable from the instant case. For example, *Ziler v. Contractor Servs.*, 2017 W. Va. LEXIS 243 (W. Va. Apr. 10, 2017), involved a single injury to real property—the one time burial of car parts and trees—and not a continuing negligent act. *Id.* at *6-*7. Additionally, *Milam v. Kelly*, 282 So.3d 682 (Miss. App. 2019), likewise involved a single tortious act – filling in a drainage ditch – and not the breach of a continuing duty of care.

The Circuit Court correctly denied Petitioner’s Motion to Dismiss. The Marshall Co. BOE’s initial Complaint and Amended Complaint plead a claim for continuing trespass in Count Two. Therein, the Marshall Co. BOE set forth sufficient information to outline the elements of a continuing tort. The Marshall Co. BOE specifically plead that:

- o the Reilleys negligently designed and constructed the bridge and roadway embankment;
- o even if the bridge and roadway embankment could handle the flowage of Little Grave Creek when designed and constructed, the bridge and embankment could not meet present conditions;
- o the Reilleys had a continuing duty to meet the changed conditions – citing *Riddle*; and
- o the Reilleys were in breach of that duty.

(Original Complaint at ¶¶ 85, 86, 88, 89 and 92 – AR 34-35 – Amended Complaint at ¶¶ 94, 95, 97, 98 and 101 – AR 144-145). As such, with respect to the motion to dismiss on statute of limitations grounds, the Circuit Court properly found that the Complaint plead plausible claims—

even with respect to the 2004 and 2008 flood events because of the continuing tort doctrine—and properly denied the motion.

The Circuit Court also properly denied Petitioner’s statute of limitations claim in her Motion for Partial Summary Judgment. In her Motion for Partial Summary Judgment, Petitioner “renewed”—but did not expound upon—the arguments about the statute of limitations made in her February 25, 2011 Motion to Dismiss. Additionally, Petitioner argued that the deposition testimony of Charles Duckworth—a teacher and athletic director at John Marshall High School—showed that he contacted the Army Corps of Engineers in April of 2007 to investigate the Reilley bridge and roadway embankment for flooding concerns. Petitioner argued that this evidence proved that the Marshall Co. BOE knew of the cause of the flooding more than two (2) years before filing suit in 2010 so that the 2004 and 2008 flood events were barred by the statute of limitations.⁹

Petitioner’s argument, below and on appeal, again ignores the import of the continuing tort doctrine. Briefly stated, as a matter of law, the statute of limitations does not accrue where the defendant is committing a continuing tort—the breach of a continuing duty of care—until the last injury caused by the breach or when the tortious conduct ceases. The evidence contained in the record at the summary judgment stage demonstrate that the property of the

⁹ The testimony of Mr. Duckworth relied upon by Petitioner to argue that the statute of limitation ran on the first two (2) flood events ignores the tolling impact of the continuing tort doctrine and actually supports application of the discovery rule to additionally toll the statute of limitations. What Petitioner fails to mention is the fact that, in a written response to Mr. Duckworth’s inquiry and after a site inspection, the Army Corps of Engineers erroneously concluded that the Reilley bridge did not significantly change the hydraulic characteristics of the stream. AR 2161. Thereafter, the Marshall Co. BOE commissioned Mr. Kearns to perform a flood study and learned in early 2010 that the Corps’ assessment was wrong and that the Reilley bridge and roadway embankment did cause water to back up on board property. The Marshall Co. BOE filed the underlying action within two (2) years of the receipt of Mr. Kearns’ study. Assuming, *in arguendo*, that the continuing tort theory does not apply, the discovery rule would toll accrual of the statute of limitations until early 2010 so that none of the flood events complained about in the case would be time barred. For a discussion of the operation of the discovery rule, *see, generally, Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009).

Marshall Co. BOE behind John Marshall High School has flooded about ten (10) times since 2004. *See*, Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment at pp. 4-5 and the documents, deposition testimony, affidavits and pictures referenced therein. AR 280-281. Based upon the expert reports available at the summary judgment stage, the flooding will continue to happen if the bridge and embankment that obstruct Little Grave Creek are not removed, modified or replaced. *See*, Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment at pp. 8-10 and the documents and deposition testimony referenced therein. AR 284-286.

