

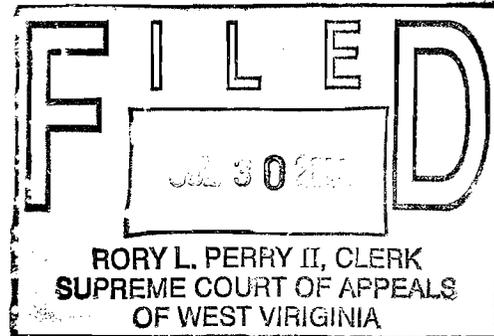
No. 090622

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRANDY PINGLEY, et al.
Plaintiffs Below, Appellant Herein,

v.

HUTTONSVILLE PUBLIC
SERVICE DISTRICT,
Defendant Below, Appellee Herein,



From the Circuit Court of Randolph County
The Honorable John L. Henning
The Honorable Jaymie Godwin Wilfong
Civil Action No. 08-C-135

BRIEF OF APPELLEE
HUTTONSVILLE PUBLIC SERVICE DISTRICT

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I. RESPONSE TO APPELLANT'S STATEMENT OF FACTS

Appellants' appeal arises out of an Order dated December 11, 2008, delivered by the Circuit Court of Randolph County, pursuant to which order the Honorable John L. Henning granted summary judgment in favor of the Appellee Huttonsville Public Service District [hereinafter "HPSD"]. The Appellants subsequently filed with the Circuit Court a Motion to Amend and/or Alter the Judgment or in the Alternative for Relief from the Court's Order Granting Motion for Summary Judgment [hereinafter referred to collectively as "Motion to Alter, Amend"]. At a hearing on plaintiff's Motion to Alter, Amend on March 9, 2009, the Circuit Court denied said motion, finding that the Appellants failed to submit any "new evidence" and further finding that the Appellants failed to properly file said motion within ten (10) days of entry of the Order granting HPSD's Motion for Summary Judgment, as required by the West Virginia Rules of Civil Procedure.¹

The action below arose after torrential rainfall that occurred in Randolph County in April 2007, which rainfall (Appellants allege) resulted in water rising into the Pingley home on or about April 14, 2007. National climatological records reflect that more than an inch of rain fell in this area in the twenty-four hour period that includes Appellants' claims.²

For HPSD, however, the timeline begins much earlier. Indeed, HPSD's records as previously produced by HPSD, and as discussed and reviewed by the Court below, demonstrate clearly that at **no time** prior to the events of April 2007 did the Appellants advise HPSD of any problems with their water/sewage system whatsoever. Further, HPSD's records for that property, also as discussed and reviewed by the Court below, indicate that previous residents had never experienced problems,

¹ Much later, the Pingleys by counsel submitted an order, reflecting the Court's rulings (signed by the Court below on June 1, 2009).

² See HPSD's Motion for Summary Judgment [hereinafter "MSJ"] at Exhibit A.

concerns, and/or damage with that property or the water systems that service it.³ Therefore, the evidence adduced below demonstrated clearly and repeatedly that HPSD did not know, nor should it have known, nor could it have known, of any potential problem with the system, even assuming *arguendo* that any problem existed.⁴

The Court below also noted the lengths to which HPSD had gone to help the Appellants, even in the absence of a duty to do so. Order (Dec. 11, 2008) at 4. For instance, when the Appellants came to HPSD's offices on April 17, 2007, HPSD promptly and effectively worked to remedy the situation, including initiating inquiries as to scope of damage (no one above or below the Pingley property experienced loss or damage) and including notifying its liability carrier. *Id.* at 3-4. Even in the absence of a duty to do so, HPSD *inter alia* paid for the repairs to the Appellants' home and paid for the Appellants to secure an alternate residence (including incidental costs related thereto) for the repair period⁵, cleaned the main line, made recommendations for avoiding future problems (increase slope, disconnect downspouts), and worked with the Public Service Commission (PSC) (at the Appellants' initiation) for the best loss prevention for the future. HPSD also replaced the line from the Pingley home to the main line.⁶

³ See MSJ at Exhibit B (Affidavit of Bonnie Serrett).

