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Judge: Paul M. Blake, Jr.

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NOTICE OF FILING

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA
NORTH HILLS GROUP, INC v. DANNY WEBB
CC-10-2019-C-2

The following order - case was FILED on 9/16/2022 11:52:52 AM

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Deborah Hendrick
CLERK OF THE CIRCUIT COURT
Fayette County
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FAYETTEVILLE, WV 25840

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IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

NORTH HILLS GROUP, INC.,

Plaintiff,

v.

Civil Action No. 19-C-2
Judge Paul M. Blake, Jr.

DANNY WEBB AND
DANNY WEBB CONSTRUCTION COMPANY, INC.,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION TO SET ASIDE VERDICT AND FOR A NEW TRIAL

On May 27, 2022, came Plaintiff North Hills Group, Inc., by counsel and Defendants Danny Webb and Danny Webb Construction Company, Inc., by counsel, for a hearing on Plaintiff's timely filed "*Plaintiff's Motion to set aside verdict and for a new trial.*"

WHEREUPON, the Court, after reviewing the pleadings and hearing the arguments of counsel, makes the following findings of fact and conclusions of law:

Findings of Fact

1. On May 17-18, 2022, a trial was conducted in this matter. The trial concerned the acts or omissions of Defendants Danny Webb and Danny Webb Construction Company, Inc., concerning a 2008 Oil and Gas Lease pertaining to property in Lochgelly, Fayette County, West Virginia, which resulted in alleged damage to the Plaintiff's real estate. At trial, the Plaintiff made claims for trespass, nuisance, negligence, unjust enrichment and breach of fiduciary duties.

2. Previously, the West Virginia Supreme Court of Appeals held, in affirming, in part, the Court's termination of the Oil and Gas Lease as well as its issuance of the cease and desist injunction in Fayette County Civil Action No. 16-C-9 that:

> "Thus, we find that in those instances where the Oil and Gas Lease used the term "brine," it plainly and unambiguously meant

water with salt." *See Webb v. North Hills Group, Inc.*, No. 16-0640 (W.Va. Supreme Court, June 9, 2017)(memorandum decision) at pg. 8.

* * *

"When the granting clause references the 'right to inject air, gas, water, salt water, brine, and other fluids from any source,' it is not incorporating and expanding the injection right contained in paragraph 14. Rather, the granting clause is strictly limited to the purpose of exploring, operating for, producing, and storing oil and gas." *Id.* at pg. 9.

* * *

"Paragraph 14, on the other hand, does not grant the right to Webb Construction to inject any permittable or licensed fluid into a well that is proven unproductive of oil and gas and/or coalbed methane. Rather, paragraph 14 is quite specific. It provides only the right to inject salt water or brine." *Id.* at pg. 10.

* * *

"[T]he record, including the permit documents, clearly establishes that fluids other than salt brine were injected into the 508/1A well. Moreover, the fluids were injected into a well that was not proven to be unproductive. We reject the argument that the best evidence of unproductivity is the fact that the 508/1A well had been plugged inasmuch as there is no documentary evidence of any effort by Webb Construction to rework the well, drill it to a different depth, or stimulate it to gain production. Because there were no drilling operations on the leased premises and there has not been salt water, brine, or salt brine injected into or stored in the 508/1A well, the Oil and Gas Lease terminated of its own accord at the conclusion of the secondary term of the lease." *Id.* at pg. 11.

* * *

"In declaring the rights of the parties based on that language, we have herein concluded, in part, that the Oil and Gas Lease provided for the continuation of the lease only on the basis of continuing injection of salt water or brine and the making of the annual injection payment. However, fluids other than salt water or brine were injected into the 508/1A well. Thus, the lease terminated." *Id.* at pg. 13.

3. Moreover, the Court **FINDS**, that during the trial, Plaintiffs adduced substantial evidence including, but not limited to: deeds, the 2008 lease, a Notice of violation, the West Virginia Department of Environmental Protection ("WVDEP") Consent Agreement between the WVDEP and the Defendants, injection gas well testing data indicative of a productive well, injection permit information and analytical data which all indicated that the Defendants caused contamination on Plaintiff's real estate. *See* adduced Trial Exhibits. This evidence was not contradicted by or rebutted by the Defendants. The Plaintiffs also called numerous witnesses, including, but not limited to: Danny Webb, WVDEP Inspector Terry Wayne Urban, attorney Philip Douglas Mooney, corporate representative Patricia Hamilton, former Plaintiff Vice-President Charles Flint, real estate appraiser J.D. Koontz, mineral estate appraiser Rachael Vass and remediation specialist Marc Glass. This testimony was not contradicted by or rebutted by the Defendants. Consequently, the clear and undisputed evidence was that the Plaintiff established its claims and that the Defendants caused contamination on the Plaintiff's property and related damages to Plaintiff, unbeknownst to it, directly related to the Defendants' injection activities. All of which further was reflected in the *Webb* decision and the Court's rulings on the parties respective Rule 50 Motions for judgment as a matter of law.

