

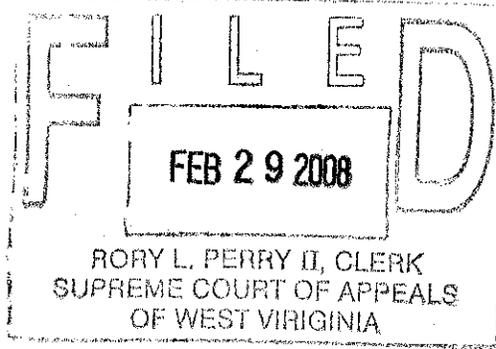
IN THE SUPREME COURT OF APPEALS

OF THE

STATE OF WEST VIRGINIA

Charles V. Beahm, Jr.
Kathryn B. Beahm,
Kathy A. Johnson,
Randy W. Johnson,
Jefferson County Council on Aging,
a corporation,

Appellants,



vs.



No. 33833

7-Eleven, Inc.,
a corporation,
Melissa Spinks,

Appellees.

BRIEF OF APPELLANTS

FROM THE CIRCUIT COURT OF JEFFERSON COUNTY

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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is an action by homeowners and the Jefferson County Council on Aging against the owner and operator of a 7-Eleven convenience store and gasoline filling station located in Ranson, Jefferson County, West Virginia.

Appellants (Plaintiffs below) are seeking compensation for damage sustained by them as a result of the tortious release of an unknown quantity of gasoline from Appellee's (Defendant below, 7-Eleven) underground storage tanks which flowed onto and under the homeowners' properties causing damage to their homes and persons, and forcing certain of them to be evacuated from their properties.

The *Plaintiffs* in this action are Charles V. Beahm, Jr., Kathryn B. Beahm, Kathy A. Johnson, Randy W. Johnson, and the Jefferson County Council on Aging. They are owners of primarily residential real property in the City of Ranson, Jefferson County, West Virginia, with the exception of the Council on Aging, which is a corporate property and utilizes the property for its business purposes as a senior citizen center.

On or about February 24, 2000, it became known to 7-Eleven and others that gasoline had leaked or had been leaking from a subterranean storage tank for an (i) undetermined period of time and in an (ii) undetermined amount and flowed underground in an (iii) undetermined distance from the Ranson store site. Upon information and belief, remediation efforts continue to this date, demonstrating that quantities of leaked gasoline still remain on the properties of the Appellants. Such a condition amounts to a continuing tortious trespass.

Prior to this cause of action, a separate cause of action was brought by separate Plaintiffs in the matter styled *Proctor, et al. v. 7-Eleven, Inc.*, hereinafter referred to as the "Proctor plaintiffs."

Although the current cause of action is wholly separate and distinct, the Appellees have asserted below that the instant action is precluded by an Order granting summary judgement entered in *Proctor v. 7-Eleven, Inc.*, Civil Action No. 3:02-CV-21, by the U. S. District Court for the Northern District of West Virginia.

The Proctor plaintiffs instituted a civil action in the Jefferson County Circuit Court on February 21, 2002 (Civil Action No. 02-C-41), against 7-Eleven claiming damages to their property and persons for the injury caused by the leaking gasoline. The Proctor case was removed by Appellees to the U.S. District Court for the Northern District of West Virginia.

In the course of the litigation of the Proctor action, the Proctor plaintiffs moved to amend the complaint to add new parties, the Beahms and the Johnsons, but the Court denied said Motion to Amend on February 12, 2003 erroneously citing expiration of the applicable statute of limitations. The Beahms and Johnsons did not attempt to intervene in the *Proctor* case. During the pendency of this Motion to Amend, Appellants Beahm and Johnson filed the instant civil action in the Jefferson County Circuit Court on January 24, 2003. The Jefferson County Council on Aging was added as a party by later amendment and was never involved in any way in the *Proctor* action. The Proctor case was ultimately dismissed on summary judgment by the U. S. District Court for the Northern District of West Virginia.

The instant Appellees filed a Motion for Summary Judgment attempting to utilize the dismissal in the *Proctor* case through the doctrine of *res judicata* or collateral estoppel, as well as attempting to assert that the Appellants cannot establish that they incurred any damage recoverable under state law. After briefing by both parties, the Jefferson County Circuit Court entered an Order granting the Appellees' Motion for Summary Judgment on January 4, 2007. (See Appendix Exhibit A). The

Appellants moved for reconsideration of this ruling. The Jefferson County Circuit Court entered an Order denying the Motion by Order dated March 5, 2007. (See Appendix Exhibit B).

This Court should be aware that neither the Proctor Plaintiffs nor Appellants have ever had their day in court.

II. STATEMENT OF FACTS.

As stated above, the instant action arises out of the continuing tortious release and trespass of an unknown quantity of gasoline from Appellee 7-Eleven's underground storage tanks. As a result of the underground storage tank leak, gasoline traveled underground in several directions for hundreds of feet away from 7-Eleven's property. The gasoline encroached and trespassed upon the properties of the Appellants herein, as well as the properties of others. The leak was discovered by the Town of Ranson and certain individuals with property in the immediate vicinity of the 7-Eleven property in late February 2000. At that point, the West Virginia Department of Environmental Protection (WVDEP) ordered 7-Eleven to determine the extent of the pollution and formulate a plan to remediate the contamination. Since then, ongoing attempts have been made by 7-Eleven, pursuant to the order of the WVDEP, to determine the extent of the underground contamination and the best way to remediate and clean it up. Upon information and belief, 7-Eleven has to this day not determined the full extent of the contamination.

Because of the ongoing nature of the WVDEP investigation, various other homeowners in the vicinity of 7-Eleven's store have discovered at different times that their properties are polluted. Defendant 7-Eleven retained a company called ENSR as its remediation contractor. As part of the remediation plan, monitoring wells were installed to determine the extent of the contamination. On April 30, 2002, ENSR submitted a report to the WVDEP. (See Plaintiffs' Opposition to Defendant's

Motion for Summary Judgment, Exhibits "A" and "B" contained within the record). Upon examination of the cover letter, it is clear that monitoring wells (MW)10 through 13 were installed no earlier than February 2002. The text portion of the report states in clear terms that ground water samples from the February 2002 wells were taken on February 26, 2002. Table 2 contained in Exhibit B of the Plaintiffs' Opposition to Defendant's Motion for Summary Judgment illustrates the sampling results. In those results, it shows that monitoring well 11, very near the residence denominated 107, contains benzyne, a confirmed human carcinogen, as well as BTEX, a combination of chemicals including benzyne, toluene, ethyl benzyne and xylene. Residence 107 is the home of Appellants Charles and Kathryn Beahm.

In addition, monitoring well 12, very near the home of Appellants Kathy and Randy Johnson, denominated as residence number 110 in figure 2, has the highest concentrations of benzyne and BTEX for any off-site well connected with this disaster. It is a clear indication that gasoline has migrated several hundred feet away from Appellee 7-Eleven's store and under the home of Mr. & Mrs. Johnson.

Therefore, the Beahms and the Johnsons were first made aware of the damage to their property on April 30, 2002 at the earliest. Moreover, on or about October 17, 2003, the Jefferson County Council on Aging was contaminated by Defendant's gasoline vapors. (See Exhibit "C" to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment). As a result, the Council on Aging suffered a distinct vapor contamination on October 17, 2003, which forced evacuation of the property.

III. ASSIGNMENTS OF ERROR

A. The Circuit Court **ERRED** as a matter of law in granting the Appellees' Motion for Summary Judgment by concluding that *res judicata* was a bar to the suit brought by the Appellants, as the statute of limitations had not yet begun to run in this continuing tort action.

B. The Circuit Court **ERRED** by concluding, without hearing, that the Appellants have no recoverable damages under West Virginia law, even though the contamination of their real estate is continuing.

IV. POINTS AND AUTHORITIES, DISCUSSION OF THE LAW AND RELIEF PRAYED FOR

A. Order of January 4, 2007 is an Appealable Order.

1. Upon the Circuit Court's March 5, 2007 denial of the Appellants' Motion for Reconsideration, the Circuit Court's Order of January 4, 2007 became final, and fully dismissed the underlying action. The Court dismissed the case entirely upon granting the Appellees' Motion for Summary Judgment. The granting of a motion for summary judgment in which no issue is remaining to be litigated is a final order and appealable. See *St. Peter v. AMPAK-Division of Gatewood Prods., Inc.*, 199 W Va 365, 484 SE2d 481 (1997).

B. Standard of Review.

Appellate review of a circuit court's order granting a motion for summary judgment is *de novo*. See *Painter v. Peavey*, Syl. Pt. 1, 217 W.Va 497, 451 S.E.2d 755 (1994).

C. Argument.

1. **The Circuit Court erred when it applied the doctrines of *res judicata* and/or claim preclusion to the instant action as the statute of limitations had not yet begun to run in this continuing tortious injury claim.**
 - a. **The doctrines of *res judicata* and/or claim preclusion do not apply to the facts of this case.**

The Circuit Court held in its January 4, 2007 Order that by applying the doctrine of *res judicata*, the ruling of the Proctor Court with respect to the statute of limitations issue should bar the instant action from proceeding. However, when considering the elements necessary to apply the doctrine of *res judicata* to bar a claim, it is clear that it is improper to apply the doctrine in the instant matter. Further, it is also clear the statute of limitations had not yet begun to run when the Court ruled.

Res judicata or claim preclusion generally applies when there is a final judgement on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action. *Slider v State Farm Mut. Auto Ins. Co.*, 210 W Va 476, 557 SE2d 883 (2001). There are three essential elements which must be met before applying the doctrine. *Blake v. Charleston Area Med. Ctr. Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997).

