

33833

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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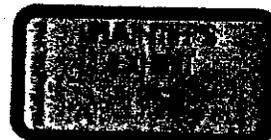
JEFFERSON COUNTY
CIRCUIT COURT

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 *Beahm* 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]rivity ... '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.

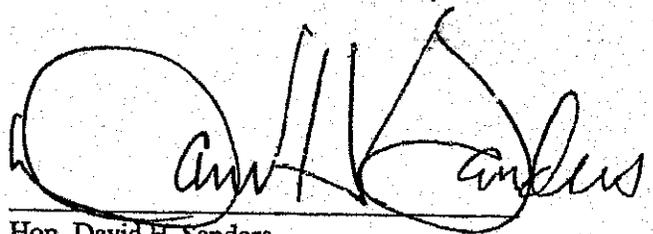
The objections and exceptions of the Plaintiffs are noted.

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

Charles F. Printz, Jr., Esq.
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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

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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.

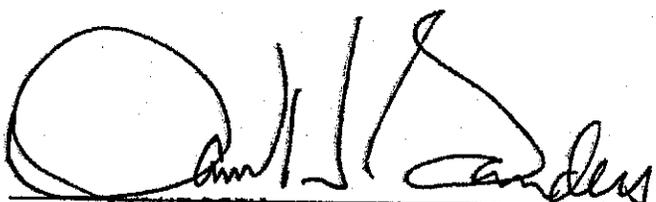
* The Clerk shall serve an attested copy of this Order on the following counsel of record:

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2cc
3/8/07
DP

ENTERED: 3/5/07



Hon. David H. Sanders
ATTEST:

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

BY D. Pettigrew
REGISTRY CLERK