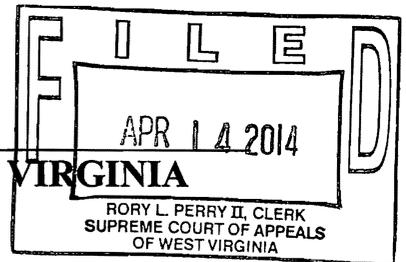

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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,

Respondent.

RESPONDENT BRIEF OF CITY OF HUNTINGTON

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STATEMENT OF THE CASE

On May 14, 2001, the U.S. Army Corps of Engineers (Corps of Engineers) and the City of Huntington (City) entered into an agreement for the Corps of Engineers to design and construct the Krouts Creek Stormwater Management System in Huntington, WV. (JA001082-1083). The Krouts Creek project was intended to relieve flooding issues in the Westmoreland section of Huntington. At the upstream end of the project is a trash rack – a series of metal bars – to keep debris from entering a 1200-foot long concrete box culvert. (JA001210). The City agreed to provide 25% of the funding for the Krouts Creek project and agreed to maintain the system. The trash rack is located just downstream of the area in Spring Valley where the Petitioners reside.

On the night of May 10, 2011, a flood occurred in the Spring Valley area affecting the Petitioners' properties. The first question that the Wayne County jury had to answer at the conclusion of the trial in this matter was whether the City "was negligent in maintaining the trash rack" on May 10, 2011.¹ Despite the fact that City employees inspected the trash rack on two separate occasions on that date, the jury found that the City negligently maintained the trash rack and caused the Petitioners' damage.² (JA000017).

The evidence presented to the jury regarding damages sustained in the May 10, 2011 flood was largely undisputed. The flood water had intruded into the Petitioners' basement, crawl spaces, including furnaces and ductwork (HVAC), and garages. (JA001270; JA001307-1308; JA001181-1182).

¹ The Petitioners' brief repeatedly references flooding in the Spring Valley area in 2006 and 2009. Those events were addressed in Civil Action No. 08-C-185, *Bailey, et al., v. City of Huntington*. Petitioner Jennie Brooks was a plaintiff in the *Bailey* case. (JA000141-149).

² The only remaining plaintiffs below that are pursuing this appeal are Jennie Brooks; Walter and Vaughna Boyle; and Bernie and Nancy Thompson.

In addition to the personal property damages and HVAC damages, the Petitioners' expert real estate appraiser provided opinions regarding the diminished property values of the Petitioners' properties. (JA000747). The parties had previously stipulated to the value of the homes in question prior to the May 10, 2011, flood event as follows:

Brooks	\$70,000
Boyle	\$51,875
Thompson	\$84,500

(JA000747)

The biggest area of contention regarding the damages presented was the Petitioners' claim for the cost of elevating or raising their homes. Over the City's numerous pre-trial objections,³ the Petitioners sought damages for raising their homes in addition to the claims for diminished property value. Petitioners' structural engineering expert, David Tabor, testified that while the structures of the homes were not damaged and did not require repair, the structures should be elevated to prevent "potential future floodwaters." (JA001435-1436, JA1453). His reason for concluding this was his belief that a "new base flood elevation has been established." Mr. Tabor was qualified by the trial court solely as a structural engineer, not an expert in the field of hydrology, hydraulics, stormwater systems or flood control. (JA001434). The statement regarding the "new base flood elevation" was not offered as his opinion as a structural engineer. He offered no supporting foundational testimony for this statement that a new base flood elevation had been established, when it was established, how or why it was established and the cause of the new elevation if it was in fact new. Rather it was "not part of his scope" and "not

³ The City's objection to the propriety of the cost of raising the homes as a "cost of repair" element of damages was fully briefed and argued prior to trial in *Defendant City of Huntington's Motion for Partial Summary Judgment regarding the Damage Claims of Certain Plaintiffs and supporting memorandum (JA000402-JA000557)* and *Defendant City of Huntington's Rule 59(e) Motion to Alter or Amend the Ruling Regarding Claims for Improvement Costs*.

necessary.” (JA001457).

