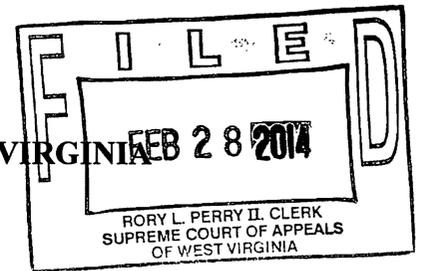


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 13-1083



**JENNIE BROOKS; MARY ADKINS;
WALTER BOYLE and VAUGHNA BOYLE;
BRIAN BRADLEY and EVANGELINE BRADLEY;
DALE CAMPBELL; JAIME CAMPBELL;
JONATHAN ESTEP and JULIE ESTEP;
ROY GWILLIAMS and BETTY GWILLIAMS;
AMANDA HICKS; SARA JAROS;
JOHN JONES and KAREN JONES;
DONZIE KAYLOR; ROGER KAYLOR;
JAMES KUHN and MINDY KUHN;
ROBERT MCCLOUD and
MELISSA MCCLOUD; DAN MCGLONE and
JUNE MCGLONE; DON NAPIER;
SHERRI NAPIER; DAVID STAMPER;
BERNIE THOMPSON and NANCY THOMPSON; and
THOMAS WELLMAN;**

Petitioners,

v.

**CITY OF HUNTINGTON, a West Virginia
municipal corporation,**

**Case No. 13-1083
(On Appeal from Wayne County
Circuit Court, Civil Action No. 11-C-125)**

Respondent.

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred by reducing the damages awarded by the jury for the costs of necessary repairs to the Petitioners' homes.
2. The Circuit Court erred by reducing, without justification, the entire damages award for the cost of repairing the Petitioners' homes.
3. The Circuit Court erred by ordering a remittitur and reducing the jury's damages award without first giving the Petitioners the option of electing a new trial.

STATEMENT OF THE CASE

During a four-day trial, a Wayne County jury heard all the relevant evidence in this case and concluded the City of Huntington (City) negligently maintained a stormwater system and caused hundreds of thousands of dollars in damages to residents of the Spring Valley area of Wayne County, just outside the City's limits. The jury had learned that, as a result of the flooding that system failed to prevent, what was once a thriving neighborhood is now full of vacant lands, with almost a dozen homes bought out by government agencies and razed. Despite the destruction, some residents, the Petitioners (and Plaintiffs below), still reside in Spring Valley. In order to do so safely and to recover their losses, they sued the City not only for their personal property losses, but also for the reduced value of their properties, as well as the cost to elevate their homes and guard against yet more flooding—essentially, to mitigate their damages and because they do not want to abandon their homes and businesses.

After finding that the City was negligent, the jury in this case relied on expert testimony in awarding the Petitioners damages for, *inter alia*, the diminished value of their homes and the cost of repairing their homes by elevating them above the new benchmark flood elevation established by the City's negligence. As compensation for these and other injuries, the jury awarded Petitioners \$935,522.10, plus pre- and post-judgment interest.

In its post-trial ruling, the Circuit Court correctly denied the City's motion for new trial based on its finding that the costs of raising the Petitioners' homes was a necessary repair, rather than an improvement. Then, without conducting any additional analysis, the Circuit Court simply found that the Petitioners were "not entitled to recover both the loss in Fair Market Value of real property and the Cost of Repair." (J.A.000029.) This reasoning led the Circuit Court to reduce the jury's damages award by \$482,250.00, or more than half the total damages award.

Petitioners bring this appeal because the Circuit Court's remittitur – ordered without even providing Petitioners the opportunity for a new trial – was wrong as a matter of law.

The storm-water control system at issue was put in place in 2005. Essentially, the project consisted of a trash rack, junction box, and long culvert that would take water flowing out of Spring Valley and push it through a culvert system constructed under the City of Huntington, allowing it to exit into a stream closer to the river. The jury was presented with this diagram of the project and neighborhood, which contains the names of the Plaintiffs, the locations of their homes, and the pertinent components of the project:



(J.A.001758.)