⁴ The PSD denies that problems existed then or exist now with its system. HPSD demonstrated same by producing consumer files and related documentation (including affidavits from a previous owner of the property at issue, HPSD's file materials for the interim landowners and affidavits from the Executive Secretary and the Operations Manager of the HPSD) that no calls/complaints were received related to problems at this property at any time prior to the April 14, 2007 incident – indeed, no calls/complaints were received at any time before April 29, 2008, when HPSD referenced the intervening silence in correspondence to Appellants' counsel. See MSJ at Exhibit C.

⁵ The actual monetary payments were made by HPSD by and through its insurer. See MSJ at Exhibit E.

⁶ Interestingly enough, on a subsequent visit to the Appellant's home, HPSD personnel found a child's toy – a stuffed animal – wedged into the takeout valve on the new line. See MSJ Exhibit F.

After HPSD's repair of their home and upgrade of their line, the Appellants sought compensation for a variety of alleged losses and damages up to and including divorce (which divorce petition, HPSD subsequently determined by its own inquiry, was voluntarily withdrawn). See, collectively, MSJ at Exhibit D.⁷ During the resulting exchange and the pendency of the Appellants' request for additional documentation, Appellants filed suit. See Civil Action No. 08-C-135 (Randolph County, West Virginia).

As its responsive pleading, HPSD filed a motion for summary judgment, noting that Appellants failed to make and, indeed, would be unable to make a sufficient showing on an essential element of the case they had the burden to prove: duty. See MSJ at 3-4.⁸ Through the course of briefing on these issues, Appellants provided an affidavit from their counsel, pronouncing the dispositive motion as premature and referencing a person who is alleged to have relevant expertise and who intended to opine on the state of the PSD's lines generally. See Appellants' Response to Defendant's Motion for Summary Judgment (Sept. 24, 2008) at Exhibit A. In reply, HPSD noted not only the deficiencies in Appellants' affidavit, but noted again the deficiencies in Appellants' claims. See Defendant's Reply to Appellants' Opposition to Motion for Summary Judgment (Oct. 2, 2008)

⁷ Whereas Appellant's brief references "injuries," the allegations of physical "injury" below extended only to emotional distress, annoyance, embarrassment, pain and suffering, and humiliation. See Complaint. See also Order (Dec. 11, 2008) at ¶4.

⁸ Appellant has alleged that HPSD's motion for summary judgment alleged only that no issue of material fact existed in this matter. Appellant's Brief at 2. However, the motion raised an issue of law, that plaintiffs could not prove duty, that is, that plaintiffs could not prove that HPSD had knowledge of any condition or risk that would elevate its duty beyond the well-settled law in West Virginia: without notice of a specific issue or concern with the property or service lines, a public utility has no duty to act beyond ensuring the line is open, in repair, and free from nuisance. Syl. pt. 3, 4, Calabrese v. City of Charleston, 515 S.E. 2d 814 (W.Va. 1999).

(hereinafter “HPSD Reply”). HPSD argued that Appellants failed to allege any problems with the system of which HPSD *even arguably* had pre-existing knowledge. HPSD stated further that Appellants remained unable to present even a scintilla of evidence on an essential component of their claim: duty. Over the course of the dispositive motion process, HPSD provided documentary evidence of the state of the HPSD’s pre-April 14 knowledge (none), along with, *inter alia*, documentary evidence of moneys/ services/counsel provided the Appellants after April 14, 2007, even in the absence of a duty and in the absence of any tie to the damages sustained.

HPSD’s dispositive motion was brought on for hearing on October 6, 2008. As noted above, by order dated December 11, 2008, the Circuit Court of Randolph County granted the motion for the reasons discussed above and as set out further in the order of the Court. See Order (December 11, 2008) (Henning, J.). Appellants challenged that dismissal with a motion to alter or amend, filed pursuant to West Virginia Rules of Civil Procedure Rule 59⁹ and a motion for relief from judgment or order, filed pursuant to West Virginia Rules of Civil Procedure Rule 60.¹⁰ In denying Appellants’ motion, the Circuit Court of Randolph County found that the Rule 59 motion was untimely filed and declined to address its substance. Further, the Court found that the portion of the motion that relied

⁹ West Virginia Rules of Civil Procedure Rule 59(e) provides that “[a]ny motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.” In this instance, the Court’s order was entered on December 11, 2008, and Appellants’ motion to alter or amend was filed on December 29, 2008.

