IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 22-0341

ELLIOTT GRISELL AND LORRI GRISELL
Plaintiffs Below, Petitioners

vs.

Appeal from a Final Order of the Circuit Court of Marshall County (19-C-187)

SHELLY & SANDS, INC.,
Defendant Below, Respondent

PETITIONERS' BRIEF IN REPLY

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ARGUMENT

THE ORDER OF THE HONORABLE CIRCUIT COURT OF MARSHALL COUNTY GRANTING SUMMARY JUDGMENT AND RESPONDENT'S BRIEF IGNORE THIS COURT HAS NOT LIMITED ITS RULING IN SEWELL TO ANY ONE PARTICULAR SET OF FACTS

The Honorable Circuit Court of Marshall County in its Order granting summary judgment on Petitioners' negligence claim and Respondent in its brief impose an improper limitation on this Court's ruling set forth in Syllabus Pt. 3 of *Sewell v. Gregory, 179 W.Va. 585; 371 S.E. 2d 82 (1988)* when they argued or determined it was not applicable to this matter.[1] As stated in said syllabus point "The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the Defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?".

Respondent argues *Sewell* and the three cases citing Syllabus Pt. 3 in *Sewell* mentioned by Petitioner in their brief are factually distinguishable from this matter rendering their ruling on the issue of when a duty is owed inapplicable to this case. Contrary to that assertion as each of the cases are also factually dissimilar to each other, it is in fact evidence this Court intended their ruling setting forth when a duty is owed to apply to all factual scenarios. This is likely a substantial reason *Sewell v. Gregory, 179 W.Va. 585; 371 S.E. 2d 82 (1988)* has been cited in 172 cases as of this time. As clearly stated in *Sewell* and the other three cases citing *Sewell*, Syllabus point 3 sets forth the "ultimate test" of when a duty is owed.

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[1] The Honorable Circuit Court of Marshall County in awarding summary judgment to Respondent on Petitioners' negligence claim did not rely upon the liability waiver provisions of the waste agreement. The Circuit Court cited the liability waiver provisions of the waste agreement in setting forth why there was no viable breach of contract claim in this matter which was never alleged by Petitioners.

Respondent spread fill material on the property in question. Respondent agreed to level up the waste site and grade the slope setting forth an obligation on how the material was to be placed. (Appendix Pg. 49) Respondent was aware water was emanating from the toe of the slope they were working on and were asked to address it, and attempted to do so. (Appendix Pg. 369) None of these facts can seriously be contested by Respondent. That Respondent owed a duty in doing this work is clear.

EVIDENCE RESPONDENT BREACHED A DUTY IT OWED TO PETITIONERS WAS SUFFICIENT FOR THIS MATTER TO SURVIVE A MOTION FOR SUMMARY JUDGMENT

In this case Petitioners alleged Respondent spread fill material on their property in a negligent and improper manner, not up to the reasonable and customary standards of a contractor and in a manner not fit for the purpose for which it was placed on the property. It was further alleged Respondent spread the material over a natural freshwater spring, not properly redirecting the same, and blocked previously installed drains and/or culverts that captured water runoff, allowing the area encompassing the fill material to become saturated. Petitioners complained Respondent owed a duty in placing the material on the property to do so as a reasonable and prudent contractor and in a manner that would not cause damage to the property or adjacent properties. (Appendix Pgs. 5 and 6)

The following facts which support Petitioners negligence claim are not to their knowledge in dispute. Again, Respondent placed fill material on property then owned by Alfred N. and Susan M. Renzella and currently owned by Petitioners after execution of a Waste Agreement. Respondent agreed to level up the waste site and grade the slope. The manner of how material was placed on the property was to be determined by Respondent according to the Waste Agreement. (Appendix Pg. 367) During operations on the Renzella property Terry LePage Respondent's foreman confirmed water was flowing from the toe of the slope. (Appendix Pg. 369) He confirmed no effort

was made to capture and divert the water. (Appendix Pg. 370) After being asked to address the water, he merely placed rock in the area functioning as a filter for the water and dug a ditch. (Appendix Pg. 369) There is no evidence Respondent in grading and leveling the slope constructed drainage, a toe key or bench. These facts were relied upon by Stephen Rogers Petitioners' expert witness when he rendered his opinion.

Mr. Rogers rendered an opinion Respondent failed to properly drain water from the toe of where the material was deposited. This being the primary cause of the slip. He further stated Respondent failed to install a proper toe key or benching to provide a stable foundation for the slope they graded. (Appendix Pg. 129) Respondent merely pushed off the fill material to level and grade it. (Appendix Pg. 374) Quite simply, Respondent failed to properly remove the water emanating from the slope, to place the fill material on the property and to grade and level the slope, and in failing to do so breached a duty owed Petitioners.

"The Circuit Court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but is to determine whether there is a genuine issue for trial. Syllabus Pt. 4 *Merrill v. West Virginia Dept. of Health and Human Resources, 219 W.Va. 151; 632 S.E.2d 307 (2006).* The opinion presented by Petitioners' expert is based upon undisputed facts and it coupled with the undisputed acts are sufficient evidence of Respondent's breach of duty to substantiate there is a genuine issue for trial.

CONCLUSION

For the reasons set forth herein and in their Brief Petitioners respectfully request their appeal for relief be granted

Elliott Grisell and Lorri Grisell

By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2022, I caused the foregoing **"PETITIONERS REPLY BRIEF"** to be served on Adam Barnes, Esquire of Walsh, Barnes & Zumpella, P.C. Counsel for Respondent by placing a true copy of the same in the United States mail, postage prepaid, to his address at 2100 Corporate Drive, Suite 300, Wexford Pennsylvania, 15090 and via electronic mail to abarnes@walshlegal.net.

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