The City of Huntington built the system to deal with “nuisance” flooding within the City limits, which is depicted at the top of the picture across James River Road. Charles Holley, the city official in charge of the project, summed it up best:

So, this is a project that was designed, [t]he purpose of it was to alleviate flooding, certainly. Now, that we have this project. . . [w]e’ve cured one problem. Again, it seems like it’s pushed the whole problem, again, upstream.

(J.A.001085.)

Soon after the project’s 2005 completion, during the summer of 2006, residents in Spring Valley were hit with two major floods. Two more floods ravaged the area in 2009. In 2008, the affected residents filed a lawsuit against the City of Huntington relating to the 2006 floods, later

amending it to address the 2009 floods. In 2010, a jury found that the City had negligently maintained and operated the storm-water control system and caused each of the floods.

Notwithstanding the first lawsuit, the City halted its efforts to monitor and maintain the system in early 2011. On May 10, 2011, heavy rains fell in Spring Valley and the City's failure to maintain the storm system again caused flooding that proved to be even more severe than any of the prior floods. Mr. Holley's description of the project's effect proved to be entirely correct: it alleviated flooding within the City of Huntington, but then pushed that flooding up onto the residents of Wayne County living in Spring Valley.

As Plaintiffs' expert in storm-water systems, hydrology and hydraulics, Mark Kiser, explained to the jury, the flooding was caused by debris that had accumulated on the trash rack, restricting the flow of water through it. (J.A.001213.) This impeded the ability of water to flow into the culvert under the City and be carried on towards the river. (*Id.*) As a result, the water backed up to the section of Krouts Creek between the trash rack and the bottom of the Spring Valley neighborhood. (*Id.*) Once it filled up that area, it overspilled the banks and flooded Petitioners' neighborhood, creating a large lake in Spring Valley that enveloped the Plaintiffs' homes. (*Id.*)

Since this storm water system was put in place in 2005, the residents of Spring Valley have suffered *five* major instances of flooding through, as determined by jury trial, the City's negligence. These five floods have destroyed this once vibrant neighborhood. The before and after photographs of this community are striking. The brown patches depicted on the picture below are the locations of houses that were razed following these floods.



(J.A.001759.)

On July 6, 2011, multiple residents affected by the May 2011 flood brought suit against the City in the Circuit Court of Wayne County. A jury trial was held between January 22, 2013, and January 25, 2013. In addition to their own testimony, the Petitioners presented expert testimony on damages. A licensed real estate appraiser opined as to the diminished property values caused by the City's negligence. In addition, a structural engineer testified as to (1) the need to elevate the remaining homes in Spring Valley by two feet in order to accommodate a new benchmark flood elevation caused by the City's negligence, and (2) the costs of elevating the Petitioners' homes.

On January 25, 2013, the jury entered a verdict in favor of the Petitioners, finding that the City was negligent in maintaining the trash rack and awarding over \$935,000 in total damages. The jury's verdict form set forth the damages by category for each respective household. For purposes of this appeal, the jury awarded the following damages to the following Plaintiffs who are appealing the trial court's rulings¹:

Jennie Brooks

• Lost value of home	\$24,500
• Raise home	\$73,500
• Cost to repair of HVAC	\$13,625
• Personal property damage	\$1,744
• Annoyance, inconvenience and loss of use	\$7,500
• Total	\$120,869

Walter and Vaughna Boyle

• Lost value of home	\$18,156
• Raise home	\$85,500
• Cost to repair of HVAC	\$12,550
• Personal property damage	\$6,715
• Annoyance, inconvenience and loss of use	\$7,500
• Total	\$129,921

Bernie and Nancy Thompson

• Lost value of home	\$29,575
• Raise home	\$126,000
• Cost to repair of HVAC	\$4,350
• Personal property damage	\$1,783
• Annoyance, inconvenience and loss of use	\$7,500
• Total	\$169,208

¹ Several Plaintiffs below are not implicated here as only Petitioners Jennie Brooks; Walter and Vaughna Boyle; and Bernie and Nancy Thompson are pursuing this appeal.