Construing these facts in the light most favorable to the Marshall Co. BOE, genuine issues of material fact existed at the summary judgment stage about application of the statute of limitations defense to a continuing tort that warranted denial of the Petitioner's Motion for Partial Summary Judgment. Specifically, the evidence contained in the record developed through discovery showed that the Reilley bridge and roadway embankment continued to cause flooding of the property of the Marshall Co. BOE. Additionally, the expert witnesses agreed that the bridge and roadway embankment were the cause of the flooding. Accordingly, evidence contained in the record demonstrated that the Reilleys were in breach of their continuing duty to remove, modify or replace their bridge and roadway embankment to meet the conditions of the flowage of the Little Grave Creek and prevent flooding of the property behind John Marshall High School. Because the Reilleys were engaged in a continuing tort, the statute of limitation was tolled and had not yet run on any of the four (4) flood events specified in the original and Amended Complaint. As such, the Circuit Court properly denied Petitioner's Motion for Partial Summary Judgment on statute of limitations grounds.¹⁰

¹⁰ Petitioner argues in passing and without any support—Opening Brief at page 25—that if the continuing tort doctrine applies and the statute of limitations does not accrue, then the Marshall Co. BOE should get no

In summary, the Circuit Court did not err in denying Petitioner's Motion to Dismiss or Motion for Partial Summary Judgment on statute of limitations grounds.¹¹ Petitioner's second assignment of error lacks merit and the Circuit Court's decision should be affirmed.

C. The Circuit Court correctly denied Petitioner's Motion for Partial Summary Judgment and post-trial motions for Judgment as a Matter of Law and for a New Trial regarding causation.

1. The Circuit Court correctly denied Petitioner's Motion for Partial Summary Judgment regarding causation.

Standard of review: Reviewing de novo, the Supreme Court of Appeals "appl[ies] the same standard as a circuit court" in reviewing summary judgment. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). "A motion for summary judgment should be granted *only when it is clear* that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Id.* at 192, 758. "[T]he underlying facts and all inferences are viewed in the light most favorable to the nonmoving party" and "the nonmoving party must . . . offer some 'concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . its favor.'" *Id.* (citing *Anderson v. Liberty Lobby*, 447 U.S. 242, 256 (1986)).

Mrs. Reilley also moved for Partial Summary Judgment as to Count Two of the original and Amended Complaint filed by the Marshall Co. BOE in the matter by arguing that the Marshall Co. BOE failed to prove proximate cause between the Reilley bridge and roadway embankment and the four (4) flooding events complained about in the original and Amended

prejudgment interest on their special damages. As the cases discussed *infra* show, the continuing tort doctrine only operates to prevent the statute of limitations from running in certain, limited circumstances. The doctrine does not prevent a party injured by the breach of a continuing duty of care from bringing suit or from recovering damages. Where those damages are—as in this case—special damages, the injured party is entitled to recover prejudgment interest on the damages amount from the date of injury to the date of judgment at the statutory rate. *See*, W. Va. Code § 56-6-31(b).

¹¹ Petitioner did not instruct on and abandoned her statute of limitations defense at trial.

Complaints. In support of her Motion for Partial Summary Judgment on causation, Petitioner argued that expert testimony is required to prove causation for the Marshall Co. BOE's continuing trespass claim. Petitioner then argued that the Marshall County BOE's expert had not testified about proximate cause so she was entitled to partial summary judgment. Mrs. Reilley cited two (2) cases in support of this argument—*Daniel v. Charleston Area Medical Center, Inc.*, 209 W. Va. 203, 544 S.E.2d 905 (2001), and *Short v. Appalachian OH-9, Inc.*, 203 W. Va. 246, 507 S.E.2d 124 (1998). Importantly, neither case deals with a continuing trespass or flooding. Instead, both cases deal with medical malpractice lawsuits and involve the extent to which expert testimony on deviation from standard of care or causation is necessary under the Medical Professional Liability Act. Because of the complex and specialized nature of medical procedures, deviations from standards of care governing those procedures and whether any deviation caused an injury or death, a trial court is empowered under the Medical Professional Liability Act to require expert testimony on the issues of standard of care and causation. Both *Daniel* and *Short* deal with cases where the trial court decided that expert testimony was required in a medical malpractice action and the consequence of failing to obtain the requisite expert testimony.

The instant matter involves flooding caused by the negligent construction and maintenance of a bridge and roadway embankment over and in the flood plain of Little Grave Creek. Whether or not the bridge and roadway embankment cause the baseball field behind John Marshall High School to flood is matter that does not require expert testimony. This Court addressed that issue in *Flanagan v. Gregory & Poole*, 136 W. Va. 554, 67 S.E.2d 865 (1951). Like the instant matter, *Flanagan* dealt with flooding caused by a roadway embankment and an inadequate culvert that impounded water on an upstream riparian owner. *Id.* at 556, 867. In addressing an evidentiary issue, this Court held that:

It is a matter of common knowledge that if a fill, dam, or embankment is constructed across the course of a flowing natural stream with inadequate outlet for the water naturally flowing in such stream, waters therein are likely to overflow the lands of an upper riparian owner to his damage.