First, there must be a final adjudication on the merits in the first action. With respect to this element, the Appellants do not dispute that the statute of limitations issue has been adjudicated, albeit incorrectly, in the Proctor case. Therefore, the first element is arguably fulfilled in the instant action. However, when examining the second and third elements, it becomes clear that it would be improper to apply *res judicata* in this matter.

The second mandatory element in applying *res judicata* is that the two actions must involve either the same parties or persons in privity with those parties. *Id.* Without going further, it is obvious that the parties in *Proctor, et al* were not the same parties in the instant action, *Beahm et al.* The Appellants were never made parties in the federal court action. The Proctor plaintiffs attempted to make them parties plaintiff, through amendment of the Proctor complaint, but they failed. The Circuit Court held that, in effect, the Proctor plaintiffs and the Beahms and Johnsons are in privity because the Beahms and Johnsons attempted to intervene in the Proctor action. However, as stated above, this is a clear misstatement of the actual procedural history. The Proctor plaintiffs attempted to amend their Complaint to join the Beahms and Johnsons. There was never a motion to intervene by the Beahms and Johnsons. In fact, the Beahms and Johnsons filed the instant civil action before the Proctor motion to amend was determined, further showing that they had a separate and distinct case. Moreover, the Order of the Circuit Court completely ignores the presence of the Jefferson County Council on Aging. They were not involved in any way in the Proctor Motion to Amend. Therefore, the Circuit Court failed to acknowledge the fact that there is no possible way to claim privity between the Proctor plaintiffs and the Council on Aging.

The Circuit Court also states that since the Appellants have common counsel and utilize common expert witnesses, then they should be determined to be in privity. However, this assertion is misguided. Appellants' counsel has many clients and it does not automatically place them all in privity. Moreover, it is only natural that separate and distinct Plaintiffs injured in different manners at different times by the same leakage would retain the same experts. The opinions by the common experts are however distinct and limited to the specific damage sustained by the individual Plaintiffs. The simple fact of the matter is that the only common thread between the Proctor plaintiffs and the

Appellants is that they both sustained damages as a result of the gasoline leak from the Appellee's underground storage tank. Therefore, it is disingenuous to claim that there is privity between them.

Finally, the third element of claim preclusion via *res judicata* is that the causes of action must be identical. *Id.* As stated above, the only common thread between the two groups of Plaintiffs is that they were both injured by the same gasoline leak. The damages sustained by both groups of Plaintiffs were different as they involved separate and distinct properties, the actual damage was discovered at different times and with respect to the Council on Aging, an invasion of harmful vapors was sustained in the present action.

b. As the facts of this case constitute both a continuing tortious trespass and nuisance, the statute of limitations is tolled.

To bar the Appellants from maintaining their cause of action under *res judicata* would deprive them of their proper statute of limitations. In the present action, the Appellants were well within the statute for their injuries. It is uncontested that the gasoline leak was discovered by 7-Eleven on or about February 24, 2000 and later by some or all of the plaintiffs by implication. That is, the arrival and presence of remediation and containment activities near their properties. It is also uncontested that the Appellants' properties were contaminated by the migrating gasoline and that gasoline which flowed from the leaking tank is, upon information and belief, still present in and/or on the plaintiffs' properties and the injury to the plaintiffs is continuing. Appellants have instituted this action under the provisions of West Virginia Code 55-2-12(a) and (b). This Court, interpreting when the statute of limitations begins to run under West Virginia Code § 55-2-12 where there is a *continuing* or *repeated* injury, has held 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,” Syllabus Point 11, *Graham v Beverage*, 211 W Va 466, 566 SE2d 603 (2002). Where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from the date of the last injury, or when the tortious acts cease. *Handley v. Town of Shinnston*, 289 SE2d 201 (WV 1982). “The distinguishing aspect of a continuing tort with respect to negligence actions is continuing tortious conduct, that is a continuing violation of a duty owed the person alleging injury, rather than continuing damages emanating from a discrete tortious act.” Syl. Pt. 4, *Robert v. American Water Co.* 655 S.E.2d 119 (WV 2007). “The two year statute of limitations set forth in WV Code §55-2-12(a) does not begin to run in a nuisance action where the tort at issue is both temporary and continuing until the date of the last injurious act or when the acts constituting the nuisance have been abated or discontinued.” Syl. Pt. 6, *Taylor v. Colloden Public Service District.*, 591 S.E.2d 197 (WV 2003).

It is a rather simple conclusion that since the gasoline is still under, in or on the appellants’ properties, regardless of whatever the quantities are, it is still a trespass causing injury and damage to the plaintiffs, and a “last injury” has not yet happened. Likewise, as remediation activities continue, the nuisance continues. Therefore, the statute of limitations has not begun to run, even as of this day, and will be tolled until remediation is complete and the last drop of gasoline is removed from affected properties—however long that is — and not before. Accordingly, Appellants’ civil action was timely filed and is not barred by any statute of limitation.

c. The discovery rule also tolled the statute of limitations.

Even if we assume that the statute of limitations has begun to run with respect to the claims of the Appellants herein, 7-Eleven has completely ignored the discovery rule in its Motion for Summary Judgment. As stated above, the injuries to the Appellants were discovered on a later date

than those in the Proctor matter. "Under the discovery rule, the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim." Syl Pt. 6, *Robert*, supra.

"In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule, the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know 1) that the Plaintiff has been injured, 2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and 3) that the conduct of that entity has a causal relation to the injury. " Syl. Pt. 7, *Robert*, supra; *Rucker v. Deere & Co*, 539 SE2d 112 (WV 2000).

In the area of subterranean trespass, the statute of limitations begins to run only from the time of actual discovery of the trespass, or the time when such discovery was reasonably possible. *Western Pocahontas Corp. v. Eastern Gas & Fuel Assocs.*, 213 F.Supp.657 (SDWV 1963), rev'd on other grounds sub nom., *Cole v. Eastern Gas & Fuel Assocs.* 322 F2d 506 (4th Cir. 1963).

As noted above, the earliest instance in which the Beahms and Johnsons could have been made aware of the encroachment of gasoline onto their property was April 30, 2002, the date ENSR, 7-Eleven's remediation contractor, advised WVDEP of the spreading subterranean contamination plume. Prior to that, they had no knowledge of any encroachment as the reports of the monitoring wells were not completed nor made available. As a result, the earliest the statute of limitations would have began to run for the Plaintiffs in the instant action is April 30, 2002. (See Exhibits "A" and "B" to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment). The instant action was filed January 24, 2003, well within the statute of limitations. In addition, the Jefferson Council on Aging sustained a vapor invasion on October 17, 2003. Therefore, at the very least, an injury was sustained by the Council on Aging subsequent to the filing of the action. As a result, even assuming *arguendo* that the statute of limitations has begun to run, said statute was not violated by the filing of the instant action as the Appellants did not discover their injuries until a much later date than the

Proctor plaintiffs and precluding their claims on the basis of *res judicata* is entirely improper.

2. The Circuit Court erred in holding that the Appellants had suffered no damages in spite of the continuing gasoline contamination of their real estate.

In granting the Appellee's Motion for Summary Judgment, the Circuit Court held that the Appellants cannot establish that they have incurred any damage recoverable under state law. However, this is not supported by the evidence in this case. The Appellee admitted that the Appellants have suffered damages to their property as a result of the Appellee's conduct. (See Defendants' Motion for Summary Judgment, p. 15, contained within the record). The Appellees argue that because the damages are reparable and temporary, there are no recoverable damages. However, the Appellees' argument that there is no dispute as to the dollar value of the impact to the properties is disingenuous. 7-Eleven admitted that there is evidence that the properties have been damaged and suffer from diminished value, but claims Appellants cannot offer evidence of the diminished values of their homes at trial because Appellants incurred no costs for repairing their property. This argument in and of itself gives rise to genuine issues of material fact which preclude summary judgment. However, the Circuit Court refused to acknowledge these genuine issues of material fact and granted summary judgment.

In doing so, the Circuit Court misinterpreted *Jarrett v. EL Harper and Son, Inc.*, 160 WV 399, 235 SE2d 362 (1977). *Jarrett*, supra, abolished the distinction between the measure of damages for temporary and permanent injury to real property. See *Jarrett* at 365. Syllabus points 2 and 3 of *Jarrett* set forth the unified measure of damage for injury to real estate regardless of whether that damage is temporary or permanent.

Syllabus point 2 of *Jarrett* reads as follows:

When realty is injured the owner may recover the cost of repairing it, plus his expenses stemming from the injury, including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover its lost value, plus his expenses stemming from the injury including loss of use during the time he has been deprived of his property. (emphasis added).

Syllabus point 3 of *Jarrett* reads as follows:

Annoyance and inconvenience can be considered as elements of proof in measuring damages for loss of use of real property.

In attempting to draw a nonexistent distinction between temporary and permanent injury to Appellants' homes, the Circuit Court below seemed to ignore the fact, supported by 7-Eleven's aforementioned admissions and *Jarrett*, that this case is about current, real impairment of the value of the real homes of real people because of 7-Eleven's gasoline contamination, not about what may happen at some unknown point in the future, nor about whom is paying for the remediation. Taken to its logical conclusion, the court below essentially held that because the damage 7-Eleven admittedly caused and are, according to 7-Eleven "morally and legally" obligated to repair, the Appellants are unable to recover any damages. However, there is no certainty as to when the remediation process will end. Moreover, since gasoline contains known carcinogens, there is the possibility that physical problems will develop prior to remediation being completed. The Appellants should not be forced, without compensation, to wait patiently in a home whose value is diminished until some unknown future date when remediation may be completed. This cannot be what was intended by the Court when it issued the *Jarrett* opinion.