(J.A.000017, 18, 21.)²

On March 6, 2013, the Circuit Court entered judgment against the City in the amount of \$935,522.10, plus pre- and post-judgment interest. (J.A.000014.) The City subsequently filed a Motion for New Trial and/or Remittitur. (J.A.000030.) As pertinent here, the City maintained that the Petitioners referenced above were limited to recovering for their diminished property values, and could not recover the cost of elevating their homes. A hearing was held on the City's motion on April 8, 2013. (J.A.001677.) On August 13, 2013, the Circuit Court entered a partial ruling, taking under advisement the City's challenge to the jury's award of damages for raising the homes. (J.A.000023.) On August 29, 2013, the Circuit Court entered a final order denying the City's motion for new trial, finding that the cost of raising the homes was a repair and not an improvement. (J.A.000028.) The Court found, however, that the Petitioners could not recover both the diminished market value of their homes and the cost of elevating the homes. As a result, the Court — without granting the Petitioners the option of a new trial — granted the City's motion for remittitur, reducing the jury's verdict by \$482,250.00 and taking away the cost to raise damages for the Petitioners above. (J.A.000029.)

SUMMARY OF ARGUMENT

In reducing the Petitioners' award by more than half the total damages award, the Circuit Court committed multiple legal errors.

First, the Circuit Court's conclusion that the Petitioners cannot recover for both diminished value and the costs of necessary repairs is unsupported by West Virginia law. The

² A chart marked as Exhibit 164 and prepared by Plaintiffs' real estate appraiser was submitted to the jury and reflected the value of various Plaintiffs' homes assuming no flooding; valuing the homes assuming the 2006 and 2009 floods, but not the May 2011 flood; and finally a range of diminished values as a result of the May 2011 flood. (J.A.000747.)

jury's award did not grant the Petitioners a windfall. At trial, the Petitioners presented the expert testimony of engineer David Tabor, who opined that the elevation of the homes at issue was necessary because a new benchmark flood elevation had been established as a result of the City's downstream drainage modification. (J.A.001436-1437.) In other words, due to the City's actions, the Petitioners no longer own flood-safe homes. Mr. Tabor testified that elevating the properties was necessary to make the homes safe and livable again, *i.e.*, to put the Petitioners back into the position they were in prior to the City's negligence. The City did not challenge the admission of Mr. Tabor as an expert or offer a competing opinion on these issues. Accordingly, the Petitioners conclusively established the necessity of these repairs as a reasonable mitigation expense. Based on this testimony, the jury properly concluded that these expenses were proper.

The Circuit Court then took damages away, based on the erroneous legal conclusion that West Virginia law precludes recovery for both the diminished value of real property and the costs of necessary repairs to that property. After the jury's damages award, however, the Petitioners' homes were no more valuable than they were before the City put them at risk — instead, pursuant to the awarded damages, the Petitioners would have received only what they had before the City put their homes in constant jeopardy: safe, dry homes. The jury listened to the expert testimony, considered the evidence, and properly concluded that raising the Petitioners' homes was the only way to restore them to their prior position. Because West Virginia law does not require the false choice between the diminished value of property and the cost of repair, the Circuit Court erred by reducing the jury's damages award and ordering a remittitur of the costs of repairing the Petitioners' homes.

In these circumstances, the award of diminished value and cost of repair damages is not duplicative. The diminished value damages compensate the homeowner for the present

diminished value of the home; the cost to repair damages are necessary to prevent future flooding and mitigate future harm.

In the alternative, the Circuit Court should have permitted the Plaintiffs to recover the full restoration costs, even if they exceeded the market value of the property, in accordance with Restatement (Second) of Torts § 929. Under Section 929 of the Restatement, a plaintiff may recover damages in excess of the market value of his home if he has personal reasons for doing so. Here that compelling reason is that these residences are the Petitioners' homes, the places where many raised their children, where they operate their businesses, and where they have resided for decades and want to continue to live. Additionally, the City has shown on five different occasions that it cannot be trusted to maintain this storm water management system. The jury recognized this and tried to give the Petitioners the best piece of mind that they could: flood safe houses.