Id. at 563, 871. At the summary judgment state of the instant proceedings, many fact witnesses gave testimony in this matter—by deposition and by affidavit—and testified that the Reilley bridge and roadway embankment caused water from Little Grave Creek to backup and impound on property of the Marshall Co. BOE behind John Marshall High School including the baseball field. These fact witnesses have personally observed how the Reilley bridge and embankment back water up on the property of the Marshall Co. BOE. *See*, Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment at pp. 4-5 and the documents, deposition testimony, affidavits and pictures referenced therein. AR 280-281. Mrs. Reilley's contention to the contrary notwithstanding, these causation issues are matters of common knowledge and observation that do not require expert testimony. *See, also*, Syl. pts. 8 and 9, *Moore v. Associated Material and Supply Co., Inc.*, 263 Kan. 226, 948 P.2d 652 (1997).

In any event, both experts in the case agreed that the bridge and embankment cause water from Little Grave Creek to impound on property of the Marshall Co. BOE behind John Marshall High School including the baseball field. Both experts conducted hydrologic studies. The results of those studies showed—for all storm events modeled (from a 1-year storm event to a 100-year storm event)—the bridge and embankment cause water to impound on property of the Marshall Co. BOE behind John Marshall High School. *See*, Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment at pp. 8-10 and the documents and deposition testimony referenced therein. AR 284-286.

Construing these facts in the light most favorable to the Marshall Co. BOE, genuine issues of material fact existed at the summary judgment stage about proximate cause to warrant

denial of the Petitioner's Motion for Partial Summary Judgment. Specifically, the evidence contained in the record developed through discovery showed that: (1) expert witness testimony is not strictly required; (2) fact witnesses can and, in this case, have testified that the Reilley bridge and embankment cause water from Little Grave Creek to backup and impound on property of the Marshall Co. BOE behind John Marshall High School including the baseball field; and (3) both experts in the case agreed that the bridge and embankment cause water from Little Grave Creek to impound on property of the Marshall Co. BOE behind John Marshall High School including the baseball field. As such, the Circuit Court properly denied Petitioner's Motion for Partial Summary Judgment on proximate cause grounds.

2. The Circuit Court correctly denied Petitioner's post-trial motions for Judgment as a Matter of Law and for a New Trial regarding causation.¹²

Standard of review: "The appellate 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*." Syl. Pt. 1, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009). "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." Syl. Pt. 2, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009).

¹² The factual and legal bases for Petitioner's Motion for Judgment as a Matter of Law and Motion for a New Trial are identical.

Motions for judgment as a matter of law are governed by Rule 50 of the West

Virginia Rules of Civil Procedure as follows:

(a) (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under controlling law be maintained or defeated without a favorable finding on that issue.

* * * * *

(b) *Renewal of motion for judgment after trial; alternative motion for new trial.* – If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion. The movant may renew the request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59. . . .

In considering motions for judgment as a matter of law, this Court directs trial courts as follows:

In determining whether there is sufficient evidence to support a jury verdict, the trial court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party’s evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

See, Syl. Pt. 2, Richmond v. Ellenbogen, 517 S.E.2d 743 (W. Va. 1999).

Substantively, sufficient evidence of proximate cause—that is, that the Reilley bridge and roadway embankment obstructed heavy flows from Little Grave Creek in the four (4) flooding events at issue and caused water to back up onto the school property—was introduced at

trial and supports the Jury's Verdict. The evidence introduced at trial which supports a finding of proximate cause and the Jury's Verdict includes:

- o First, the bridge and embankment were constructed in the flood way and flood plain of Little Grave Creek. The bridge left only a small opening directly over the creek channel for water to pass. Both hydrologic experts—Mr. Kearns and Mr. Spurlock—testified that placing an obstruction in a floodway and floodplain will necessarily obstruct heavy flows of Little Grave Creek and cause water to impound on the board's property. AR 1507-1508, 1622-1625.