The Circuit Court below held that simply because Appellants incurred no repair costs, they can prove no damages. However, this holding does not take into account the second portion of syllabus point 2 in *Jarrett* which reads as follows: "if ... the cost of repair would exceed the property's market

value, then the owner may recover its lost value, plus his expenses stemming from the injury including loss of use....” It is undisputed that the costs of remediation, expected to reach over \$700,000.00, exceed the aggregate market values of the individual Appellants’ homes. Therefore, the cost to repair Appellants’ properties exceeds the market value of those properties, regardless of whom is paying the cost of remediation. If the cost of repair exceeds the properties’ market value, it is irrelevant whom is paying for that repair.¹ Therefore, pursuant to syllabus point 2 of *Jarrett*, Appellants are entitled to recover the lost value of their homes plus expenses stemming from the injury to their homes including loss of use.

The most important genuine issue of material fact which precludes summary judgment is the amount of lost value to Appellants’ homes. As cited by the Appellees in their Motion for Summary Judgement, Appellants’ expert appraiser, Richard Parli, opines there is a substantial lost value. The reliability of expert opinions are for a jury to sort out. Parli’s opinions are supported for a number of independent reasons. The decision of the Jefferson County Commission, sitting as a Board of Review and Equalization, found seventy-five percent (75%) impairment to the assessed value of Plaintiffs’ homes. As a result of this impairment, the Appellants have lost their ability to use their homes as loan collateral. Moreover, Appellants are expected to testify at trial, as they did at their depositions, that the value of their homes is substantially impaired and reduced by the presence of contamination and monitoring wells under and around their homes as well as the Senior Center. It has been “...long [recognized] that a landowner’s opinion concerning the value of his or her land is

¹ Rule 401, W.Va. Evid., defines relevant evidence as follows: “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Thus, whom is paying for the cost of repair is irrelevant because the cost of repair is what it is, regardless of whom pays for the repair.

admissible.” *Evans v. Mutual Mining*, 199 WV 526, 485 SE2d 695 (1997). See also *Justice v. Pennzoil Co.*, 598 F.2d 1339 (4th Cir. 1979) (“a landowner’s opinion concerning the value of his land is certainly admissible.”)

When the value of a property is disputed, the ultimate determination of the value of property must be resolved by the trier of fact. Syl. Pt. 2, *Evans*, supra. Given this dispute of fact, summary judgement was totally inappropriate.

Appellants have incurred litigation expenses of over One Hundred Thousand Dollars (\$100,000.00) bringing 7-Eleven, a recalcitrant and strictly liable tort feisor, to the bar of justice. These litigation expenses stem directly from 7-Eleven’s refusal to compensate Appellants for their damages, and forcing them to seek redress through litigation. This very same Appellee’s past refusal to compensate similarly situated Plaintiffs resulted in the imposition of strict liability on 7-Eleven and every other gasoline retailer in West Virginia. See *Bowers v. Wurzburg, et al.*, 528 SE2d 475 (WV 1999).

Turning to the issue of loss of use, the Circuit Court held that Plaintiffs have not sustained these damages. At the very least the Senior Center was forced to evacuate on October 17, 2003, as a result of gasoline vapors invading the Center. This is clear evidence of loss of use. Obviously, given 7-Eleven’s denial of loss of use and the clear incident report of the Independent Fire Company, contained within the record, there is a genuine issue of material fact as to whether the Appellants suffered loss of use and the amount of damages for such loss of use.

Moreover, the Circuit Court’s Order focused its ruling on the damage, or purported lack thereof, to Appellants’ real property. However, Appellants/Plaintiffs also asserted claims for nuisance and trespass in their Complaint. (See Appendix, Exhibit “C”). Appellants’ complaint

makes repeated references to Appellees casting large quantities of gasoline on the Appellants' properties. However, the Circuit Court did not even address these claims for nuisance and trespass.

“Recovery in a nuisance action is not limited to damages to Plaintiff’s property and its rental value, but the owner of a residence or dwelling house occupied by him as a home is entitled to just compensation for annoyance, discomfort, and inconvenience caused by a nuisance, even though he makes no showing of a monetary loss or bodily injury or illness.” Syl. Pt. 3, *Taylor*, supra.

Therefore, it was improper for the Court to enter an Order dismissing the case in its entirety while not addressing each of the claims.

Appellants have also asserted that they are entitled to damages for aggravation and mental anguish in the demand for relief contained in their complaint. *Jarrett* and its progeny do not “...expressly [hold] that mental distress damages [are] not recoverable.” The *Jarrett* Court’s true statement on page 365 of its opinion that “...[it was] not prepared in this case to allow recovery for mental pain and suffering” (emphasis added) is not an express, blanket prohibition of such damages in all cases. The *Jarrett* Court simply did not allow such damages in that particular case. Appellants’ position on this issue is supported by this Court’s opinion in *Evans*, supra. Footnote 3 of *Evans*, in acknowledging the foregoing language from *Jarrett*, reads in pertinent part as follows:

Our opinion today does not foreclose a recovery for mental anguish in a case where only property is damaged. The circumstances in this case come close, but we have insufficient evidence of whether, using an objective standard, an ordinary person would have feared for his or her life when the water rupture came down the mountainside and into the community.” *Evans*, supra, at 532.

Based on the *Evans* opinion, Appellants are not precluded from seeking mental distress damages. Because Appellants may introduce such evidence to a jury, genuine issues of material fact precluding summary judgment exist on the existence and measure of such damages. Thus, for all

of the foregoing reasons, there is a genuine issue of material fact as to whether the Appellants have sustained recoverable damages and the Circuit Court erred in granting summary judgment.

3. Conclusion

It is clear from the pleadings, record, facts, and argument that the Circuit Court of Jefferson County erred by granting summary judgment in favor of 7-Eleven. The Circuit Court below applied the dismissal in the Proctor case to the instant action via *res judicata*. However, neither the parties nor the causes of action are identical as required to apply said doctrine. Moreover, the injuries were discovered by the Appellants much later and to preclude their cause of action would deny them their statutory right to bring said action within the statutory time period.

Further, the Appellants have shown that there is a genuine issue of material fact as to whether damages have been sustained. Appellees have admitted that the values of Appellants' real properties are impacted by 7-Eleven's gasoline contamination. A genuine issue of fact exists as to the amount of compensation to which Appellants are entitled for the lost value of their homes. Because the cost to repair Appellants' properties exceeds the value of said properties, genuine issues of material fact exist as to whether Appellants have incurred expenses stemming from their injuries, and if the jury finds such expenses, the amount of compensation for these expenses. In addition, the Appellants have claims for nuisance and trespass, none of which were addressed in the Circuit Court's Order. Finally, the Appellants have suffered aggravation and mental anguish, and in accordance with West Virginia law, there are cases where mental anguish and distress may be recovered, particularly when dealing with known carcinogens.

Viewing the facts of this case in a light most favorable to Appellants, 7-Eleven, a strictly liable tortfeasor, should not be allowed to evade responsibility for the damages it has caused innocent

homeowners by its mishandling of a hazardous material known to contain confirmed human carcinogens. This Court should be aware that neither the Proctor Plaintiffs, not Appellants, have had their day in Court.

V. RELIEF PRAYED FOR

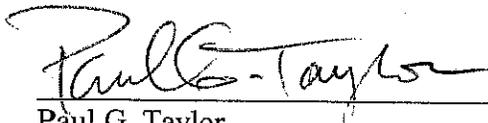
Appellants pray that this Court reverse the January 4, 2007 Order of the Circuit Court of Jefferson County and:

(1) Find as a matter of law that genuine issues of material fact exist so as to preclude summary judgment in this action;

(2) Find as a matter of law that Appellee 7-Eleven's actions constitute a continuing tort which precludes the running of any applicable statute of limitations.

(3) Remand this civil action to the Circuit Court of Jefferson County with instructions that Appellants be afforded a jury trial on the matters at issue as set forth more fully in the Plaintiffs' Complaint.

Respectfully submitted this 28th day of February, 2008.



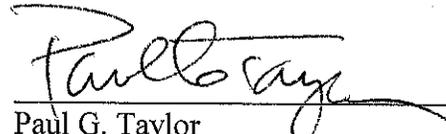
Paul G. Taylor
Attorney for the Appellants
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Telephone 304-263-7900
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CERTIFICATE OF SERVICE

Service on Appellees

I certify that a true and correct copy of the attached Brief of Appellants was sent by first-class U.S. Mail in a properly addressed envelope with first class postage duly paid before 5:00 PM on the 28th day of February, 2008, to the attorney of record for all of the parties in this action at the address listed below:

Charles F. Printz, Jr. Esq.
Attorney for Appellees.
Bowles Rice McDavid Graff & Love
P.O. Drawer 1419
Martinsburg W Va 25402



Paul G. Taylor
Attorney for Appellants

“APPENDIX”

Exhibit A - Order Granting Motion for Summary Judgment

Exhibit B - Order Denying Motion for Reconsideration

Exhibit C - Complaint filed by Appellants/Plaintiffs

P. Taylor

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

CHARLES & KATHRYN BEAHM, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. 03-C-13
Judge Sanders (by designation)

7-ELEVEN, INC. and MELISSA SPINKS,

Defendants.

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JEFFERSON COUNTY
CIRCUIT COURT

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ON A PREVIOUS DAY came the Defendants, by counsel, on their motion summary judgment, and the Plaintiffs in opposition to said motion. The Court has studied the Defendants' Motion, the Plaintiff's Opposition Memorandum, and the Defendants' Reply, as well as the depositions and exhibits submitted in support thereof. The Court has considered all papers of record, and reviewed the pertinent legal authorities. As a result of these deliberations, for the reasons particularly set forth in the following opinion, the Court has concluded that Defendants are entitled to summary judgment.