Second, even if the Circuit Court had properly concluded that some form of remittitur was necessary, it erred by ordering the remittitur of the *entire* costs of raising the Petitioners' homes without conducting any further analysis. The cost of repair damages awarded by the jury for each Petitioner dwarfed the amount of damages awarded for diminished value. In ruling on the remittitur, the Circuit Court simply concluded that the Petitioners could not recover both types of damages. Then, without any further analysis, the Circuit Court took away the significantly larger item of damages and left in place the smaller diminished value damages. Nor did the Circuit Court conduct any further analysis of the value of the underlying property, or explain why it was reducing the entire award for each Petitioner for cost of repair damages. In deleting *in toto* this major category of damages without a proper justification for doing so, the Circuit Court committed legal error.

Third, it is black-letter West Virginia law that, when a court grants a remittitur, the plaintiff must be given the option of either accepting the reduction in the verdict or electing a new trial. The Circuit Court failed to follow that practice here. Instead, the Court denied the City's motion for new trial but granted the City's remittitur motion, and then reduced the amount of the final judgment by \$482,250.00. Thus, even if this Court concludes that the Circuit Court did not commit any substantive legal error in reducing the jury's damages award, the remittitur order must be reversed and remanded due to the Circuit Court's failure to follow the remittitur procedure required by West Virginia law.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners respectfully request oral argument because none of the criteria set forth in Rule 18(a) preclude oral argument in this appeal. Moreover, Petitioners request oral argument under Rule 20(a) of the West Virginia Rules of Appellate Procedure because the primary issue is one of first impression, *i.e.*, whether West Virginia law precludes recovery of damages for both the diminished value of real property and the costs of necessary repairs to that property – or, in the alternative, if West Virginia should follow Restatement (Second) of Torts § 929, permitting full restoration costs if a plaintiff shows reasons personal for requiring them.

STANDARD OF REVIEW

This Court “appl[ies] a *de novo* standard of review to the grant or denial of a pre-verdict or post-verdict motion for judgment as a matter of law.” *Gillingham v. Stephenson*, 209 W. Va. 741, 745, 551 S.E.2d 663, 667 (2001); *see also Norfolk S. Ry. Co. v. Higginbotham*, 228 W. Va.

522, 526, 721 S.E.2d 541, 545 (2011) (applying *de novo* review to order denying motions for judgment as a matter of law, new trial, or remittitur).

ARGUMENT

I. THE CIRCUIT COURT ERRED BY REDUCING THE JURY'S DAMAGES AWARD FOR THE COSTS OF NECESSARY REPAIRS TO THE PETITIONERS' HOMES.

A. The Court should not have reduced the damages award.

In denying the City's motion for new trial, the Circuit Court properly concluded that the damages awarded by the jury for raising the Petitioners' homes constituted a repair, rather than an improvement. Then, without citing any authority from this Court or offering any discussion of damages law from any jurisdiction, the Circuit Court inexplicably took away the jury's damages award for the costs of those necessary repairs. The Circuit Court did so based on the erroneous legal conclusion that the Petitioners cannot recover damages for both the diminished value of real property and the costs of repairs to that property. West Virginia law, however, does not require the false choice between those two categories of damages. Instead, the jury properly found that the cost of raising the Petitioners' homes was necessary to restore the Petitioners to their prior position, mitigate damages, and prevent future harm by making the Petitioners' homes safe and livable again. Thus, the Petitioners did not receive a windfall as a result of the jury's award of damages for raising their homes, but rather were restored to the position they would have been in but for the City's negligence.

In seeking a remittitur below, the City misinterpreted West Virginia damages law as being limited to *either* the diminution in value or the cost of repair. (J.A.001711.) The Circuit Court's remittitur ruling applying this misinterpretation simply failed to recognize that the jury's award of cost of repair damages was necessary to restore the Petitioners to their pre-flood

position. “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.” Syl. Pt. 2, *Jarrett v. E.L. Harper & Son*, 160 W. Va. 399, 235 S.E.2d 362 (1977); *see also* Syl. Pt. 1, *Ellis v. King*, 184 W. Va. 227, 400 S.E.2d 235 (1990).