- o Second, the athletic director and baseball coaches observed how and collectively testified about the fact that the bridge and roadway embankment obstructed the flow of Little Grave Creek in each of the four (4) flooding events complained about and caused water to back up on the board's property – including the baseball field. Specifically:

Mr. Robert Montgomery—head baseball coach at the time—testified that he recalled seeing water from the February 1, 2008, June 17, 2009 and June 5, 2010 flood events, flow down Little Grave Creek, overwhelm the opening under the bridge and back-up onto the board's property – first across the bottom near the roadway embankment and towards State Route 2 then up towards and eventually over the baseball field. AR 1270-1272.

Mr. Charles Duckworth—a teacher and athletic director at John Marshall High School—testified that he saw the water from the September 17, 2004 flood event from his classroom at John Marshall High School. Like Mr. Montgomery, Mr. Duckworth testified that the high water backed-up on the board's property in the same manner—it flowed down Little Grave Creek, overwhelmed the opening under the bridge and backed-up onto the board's property—first across the bottom near the roadway embankment and towards State Route 2 then up towards and eventually over the baseball field. Mr. Duckworth was also in the home economics room that

looked out onto the baseball field and saw the June 5, 2010 flood event back up on the board's property in the same manner. AR 1422-1425, 1444.

Mr. Simmons—the assistant baseball coach—testified that he did not see the September 17, 2004 flood event but that he saw two (2) of the next three (3) events and that both of those flood events backed-up on the board's property in the same manner—it flowed down Little Grave Creek, overwhelmed the opening under the bridge and backed-up onto the board's property—first across the bottom near the roadway embankment and towards State Route 2 then up towards and eventually over the baseball field. AR 1454-1457.

o Third, Mr. Kearns—the Plaintiff's expert hydrologist—testified about his hydrologic study that modeled peak flows in the Little Grave Creek watershed for 2, 5, 10, 25, 50 and 100-year storms and concluded that the Reilley bridge and roadway embankment back water up on the board's property for all storm events modeled. When sedimentation is taken into consideration, the Reilley bridge and roadway embankment has increased the flood elevations on the board's property from 2 to almost 8 feet comparing 1965 conditions (scenario 1 in Mr. Kearns' study) to 2010 conditions with the bridge and roadway embankment in place (scenario 3 in Mr. Kearns' study). AR 1514, 1518-1519, 1913-2156.

o Fourth, even Mr. Spurlock—the Reilleys' hydrologic expert—agreed in cross examination that the bridge and roadway embankment when considered as one unit caused water to back-up on board property. AR 1607-1608, 1615-1616, 1624-1625.

o Fifth, Mr. Montgomery testified that before the Reilley bridge and roadway embankment, the drive-in flooded not the board's property. After the Reilley bridge and roadway embankment, the board's property flooded not the drive-in. AR 1271.

o Sixth, Mrs. Sabrina Montgomery's pictures show the bridge and embankment impounding water on the board's property for each of the four (4) flooding events complained about. The pictures also show sedimentation on the baseball field following each flooding event which is evidence that the heavy flows of Little Grave Creek were obstructed and slowed by the Reilley bridge and roadway embankment. AR 1332-1394, 1788-1912.

Applying the factors announced in *Richmond* to the evidence of proximate cause highlighted above shows that the Circuit Court properly denied the Reilleys' post-trial motions. Most notably, the athletic director and baseball coaches collectively testified about each of the flooding events at issue and consistently described how the Reilley bridge and roadway embankment caused heavy flows of Little Grave Creek to back up onto the school property. *Richmond* first instructs that this evidence be considered most favorably to the Marshall Co. BOE. *Richmond* next instructs that all conflicts in the evidence be resolved in favor of the Marshall Co. BOE. Following the direction of *Richmond*, the Reilleys' attempt to discredit the eyewitness testimony of the athletic director and baseball coaches should be rejected because the Jury itself rejected the attempt in returning a Verdict favorable to the Marshall Co. BOE. Counsel for the Reilleys cross-examined the athletic director and baseball coaches to cast doubt on their eyewitness accounts. Counsel for the Reilleys focused his closing argument on this issue. The Jury—as instructed and as is their role—made credibility determinations, sorted through apparent conflicts in testimony, weighed the evidence and ultimately found in favor of the Marshall Co. BOE. The Circuit Court below did not, and this Court likewise should not, second-guess the Jury's credibility findings. The Litigation Handbook on the West Virginia Rules of Civil Procedure (Palmer and Davis 5th ed. 2017 and 2018 Cum. Supp.) provides on pages 1192 and 1193 that:

Further, a trial court cannot set aside the jury's credibility findings and may not find for the movant based on evidence the jury was

entitled to discredit. That is, in performing the analysis for a post-verdict motion for judgment as a matter of law, the credibility of the witnesses cannot be considered, conflicts in testimony may not be resolved, and the weight of the evidence cannot be evaluated.