I. BACKGROUND

This suit arises out of a January 2000 underground gasoline storage tank leak in Ranson, West Virginia. The Plaintiffs claim that 7-Eleven's gasoline leaked into the groundwater that circulates beneath their properties, and that their properties have been contaminated and devalued because of it. All of the Plaintiffs' properties are served by a public water system.



This is the second of two suits filed as a result of the Ranson leak. The first suit, *Proctor v. 7-Eleven, Inc., et al.*,¹ filed in February 2002, was dismissed on summary judgment by the late Judge Broadwater of the U.S. District Court for the Northern District of West Virginia. That suit is nearly identical to this suit, involving the same types of claims, issues, parties, attorneys and expert witnesses. This case was stayed for over a year pending the outcome of *Proctor* so that this Court could have the benefit of the Fourth Circuit's review of the *Proctor* case. The Fourth Circuit affirmed the dismissal of *Proctor* on May 18, 2006.² The Plaintiffs' petition for rehearing was denied on July 3, 2006, and the stay was lifted in this case on October 5, 2006.

II. FINDINGS OF FACT

1. In late 1999 and early 2000, a release of gasoline occurred from underground storage tanks at 7-Eleven, Inc.'s Ranson, West Virginia store and contaminated the groundwater on and off site.
2. When 7-Eleven received notice of the leak and its contamination, it identified the leaking tank and began the remediation process as required by federal law and West Virginia law.
3. All of the Plaintiffs' properties allegedly affected by contaminated groundwater draw their water supply through a public water system.

¹ Civil Action No. 3:02-CV-21 (N.D. W.Va.); Fourth Circuit Docket No. 05-1598.

² The Complaint in *Proctor* is attached hereto as Exhibit H, and the final order entered April 25, 2005, is attached hereto as Exhibit M.

4. 7-Eleven, Inc. and its insurers have paid all of the costs of remediating the site, which includes all of the Plaintiffs' properties, such that Plaintiffs have not personally paid or expended any funds to repair their own properties.

5. Plaintiffs' expert real estate appraiser, Richard Parli, has opined that "[a]ny impact on the subject properties of the environmental contamination is temporary. Upon complete remediation, the [monitoring] wells will be removed and no stigma should remain. Thus at that time, the value of each property will return to being a function of normal market conditions." (Richard Parli Expert Report, at 4). This is the same opinion offered in *Proctor*.

6. Plaintiffs' expert witness in the area of environmental compliance, Dr. Nicholas Cheremisinoff, has also opined that the damage to the Plaintiffs' properties is temporary, and that once the properties are remediated, the properties will regain their market values. (Depo. of N. Cheremisinoff, at 199 ("Q. If the properties are remediated in five years, as ENSR estimates, and as you agree is a conservative time line, do these properties return to their original value? . . . A. Okay. At that point, property values should return to their market value, yes."); see also Cheremisinoff Report entitled "Environmental Impact Assessment from Gasoline Spill in Jefferson County, WV," at 14).

7. On February 21, 2002, a civil suit was filed by Vernon Proctor and seven other property owners in Ranson West Virginia alleging their groundwater was contaminated by the release of gasoline at 7-Eleven's Ranson store.

8. After removal to federal court, the Plaintiffs in *Proctor* moved to amend their complaint twice. The first motion sought to add Melissa Spinks as a defendant, and the second sought to add Charles and Kathryn Beahm, and Randy and Kathy Johnson (referred to

herein as “the Beahms” and “the Johnsons,” respectively) as parties plaintiff. The Court denied both motions for leave on the same grounds: “the statute of limitations ha[d] expired for the torts alleged in the complaint[.]”

9. The Beahms and the Johnsons then filed a petition for a writ of mandamus to force Judge Broadwater to allow them to intervene in *Proctor* as parties plaintiff. However, their petition was denied. In the meantime, they filed, but did not serve, the present suit. They later added the Senior Center as a plaintiff and served their amended complaint.

10. On April 26, 2005, Judge Broadwater entered summary judgment in favor of the Defendant, 7-Eleven, Inc. in *Proctor*, holding that the Plaintiffs had no evidence of recoverable damages under West Virginia law.

11. Although an appeal was filed in *Proctor*, the plaintiffs did not cite as error the Courts’ refusal to allow the Beahms and Johnsons to intervene as parties plaintiff.

12. The United States District Court for the Fourth Circuit affirmed Judge Broadwater’s entry of judgment against the plaintiffs in the *Proctor* case by unpublished opinion dated May 18, 2006.

III. RULE 56 STANDARD

Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. W.Va. R. Civ. P. 56(c). Further, “summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party,

such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

IV. CONCLUSIONS OF LAW

A. *Res judicata* is a complete bar to this suit.

The United States District Court has already ruled that the statute of limitations has expired on all claims against 7-Eleven and Melissa Spinks arising out of the 2000 gasoline release and that the Plaintiffs have no recoverable damages as a matter of West Virginia law.

The statute of limitations ruling was made twice. First, the *Proctor* plaintiffs sought to add another defendant, Melissa Spinks, to their suit, and Judge Broadwater ruled that they could not do so because the statute of limitations had expired. Later, they brought a second motion for leave to amend the complaint to add the Beahms and Johnsons. Again, the court ruled that the statute of limitations had expired, and it denied the amendment. Although the decision to disallow the addition of Melissa Spinks was appealed, the decision to prohibit the additional plaintiffs was not appealed. The Fourth Circuit did not address the merits of the statute of limitations issue. All appeals have been exhausted, and the *Proctor* judgment is now final.

Res judicata or claim preclusion “generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action.” *State v. Miller*, 194 W. Va. 3, 9, 459 S.E.2d 114, 120 (1995) (citing *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414, 66 L. Ed. 2d 308, 313 (1980); *In re Estate of McIntosh*, 144 W. Va. 583, 109 S.E.2d 153

(1959)). Claim preclusion serves to “conserve[] judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Conley v. Spillers*, 171 W. Va. 584, 588, 301 S.E.2d 216, 220 (1983) (quoting *Montana v. United States*, 440 U.S. 147, 153-54, 99 S. Ct. 970, 973-74, 59 L. Ed. 2d 210, 217 (1979)).

The basic requirements for invoking *res judicata* or claim preclusion were summarized in *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997): (1) “a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings;” (2) “the two actions must involve either the same parties or persons in privity with those same parties;” and (3) “the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.” *Id.* at syl. pt. 4. The third prong of this test is most often the focal point, since “the central inquiry on a plea of *res judicata* is whether the cause of action in the second suit is the same as in the first suit.” *Conley*, 171 W. Va. at 588, 301 S.E.2d at 220.

1. A final adjudication on the merits has now been reached in *Proctor*.

The parties agree that the first element of *res judicata* has been met by virtue of the final judgment entered in *Proctor*. See *Tolley v. Carboline Co.*, 217 W. Va. 158, 164 (2005) (holding that summary judgment is a final adjudication on the merits) (citing *Stemler v. Florence*, 350 F.3d 578, 587 (6th Cir. 2003) (“A summary judgment order is a decision on the merits.”)).

2. The *Beahn* and *Proctor* cases involve either the same parties or persons in privity with those same parties.

A plaintiff cannot escape the application of *res judicata* or collateral estoppel³ simply because he was not formally joined as a party in the prior litigation. *Gribben v. Kirk*, 195 W. Va. 488, 499 n. 21(1995). Courts generally acknowledge that "there is no generally prevailing definition of privity which can be automatically applied to all cases involving *res judicata* and collateral estoppel." 46 Am Jur 2d Judgments § 587; see *W. Va. Human Rights Comm'n v. Esquire Group, Inc.*, 217 W. Va. 454, 460-461 (W. Va. 2005) ("the concept of privity with regard to the issue of claim preclusion is difficult to define precisely but the key consideration for its existence is the sharing of the same legal right by parties allegedly in privity, so as to ensure that the interests of the party against whom preclusion is asserted have been adequately represented."). It has been recognized that "[p]rivty ... 'is merely a word used to say that the relationship between one who is a party on the record and another is close enough to include that other within the *res judicata*.'" *Rowe*, 206 W. Va. at 715. Put another way, "preclusion is fair so long as the relationship between the nonparty and a party was such that the nonparty had the same practical opportunity to control the course of the proceedings that would be available to a party." *Gribben v. Kirk*, 195 W. Va. 488, 498 n. 21, 466 S.E.2d 147, 157 n. 21 (1995) (quoting 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4466 at 430 (1981)); *Esquire Group, Inc.*, 217 W. Va. 454, 460-461.

The undisputed record clearly supports a finding of privity between the Plaintiffs in this case and the *Proctor* plaintiffs. All of the following facts establishing a privity relationship are undisputed by the Plaintiffs:

³ The concepts of *res judicata* and collateral estoppel are very similar. As the West Virginia Supreme Court recognized in *Rowe v. Grapevine Corp.*, 206 W. Va. 703, 709 (W. Va. 1999), "Res judicata 'is often analyzed ... to consist of two preclusion concepts: 'issue preclusion' and 'claim preclusion'.""

- (1) All of the parties to this case share common counsel with the parties in *Proctor*;
- (2) All of the parties to this suit had notice of the *Proctor* suit.
- (3) The Beahms and Johnsons sought to be added as parties to the *Proctor* suit and the parties proposed a common complaint alleging the same claims as to all of those parties;
- (4) After being denied joinder, the Beahms and Johnsons sought an extraordinary writ to challenge the decision not to allow them to join;
- (5) All of the parties were allegedly injured by the same release of gasoline;
- (6) All of the parties rely on the same expert witnesses that appeared in *Proctor*;
- (7) All of the parties rely on the same expert opinions offered in *Proctor*;
- (8) All of parties rely on the same witnesses offered in *Proctor*; and
- (9) All of the parties rely on the same documents and exhibits offered in *Proctor*.