In *Jarrett*, the court found that the property “appears now to be in as good condition as it was before the injury.” *Jarrett*, 160 W. Va. at 404, 235 S.E.2d at 365. The *Ellis* court recognized the difference between those circumstances and ones where “no amount of repair can return the vehicle to its condition prior to the accident and consequently, to the value it had prior to the injury.” *Ellis*, 184 W. Va. at 229, 400 S.E.2d at 237. Thus, in *Ellis*³, the Court declined to impose the limitation the City suggested should be imposed here. *See id.* at 229-30, 400 S.E.2d at 237-38 (“Damages are not limited to the cost of repairs actually made where it is shown that they did not put the property in as good condition as it was before the injury, and it would have cost a larger sum to do so. In such cases, the cost of the repairs made plus diminution in value of the property will ordinarily be the proper measure of damages.”)

The *Ellis* rule applies here because only elevating the homes can restore them to the condition they were in before the City’s injuries to the homes. Indeed, the trial court was correct in finding the elevation costs to be restoration costs, as many courts have held that an award of damages for mitigating future harm is appropriate when necessary to restore a plaintiff to his prior position. *See, e.g., Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 162-67 (1st Cir. 2011) (grocery store customers whose electronic payment data was stolen could recover cost of credit monitoring insurance as a mitigation expense); *Toll Bros. Inc. v. Dryvit Sys. Inc.*, 432 F.3d 564,

³ Admittedly *Ellis* addressed personal property, but there is no compelling reason why this rule should not be extended to real property as important as a person’s home, which can also suffer damage that cannot be fully repaired.

570 (4th Cir. 2005) (real estate developer could recover cost of removing defective stucco from homes and recladding homes with a different finish as a reasonable mitigation expense against potential future liability); *Kelly v. CB & I Constructors Inc.*, 102 Cal. Rptr. 3d 32, 39-42 (2009) (plaintiff could recover cost of new drainage system to protect against flooding that resulted from changed topography caused by erosion after the defendant negligently started a fire on the property); *Kelleher v. Marvin Lumber*, 152 N.H. 813, 836-38, 891 A.2d 477, 496-498 (N.H. 2006) (homeowner who suffered rot damage as a result of defective windows could recover cost of replacement windows as a mitigation expense); *Albers v. Los Angeles Cnty.*, 42 Cal. Rptr. 89 (1965) (owners of property damaged by landslide were entitled to recover expenditures made in good faith to prevent additional harm to their property); *see also* Restatement (Second) of Torts § 919 (“One who has already suffered injury by the tort of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert future harm.”)

In this case, the cost of raising the Petitioners’ homes is a necessary expense to avert future harm, make the Plaintiffs’ homes livable and safe, and restore the Plaintiffs to their prior position. *See id.* (“One who has already suffered injury by the tort of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert future harm.”).⁴ At trial, the Petitioners presented evidence, through the expert testimony of engineer David Tabor, that they must elevate their homes by two feet, which would place the homes above the maximum elevation that flood water could reach without overtopping the railroad tracks and pouring into the City of Huntington. (J.A.001436-1438.) Mr. Tabor examined other options, including dry- and wet-proofing and building a dike or levy, for flood-proofing, but determined that elevating was the best option. (*Id.*) He determined this cost based upon accepted

⁴ The City cannot dispute that the Petitioners are under a legal duty to mitigate their future damages. At the City’s insistence, the Court instructed the jury to that effect at trial.

methodology developed by the U.S. Army Corps of Engineers. (J.A.001442.) Mr. Tabor testified that, in his opinion, elevating the properties was essential to making the homes safe and livable again, *i.e.*, to put the Petitioners back into the position they were in prior to the City's negligence. (J.A.001438-1440.)