(Internal citations omitted).

The Reilley bridge and roadway embankment are constructed in a floodway and floodplain of Little Grave Creek. Those facts were established by the testimony of several witnesses—notably, Mr. Kearns and Mr. Spurlock. Mr. Kearns and Mr. Spurlock also testified that placing an obstruction in a floodway and floodplain would naturally and necessarily obstruct heavy flows of Little Grave Creek. Under the third and fourth factors of *Richmond*, the Circuit Court properly found as proven the notion that placing an obstruction in a flood way or floodplain will obstruct the flow of flood waters. At the very least, the Marshall Co. BOE is entitled to the inference that placing an obstruction in a flood way or floodplain will obstruct the flow of flood waters.

The same analysis applies to what Mrs. Montgomery's pictures of the four (4) specific flooding events show. The pictures actually show the Reilley bridge and roadway embankment obstructing the flow of Little Grave Creek during the heavy flows at issue in this case. The pictures also show the aftermath including sediment left behind after the flood waters receded. The fact that sediment collected on the school property after each of the flooding events at issue likewise proves that the Reilley bridge and roadway embankment obstructed the flow of Little Grave Creek which in turn caused the velocity of the water to slow which in turn caused sedimentation. Both expert witnesses confirmed this.

The experts both also prepared hydrologic models of the Little Grave Creek watershed which concluded that for all storms modeled—from a two-year to a 100-year storm—the Reilley bridge and roadway embankment cause water to back up onto school property.

Mr. Kearns also testified in depth about how the Reilley bridge and roadway embankment repeatedly obstructed the heavy flows of Little Grave Creek and caused between 2 and 8 feet of sediment to accumulate on board property from 1985 to 2010. Again, this is either direct or inferential evidence of the fact that the Reilley bridge and roadway embankment obstruct the flow of Little Grave Creek and impound water on the board's property.

The Circuit Court properly applied the *Richmond* factors to the evidence in the case and properly found that the Marshall Co. BOE presented the Jury with sufficient evidence of proximate cause to support the Jury's Verdict. The Circuit Court below properly chose to invade the province of the Jury by considering witness credibility, resolving alleged conflicts in the evidence or by weighing the evidence. As such, the Circuit Court properly denied Petitioner's post-trial motions.

Procedurally, the Reilleys waived their argument that the trial evidence of proximate cause was insufficient by not renewing their motion for a judgment as a matter of law at the close of all evidence. The Record reflects that the Reilleys only moved for a judgment as a matter of law at the close of the Marshall Co. BOE's case. The Circuit Court denied the motion. AR 1563- 1575. The Record reflects that the Reilleys did not renew their motion for a judgment as a matter of law at the close of their case—after the Reilleys put on the testimony of Mr. Daryl Reilley and Mr. Derrick Spurlock—when all the evidence was introduced. AR 1631-1636. The rule in West Virginia is that failure to renew a motion for judgment as a matter of law at the close of all evidence constitutes a waiver of the objection to the sufficiency of the evidence. *Cline v. Joy Mfg. Co.*, 172 W. Va. 769, 774, 310 S.E.2d 835, 840 (1983) (decided under former rule); *Syl. Pt. 1, Chambers v. Smith*, 157 W. Va. 77, 198 S.E.2d 806 (1973) (decided under former rule). Because the Reilleys did not renew their motion for judgment as a matter of law at the close of all

evidence, they have waived their objection to the sufficiency of the evidence regarding proximate cause and the Circuit Court properly denied their post-trial motions for Judgment as a Matter of Law and for a New Trial.

In summary, the Circuit Court did not err in denying Petitioner's Motion for Summary Judgment or post-trial motions regarding the sufficiency of the evidence on proximate cause. Petitioner's third assignment of error lacks merit and the Circuit Court's decision should be affirmed.

D. The Circuit Court correctly awarded the Marshall Co. BOE a mandatory injunction requiring that the Reilleys remove all obstructions they placed or caused to be placed in the stream channel and floodway of Little Grave Creek.

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." Syl. Pt. 11, *Stuart v. Lake Washington Realty Corp.*, 141 W. Va. 627, 92 S.E.2d 891 (1956).