Nonetheless, Mr. Tabor opined that the structures should be elevated against possible future flooding at these costs:

Brooks	\$ 73,500
Boyle	\$ 85,500
Thompson	\$126,000

(JA000737)

Following the evidence, the Circuit Court advised the jury regarding the law of damages.

In addition to general instructions for the purpose in awarding damages, the court gave specific instructions on the proper measure of damages:

In West Virginia, the measure of damages for property, either real or personal, should you decide to award damages, is either the cost of repair or reduction in market value, whichever is less, and loss of use and the expenses incurred during the repair period, and also annoyance and inconvenience

(JA001586-1587).

Ultimately, the jury awarded the Petitioners damages for every element claimed, including both diminished property value **and** the cost to elevate the homes:

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

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
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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
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(JA000017, 18, 21).

The Circuit Court entered its judgment order on the jury’s verdict, including pre-and post-judgment interest on March 6, 2013. (JA000013-14) On that same day, the City filed its *Motion for New Trial and/or Remittitur* and memorandum in support thereof. (JA000030, JA000034). Among other issues, the City asserted that the jury disregarded the evidence and the legal standard for awarding damages in its verdict by awarding both the diminished property value and the cost to raise the homes.

A hearing was held on the City’s *Motion for New Trial and/or Remittitur* on April 8, 2013. The Circuit Court reviewed the pre-flood market values of the homes, the cost of elevating the homes and the diminished value of the homes as well as the applicable legal standards. (JA001695-001716). Ultimately, Judge Pratt disagreed with the City’s position that cost of elevation was an improvement to the Petitioners’ properties, and instead found that it was a cost of repair. But, based on the applicable legal standard, the Judge determined that the Petitioners could not recover both the lost market value and the cost of repair. (JA000028-29).

The verdict form was crafted with separate lines for the damage categories. The Circuit

Court's remittitur order removed the cost of raising the homes without disturbing the other categories – providing damages resulting from the May 10, 2011, flood for Petitioner Brooks with \$47,369; the Boyles with \$44,421; and the Thompsons with \$43,208. (Compare JA00029 and JA00017, 18, 21).

SUMMARY OF ARGUMENT

While the City maintains that the cost of elevating the Petitioners' homes is an improvement or enhancement, as opposed to a cost of repair as determined by the Circuit Court, the lower court's ultimate decision to strike that line item from the verdict was based soundly in West Virginia law.

The Petitioners' assertion that they are entitled to home raising costs to protect against future flooding makes unsupported assumptions of negligence and causation and is contrary to clearly established legal principles of awarding property damages. Those clearly established principles require awarding damages for the actual injuries sustained by the acts or omissions complained of on May 10, 2011. In other words, putting the Petitioners in the same position they were in before the date of the flood event, and not improving their property. Further, the method for calculating those damages i.e., a comparison of the cost of repair to the property's market value must be respected.

It is undisputed that the Petitioners suffered no structural damage to their homes. Elevation of the homes does not mitigate or restore any actual damage caused by the May 10, 2011 flood. For each of the properties in question, the pre-flood market value was less than the cost of elevation. (JA000747). For each of the properties in question, the diminished property value was less than the cost of elevation. (JA000017, 18, 21) Thus the diminished value is the

only amount of real property damages that was appropriate in accordance with the lower Court's instruction and West Virginia law.

By entering the remittitur order, the Circuit Court recognized the damage rules set out plainly in West Virginia law and recognized the jury's misapplication of the law to the relevant facts. The Circuit Court was able to strike a single line item on the verdict form and allow a just result for all parties. The remaining verdict in favor of the Petitioners satisfies the tenets of compensatory damages for injury to property and allows them recovery for the harm that resulted from the City's negligence on May 10, 2011. It is unnecessary to change or modify this Court's longstanding damage law to obtain the goal of compensation for the Petitioners' harm.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The City requests oral argument as it would aid the decisional process and is not precluded by Rule 18(a) of the *West Virginia Rules of Appellate Procedure*. Because the Petitioners have raised issues of first impression, the City agrees that oral argument in accordance with Rule 20(a).