The evidence the Plaintiffs rely upon has been reviewed by the federal courts and the case adjudicated. The fact that the Plaintiffs may disagree with the outcome makes no difference. As the West Virginia Supreme Court of Appeals held in *Esquire Group, Inc.*, "the key consideration" in deciding whether privity exists is "to ensure that the interests of the party against whom preclusion is asserted have been adequately represented." Under the circumstances of this case, the only reasonable conclusion is that these Plaintiffs' interests have adequately been represented by their own attorney in the *Proctor* litigation who has advanced substantially the same proof in both cases.

Virtual Representation

In past cases, the West Virginia Supreme Court of Appeals has looked to the doctrine of virtual representation to determine whether privity exists. Virtual representation, a variety of privity, "precludes relitigation 'of any issue that [has] once been adequately tried by a person sharing a substantial identity of interests with a nonparty.'" *Galanos v. National Steel Corp.*, 178 W. Va. 193, 195 (1987). *Galanos* offers several examples of circumstances which would give rise to a finding of virtual representation. One example offered by the court is that "a nonparty is bound by a prior judgment where he actively participated in and exercised control over the conduct of the prior litigation." *Galanos v. National Steel Corp.*, 178 W. Va. 193, 195 (1987) (citing *Montana v. United States*, 440 U.S. 147, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979) (finding that collateral estoppel applied to bar a federal case brought by the United States where it had exercised control over prior state court litigation by "directing and financing" the litigation).⁴

The Plaintiff's in this case have been jointly financing their litigation with the *Proctor* plaintiffs. Together, they claim to have incurred over \$100,000 in litigation expenses. Not only are these parties using the same expert witnesses, they are spreading the costs of the litigation among the plaintiffs in both cases. This gives the *Beahm* plaintiffs a financial interest in the outcome of the *Proctor* litigation. Such a financing arrangement, coupled with the active participation of the *Beahms* and *Johnsons* in the *Proctor* litigation, demonstrates sufficient

⁴ The *Montana* case, cited with approval by the West Virginia Supreme Court in *Galanos*, tends to support application of claim preclusion in this case, as the five factors found to support collateral estoppel in that case are all present in this case. They are: (1) exercise of control of the prior litigation by directing and financing of the litigation; (2) the presentation of the same legal claims in the second case as were presented unsuccessfully in the first; (3) the similarity in the controlling facts in both cases (even though the contracts at issue in the two cases were different); (4) there had been no changes in controlling law between the first case and the second; and (5) there were no special circumstances justifying an exception to general principles of estoppel.

control over these cases to create privity. *See Montana*, 440 U.S. 147, 153-154 (“To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. These interests are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved.”)

In addition, the Beahms and Johnsons themselves recognized in the *Proctor* litigation that their claims may be barred by res judicata. In their petition for writ of mandamus with the Fourth Circuit, the Beahms and Johnsons made the following argument:

[D]isposition of the claims of the Plaintiffs in this action [*i.e.* the *Proctor* plaintiffs] in the absence of the Petitioners [*i.e.* the Beahms and the Johnsons] as parties Plaintiff will impair and impede the Petitioners’ ability to protect their claim. **Petitioners, by not moving to join this action as parties Plaintiff, risk the barring of their claims by res judicata and or collateral estoppel, e.g. see *Haba v. Big Arm Bar & Grill, Inc.*, 196 W.Va. 129, 468 S.E.2d 915 (1996).**

The inconsistency of their position with their current position is troublesome. The conduct fits the Plaintiffs squarely within a second category of virtual representation recognized in *Galanos*, in which the court noted that where “a nonparty’s actions involve deliberate maneuvering or manipulation in an effort to avoid the preclusive effects of a prior judgment” that non-party will be bound by the prior judgment. The Plaintiffs knew that once they were denied leave to join as parties in *Proctor* based on the statute of limitations, they would be bound by the final judgment. For that reason, they filed this civil action in an attempt to avoid the ruling against them. The law does not permit such tactics to succeed.

3. Many of the causes of action in *Beahm* are identical to the causes of action in *Proctor*, and the others were resolved or could have been resolved, had they been presented.

The third element of *res judicata* is satisfied because the causes of action identified for resolution in this proceeding are either identical to the cause of action determined in *Proctor* or are such that they could have been resolved, had they been presented, in *Proctor*. Although the Plaintiffs claim that this case involves claims for nuisance and trespass which were not asserted in *Proctor*, such claims could easily have been asserted and resolved in *Proctor*. *Proctor* was dismissed because no recoverable damages were suffered, and the measure of damages under *Jarrett* is the same regardless of the legal theory (negligence, strict liability, nuisance, trespass, etc.) A review of the causes of action in the two suits shows that the cases are not only identical for all practical purposes, but also that any of the claims made against the Defendants in this case either were made or could have been made in *Proctor*.

The application of *res judicata* under similar circumstances was considered by the Supreme Court of Illinois in *Gregory v. County of La Salle*, 40 Ill. 2d 417, 240 N.E.2d 609 (1968). After a decedent's property escheated to the state, certain putative heirs emerged. One group of alleged heirs sought to recover the estate in state court, while another group filed a petition in federal court. All parties to the state action successfully intervened in the federal action except for two intervenors who were denied leave to intervene on the ground that the statute of limitations had run. The time-barred intervenors attempted to relitigate their claims in state court, and the court stated that it was of the opinion that the denial of the prior motion to intervene by the federal court "amounted to a conclusive adjudication of their rights to the escheated property and even if erroneous could not be collaterally attacked in the State proceeding":

No question of supremacy of the Federal and State courts is involved, since in this case, proceeding under diversity jurisdiction, the Federal court is in effect another court of the State. *Angel v. Bullington*, 330 U.S. 183, 91 L. Ed. 832. . . . [T]he Federal court proceeding has now terminated in a final order entered on July 16, 1968, holding that the plaintiffs therein were entitled to the proceeds from the escheated property. Under the most basic fundamentals of *res adjudicata* such a holding by a court having jurisdiction of the subject matter is conclusive as to all parties to the proceeding as to their interests in the escheated property. This doctrine applies not only to all matters which were decided but also to those matters which might properly have been decided.

The question of the rights of [the two time-barred parties] was properly presented to the Federal District Court by their motion to intervene in the proceeding to set aside the escheat in which they fully set forth their claims. This motion was denied on the ground that their claim was made too late under Illinois law. Thereafter [the time-barred parties] sought to present the same claims to the State court in this proceeding. Because of the prior adjudication by the Federal court, they had no right to do so at either the trial or appellate level. It, therefore, follows that the appellate court was correct in denying leave to file a cross appeal, and the judgment of the Appellate Court of Illinois, Third District, is affirmed.

40 Ill. 2d 417, 421-22; 240 N.E.2d at 612. The same logic applied in the *Gregory* case applies here. It is undisputed that the Beahms and Johnsons first chose federal district court to prosecute their claims against 7-Eleven, Inc. by seeking to intervene in the ongoing *Proctor* litigation. Only *after* having their claims dismissed on the statute of limitations defense did they serve and pursue the present action. The District Court fully considered the statute of limitations issue twice—once when the *Proctor* plaintiffs moved to add a defendant, then again when they attempted to add plaintiffs. The Beahms and Johnsons unsuccessfully brought an extraordinary writ petition to challenge the ruling, but after the entry of a final order in *Proctor* made the interlocutory order denying leave to amend final as well, they chose not to pursue an appeal. Having waived their appeal of the adverse ruling in federal court, the Plaintiffs are not entitled to relitigate those claims here in hopes of obtaining a different result.

Furthermore, because all of the parties to the present case are in privity with the *Proctor* plaintiffs, they are all bound by the final judgment in *Proctor* that plaintiffs have no recoverable damages under state law. This result is dictated by the doctrine of *res judicata*.

B. The Plaintiffs have no recoverable damages under West Virginia law.

Even if *res judicata* were not a complete bar to this suit, summary judgment is nevertheless appropriate for the same reasons summary judgment was entered against the *Proctor* plaintiffs—the Plaintiffs have no evidence of damages recoverable under state law. The Plaintiffs' measure of damages is their costs of repairing their properties, and they have incurred no repair costs. The West Virginia Supreme Court of Appeals set forth the standard for the measure of damages to real property in the case of *Jarrett v. E. L. Harper & Son, Inc.*, 160 W.Va. 399, 235 S.E.2d 362 (1977) in syllabus points two and three as follows:

2. *Damages.* When realty is injured the owner may recover the cost of repairing it, plus his expenses stemming from the injury, including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover its lost value, plus his expenses stemming from the injury including loss of use during the time he has been deprived of his property.

3. *Damages – Evidence.* Annoyance and inconvenience can be considered as elements of proof in measuring damages for loss of use of real property.

Syl. Pts. 2-3, *Jarrett* (emphasis added). In other words, under *Jarrett*, if property damage is reparable, the plaintiff can recover from the tortfeasor (1) the owner's cost of repairing the property; (2) the owner's out of pocket expenses including loss of use during the repair period; and (3) if the owner suffers loss of use, then annoyance and inconvenience damages. *Id.* Diminished value only comes into play where the damage is irreparable. The court refused to permit a recovery for mental distress.