Petitioner's last assignment of error is that the Circuit Court's Order Granting the board's Motion for Injunctive Relief (AR 19-20) failed to comply with Rules 65(d) and 52(a) of the West Virginia Rules of Civil Procedure. The crux of the Petitioner's argument is that the Order did not sufficiently set out findings of fact and conclusions of law to allow for appellate review. Importantly, the Petitioner did not file any response in opposition to the Marshall Co. BOE's Motion for Injunctive Relief. While an attorney appeared at the injunction hearing for the Petitioner, counsel did not object to the Motion or the engineering report attached to the Motion. Under the facts and circumstances of the case, the Injunction Order and hearing transcript of the

injunction hearing sufficiently set out the findings of fact and conclusions of law that support the granting of the board's Motion for Injunctive Relief. Under the facts and circumstances of the case, there is an adequate record for appellate review and the Circuit Court did not abuse its discretion in awarding the board an injunction and the Circuit Court's action should be affirmed.

Count Six of the board's original and Amended Complaint asked for injunctive relief. AR 42-44, 152-154. As a matter of law, where someone obstructs a watercourse—as part of a continuing trespass, violation of riparian rights or as a private nuisance—the aggrieved party is entitled to injunctive relief that orders removal of the obstruction. In the case of a continuing trespass, one who recklessly or negligently causes a thing to enter land in the possession of another is subject to liability to the possessor for harms caused to the land or the possessor or both. Restatement (Second) of Torts, § 165. This Court has long held that “[o]ne cannot negligently obstruct or divert water of a natural course to the injury of another without liability.” Syl. pt. 1, *Atkinson et al. v. Chesapeake & O. Ry. Co.*, 74 W. Va. 633, 82 S.E. 502 (1914); Syl. pt. 4, *Whorton v. Malone*, 209 W. Va. 384, 549 S.E.2d 57 (2001). Importantly, those aggrieved by obstruction to a water course that causes water to unlawfully impound upon their land may seek injunctive relief requiring the removal of the obstruction and water to restore the full enjoyment of the property. *Stuart v. Lake Washington Realty Corp.*, 141 W. Va. 627, 654, 92 S.E.2d 891, 906 (1956).

The same is true where someone violates another's riparian right to the natural flow of the watercourse. This Court has determined that: “[t]he owner of land through which a natural watercourse passes has a right of property in such land to have the water of the stream pass to and from his land in its natural flow.” Syl. pt. 2, *McCausland v. Jerrell*, 136 W. Va. 569, 68 S.E.2d 729 (1951). Obstructions to a water course unlawfully infringes on the riparian rights of an upstream landowner. This Court has held: “[t]he obstruction or the diversion of a natural

watercourse which restricts the natural flow of the water of the stream and causes such water to overflow, accumulate and stand upon the land through which such watercourse passes is an infringement of a property right of the landowner and imports damage to such land. Syl. pt. 3, *McCausland v. Jerrell*, 136 W. Va. 569, 68 S.E.2d 729 (1951). Landowners whose riparian rights have been unlawfully infringed by a downstream obstruction in a watercourse can seek injunctive relief to require removal of the obstruction. This Court has found that: “[e]quity has jurisdiction to vindicate the right of a landowner to the natural flow of the water of a natural watercourse to and from his land by restraining the obstruction of the natural flow of the water or its inadequate diversion from its natural course and by requiring the removal of such obstruction or the cause of such diversion.” Syl. pt. 4, *McCausland v. Jerrell*, 136 W. Va. 569, 68 S.E.2d 729 (1951).

The law of private nuisance also supports issuance of an injunction to abate the nuisance. This Court has explained that: “[t]he obstruction or unreasonable diversion of the water of a stream is also a private nuisance.” Injunctive relief will lie to abate such a nuisance. *McCausland v. Jerrell*, 136 W. Va. 569, 68 S.E.2d 729, 737 (1951).

In the damages phase of this case, the Marshall Co. BOE proved to the Jury and the Jury returned a Verdict in the board’s favor which found that the Reilley bridge and roadway embankment obstructed the flow of Little Grave Creek. The Jury’s Verdict was confirmed when the Circuit Court denied the Reilleys’ post-trial motions. Based upon the Jury’s finding of an obstruction, the Circuit Court properly awarded the Marshall Co. BOE injunctive relief ordering that the obstruction be removed. In fact, the board hired Mr. Kearns to identify the obstructions placed or caused to be placed by the Reilleys and introduced the study with the Motion for Injunctive Relief. The Reilleys did not object to the Motion or study and the Circuit Court properly

awarded the board injunctive relief and ordered the Reilleys to restore the stream channel and floodway of Little Grave Creek in accordance with Mr. Kearns' study.