The City did not challenge the admission of Mr. Tabor as an expert or offer a competing expert opinion on these issues. Accordingly, the Petitioners met their burden of proving the existence of the new benchmark flood elevation and the necessity of these repairs as a reasonable mitigation expense. Based on this testimony, the jury properly concluded that these expenses were proper. Moreover, both the jury and the Circuit Court rejected the City's argument below that an award of damages for raising the Petitioners' homes would make those homes *more* valuable. In fact, Mr. Tabor testified that making such repairs does not constitute an "improvement" to the home. When asked whether raising the home was an improvement, Mr. Tabor explained how it was most definitely not:

But, to say that it was improvement, it's not even a — it's not even back to where it was because you're going to have access issues when you raise that home. You're going to have more steps to go up into it. It's going to look a little, you know, look a little funny unless you do some special landscaping around the house or aesthetic features to make it look right. Also, you're going to lose space upstairs, because anything important in the crawl space, you've got to find a spot for it upstairs. So you might lose a closet. You might lose your kitchen pantry. So, it's - - it's a process to get the house safe so you can inhabit it, so you can have heat, so you can live there. It's not a process to improve the home. You're just trying to get back to where it was for decades. Some of these homes are 60, 70 years without this type of problem. So we're just trying to get them, you know, back to being able to live there and enjoy Spring Valley.

(J.A.001439-40.) Moreover, the Circuit Court acknowledged the propriety of the jury's finding when it denied the City's motion for new trial, specifically ruling that the costs of raising the Petitioners' homes constituted a repair and not an improvement. (J.A.000028.)

Because raising the Petitioners' homes is simply a necessary repair, the Petitioners' homes would have been no more valuable after the jury's award than they were before the City put them at risk — instead, the Petitioners would have receive only what they had before the City's negligence: safe, dry homes. Rather than preventing a windfall, the effect of the Circuit Court's remittitur order is to benefit the negligent party, the City, by allowing it to avoid responsibility for making the Petitioners whole. For that reason, and under these circumstances, West Virginia law does not require the false choice between damages for the diminished value of real property and the costs of necessary repairs to that property. Accordingly, the Circuit Court lacked justification for reducing the jury's total damages award by removing the costs of repair damages. This Court should reverse and remand this case to the Circuit Court with instructions to deny the City's remittitur motion and enter judgment for the Petitioners based on the jury's verdict and damages award.

B. In the alternative, this Court should follow Restatement (Second) of Torts § 929, which would permit Plaintiffs' full restoration damages.

Section 929 of the Restatement Second of Torts, *Harm to Land from Past Invasions*, provides in pertinent part that:

(1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for

(a) the difference between the value of the land before the harm and the value after the harm, **or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,**

(b) the loss of use of the land, and

(c) discomfort and annoyance to him as an occupant.

Rest. (2d.) Torts § 929 (emphasis added).

Comment b to Section 929 provides:

Restoration. Even in the absence of value arising from personal use, the reasonable cost of replacing the land in its original position is ordinarily allowable as the measure of recovery. Thus if a ditch is wrongfully dug upon the land of another, the other normally is entitled to damages measured by the expense of filling the ditch, if he wishes it filled. **If, however, the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, unless there is a reason personal to the owner for restoring the original condition, damages are measured only by the difference between the value of the land before and after the harm.** This would be true, for example, if in trying the effect of explosives, a person were to create large pits upon the comparatively worthless land of another.

On the other hand, if a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building. So, when a garden has been maintained in a city in connection with a dwelling house, the owner is entitled to recover the expense of putting the garden in its original condition even though the market value of the premises has not been decreased by the defendant's invasion.

Rest. (2d) of Torts § 929 cmt. b (emphasis added).

In *Kelly v. C.B. & I Constructors Inc.*, the court relied on Section 929 to find that there was substantial evidence that a “reasonable person in plaintiff’s circumstances was justified in incurring costs to restore his property *notwithstanding that the restoration costs substantially exceeded the property’s value before the fire.*” 102 Cal. Rptr. 3d 32, 41 (emphasis added) (J.A.000090; J.A.001700; J.A.001703). The court specifically approved an award of a new drainage system to prevent flooding, *id.* at 41, just as the jury below approved the costs to raise the home to accomplish the same goal.