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) (*de novo* review applied to review of order denying motions for judgment as a matter of law, new trial, or remittitur).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY RULED THAT THE PETITIONERS ARE NOT ENTITLED TO RECOVER THE COST OF ELEVATING THEIR HOMES.

A. Elevation of the Petitioners' homes is not a repair.

Under West Virginia law, the Court has been very clear that one who suffers damage to his real property because of the negligence of others may recover in one of two ways – (1) the cost of repair **or** (2) if the damage cannot be repaired or the repair cost exceeds the market value, then diminished property value is appropriate. In either instance, expenses, including loss of use are included in any award. The seminal West Virginia case on property damage is *Jarrett v. Harper & Son, Inc.*, 160 W. Va. 399, 235 S.E.2d 362 (1977). In Syllabus Point 2 of *Jarrett*, the Court held:

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.

Petitioners assert that the cost of elevating their homes is simply a repair to their property. Over the City's pre-trial objections, the Petitioners presented evidence to the jury seeking damages for both diminished property value as a result of the flooding **and** the costs of raising the homes to prevent *future* flooding. For a repair to be necessary, the property must be in need of repair – either damaged or destroyed due to the City's negligence. That is not the case for the Petitioners' homes. To the contrary, the Petitioners' structural engineering expert, David Tabor, testified that there was no structural damage and that none of the foundations require repair. (JA001435-1436 and JA001453-1454).

Elevating the homes will provide them with new, changed foundations, when the existing

foundations were not damaged in the May 10, 2011 flood. (JA001454). These costs are not repairs. These costs are to improve the structures by raising the homes. The sole reason for seeking these new, higher foundations is to elevate the structures out of “potential future floodwaters.” (JA001435) The jury determined that the City’s negligence caused the May 10, 2011 flood. However, the Petitioners are essentially asserting the need for elevation exists because the City’s future negligence will cause future floods. That is pure speculation and conjecture.

Mr. Tabor made the bare assertion that “a new base flood elevation has been established” which necessitates the home elevations even though there was no reason to repair the foundations. (JA000143-1437 and JA001453-1454). Mr. Tabor merely made a conclusory statement that there was a new base flood elevation. This statement was not offered as a professional opinion as a structural engineer. Mr. Tabor clearly indicated that determining if, when, why, or how that new base flood elevation was determined was “not part of my scope.” (JA001456-1457).

Notwithstanding his lack of expertise to make such a conclusion and his failure to undertake any study or analysis of what the current and prior base flood elevations are, Mr. Tabor did not testify that a new base flood elevation was caused by the City’s negligent maintenance of the trash rack on May 10, 2011. Neither Mr. Tabor nor any other witness testified that the City’s negligence caused such a condition to exist. (JA001434, 1437, 1456-1457). The Petitioners did not and could not present evidence to prove that the City will negligently maintain the trash rack in the future and that such negligence will cause flooding to the Petitioners’ homes.⁴ The existing elevation of the Petitioners homes, which is the same

⁴ With the permission of the U.S. Army Corps of Engineers, the trash rack at issue has been removed, thus making such a proposition impossible.

before and after the May 10, 2011 flood does not warrant any repair absent damage to the foundation. Rather it is an enhancement or improvement, and the costs for such are not legally allowable.