The Circuit Court's Injunction Order makes the factual finding and legal conclusions necessary to support the award of injunctive relief: namely, the Order finds as a matter of fact that the Reilley bridge and roadway embankment obstructed the flow of Little Grave Creek and the Order concludes as a matter of law that the board is entitled to a mandatory injunction ordering the Reilleys to remove the obstructions. Mr. Kearns' engineering study is incorporated into the Order and details the extent of the obstructions that require removal. Under the circumstances of the case, the Order meets the requirements of Rule 65(d) and 52(a) – the Order sets out as a matter of fact that the Reilleys have obstructed Little Grave Creek and concludes as a matter of law that the obstructions must be removed consistent with the Kearns engineering report.

Moreover, pursuant to Rule 52(a), the trial court may announce findings of fact and conclusions of law orally in open court so long as they appear in the record. Here, the injunction hearing was recorded and is part of the Record on appeal for this Court's consideration. In the transcript from the injunction hearing, the Circuit Court announced that in the damages phase of the case, the Jury had returned a Verdict in favor of the board and that what remained of the case was to determine if the Reilleys should be ordered to abate their improper conduct. AR 2231. The Circuit Court noted that the jury made a finding of causation—that the Reilley bridge and roadway embankment were obstructing the flow of Little Grave Creek and causing water to impound on the board's property. AR 2233. The Court then noted that with a finding of causation, the injunctive relief of abatement of the obstruction followed—"almost summarily." AR 2233. Counsel for the Reilleys asked that the Circuit Court consider balancing the equities and the Circuit Court refused citing *McCausland v. Jerrell*. AR 2241. Based upon the Jury's finding of causation

and the applicable law, the Circuit Court awarded the board an injunction and ordered that the Reilleys remove the obstructions to Little Grave Creek in accordance with the Kearns report.

Rule 52(a) does not require that the Circuit Court list every finding of fact or conclusion of law that could support the Circuit Court's decision. Instead, Rule 52(a) only requires that the salient findings and conclusions be set forth as the needs of the case require. The *Litigation Handbook on the West Virginia Rules of Civil Procedure* (Palmer and Davis 5th ed. 2017 and 2018 Cum. Supp.) provides on page 1218 that:

What is understood regarding Rule 52(a) is that, it is not necessary that a trial court's findings expressly mention all the evidence proffered by the parties. "The nature and degree of exactness of the findings required depends on the circumstances of the particular case."

(Internal citations omitted). Under the circumstances of the injunction sought in the present case— involving a single material finding of fact (i.e., that the Reilleys are obstructing the flow of Little Grave Creek) and a single material conclusion of law (i.e., that the board is entitled to an injunction ordering the removal of the obstructions), the Injunction Order and hearing transcript meet the minimum requirements of Rules 65(d) and 52(a) of the West Virginia Rules of Civil Procedure.

Additionally, 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. Again, the *Litigation Handbook on the West Virginia Rules of Civil Procedure* (Palmer and Davis 5th ed. 2017 and 2018 Cum. Supp.) provides on page 1217 and 1218 that:

It had been held that the purpose of Rule 52(a) is to adequately enable an appellate court to apply the law to the facts of a case during an appellate review. . . . However, an appellate court may overlook the absence of Rule 52(a) findings and conclusions, if a review of the record substantially eliminates all reasonable doubt as to the basis of the trial court's decision. The Supreme Court has expressly indicated that "[a] case will be disposed of without remanding it to the trial court to find the facts specially and state separately its conclusions of law in accordance with Rule 52(a),

when there is sufficient information in the record with regard to the facts which control the proper disposition of the case.”

(Internal citations omitted). In the present action—because the damages phase of the case was tried to a jury—an extensive appellate record exists that informs this Court as to the proper disposition of the case and, specifically, as to the factual and legal bases for the award of injunctive relief by the Circuit Court. Accordingly, the form of the Order granting injunctive relief does not present reversible error under the facts and circumstances of the case.

Finally, Petitioner’s contention notwithstanding, the Circuit Court’s injunction order properly omitted any reference to or analysis of balancing the equities. As the Circuit Court noted in its discussion of *McCausland v. Jerrell*, 136 W. Va. 569, 68 S.E.2d 729 (1951), at the injunction hearing and as this Court has held, no balancing of the equities will excuse a violation of another’s riparian rights. In *McCausland*, this Court stated:

The obstruction and the improper diversion of the natural flow of the water of the stream on the land of the plaintiff, caused by the acts of the defendants, constituted an infringement of the property right of the plaintiff and, in determining whether injunctive relief against such infringement should be granted, a court of equity should not resort to or apply the doctrine of the balance of equities or conveniences between the parties involved.