¹⁰ West Virginia Rules of Civil Procedure Rule 60(b) provides that “[o]n motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).” As recently as June 22, 2009, this Court has found that the Court’s review on appeal of a denial of a Rule 60(b) motion is limited to “the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order.” Builders’ Service and Supply Co. v. Dempsey, ___ S.E.2d ___ (W. Va. 2009) (Docket No. 34154), quoting Syl. pt. 3, Toler v. Shelton, 204 S.E.2d 85 (W. Va. 1974).

upon West Virginia Rules of Civil Procedure Rule 60 related to “new” evidence was not relevant nor controlling, as the purported “new” evidence was an affidavit from Brandy Pingley’s brother in law and did not rise to the level of “new evidence” so as to relieve the Appellants from the Court’s final judgment. See Order dated June 1, 2009 (Wilfong, J.).¹¹

II. RESPONSE TO ASSIGNMENT OF ERROR

1. The Circuit Court was plainly correct in granting summary judgment in favor of Huttonsville Public Service District. No basis exists for finding or suggesting that the Circuit Court abused its discretion in granting the Motion for Summary Judgment but, rather, all of the evidence demonstrates clearly that the decision was properly based on applicable law and the Appellant’s inability to make a sufficient showing on an essential element of the case that they have the burden to prove: duty.

III. AUTHORITIES RELIED UPON

CASES

Calabrese v. City of Charleston, 515 S.E. 2d 814 (W.Va. 1999). 3, 6, 8, 14
Builders’ Service and Supply Co. v. Dempsey, ___ S.E.2d ___ (W. Va. 2009)
(Docket No. 34154) 4, 7
Toler v. Shelton, 204 S.E.2d 85 (W. Va. 1974) 4, 7
Gerver v. Benavides, 530 S.E.2d 701 (W.Va. 1999) 5
Powderidge Unit Owners Ass’n v. Highland Properties, Ltd., 474 S.E.2d 872 (W. Va. 1996) 5,10
Burgess v. Porterfield, 469 S.E.2d 114 (W. Va. 1996) 7
Conley v. Johnson, 580 S.E.2d 865 (W. Va. 2003) 7
Absure, Inc. v. Huffman, 584 S.E.2d 507 (W. Va. 2003) 7
Burless v. West Virginia University Hospitals, 601 S.E.2d 85 (W. Va. 2004) 7, 13
Brady v. Deals on Wheels, Inc., 542 S.E.2d 457 (W. Va. 2000) 7, 13, 14
Strahin v. Cleavenger, 603 S.E.2d 197 (W. Va. 2004) 9
Aikens v. Debow, 541 S.E.2d 576 (W. Va. 2000) 9
Haddox v. Suburban Lanes, Inc., 349 S.E.2d 910 (W. Va. 1986) 9
Crum v. Equity Inns, Inc., ___ S.E.2d ___ (W. Va. 2009) (WL 1835108) 11, 12
Brady v. Reiner, 198 S.E.2d 812 (W. Va. 1973) 14

STATUTES

¹¹ See also Gerver v. Benavides, 530 S.E.2d 701 (W.Va. 1999); Powderidge Unit Owners Ass’n v. Highland Properties, Ltd., 474 S.E.2d 872 (W. Va. 1996).

<u>RULES</u>	West Virginia Rules of Civil Procedure Rule 59	4
	West Virginia Rules of Civil Procedure Rule 60	4, 5
	West Virginia Rules of Civil Procedure Rule 59(e)	4, 11, 12
	West Virginia Rules of Civil Procedure Rule 60(b)	4
	West Virginia Rules of Civil Procedure Rule 59(b)	4
	West Virginia Rules of Civil Procedure Rule 56(f)	10, 11, 12
	West Virginia Rules of Civil Procedure Rule 56	11, 12

IV. DISCUSSION OF LAW

It was the Appellant’s burden to prove in the case below that HPSD breached its duty of reasonable care to avoid damage to the property of others, namely the Appellant’s property. It is well-settled law in West Virginia that without notice of a specific issue or concern with the property or service lines, a public utility has no duty to act beyond ensuring the line is open, in repair, and free from nuisance. Syl. pt. 3, 4, Calabrese v. City of Charleston, 515 S.E. 2d 814 (W.Va. 1999).