4. Thereafter, on May 18, 2022, the jury returned a verdict for Defendant, but Plaintiff objected to this verdict because it was plainly contrary to the clear weight of the evidence and without sufficient evidence to support it. On May 27, 2022, Plaintiff timely filed its "*Plaintiff's Motion to set aside verdict and for a new trial*" seeking, pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, to set aside this verdict and requesting a new trial. On July 18, 2022, the Court conducted a hearing on the Motion and, at that time, took the Motion under advisement and directed the parties to submit proposed Orders regarding the Motion.

Conclusions of Law

5. Pursuant to Rule 59 of the West Virginia Rules of Civil Procedure:

> Grounds. — A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law; . . .

In syllabus point 3 of *In re State Pub. Bldg. Asbestos Litig.*, the West Virginia Supreme Court of Appeals held:

> A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion. *Id.*, 193 W.Va. 119, 454 S.E.2d 413 (1994).

Furthermore, "a trial judge, unlike this Court, is in a unique position to evaluate the evidence." *In re Pub. Bldg. Asbestos Litig.*, 193 W.Va. at 126, 454 S.E.2d at 420. As such:

> Given the trial court's intimate familiarity with the proceedings, the trial court "may weigh evidence and assess credibility in ruling on the motion for a new trial." *Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429, 1433 (4th Cir.1985), *cert. denied*, 475 U.S. 1016, 106 S.Ct. 1199, 89 L.Ed.2d 313 (1986). There are many critical events that take place during a trial that cannot be reduced to record, which may affect the mind of the judge as well as the jury in forming the opinion as to the weight of the evidence and the character and credibility of the witnesses. These considerations can [not] and should not be ignored in determining whether a new trial was properly granted. *Id.*, 193 W.Va. at 132-33, 454 S.E.2d at 426-27.

Consequently, the trial judge has unique knowledge of what occurred at trial that no other judge can have. Given such unique knowledge and intimate familiarity with the proceedings, it is

perfectly proper for the trial judge to use and consider that peculiar and personal knowledge when weighing the evidence and assessing the credibility in ruling on the Motion for a new trial. *Id.*

6. Notwithstanding, in *Grimmett v. Smith*, the West Virginia Supreme Court of Appeals analyzed syllabus point 3 of *In re State Pub. Bldg. Asbestos Litig.* and explained that "[w]hen a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside ***unless*** plainly contrary to the weight of the evidence or without sufficient evidence to support it." *Id.*, 238 W.Va 54, 60, 792 S.E.2d 65, 70 (2016) (emphasis added).

7. In this case, the Court **FINDS** that the verdict was plainly contrary to the clear weight of the evidence and without sufficient evidence to support it. The Court believes that the verdict should be set aside and Plaintiff granted a new trial because a miscarriage of justice would result if the verdict is allowed to stand. *Lamphere v. Consolidated Rail Corp.*, 210 W.Va. 303, 557 S.E.2d 357 (2001) (affirming the trial court's ruling that the verdict was against the clear weight of the evidence and warranted a new trial). In syllabus point 5 of *Orr v. Crowder*, the West Virginia Supreme Court of Appeals stated:

> In determining whether there is sufficient evidence to support a jury verdict the 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. *Id.*, 173 W.Va. 335, 315 S.E.2d 593 (1983), cert. denied, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984).

Here, the Court **FINDS** that even if this Court examines the evidence in a light most favorable to Defendants, assumes that all evidentiary conflicts were resolved in favor of Defendants and assumes as true all facts tended to be proven by Defendants' evidence, the evidence presented in

this case, as outlined above, was not sufficient to sustain the verdict returned by the jury and was "plainly contrary to the weight of the evidence or without sufficient evidence to support it." Syl. Pt. 2, *Walker v. Monongahela Power Co.*, 147 W.Va. 825, 131 S.E.2d 736 (1963).

8. The Court **FINDS** that the aforementioned findings in the *Webb* decision are determinative on Plaintiff's claims for trespass, nuisance, negligence, unjust enrichment and breach of fiduciary duty. These findings by the West Virginia Supreme Court of Appeals establish the elements for each of Plaintiff's claims against the Defendants.

9. With respect to the evidence adduced at trial, the Court **FINDS** that the deeds, the 2008 lease, a Notice of violation, the West Virginia Department of Environmental Protection ("WVDEP") Consent Agreement between the WVDEP and the Defendants, injection gas well testing data indicative of a productive well, injection permit information and analytical data clearly indicated that there was clear evidence from Plaintiff's trespass, nuisance, negligence, unjust enrichment and breach of fiduciary duty claims and that, unbeknownst to the Plaintiff, the Defendants caused contamination on Plaintiff's property.