B. Petitioners are not entitled to lost property value and cost of repair.

If the home raising costs are considered a cost of repair, the Petitioners would not be entitled to recover those costs in accordance with West Virginia's clearly stated law of property damages. As set forth in *Jarrett*, if the repairs exceed the property's market value, then the measure of damages is the lost value, plus expenses. *Jarrett v. Harper & Son, Inc.*, 160 W. Va. 399, 235 S.E.2d 362 (1977), Syllabus Point 2. The cost of elevating each of the Petitioners' homes exceeded the pre-flood market value of the homes as determined by Petitioners expert Dean Dawson and as stipulated by the City. (JA000747). The jury awarded damages for diminished property value and for raising the structures for each for each of the Petitioners' properties in contravention of the evidence presented and contrary to the trial court's accurate statement of the law when instructing the jury.

As they did in the lower court, the Petitioners are asking this Court to change West Virginia's longstanding and well settled law on real property damage awards. The Petitioners assert that *Ellis v. King*, 184 W. Va. 227, 400 S.E. 2d 235 (1990) to support of their position that they can recover both the cost of repair and diminished property value.

This Court's holding in *Ellis* holding was specifically limited to situations of post-repair structural damage to vehicles:

If the owner of a vehicle which is damaged and subsequently repaired can show a diminution in value based upon structural damage after repair, then recovery is permitted for that diminution in addition to the cost of repair, but the total shall not exceed the market value of the vehicle before it was damaged.

Ellis, at Syllabus Point 2

This Court made clear that the ruling was to be used in limited circumstances of vehicle damage. “We caution that trial courts should narrowly construe our holding today. Not all damage to a vehicle would allow the plaintiffs to recover for diminution in value...” *Ellis*, 184 W. Va. at 230.

Ellis was a very narrow ruling and applicable to vehicle damage, which is personal property. But, even if this Court would choose to extend the *Ellis* rule to real property, the Petitioners would not be entitled to reinstatement of the jury’s award. First, the *Ellis* holding was limited to post-repair “structural damage” to personal property. In this case, it is uncontroverted that the homes, which are real property, did not sustain any structural damage from the flood. (JA001436 and JA001453). If this Court allows that the home elevation is a cost of repair, those amounts alone exceed the market value of the properties prior to the May 10, 2011 floods.⁵ (JA000017, 18, 21 and JA000747). Consequently, even assuming that such an improvement/enhancement is a cost of repair, West Virginia law would not allow recovery of those costs.

By entering the remittitur order, the Circuit Court corrected the jury’s misapplication of the court’s instruction on damages, and awarded the Petitioners all the real property damages to which they were entitled – their diminished value plus their expenses, including loss of use (JA000017, 18, 21 and JA000028-29).

C. The cost of elevation is not mitigation of harm caused by the May 10, 2011, flood.

The Petitioners are asserting that the cost to elevate the homes is a necessary restoration

⁵ Petitioners’ pre-flood market values are: Boyle - \$51,875; Brooks - \$70,000; and Thompson - \$84,500. (JA000747). The elevation costs are: Boyle - \$85,500; Brooks \$73,500; Thompson- \$126,000 (JA000737). That total does not include the repairs to the Petitioners’ heating and cooling systems which the jury also awarded in a separate line on the verdict form.

cost to mitigate future harm and are asking this Court to change West Virginia's longstanding and well settled law on real property damage awards. In support of this request, the Petitioners reference the *Restatement (Second) of Torts § 919* and various cases from other jurisdictions regarding mitigation of harm. The cases cited by the Petitioners in support of that position are readily distinguishable from this case. In the cited cases, the plaintiffs were seeking recovery of *costs actually expended* in an effort to avoid injury or further injury from the *prior* actions or failures of the defendants. In the present case, the Petitioners are not seeking recovery of costs actually expended for the home elevation and importantly, they are asking for the damage item to avoid speculative injury for hypothetical *future* negligence of the City.

In *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151 (1st Cir. 2011), credit monitoring services were purchased to avoid or mitigate harm from the plaintiffs' personal data being stolen due to the defendant's negligent protection of the information. There was an actual expenditure of money to protect against the defendant's prior actions, not hypothetical future actions.