Viewing the evidence in a light most favorable to the Plaintiffs, they have suffered reparable and temporary damage to their properties as the result of the Defendants' conduct. Their own expert witnesses state that the properties have been temporarily damaged, and the Plaintiffs have no evidence that their properties have been permanently or irreparably damaged. The undisputed evidence further shows that the Plaintiffs' costs of repair have been zero. The Defendant 7-Eleven, not the Plaintiffs, is responsible for paying the full cost of remediating this site. Defendant began the remediation process years before this suit was filed. Therefore, the first element of recoverable damages under *Jarrett*, the costs of repair, is nonexistent for the Plaintiffs.

The undisputed evidence also shows that the Plaintiffs have suffered no out of pocket expenses or loss of use. During discovery, the Behams and Johnsons were served with the following interrogatories by 7-Eleven, and each Plaintiff answered as follows:

7. At paragraph 10 of your Amended Complaint, you state that you suffered "losses" as a result of Defendants' conduct. Please give an itemized account of those losses, including, but not limited to, the following: (a) Any lost wages and income; (b) any medical treatments, examinations and tests; and (c) any other out-of-pocket expenses.

ANSWER: Objection: calls for legal conclusion. Without waiving said objection, Plaintiffs have suffered diminution in property value, annoyance, inconvenience, and fear of contacting cancer. Plaintiffs have also incurred litigation expenses.

8. At paragraph 15 of your Amended Complaint, you claim to have suffered damage to your property and your person. State with specificity the nature of the damages you claim to have suffered to your property and to your person.

ANSWER: Objection: calls for legal conclusion. Without waiving said objection, Plaintiffs have suffered diminution in property value. Plaintiffs also suffer from fear of contacting cancer.

10. Describe, with specificity, all other damages, including general damages, which you allegedly suffered as a result of the

Defendants' actions, indicating the nature of those damages and your calculation of the amount of each item of such damages.

ANSWER: Objection: calls for legal conclusion. Without waiving said objection, Plaintiffs have suffered annoyance and inconvenience. This response will be supplemented.

None of the Plaintiffs seek out of pocket expense incurred as a result of the leak. During their depositions, none of the natural person Plaintiffs indicated they had lost use of their properties or suffered any out of pocket losses as a result of the contamination. Although the Senior Center had to be closed early due to fumes one afternoon, they did not suffer any out of pocket costs for which they seek recovery, nor did their loss of use last more than a few hours. None of the Plaintiffs suffered any personal injuries, or sought medical treatment for inhaling fumes or any other problems they might associate with the subterranean release. Therefore, the second element of recoverable damages is nonexistent as well.

Annoyance and inconvenience damages are not recoverable because the Plaintiffs have no loss of use. *See* Syl. Pt. 3, *Jarett* ("Annoyance and inconvenience can be considered as elements of proof in measuring damages for loss of use of real property.") (emphasis added). The Senior Center, being a corporation, can make neither a claim of personal injury nor annoyance and inconvenience.⁵ Although the Plaintiffs have argued that they are entitled to damages for "aggravation and mental anguish," they did not come forward with any evidence from the record to oppose summary judgment showing that the Plaintiffs have suffered such damages. Pursuant to Rule 56, "[w]hen a motion for summary judgment is made and supported

⁵ Although the West Virginia Supreme Court of Appeals has not ruled on the recoverability of a corporation for annoyance and inconvenience damages, *see Hardman Trucking, Inc. v. Poling Trucking, Inc.*, 176 W. Va. 575, 580, 346 S.E. 2d 661, 556 (1986) (refusing to rule on the issue), other courts have held that such damages are not recoverable. *Pak-Mor Mfg. Co. v. Brown*, 364 S.W.2d 89 (Tex. App. 1962) (reversing jury award of annoyance and inconvenience damages for corporation, holding that property "annoyance, inconvenience and discomfort was suffered by the officers and employees of the corporation, but not by the corporation.").

as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided . . . , must set forth specific facts showing that there is a genuine issue for trial." Even if the Plaintiffs were correct that recovery of mental anguish in a real property damage case is theoretically *possible*, they have shown no evidence of such damages so as to create a trialworthy issue.

The Court finds persuasive and adopts the reasoning of the United States District Court and the Fourth Circuit in *Proctor*, and hereby concludes that the Plaintiffs have no recoverable damages as a matter of state law.

Based on the foregoing, IT IS HEREBY ADJUDGED AND ORDERED that summary judgment is granted in favor of the Defendants and against the Plaintiffs, and this case is hereby DISMISSED with prejudice.

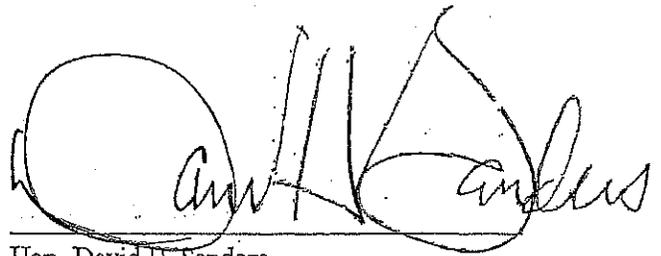
The objections and exceptions of the Plaintiffs are noted.

* The Clerk shall serve an attested copy of this Order on the following counsel of record:

Charles F. Printz, Jr., Esq.
Bowles Rice McDavid Graff & Love, LLP
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Martinsburg, West Virginia 25402-1419

Paul G. Taylor, Esq.
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ENTERED: 1/4/07



Hon. David H. Sanders

2cc
P. Taylor
C. Priddy
1/9/07
DP

A TRUE COPY
ATTEST:

PATRICIA A. NOLAND
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY _____
DEPUTY CLERK

P. Taylor

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

RECEIVED
MAR 07 2007
JEFFERSON COUNTY
CIRCUIT COURT

CHARLES & KATHRYN BEAHM, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. 03-C-13
Judge Sanders (by designation)

7-ELEVEN, INC. and MELISSA SPINKS,

Defendants.

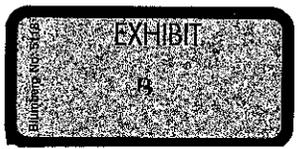
ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

ON A PREVIOUS DAY came the Plaintiffs, by counsel, on their Motion for Reconsideration of Order Granting Defendant Summary Judgment, and the Defendants in opposition to said motion. The Court has studied the Plaintiffs' Motion, the Defendants' Response, and the Plaintiffs' Reply, and has concluded that the Motion should be denied.

The Plaintiffs have styled their motion as a "Motion for Reconsideration." The West Virginia Rules of Civil Procedure do not permit a party to file a motion for reconsideration; instead, they allow a party to seek relief from a circuit court's order:

the West Virginia Rules of Civil Procedure do not recognize a "motion for reconsideration." This Court will consider a motion for reconsideration in one of two ways. If a motion is filed within ten days of judgment, the motion is treated as a motion to alter or amend judgment under Rule 59(e). Alternatively, if it is filed more than ten days after entry of judgment, we look to Rule 60(b) to provide the basis for analysis of the review.

Savage v. Booth, 196 W. Va. 65, 68, 468 S.E.2d 318, 321 (1996) (footnote omitted). Accord Franklin D. Cleckley et al., *Litigation Handbook on West Virginia Rules of Civil Procedure* 975 (2002). Given that the Plaintiffs' Motion was filed within ten days of the entry of the Court's January 4, 2007 order, the motion will be treated as one filed pursuant to Rule 59(e).



Rule 59(e) simply provides that “any motion to alter or amend the judgment shall be filed not later than 10 days after the entry of the judgment.” W.Va. R. Civ. P., Rule 59(e) (1998). The West Virginia Supreme Court has provided little guidance to the circuit courts regarding the burden of proof a moving party must meet to succeed on a motion to alter or amend. However, because the West Virginia rule is nearly identical to the federal rule, the federal authorities interpreting Rule 59(e) are instructive in making this determination. See Cleckley et al., *Litigation Handbook on West Virginia Rules of Civil Procedure* 974-975 (2002).

The draftsmen of Rule 59(e) had the “clear and narrow aim” of making it clear that under the Rules of Civil Procedure, a trial court “possesses the power to rectify its own mistakes in the period immediately following the entry of judgment.” *White v. New Hampshire Dep’t of Employment Security*, 455 U.S. 445, 450, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982). A Rule 59(e) motion “involves the reconsideration of matters properly encompassed in a decision on the merits.” J. Wm. Moore, *Moore’s Federal Practice* § 59.30[2][a]. A “motion to alter or amend a judgment must demonstrate why the court should reconsider its previous decision and set forth facts or law of a strongly convincing nature to induce the court to reverse its earlier decision.” *Moore’s Fed. Prac.* § 59.30[3] (emphasis added).

While the Rule itself provides no standard for when a trial court may grant such a motion, courts interpreting Rule 59(e) have found that the rule “permits a court to amend a judgment within ten days for three reasons: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” 12 *Moore’s Fed. Prac.* §59.30[4]; *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997); accord Cleckley et al., *Litigation Handbook on West Virginia Rules of Civil Procedure* 974-975 (2002). Trial courts have “considerable

discretion in determining whether to grant or deny a motion to alter or amend . . . [h]owever, this discretion is not limitless: the reconsideration of a previous order is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." 12 Moore's Fed. Prac. §59.30[4] (emphasis added).

The Plaintiffs in this case do not allege an intervening change in the law or that new evidence has come to light that was not previously available. Instead, their motion rests on their arguments that the Court committed an error of law that results in manifest injustice. The Court has thoroughly reviewed the alleged errors cited by the Plaintiff, and finds none of them to be meritorious. The Court sees no good cause for altering or amending its judgment in this case.

ACCORDINGLY, the Plaintiffs' Motion for Reconsideration of Order Granting Defendant Summary Judgment is DENIED.