The undisputed facts considered by the Circuit Court of Randolph County demonstrate that the Appellants were unable to meet their burden of proof on the issue of duty, an essential element of their case, and that, therefore, judgment as a matter of law was the appropriate remedy. Appellants lament now that they were not permitted to conduct any discovery whatsoever. However, Appellants did not submit their own affidavits of alleged previous problems with the property nor of alleged previous discussions with HPSD personnel regarding the property. Appellants did not contact or attempt to depose the previous landowners nor HPSD’s personnel in any effort to challenge the affidavits submitted by HPSD. Appellants did nothing to gather information or evidence of any previous knowledge by HPSD. The fact of the matter is that Appellants did not offer one scintilla of evidence to show that they – or any other person – notified HPSD of an issue or concern with the Appellants’ water/sewer lines prior to the events of April 14, 2007 – in part, no doubt, because no such evidence exists. Conversely, HPSD offered substantial evidence to

demonstrate that at no time prior to the events of April 14, 2007, was it notified by anyone (including, but not limited to, the Appellants) of a problem with the lines at the Appellants' property. On the basis of the undisputed facts, testimony and documentary evidence, the court below properly granted summary judgment in favor of HPSD.

A. Standard of Review.

The Supreme Court of Appeals of West Virginia shall review the circuit court's final order and ultimate disposition under an abuse of discretion standard. The Court shall review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*. Syl. Pt. 4, Burgess v. Porterfield, 469 S.E.2d 114 (W. Va. 1996); Conley v. Johnson, 580 S.E.2d 865 (W. Va. 2003); Absure, Inc. v. Huffman, 584 S.E.2d 507 (W. Va. 2003).¹²

B. The Circuit Court was correct in granting summary judgment in favor of Huttonsville Public Service District on the basis that the Appellants cannot make a sufficient showing on an essential element of the case that they have the burden to prove, namely that the Huttonsville Public Service District breached a duty to the Appellants as relates to the events of April 2007.

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. 3, Burless v. West Virginia University Hospitals, 601 S.E.2d 85 (W. Va. 2004); Syl. pt. 2, Brady v. Deals on Wheels, Inc., 542 S.E.2d 457 (W. Va. 2000). In this instance, as recognized by West Virginia's Supreme Court of Appeals in other instances and as recognized by the Circuit Court of Randolph County on at least two occasions, summary judgment is appropriate because "a

¹² Appellants have not challenged the denial of their Motion to Alter, Amend on the basis of newly discovered evidence. Had Appellants questioned that denial, the review would have been limited to the substance of the order denying their motion. See, e.g., Builders' Service and Supply Co. v. Dempsey, ___ S.E.2d ___ (W. Va. 2009) (Docket No. 34154), quoting Syl. pt. 3, Toler v. Shelton, 204 S.E.2d 85 (W. Va. 1974).

municipality, in the maintenance of its sewerage system, owes only the duty of reasonable care to avoid damage to the property of others.” Calabrese v. City of Charleston, 515 S.E.2d 814, 822 (W. Va. 1999). The undisputed facts of this case show that, as a matter of law, HPSD behaved reasonably in fulfilling its duty to the Pingley family prior to April 14, 2007, and in greatly exceeding any duty owed to the Pingley family thereafter. The Circuit Court’s entry of summary judgment in favor of HPSD was appropriate and just. Therefore, the Order of December 11, 2008, should be affirmed.

HPSD has consistently denied – and has asserted its denial under oath – any allegation of problems with the lines at issue in this suit. See MSJ at Exhibit B. HPSD had no previous knowledge nor even inquiry notice of impending issues, including no requests for work on the line and no complaints of slow or otherwise problematic drainage or water handling at this site. Id. Through all of the pleadings and arguments and rulings in this matter, it has been and remains to this day an undisputed fact that HPSD received no complaints about or work orders related to the lines from the Appellants prior to April 2007 nor from the previous landowner at any time prior to the date of this incident.¹³ Id. See also HPSD Reply at Exhibit 1 (Affidavit of Catherine Hans); Huttonsville’s Response in Opposition to Appellants’ Motion to Huttonsville’s Public Service District’s Response in Opposition to Appellants’ or Amend (hereinafter “HPSD Opposition”) (Jan. 15, 2009), at

¹³ After the Pingley suit was filed, HPSD initiated inquiries into the experiences of previous owners of the property at issue. In the process of so doing, HPSD was advised that the previous residents (who lived in the home for nearly twenty years) had no trouble with sewage backing up or otherwise entering the home. See, e.g., HPSD Reply at Exhibit 1. On only one occasion did water enter the home – in approximately 1981, when a flash flood resulted in water cascading down the steep hill behind the house and into the utility room. At that time, the previous owners added boards around the porch on the side of the house facing the steep hill, and it is our understanding that water never entered the home again until April 2007. Also, the previous owners added onto the house, including adding an additional bathroom off of the kitchen, further adding a gravel bed approximately a foot from the house with two layers of drain tile. The previous owner reported that all of these systems, while correctly maintained and operative, worked to keep the water from coming down the hill behind the house and entering the house.