West Virginia has not addressed this Restatement Section, but many other states have cited with approval or expressly adopted Section 929 or the “reasons personal” rule generally. *See Lampi v. Speed*, 362 Mont. 122, 128-34, 261 P.3d 1000, 1004-09 (Mont. 2011) (reversing judgment and remanding for a new trial when trial court should have concluded that restoration damages constituted the appropriate measure of damages, even though evidence showed that restoration damages exceeded value of property); *Weitz v. Green*, 148 Idaho 851, 864-67, 230

P.3d 743, 756-59 (Idaho 2010) (Permitting the recovery of restoration damages for the destruction of trees when the value of the lumber was only \$1,500 in accordance with the Restatement Second of Torts § 929); *Osborne v. Hurst*, 947 P.2d 1356, 1359-61 (Alaska 1997) (remanding for a retrial when jury was precluded from determining appropriate measure of damages in accordance with the reason personal test and recognizing that an intent to use property for retirement could satisfy ‘reason personal’ for justifying damages in excess of market value.”); *Roman Catholic Church v. La. Gas*, 618 So.2d 874, 877 (La. 1993) (applying reasons personal rule and awarding full costs of restoration of low income housing building even though costs exceeded market value of building before fire damage); *Lerman v. Portland*, 675 F.Supp. 11, 18 (D. Me. 1987) (recognizing but refusing to apply exception when building had been vacant for several years, had obviously been untended, and had fallen into serious disrepair before being ordered demolished); *Bd. of Cnty. Commrs. v. Slovek*, 723 P.2d 1309, 1314-16 (Colo. 1986) (approving of factors set forth in section 929, comment b and agreeing that trial court judgment should be reversed because it had “considered itself bound by the diminution of market value test”); *Neda Constr. Co. v. Jenkins*, 137 Ga. App. 344, 223 S.E.2d 732 (Ga. App. 1976) (cost to repair historic home allowed even though such cost exceeded home’s market value by approximately twenty-five thousand dollars); *G&A Contractors, Inc. v. Alaska Greenhouses, Inc.*, 517 P.2d 1379, 1385-87 (Alaska 1974) (trial court did not err in awarding reasonable restoration costs, even though these exceeded the value of the land); *Regal Construction Co. v. W. Lanham Hills Citizen’s Assoc.*, 256 Md. 302, 305, 309, 260 A.2d 82, 84, 86 (Md. 1970) (“Once a reason personal is found, the measure of damages is the cost of restoration, even though this may be greater than the entire value of the property With few exceptions, cost of

restoration has been the measure of damages in cases where the plaintiffs were individuals and where residential property was involved.”)

This case represents the ideal circumstances for application of the “reasons personal” rule. The jury recognized that the cost to raise Plaintiffs’ homes exceeded the diminished value of the homes. However, the Plaintiffs for whom the jury awarded damages to raise their homes put on evidence of their personal reasons for valuing and wanting to restore their homes. For example, Plaintiff Jennie Brooks testified that she had lived in Spring Valley for forty-two years. (J.A.001266.) She testified that prior to the installation of the storm-water management system, she had never had water in her house. (*Id.*) She talked about the impact of the repeated instances of flooding on the neighborhood, “[t]here is no neighborhood. The houses around me have all been torn down. What’s left, most of the people left, or it’s rental property.” (J.A.001268.) She described pre-flooding Spring Valley as a “wonderful place to live,” where the “children all played together,” and the families used Spring Valley Park. (J.A.001268.) She doesn’t feel safe anymore in her own home; “I mean, every time it rains you wonder, how much rain are we going to get? Do we need to move our car? Do we need to get to safety, ourselves?” (J.A.001268-69.)

Walter and Vaughna Boyle moved to Spring Valley in 2008 and operate a car repair business from their garage. Their home was surrounded by flood water. It entered their garage, where they operate a car repair business and also entered the crawl space where their furnace and duct work were located. (J.A.001307-08.) Ms. Boyle echoed Ms. Brooks’ concerns about future flooding. (J.A.001312.)

Bernie and Nancy Thompson have lived in Spring Valley for 36 years. (J.A.001177.) He operates a graphic design business out of a structure that is right next to his home. (J.A.001178.) The water surrounded his property as well and entered the crawlspace, touching floor joists and

covering the heating ducts, filling them with “sewage-tainted storm water.” (J.A.001181.) Mr. Thompson had ten inches of water in his business. (*Id.*) He talked about how his house stank from the water, forcing him to run a fan continuously for three months in an attempt to dry it out. (J.A.001187.)