The objections and exceptions of the Plaintiffs are noted.

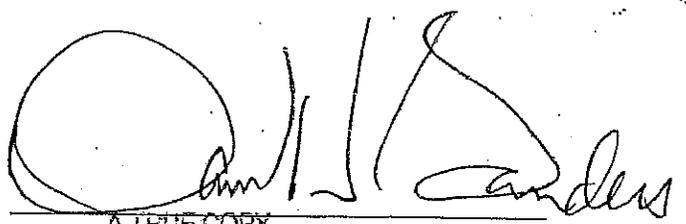
* The Clerk shall serve an attested copy of this Order on the following counsel of record:

Charles F. Printz, Jr., Esq.
Bowles Rice McDavid Graff & Love, LLP
Post Office Drawer 1419
Martinsburg, West Virginia 25402-1419

Paul G. Taylor, Esq.
Post Office Box 6086
Martinsburg, West Virginia 25402

2cc
3/8/07
DP

ENTERED: 3/5/07



Hon. David H. Sanders
ATTEST:

PATRICIA A. NOLAND
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

CIVIL CASE INFORMATION STATEMENT
CIVIL CASES

FILE

IN THE CIRCUIT COURT, JEFFERSON COUNTY, WEST VIRGINIA

I. CASE STYLE

PLAINTIFF(s)

CHARLES & KATHRYN BEAHM
107 WEST SIXTH AVENUE
RANSON WV 25438

RANDY & KATHY JOHNSON
110 WEST FIFTH AVENUE
RANSON WV 25438

JEFFERSON CO COUNCIL ON AGING
103 WEST FIFTH AVENUE
RANSON WV 25438

vs.

DEFENDANT(s)

7-ELEVEN, INC.
a corporation
2711 NORTH HASKELL AVENUE
DALLAS, TEXAS 75204

MELISSA SPINKS
68 COMFORT LANE
INWOOD WV 25428

DIRECTOR, WV DEP
1356 HANSFORD STREET
CHARLESTON WV 25301-1404

Case # 03-C-13

Judge _____

RECEIVED

MAR 06 2003

JEFFERSON COUNTY
CIRCUIT COURT

Days to
Answer

Type of Service

30

SEC OF STATE

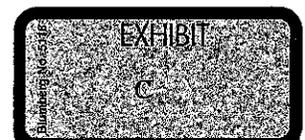
20

PERSONAL

30

CMRR

Original and 2 copies of complaint furnished herewith



PLAINTIFF: BEAHM, et al.

CASE NUMBER: 03-C-13

DEFENDANT: 7-ELEVEN, et al.

II. TYPE OF CASE:

| | | |
|---|--|---|
| TORTS | | OTHER CIVIL |
| <input type="checkbox"/> Asbestos | <input type="checkbox"/> Adoption | <input type="checkbox"/> Appeal from Magistrate Court |
| <input type="checkbox"/> Professional Malpractice | <input type="checkbox"/> Contract | <input type="checkbox"/> Petition for Modification of Magistrate Sentence |
| <input type="checkbox"/> Personal Injury | <input type="checkbox"/> Real Property | <input type="checkbox"/> Miscellaneous Civil |
| <input type="checkbox"/> Product Liability | <input type="checkbox"/> Mental Health | |
| <input checked="" type="checkbox"/> Other Tort | <input type="checkbox"/> Appeal of Administrative Agency | |

III. JURY DEMAND Yes No

CASE WILL BE READY FOR TRIAL BY (Month/Year) 01/2004

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE?

YES NO

- Wheelchair accessible hearing room and other facilities
- Interpreter or other auxiliary aid for the hearing impaired
- Reader or other auxiliary aid for the visually impaired
- Spokesperson or other auxiliary aid for the speech impaired
- Other: _____

Attorney:

PAUL G. TAYLOR

710 NORTH FOXCROFT AVENUE
POST OFFICE BOX 6086
MARTINSBURG, WV 25401
(304) 263-7900

Representing:

Plaintiff Defendant

Cross-Complainant

Cross-Defendant

Dated: 3/6/03

Paul G Taylor
Signature

Paul G. Taylor

Attorney at Law, PLLC

710 N. Foxcroft Avenue
Post Office Box 6086
Martinsburg WV 25402-6086
TaylorPaulG@aol.com

FILE

Licensed in
West Virginia and Virginia

Phone: 304/263-7900
Fax: 304/263-5545

March 6, 2003

Patricia Noland, Clerk
Jefferson County Courthouse
Post Office Box 1234
Charles Town, WV 25414

Re: Beahm, et al. v. 7-Eleven, Inc., et al.
Jefferson County Civil Action No. 03-C-13

Dear Clerk:

Enclosed please find the original FIRST AMENDED COMPLAINT for filing in the aforementioned matter.

If you have any questions, please feel free to contact my office.

Truly yours,



Paul G. Taylor

Enclosure (as stated)

FILE

SUMMONS

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

**CHARLES V. BEAHM, JR.
KATHRYN B. BEAHM,
KATHY A. JOHNSON and
RANDY W. JOHNSON, and
JEFFERSON COUNTY COUNCIL ON AGING,
a corporation,**

PLAINTIFFS,

v.

CIVIL ACTION NO. 03-C-

13

**7-ELEVEN, INC.
a corporation, and
MELISSA SPINKS, and
DIRECTOR, STATE OF WEST VIRGINIA
DIVISION OF ENVIRONMENTAL PROTECTION,**

DEFENDANTS.

**DIRECTOR, DIVISION OF
ENVIRONMENTAL PROTECTION
1356 HANSFORD STREET
CHARLESTON, WV 25301-1404**

To The Above-named Defendant(s):

IN THE NAME OF THE STATE OF WEST VIRGINIA, you are hereby summoned and required to serve upon PAUL G. TAYLOR, Plaintiffs' attorney, an answer, whose address is POST OFFICE BOX 6086, MARTINSBURG, WEST VIRGINIA 25402, including any related counterclaim you may have, to the complaint filed against you in the above styled civil action, a true copy of which is herewith delivered to you. You are required to serve your answer with THIRTY (30) DAYS after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint and you will be thereafter barred from asserting in another action any claim you may have which must be asserted by counterclaim in the above styled civil action.

Dated: _____

CLERK OF COURT

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

CHARLES V. BEAHM, JR.
KATHRYN B. BEAHM,
KATHY A. JOHNSON,
RANDY W. JOHNSON, and
JEFFERSON COUNTY COUNCIL ON AGING,
a corporation,

RECEIVED

MAR 06 2003

JEFFERSON COUNTY
CIRCUIT COURT

PLAINTIFFS,

v.

CIVIL ACTION NO. 03-C-13

7-ELEVEN, INC.,
a corporation,
MELISSA SPINKS, and
DIRECTOR, STATE OF WEST VIRGINIA
DIVISION OF ENVIRONMENTAL PROTECTION,

DEFENDANTS.

FIRST AMENDED COMPLAINT

1. Plaintiffs are residents of the State of West Virginia, and are owners in fee simple of tracts of real property situate in the Town of Ranson, Jefferson County, West Virginia. Said tracts of real property are improved with dwelling houses and other structures. Plaintiffs suffered real property damage as a result of Defendants' casting gasoline on and into their properties which was discovered in July 2002 and continuing.

2. Defendant, 7-Eleven, Inc. is a Texas corporation, authorized and licensed to do business in West Virginia, and is the owner in fee simple of a tract of real property situate in the Town of Ranson, Jefferson County, West Virginia. Said tract of real property is improved with a commercial building known as Store No. 10673 and said tract is further affixed with divers liquid fuels storage and dispensing paraphernalia.

3. Defendant Melissa Spinks, is a natural person and a resident and citizen of the State of West Virginia. Spinks was, upon information and belief, at all times material herein, employed by the Defendant 7-Eleven as a manager of the aforesaid Ranson, W. Va. 7-Eleven store.

Defendant Spinks, as manager, was responsible for the general management, supervision and control of the gasoline dispensing facilities at the Ranson store. Such responsibilities included gauging the gasoline storage tanks, recording and reporting the filling of the tanks and pump-outs of the tanks for retail delivery, maintaining records of discrepancies in tank inventory, and reporting all such information to her employer.

Defendant Spinks had a duty to report to 7-Eleven, Inc. discrepancies in the inventory of gasoline in the tanks at the Ranson store that might indicate a leaking tank or tanks.

Defendant Spinks had a duty, beyond the scope of her employment, to report her knowledge of leaking gasoline storage tank(s) at the Ranson store to the State of West Virginia environmental protection authorities.

Defendant Spinks has a duty, beyond the scope of her employment, to report to the Jefferson County authorities, including emergency organizations, her knowledge of a leaking gasoline storage tank(s) at the Ranson store.

Defendant Spinks had a duty, beyond the scope of her employment, to report her knowledge of a leaking storage tank(s) to adjoining property owners.

Defendant Spinks had a duty to report to and notify the State of West Virginia, Jefferson County, and adjoining property owners so as to prevent a disaster emanating from explosion, pollution of water resources, fouling of sewage treatment facilities, and exposing residents to gasoline and its toxic components.

Defendant Spinks was negligent in the performance and execution of her duties as manager of the Ranson store, at the least, in the administration of the gasoline storage facilities. Such

negligence exceeded the bounds of the scope of her employment with Defendant 7-Eleven and her negligence caused great harm and damage to the Plaintiffs.

Defendant Spinks breached her duties to her employer, the State of West Virginia, Jefferson County, and the adjoining property owners.