Exhibits A, B, C and D.¹⁴

As noted below, however, upon notice of the loss/damage, HPSD's actions exceeded its duty, went beyond any concept of "reasonable," in that it remedied the situation swiftly and effectively. It is an undisputed fact that HPSD spent over \$60,000 to make repairs to the property, to upgrade the system, to care for the Appellants' needs in the interim and to cover administrative expenses (\$5,400). See MSJ at Exhibit E (receipts for work done, moneys paid). If HPSD had knowledge of any impending damage and if HPSD had ignored its duty to intervene, then arguably HPSD would be liable for the damages that could reasonably be seen to arise from that breach. See, e.g., Syl. pt. 7, 8, Strahin v. Cleavenger, 603 S.E.2d 197 (W. Va. 2004); Syl. pt. 6, Aikens v. Debow, 541 S.E.2d 576 (W. Va. 2000); Syl. pt. 6, Haddox v. Suburban Lanes, Inc., 349 S.E.2d 910 (W. Va. 1986) However, in this instance, where HPSD did not know and could not have known of problems with the line, where Appellants produced not one scintilla of evidence nor one allegation of a previous problem with or complaint related to that line, the Appellants were not entitled to recover any sums whatsoever against HPSD. That said, the Appellants recovered significant sums already, and their repeated and endless efforts to enrich themselves further are unjust.¹⁵

The Order of December 11, 2008, was plainly correct in granting summary judgment in favor

¹⁴ As noted in HPSD's Opposition, HPSD used an abundance of caution in providing the Court with copies of consumers' files. While those files at issue appeared not to contain confidential information, HPSD declined to introduce documentation of non-parties into the public arena. Therefore, copies of Exhibits B, C and D were provided to Appellants' counsel and the Court, but were not filed in the open Circuit Clerk's file with the Response in Opposition. In the same vein, HPSD will supplement the submission with copies of the consumers' files upon the Supreme Court's request for same.

¹⁵ On March 30, 2009, the Appellants filed suit again in Randolph County as against HPSD, raising vague allegations of negligence and loss – but not specifically identifying incidents of injury nor specific losses nor dates upon which any alleged loss(es) were to have occurred. See Civil Action No. 09-C-81 (Randolph County, West Virginia) at Complaint, generally (stayed by agreed order, entered on June 23, 2009).

of HPSD and therefore, should not be disturbed on appeal. Thus, HPSD prays that this Honorable Court AFFIRM the Order of December 11, 2008.

C. The Motion for Summary Judgment filed on behalf of HPSD was not premature. It is undisputed that the Appellants never informed the HPSD of any problems they experienced with the water/sewage system prior to the events of April 14, 2007. Further, the Appellants did not raise any allegation before the Circuit Court that there was a pre-existing problem with the sewer line.

Appellants' brief to this Court relies solely on the Appellants' assertion that HPSD's dispositive motion was premature. Appellant's Brief at 5, 7, 10. In support of that assertion, Appellants rely in pertinent part upon West Virginia case law setting out a "departure" from the requirements of West Virginia Rules of Civil Procedure Rule 56(f) for non-moving parties to follow in avoiding summary dismissal. Syl. pt. 1, Powderidge Unit Owners Ass'n v. Highland Properties, 474 S.E.2d 872 (1996). Specifically, in Powderidge, the West Virginia's Supreme Court clarified that the affidavit from counsel, as provided by the Appellant's in their brief in opposition to HPSD's Motion for Summary Judgment, is intended to demonstrate that the evidence necessary to support Appellants' claim exists (but has not yet been developed in discovery). Powderidge, 474 S.E.2d at 882. The affidavit provided by the Appellants, however, failed to accomplish that goal. That is, instead of providing, by example, an affidavit from either of the Appellants, testifying that complaints of problems with the line had been made to HPSD prior to the loss at issue (that is, that HPSD had knowledge of issues with this line), Appellants provided this Court with counsel's proffer as to efforts made to obtain documents from HPSD and with expectations of what an expert witness may deliver. The Affidavit submitted by the Appellants was insufficient to comply with the rationale and goal of the Powderidge court, in that the Affidavit did not demonstrate to the Circuit Court that the evidence necessary to support Appellants' claim exists.