In *Toll Bros. v. Dryvit Sys.*, 432 F.3d 564 (4th Cir. 2005), the court reversed a summary judgment against the plaintiff/developer that sought to recover damages for his expenses actually incurred in removing defective synthetic stucco from homes and recladding the homes with a different finish to protect against home damage from the defective product. The case was remanded for further proceedings, including, determining whether the plaintiff's measures were a "reasonable attempt" to avoid damages for the defendant's negligent conduct, i.e. negligent misrepresentation of the product prior to purchase. Again, the focus was on damages for the defendant's prior actions.

In *Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 891 A.2d 477 (N.H. 2006), a homeowner who suffered rot damage to his home as the result of leaking windows filed various

breach of warranty and strict liability claims against the defendant. The plaintiff sought to recover his costs actually expended for replacing the windows and repairing the home damage resulting from the leaking windows. The court allowed the replacement costs of the windows and home damage repair, because the defective product was causing “ongoing damage to other property.” *Kelleher*, 152 N.H. at 837.

Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129 (1965) is an inverse condemnation proceeding resulting from construction of a road that caused “a major landslide.” The landslide had continued for nine years at the time the court made its ruling and was ongoing at that time. The court allowed certain plaintiffs to recover damages incurred for costs actually expended in efforts to minimize the losses caused by the landslides and prevent additional harm from the ongoing slides.

In addition to the home raising costs not having been actually expended by the Petitioners in this matter, such costs are not “mitigation” of damages caused by the City’s negligence related to the May 10, 2011 flood. Rather, by the Petitioners’ own statements, it is to prevent damage from “future floods.” With this argument, the Petitioners are making assumptions that future floods will occur as a result of the City’s future negligent maintenance of the trash rack. Such a request does not comport with West Virginia’s law of property damages or with any reasonable extension of the same.

D. There is no compelling reason to change West Virginia’s existing property damage law to follow Restatement (Second) of Torts § 929 in this matter.

Petitioners are asking the Court to follow the *Restatement (Second) of Torts § 929* and the “reason personal” exception in the commentary to allow them to recover the home elevation damages as “restoration costs” even though those costs exceed the pre-flood market value of the

properties in question. The Restatement section provides:

(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.

Restatement (Second) of Torts § 929(1).

The “reason personal” language referenced by the Petitioners is found in the Comment portion of §929 (1) (a). That portion of the Comment discusses “replacing the land in its original condition.” What the Petitioners refer to as the “reason personal” rule is actually an exception to the general rule of damages that diminished property value is awarded if repair costs exceed the market value of the property. *Kelly v. CB&I Constructors, Inc.*, 179 Cal. App. 4th 442, 451; 102 Cal. Rptr. 3d 32, 38 (2009) (citing *Orndorff v. Christiana Community Builders* 217 Cal.App.3d 683, 687–688, 266 Cal. Rptr. 193 (1990)).

The cases cited by the Petitioners in support of this “reason personal” standard involve serious damage or complete destruction of real property resulting from an act or omission of the defendants. The courts in those cases allowed restoration costs in order to correct the actual damage suffered by the plaintiffs so as to place them in their pre-tort condition. In this matter, the Petitioners are not trying to restore property that was actually damaged to its original condition. Rather, they are seeking to modify or change the original condition of the foundations when there is was no damage to the structure or foundations in order to prevent possible future

damage.

In *Lampi v. Speed*, 362 Mont. 122; 261 P.3d 1000 (2011), a fire destroyed over 1,000 trees and other vegetation on forty acres of land. In allowing restoration damages in excess of the property value, the Supreme Court of Montana held that the restoration rule in *Restatement (Second) of Torts* § 929 required proof of “temporary injury” and “reasons personal”. *Lampi*, 362 Mont. at 129. (citing *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 338 Mont. 259, 165 P.3d 1079 (2007)). In addition to the factual distinction, *Lampi* is legally distinguishable and inapplicable as West Virginia has expressly rejected and overruled any differentiation of real property damages on the basis of temporary or permanent injury. *Jarrett v. Harper & Son, Inc.*, 160 W. Va. at 403.