10. With respect to the specific uncontroverted testimony of the witnesses, the Court **FINDS**:

a. Danny Webb and WVDEP Inspector Terry Wayne Urban testified that the Defendants were issued a Notice of Violation for injecting and unknown amount of unknown substances without a permit at a time they were to be trying to rework the subject 508 well into a production well, that the Defendants injected an unknown amount of substances from unknown sources into the subject well, that the Defendants failed to keep any records about what was injected into the well and from where they obtained the substances, that the subject well could have been a production well, but Defendants converted it into an injection well in violation of the

lease and that the Defendants merely made the meager $3,624.00 yearly payment to Plaintiff, instead of paying gas production royalties, while using Plaintiff's property for a substantial profit, but not informing Plaintiff of their injection activities.

b. Attorney Philip Douglas Mooney testified that he was one of the original members of Plaintiff's corporate officers and he was the President of Plaintiff at the time the lease was negotiated the subject lease, that he negotiated the lease for Plaintiff, that there was no contemplation there would be any injection of substances other than salt water or brine in conjunction with natural gas production in the 508 well and that had he known the Defendants were going to engage in the injection activities they did, then he would not have recommended or executed the lease.

c. Corporate representative Patricia Hamilton and former Plaintiff Vice-President Charles Flint testified that there was never approval of the Defendants' injection activities, that they would have never approved of the Defendants' injection activities, that once Plaintiff learned of Defendants' injection activities, Plaintiff took immediate efforts to stop the injection of fracking waste which culminated in the aforementioned *Webb* decision and that they learned of the damage to the property close to the time of the filing of the Complaint.

d. Real estate appraiser J.D. Koontz testified that the property has a fair market value of $10,000.00 with the contamination and $370,000.00 with the remediation and that Plaintiff is required to disclose the contamination on the property to all potential buyers.

e. Mineral estate appraiser Rachael Vass testified that the subject 508 well had the potential to be a production well, that the Defendants' injection activities now prevent the well from being converted into or used as a production well and that the production value of the well had a value of $46,600.00.

f. Remediation specialist Marc Glass testified that there was contamination on the property, that due to the unknown substances injected into the 508 well, there are synergistic effects which raise concerns about health impacts, that the probable cost to complete removal of the Defendants' pipeline, implement a confirmatory soil sampling program, and to complete well plugging and well site restoration on Plaintiff's property is $381,816.67 and that the probable cost to perform remediation of soil impacted by the Defendants' pipeline, based on the percentage of confirmatory samples showing impacts, is $260,798.71.

11. The Court **FINDS** that in analyzing the evidence, Plaintiff established the lease was terminated due to Defendant's violation of the lease. The Defendants only were allowed to inject salt water or brine in conjunction with natural gas production. However, the Defendants violated this lease by injecting an unknown amount of substances from unknown sources into the 508 well. The Defendants failed to keep any records about what was injected into the well and from where they obtained the substances. The evidence also established that the subject well could have been a production well, but Defendants converted it into an injection well in violation of the lease. Meanwhile, the Defendants merely made the meager $3,624.00 yearly payment to Plaintiff, instead of natural gas production royalties, while using Plaintiff's property for a substantial profit, but not informing Plaintiff of their injection activities. Defendant's have been unjustly enriched by such verdict. Thereafter, the Plaintiff's property was contaminated by the Defendants' injection activities and needs remediation. The clear weight of the evidence indicated that the Defendants were using Plaintiff's property as a toxic fracking waste dump site. For the jury to return a verdict for the Defendants, indicating there was no injury, the verdict flies in the face of common sense and results in a flagrant miscarriage of justice.

12. Based upon the foregoing, the Court **FINDS** that the jury simply ignored the weight of the evidence, including, but not limited to the evidence in the case, the testimony of the witnesses and the adduced documentary evidence, as outlined herein, which conclusively proved Defendants were responsible for the contamination on Plaintiff's property. Likewise, the Court **FINDS** that there was insufficient evidence to support the verdict. Under these circumstances, the Court is inclined to grant the Motion, set aside the verdict and grant a new trial.

NOW, THEREFORE, the Court is of the opinion to, and hereby does, **GRANT** Plaintiff's "*Plaintiff's Motion to set aside verdict and for a new trial.*" Consequently, the Court hereby sets aside the May 18, 2022, verdict and **ORDERS** and **DIRECTS** the parties to set a Scheduling Conference with the Court for a new trial date.

Accordingly, the Court further **ORDERS** as follows:

1. This matter shall come on for a **STATUS HEARING** before the Court, by way of TEAMS, on **DECEMBER 19, 2022, AT 9:00 A.M.** This *Order Granting Plaintiff's Motion To Set Aside Verdict And For A New Trial* shall constitute notice to the parties of such hearing, no further notice being required or necessary. In the event a timely appeal of this Court's ruling is filed, ***counsel shall promptly notify this Court upon its filing*** so that the foregoing hearing can be cancelled and removed from the active docket of the Court pending the results of such appeal; and

2. The Court hereby **ORDERS** and **DIRECTS** the Clerk of the Court to ensure that a copy of this *Order Granting Plaintiff's Motion To Set Aside Verdict And For A New Trial* is transmitted or sent to counsel of record.

All objections and exceptions to the rulings herein are noted and preserved for the record for purposes of appeal.

ENTERED on this 16th day of September 2022.

THE HONORABLE PAUL M. BLAKE, JR.
Circuit Judge, 12th Judicial Circuit