In Crum v. Equity Inns, Inc., ___ S.E.2d ___ (W. Va. 2009) (Docket No. 34400) (WL 1835108), this Court was recently asked to determine whether a circuit court’s grant of summary judgment was appropriate under a set of facts very similar to the matter *sub judice*. In Crum, defendant Equity Inns, Inc., filed a motion for summary judgment, which it supported with an expert report, to challenge plaintiff’s negligence claim arising out of a fallen light fixture. The plaintiff, in turn, submitted only a one-page Response, in which he asserted, *inter alia*, that the defendant’s summary judgment motion was premature based on incomplete discovery. The plaintiff subsequently appealed the decision of the circuit court that had granted the defendant’s motion for summary judgment.

Regarding the plaintiff’s one-page Response, this Court stated, “Appellant failed to produce any evidence, affidavits, admissions, or other materials which show that there is an issue of material fact...and failed to identify with reasonable specificity the facts that still needed to be discovered, or explain how the facts might show that there is a genuine issue of material fact that would defeat summary judgment. Rule 56 of the *West Virginia Rules of Civil Procedure* requires more than this.” Crum, supra. This Court further explained that the party making an informal Rule 56(f) motion must, at a minimum, satisfy four requirements, in that the party should “(1) articulate some plausible basis for the party’s belief that specified ‘discoverable’ material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.” Id. Finding that the Appellant failed to offer specific facts or evidence showing that there was a genuine issue remaining for trial, this Court affirmed the circuit court’s grant of summary judgment in favor of Equity Inns. Id.

In the matter *sub judice*, the Appellants likewise have failed to offer any specific facts or evidence showing that there was a genuine issue remaining for trial. To the contrary, in response to HPSD's motion for summary judgment – and even now, before this Court – the Appellants' only basis for contending that summary judgment was premature is to argue that no discovery was conducted and to speculate regarding a purported expert's possible opinions. The Appellants' response is inadequate in light of the mandates of Rule 56 and this Court's recent Crum opinion. The Appellants have not offered any evidence, affidavits, admissions, or other materials which show that there is an issue of material fact and they have failed to identify with reasonable specificity the facts that still needed to be discovered.

With respect to the argument that HPSD's motion for summary judgment was premature and should not have been granted due to lack of discovery, it is important to note the timeline with respect to HPSD's motion. First, HPSD's motion for summary judgment was filed on July 11, 2008. The Appellants did not file any response to the dispositive motion until September 24, 2008. Thus, more than two (2) months passed between HPSD's filing of its motion for summary judgment and the Appellants' response, asserting that the motion was premature for lack of discovery. However, during that period of more than two (2) months, the Appellants failed to serve upon HPSD any written discovery and failed to request the deposition of any HPSD representative, including the individual who authored the affidavit attached to the motion for summary judgment – or, for that matter, those who submitted affidavits thereafter (including the Pingleys' own brother in law, whose affidavit was filed with the Motion to Alter, Amend). Certainly, if the Appellants believed discovery was key to challenging HPSD's motion for summary judgment, they had ample time to conduct such discovery. The Appellants have failed to demonstrate good cause for their failure to have conducted discovery earlier, as is one of the four (4) requirements for the party bringing an informal Rule 56(f) motion, as set forth in Crum, *supra*.

In a nutshell, the Affidavit by counsel and the Appellants' corresponding argument that HPSD's Motion for Summary Judgment was premature for lack of adequate discovery is essentially a red herring. Beyond the fact that the document collection-exchange efforts were ongoing at the time Appellants elected to file suit and the fact that any true expert cannot predict findings before his or her review (and cannot determine what condition the lines were in and what knowledge HPSD had of that condition without relying on the documentation produced by HPSD in any event), the fact of the matter remains that Appellants' case is fatally flawed in that Appellants have not – indeed, cannot – “make a sufficient showing on an essential element of the case that [they have] the burden to prove.” Syl. pt. 3, Burless, supra; Syl. pt. 2, Brady, supra.