4. Defendant State of West Virginia, Division of Environmental Protection, has established, pursuant to WV Code §22-17-22, an underground storage tank insurance fund ("Fund") for the purpose of reimbursing entities such as Defendant 7-Eleven for clean up costs incurred in responding to underground petroleum storage tank releases such as the release underlying this civil action. [See West Virginia Code §22-17-21(e)(2)].

Plaintiffs anticipate that Defendant 7-Eleven has applied, or will make application in the future, to the Fund for reimbursement of clean up costs associated with the release underlying this civil action.

Plaintiffs have suffered and will continue to suffer irreparable harm unless and until they are compensated for damages caused by Defendants' wrongful release of petroleum underlying this case.

Plaintiffs object to the release of monies from or by the Fund in connection with this case unless and until Plaintiffs are made whole in this civil action.

Plaintiffs pray for a permanent injunction against the Fund enjoining the Fund from dispensing monies to Defendant 7-Eleven, its successors and assigns in connection with this case unless and until Plaintiffs are made whole in this civil action or until further order of the Court.

5. Sometime in 1976, Defendant 7-Eleven intentionally and with total disregard for the safety and quiet enjoyment of the surrounding real property owners and residents, exposed the aforesaid Plaintiffs' residences, and the public at large, to great risk and danger when Defendant constructed and installed on its said tract of real property, permanent facilities for the storage of

ultra-dangerous, highly flammable and explosive, toxic petroleum distillates. Said permanent facilities were negligently constructed by Defendant with total disregard for the dangerous propensities of the proposed use and occupation of the tract.

6. Since the year 1976, Defendants have permitted, encouraged, suffered, and profited from the storage and dispensing of the aforesaid highly flammable, ultra-dangerous, explosive and toxic petroleum distillates on its aforesaid real property.

7. Since the year 1976, and up to and including all times relevant to this complaint, Defendants, with knowing reckless disregard for the safety of others including the Plaintiffs, and knowing the dangerous propensity therein, did permit, encourage, suffer and profit from the continual storage of large quantities (20,000 U.S. Gallons) of the said highly flammable, ultra-dangerous, explosive and toxic petroleum distillates on its real property aforesaid.

8. Defendants, knowing the risk that the communities, including the Plaintiffs, were exposed to, and knowing the ultra-dangerous propensities of the aforesaid petroleum distillates, willfully failed and refused to protect the community and the Plaintiffs from the risks aforesaid by providing effective safeguards and restraints on the petroleum distillates. Defendants had a duty to exercise strict care to prevent and contain any escape of these petroleum distillates from its premises.

9. Plaintiffs discovered on or about July 2002, Defendants intentionally and recklessly permitted, suffered and did not impede the casting of thousands of gallons of the aforesaid ultra-dangerous liquid petroleum distillates onto the real property of the Plaintiffs. Such reckless and gross negligence includes, but is not limited to, Defendant Spinks' failure to properly track gasoline inventory.

10. Because Defendants have refused to acknowledge their patent liability to the Plaintiffs for the damage aforesaid; because Defendants have refused to pay any compensation to the Plaintiffs for the losses they have sustained as a result of the Defendants' intentional and reckless conduct;

Plaintiffs believe that Defendants are acting in a wanton, meanspirited and malicious manner toward the Plaintiffs. Plaintiffs demand punitive damages from the Defendants to punish them for the reprehensibility of their conduct towards Plaintiffs. Defendants were (1) aware that harm was caused to the Plaintiffs; (2) made no efforts to make amends to the Plaintiffs once their liability became clear; (3) Defendants profited from their wrongful conduct; (4) Plaintiffs were forced to incur costs of litigation to redress the harm and damage inflicted on them by the Defendants.

COUNT I

11. Plaintiffs incorporate herein by reference and reallege verbatim the preceding paragraphs of this Complaint.

12. Defendant 7-Eleven, caused to be, and permitted to be constructed on its aforescribed premises a petroleum distillate storage tank system, connecting pipes and dispensing equipment for the purpose of engaging in the retail sale of gasoline and kerosene. Defendant negligently constructed or negligently caused to be constructed, a petroleum distillate storage and dispensing system without adequate controls to inform the Defendant when leaks of the petroleum distillates from the tanks and lines occurred.

13. Defendant 7-Eleven, caused to be stored, at various times relevant herein, in tanks and pipelines, quantities of petroleum distillates up to a maximum capacity of 20,000 gallons at the aforescribed premises. The petroleum distillates so stored at the premises, gasoline and kerosene, are ultra-dangerous substances, and Defendants had a duty to exercise strict care to prevent and contain any escape of these petroleum distillates from its premises.

14. Defendants, (i) disregarding their duties to exercise strict care over the ultra-dangerous substances, and (ii) in total disregard for the safety and health of the community and the public at large, negligently failed to supervise, monitor, account for and police the storage and dispensing of the petroleum distillates.

15. In July 2002, Plaintiffs became aware of and detected that the Defendants had cast the leaking gasoline from its premises onto the property and residences of the Plaintiffs. Plaintiffs suffered damage to their property and persons which was proximately caused by Defendants' negligence in casting gasoline in large quantities onto them.

COUNT II

16. Plaintiffs incorporate herein by reference and reallege verbatim the preceding paragraphs of this Complaint.

17. Defendant 7-Eleven, at all times relevant to this Complaint, stored and dispensed ultra-dangerous petroleum distillates from its premises aforescribed.

18. Defendants negligently and without regard for the public safety of the community, residents and the public at large, failed and refused to inspect, monitor, identify, prevent and contain leaks of petroleum distillates from their storage and dispensing facilities at the aforescribed premises and because of its negligence, damaged Plaintiffs.

19. Defendants had knowledge that a leak in its petroleum storage and dispensing facilities had occurred as early as January 2000, but negligently, criminally and with malicious intent, concealed said leak from Plaintiffs, governmental response agencies, and public safety agencies, thereby causing damage to Plaintiffs.

20. From January 2000 or before, Defendants willfully, wantonly, and unlawfully cast large quantities of gasoline in and onto the properties and residences of the Plaintiffs and others causing damage to their property and persons.

21. Defendants' wilful, wanton, unlawful and negligent conduct and actions proximately caused damage to the Plaintiffs.

COUNT III

22. Plaintiffs incorporate herein by reference and reallege verbatim the preceding paragraphs

of this Complaint.

23. Defendant 7-Eleven has failed and refused to pay to Plaintiffs compensation to recompense them for their (i) diminution of the value of their real and personal property; (ii) out-of-pocket expenses incurred; (iii) inconvenience; (iv) personal injury; (v) stress, aggravation, and mental anguish; (vi) loss of use of premises.

Notwithstanding that considerable time has elapsed since Plaintiffs' suffered damage, and notwithstanding the obvious liability of Defendants to Plaintiffs, Defendant 7-Eleven has refused, with utter disregard of any decency, to compensate the Plaintiffs. Such circumstances constitute grounds for the award of punitive damages to Plaintiffs to punish Defendant 7-Eleven for their mean-spiritedness and malice.

24. Notwithstanding that Defendants have refused and failed to pay any compensation to the Plaintiffs, Defendant 7-Eleven has continued for 24 months to operate its store at the same location and continues to dispense petroleum distillates at its premises, all presumably at a profit to it.

COUNT IV

25. Plaintiffs incorporate herein by reference and reallege verbatim the preceding paragraphs of this Complaint.

26. Defendants have violated the laws of West Virginia and Plaintiffs brings this action, in addition to other grounds and causes, under the provision of West Virginia Code §55-7-9.

COUNT V

27. Plaintiffs incorporate herein by reference and reallege verbatim the preceding paragraphs of this Complaint.

28. The acts and omissions of Defendants have substantially and unreasonably interfered with the Plaintiffs use and enjoyment of their land and constitute a private nuisance.

29. Defendants acts and omissions have damaged Plaintiffs in an amount to be proven at trial.

COUNT VI

30. Plaintiffs incorporate herein by reference and reallege verbatim the preceding paragraphs of this Complaint.

31. The acts and omissions of Defendants resulting in the casting of gasoline on Plaintiffs' properties constitutes trespass.

32. Because the gasoline remains under Plaintiffs' homes, Defendants' trespass is continuing.

33. Defendants acts and omissions have damaged Plaintiffs in an amount to be proven at trial.

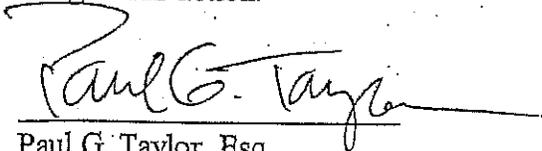
DEMAND FOR TRIAL BY JURY

Plaintiffs demand trial by jury of all issues triable of right, in accordance with Rule 38(a) R.C.P.

WHEREFORE, Plaintiffs, DEMAND judgment against the Defendants, jointly and severally, for general and special damages in an amount to be determined by a jury for:

- (a) fair market value of their real estate prior to its destruction by Defendants;
- (b) fair market value of their tenancy prior to its destruction by Defendants;
- (c) inconvenience and loss of wages and income;
- (d) fright, stress, aggravation and mental anguish;
- (e) out-of-pocket expenses;
- (f) medical expenses, including costs of examinations and tests;
- (g) emotional distress; and
- (h) injuries to Plaintiffs' bodies.

PLAINTIFFS FURTHER DEMAND punitive damages against the Defendants, jointly and severally, in an amount to be determined by a jury to punish Defendants for their mean-spirited conduct and abusive conduct directed towards Plaintiffs, both before filing this action and since the filing of this action.



Paul G. Taylor, Esq.
Counsel for Plaintiffs
Post Office Box 6086
710 North Foxcroft Avenue
Martinsburg WV 25402
(304) 263-7900
(304) 263-5545 (fax)

Charles V. Beahm, Jr., et al.
By Counsel