As Petitioners correctly point out, in *Kelly v. CB&I Constructors, Inc.*, 179 Cal. App. 4th 442, 102 Cal. Rptr. 3d 32 (2009) the court allowed the plaintiff to recover restoration costs in excess of the property value. However, in that case, the plaintiff’s property suffered extreme damages from a fire that completely destroyed a vintage barn, damaged several other structures on the property, and destroyed trees and other vegetation on the property. Due to the destruction of the trees and vegetation, numerous mudslides occurred in subsequent years. The mudslides destroyed one of the ranch houses on the property and gouged a 200 foot long, 12 foot deep and 15 foot wide gully on the property.

Due to the significance of the plaintiff’s actual losses, and the continuing damages resulting from the negligently sparked fire, the *Kelly* court discussed the “personal reason” exception to the general rule of damages. The court stated that when this exception applies, “restoration costs are allowed only if they are reasonable in light of the value of the real property before the injury and the actual damage sustained.” *Id.* (citing *Orndorff*, 217 Cal.App.3d at 690).

“...Nor are repair costs appropriate where only slight damage had occurred and the cost of repair is far in excess of the loss in value.” *Id.*

This Court has not previously been presented with a case wherein a specific reference to *Restatement (Second) of Torts § 929* was made. However, in the case of *Perrine v. E. I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010), the plaintiffs in a class action suit sought to recover the significant costs of soil and structural remediation as damages from arsenic, cadmium and lead contamination emanating from DuPont’s zinc smelter facility. The class was awarded over 55 million dollars for the soil and structural remediation. Justice Ketchum’s dissent in *Perrine* indicates that the plaintiffs had abandoned their diminished property value claims in favor of remediation damages only, similar to the election of damages found in *Restatement (Second) of Torts § 929(1)(a)*. *Perrine*, 225 W. Va. at 590-591 (Ketchum, J., dissenting).

The abandonment of the reduced property values claims is similar to the election of damages found in *Restatement (Second) of Torts § 929(1)(a)*. This Court was not presented with the issue of whether it was appropriate to permit the plaintiffs to abandon the diminished property value claim and elect to proceed with restoration costs alone and did not analyze the same in affirming the restoration damages.⁶ However, this Court did find that the jury was properly instructed to determine “whether the ...plaintiffs suffered harm to their property” before the restoration damages were allowed. *Perrine*, 225 W. Va. at 539-540. In *Perrine*, as opposed to the present matter, the plaintiffs’ property was contaminated by the defendant’s prior acts and the property was actually injured. Here, there is no injury to the structure of the homes caused by the City’s actions on May 10, 2011.

⁶ This was a point raised by Justice Ketchum raised in his dissent as he believed it to be in error *Id.*

In this case the value of the Petitioners' homes prior to the May 10, 2011, flood was less than the proposed home elevation cost. The cost of elevation is significantly higher than the lost value of the homes: Brooks - \$24,500 lost value compared to \$73,500 to elevate; Boyle - \$18,156 lost value compared to \$85,500 to elevate; Thompson - \$29,575 lost value compared to \$126,000 to elevate. While in no way attempting to trivialize the Petitioners' losses, the actual costs of those losses were slight in comparison to the costs the Petitioners are seeking to elevate the home. The actual damages sustained, including replacement costs for HVAC systems and duct work along with personal property for the Petitioners are: Brooks - \$15,369; Boyle - \$19,265; Thompson - \$6,133. (JA000017, 18, 21). The Petitioners' homes were examined for structural damage and none exists. Yet the Petitioners still sought damages in excess of the value of their homes. Allowing recovery for the home elevations does not comport with the proper standard of property damages in West Virginia.