For a viable claim in this matter, at the least, Appellants needed to allege the basis of HPSD's duty to the Appellants *vis a vis* the sewer line and flooding at issue. Without knowledge of any problem with the line whatsoever, HPSD had no duty to the Appellants other than “reasonable care” – that is, to provide service, which it did. It was undisputed at the time its Motion for Summary Judgment was granted – and indeed, remains undisputed now, as evidenced by the Appellant's Brief – that HPSD had no knowledge of pre-existing problems with the water/sewer line at issue. Notwithstanding their opportunity to appear before this Court to plead their case, Appellants have produced not one scintilla of evidence that HPSD had a duty to act differently than it did at any time prior to the flooding of which Appellants complain. Even here, Appellants have not provided an affidavit nor other evidence or allegation of notice provided and/or complaints made to HPSD regarding any issues with the line or sewage or water. It is axiomatic under West Virginia law that “[t]o successfully resist a motion for summary judgment, the party against whom it is made must present some evidence to indicate to the court that facts are in dispute. ... The mere

contention that issues are disputable is not sufficient to deter the trial court from the award of summary judgment.” Brady v. Reiner, 198 S.E.2d 812 (W. Va. 1973).

Without notice of a specific issue or concern with the property and/or service lines at issue, HPSD had no duty to act beyond ensuring that the line was open, in repair and free from nuisance. See, e.g., Calabrese v. City of Charleston, 515 S.E.2d 814, 823 (W. Va. 1999).

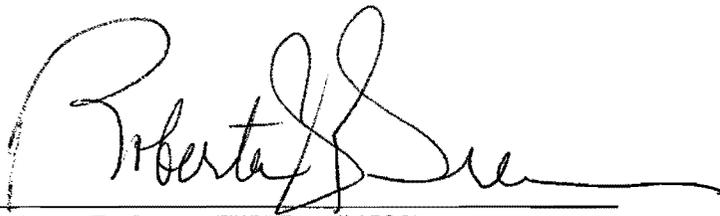
The undisputed facts of this case show, as a matter of law, that HPSD behaved reasonably in fulfilling its duty to the Pingley family prior to April 14, 2007, and in greatly exceeding any duty owed to the Pingley family thereafter. Further, Appellants have stopped far short of demonstrating even a scintilla of evidence, by affidavit or otherwise, of unreasonable behavior or of any duty (heightened or otherwise) as relates to the loss alleged in this matter.

For these reasons, the Order of December 11, 2008, granting summary judgment in favor of HPSD, was correct and should be AFFIRMED.

V. CONCLUSION

The Appellants have failed to raise any novel issues of law or fact that would justify overturning the Circuit Court’s well-reasoned Order replete with substantial findings of fact and conclusions of law. As such, Huttonsville Public Service District respectfully requests that this Honorable Court AFFIRM the Order of December 11, 2008.

HUTTONSVILLE PUBLIC SERVICE DISTRICT,
By Counsel.

A handwritten signature in black ink, appearing to read "Roberta F. Green". The signature is written in a cursive style with a long horizontal flourish extending to the right.

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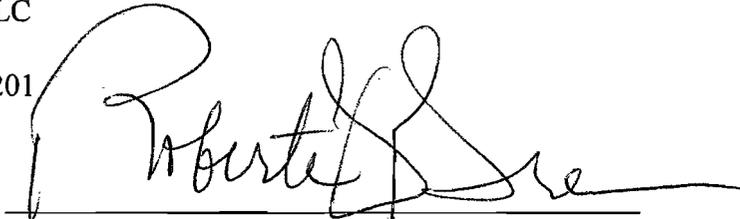
v.

**HUTTONSVILLE PUBLIC
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Defendant Below, Appellee Herein,

CERTIFICATE OF SERVICE

I, Roberta F. Green/ Heather B. Osborn, certify that on this 30th day of July, 2009, a true and exact copy of the foregoing "**Brief of Appellee Huttonsville Public Service District**" has been forwarded to counsel of record, via regular mail, as follows:

Erika H. Klie-Kolenich, Esquire
Klie Law Offices, PLLC
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Buckhannon, WV 26201

A handwritten signature in black ink, appearing to read "Roberta F. Green", written over a horizontal line.

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