Id. at 587, 740. The rationale for this rule is that “. . . no man can complain that he is injured by being prevented from doing, to the hurt of another, that which he had no right to do.” *Id.* at 586-587, 740.

Because the Reilleys have no right to obstruct the flow of Little Grave Creek with their bridge and roadway embankment, they cannot complain that removal or modification of the bridge and roadway embankment will be inconvenient or costly. Likewise, the Circuit Court was correct in refusing to balance the equities as between the Marshall Co. BOE and the Reilleys surrounding the order requiring removal of the obstructions to Little Grave Creek. As such, the

Circuit Court properly refused to include findings of fact and conclusions of law that balance the equities in the injunction order.

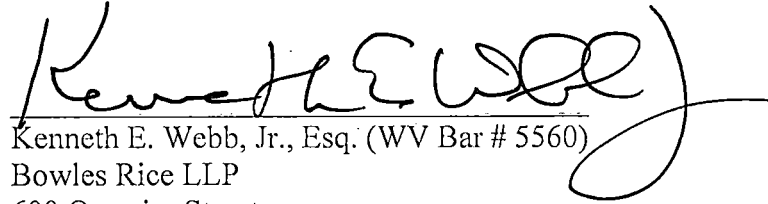
The Circuit Court did not abuse its discretion in awarding the Marshall Co. BOE an injunction that required the Reilleys to restore the flow of Little Grave Creek. Given the nature of the case, the findings and conclusions of the injunction order – and those set out in the transcript of the injunction hearing – were sufficient for Rule 65(d) and 52(a) purposes. Moreover, because the damages phase of the case was tried to a jury, an adequate appellate record exists from which this Court can exercise its appellate review. Finally, the Circuit Court did not err in refusing to balance the equities as part of the injunction proceeding. Petitioner's fourth assignment of error lacks merit and the Circuit Court's decision should be affirmed.

VI. CONCLUSION

The Circuit Court correctly denied the Reilleys' Motion to Dismiss, correctly denied the Reilleys' Motion for Partial Summary Judgment (as to both statute of limitations and causation), correctly denied the Reilleys' post-trial motions and correctly awarded the Marshall Co. BOE a mandatory injunction requiring that the Reilleys remove all obstructions they placed or caused to be placed in the stream channel and floodway of Little Grave Creek. The pre and post-trial rulings of the Circuit Court and the Jury Verdict are supported by the substantial evidentiary and trial record developed in the case and by the applicable legal authorities. The Circuit Court committed no error in its pre and post-trial rulings and the Marshall Co. BOE respectfully requests that the decisions of the Circuit Court of Marshall County be affirmed.

THE BOARD OF EDUCATION OF THE
COUNTY OF MARSHALL,

By Counsel,

A handwritten signature in black ink, appearing to read "Kenneth E. Webb, Jr.", with a large, stylized flourish extending from the end of the signature.

Kenneth E. Webb, Jr., Esq. (WV Bar # 5560)

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Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MYRA KAY REILLEY, AS
ADMINISTRATRIX OF THE
ESTATE OF FRANCIS E.
REILLEY, AND MYRA KAY
REILLEY, INDIVIDUALLY,
(Defendants below),

Petitioner,

v.

NO. 20-0849
(Appealed from the
Circuit Court of Marshall County,
Civil Action No. 10-C-180)

THE BOARD OF EDUCATION
OF THE COUNTY OF
MARSHALL,
(Plaintiff below),

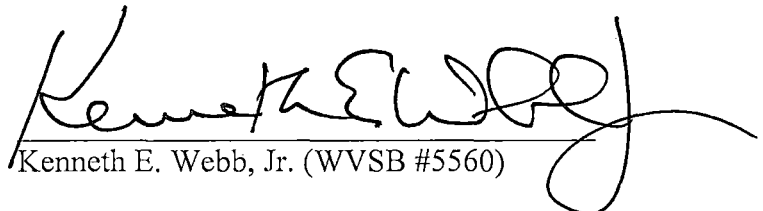
Respondent.

CERTIFICATE OF SERVICE

I, Kenneth E. Webb, Jr., hereby certify that a true and exact copy of the foregoing
RESPONDENT'S BRIEF ON APPEAL has been served by United States mail, postage prepaid,
upon the following individuals:

Jeffrey A. Holmstrand, Esq.
GROVE, HOLMSTRAND & DELK, PLLC
44 1/2 Fifteenth Street
Wheeling, West Virginia 26003

This 5th day of March 2021.


Kenneth E. Webb, Jr. (WVSB #5560)