This case does not present a compelling reason to change West Virginia's long standing law for recovery of property damages. However, if § 929(1)(a) and the "personal reason" exception is applied, there could be no recovery using the considerations set forth in *Kelly* and because there was no damage sustained to the foundations that is necessary to repair.

II. THE CIRCUIT COURT'S DECISION NOT TO HAVE A NEW TRIAL, BUT TO REDUCE THE ENTIRE COST OF ELEVATING PETITIONERS HOMES WAS APPROPRIATE.

When it entered the order of remittitur, the Circuit Court was relying upon the extensive pre-and post-trial briefing and arguments by the parties (JA000034, JA000083, JA000407, JA000558, JA000756, JA001677). The circuit court, by its instruction to the jury quoting the

applicable property damage standard set out in *Jarrett*, recognized the correct legal standard to apply in this matter. (JA001586-1587). The verdict form contained separate lines for the cost of raising the homes and for lost value of the homes. (JA000017, 18, 21). By reviewing the verdict rendered by the jury and applying the *Jarrett* property damage rule, the lower court did not need further analysis or proceedings to correct the jury's error in application of the law. It simply needed to strike the portion of damages that the Petitioners were not entitled to under the law.

The Petitioners complain that they were only given the "lesser" category of damages, i.e. the lost value of the homes. (The Petitioners' awards for HVAC, personal property damage, and annoyance inconvenience and loss of use were left undisturbed as well.). In accordance with Syllabus Point 2 of *Jarrett*, the Petitioners are entitled to (1) the cost of repair or (2) if the damage cannot be repaired or the repair cost exceeds the market value, then diminished property value. As the Circuit Court determined that the home elevation was a cost of repair, that cost exceeded the pre-flood market value and was not an allowable damage award. Upon entry of the remittitur order, the Petitioners received the full measure of damages available under West Virginia law.

III. ENTRY OF REMITTITUR WITHOUT THE OPTION OF A NEW TRIAL WAS APPROPRIATE UNDER THE CIRCUMSTANCES.

The Petitioners correctly cite the typical practice of giving a plaintiff the option of either accepting the remittitur or electing a new trial. *Perrine v. E. I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010). However, in this case, providing such an option is unnecessary and would serve no purpose other than impeding resolution of this matter.

On the verdict form, each category of damages was set out on a separate line. (JA000017,

18, 21). The parties stipulated to the reduced property values and the stipulated amounts were awarded by the jury (JA000747 and JA000017, 18, 21). The cost of the HVAC repairs presented by the Petitioners was awarded in full (JA000736 and JA000017, 18, 21). The personal property damage amounts submitted to the jury by the Petitioners were awarded in full. (JA000017, 18, 21). The cost of elevation submitted by the Petitioners is an all or nothing proposition. Petitioners' expert testified that the cost of elevation is essentially the same regardless of the height of the elevation – the cost is in the disconnecting, lifting and reconnecting. (JA001440-1441).

Because the verdict form was set up with separate line items and the cost of elevation is an item that will either be awarded or not awarded based on the law, there is no justifiable reason for the Petitioners to have been offered the option of a new trial instead of the remittitur. Other than the cost of elevation, the Petitioners were awarded everything they asked for and there are no other liability or damage issues to warrant a new trial.

CONCLUSION

For the reasons set forth herein, this Court should affirm the amount of the remittitur ordered by the Circuit Court, but conclude that the cost of raising the homes is an improvement or enhancement and should not have been considered as a cost of repair. Alternatively, this Court should affirm the remittitur order because in its conclusion that the cost of elevating the homes exceeded the market value, the Circuit Court properly determined that the Petitioners are not entitled to the home elevation costs in accordance with West Virginia law.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

Pursuant to Rule 10(c)(9) of the WEST VIRGINIA RULES OF APPELLATE PROCEDURE, the undersigned does hereby certify that on the 14th day of April, 2014, a copy of the foregoing *Respondent Brief of City of Huntington* was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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