The restoration damages awarded by the jury were proper because Plaintiffs offered reasons personal for those costs. Moreover, an expert witness testified, unchallenged, that in order to make these homes safe again, they must be raised. The jury’s verdict should be reinstated and judgment awarded to the Petitioners.

II. THE CIRCUIT COURT ERRED BY REDUCING, WITHOUT JUSTIFICATION, THE ENTIRE DAMAGES AWARD FOR THE COSTS OF REPAIRING THE PETITIONERS’ HOMES.

Even if the Circuit Court had properly concluded that some form of remittitur was necessary, it erred by ordering the remittitur of the *entire* costs of raising the Petitioners’ homes without conducting any analysis to justify that result. The jury’s damages award for the costs of repairing the Petitioner’s homes dwarfed the amount of damages awarded by the jury for the diminished value of those homes. In ruling on the remittitur, the Circuit Court simply concluded that the Petitioners could not recover both types of damages. The Circuit Court then took away the significantly larger item of damages and left in place the smaller diminished value damages. The Circuit Court offered no analysis or explanation of why, even if West Virginia law did not permit recovery of *both* types of damages, it forced the Petitioners to accept the *lesser* category of damages. Nor did the Circuit Court conduct any further analysis of the value of the underlying property, or explain why it was reducing the entire award for each Petitioner for cost of repair damages. As set forth above, the Circuit Court should not have been constrained by the *Jarrett*

Court's refusal to allow compensation for repairs, because in that case the Court found that plaintiffs' property was "in as good condition as it was before the injury." 160 W. Va. at 404, 235 S.E.2d at 365. Here, as in *Ellis*, Petitioners has shown that their homes are irreparably damaged and simply not safe. *See Ellis*, 184 W. Va. 227, 231, 400 S.E.2d 235, 239.

Accordingly, the Circuit Court's remittitur order was erroneous even if some level of remittitur was appropriate.

III. THE CIRCUIT COURT ERRED BY ORDERING A REMITTITUR WITHOUT FIRST GIVING THE PETITIONERS THE OPTION OF ELECTING A NEW TRIAL.

Even if this Court concludes that the Circuit Court did not err as to the substance of its remittitur ruling, it nevertheless must reverse the remittitur order and remand for further proceedings due to the Circuit Court's failure to grant the Petitioners the option to elect a new trial in lieu of accepting the remittitur.

It is black-letter West Virginia law that, when a court grants a remittitur, the plaintiff must be given the option of either accepting the reduction in the verdict or electing a new trial. Syl. Pt. 9, *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010); Syl. Pt. 10, *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993); *Roberts v. Stevens Clinic Hosp.*, 176 W. Va. 492, 501, 345 S.E.2d 791, 800 (1986); Syl. Pt. 1, *Earl T. Browder, Inc. v. County Court*, 145 W. Va. 696, 116 S.E.2d 867 (1960).

The Circuit Court failed to follow that practice here. Instead, the Court denied the City's motion for new trial but granted the City's remittitur motion, and then reduced the amount of the final judgment by \$482,250.00. Thus, even if this Court concludes that the Circuit Court did not commit any substantive legal error in reducing the jury's damages award, the remittitur order

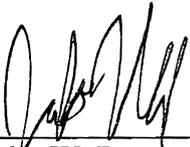
must be reversed and remanded due to the Circuit Court's failure to following the remittitur procedure required by West Virginia law.

CONCLUSION

For the above reasons, this Court should reverse the judgment judgment below and remand the case with instructions that the Circuit Court deny the City's motion for remittitur and enter judgment in favor of the Petitioners. In the alternative, this Court should reverse the Circuit Court's remittitur order and remand with instructions to enter a modified remittitur order that does not reduce the entire award of cost of repair damages and provides the Petitioners with the option to elect a new trial in lieu of the remittitur.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of February, 2014, the foregoing **Petitioners' Brief** was hand-delivered addressed to counsel for all other parties to this appeal as follows:

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