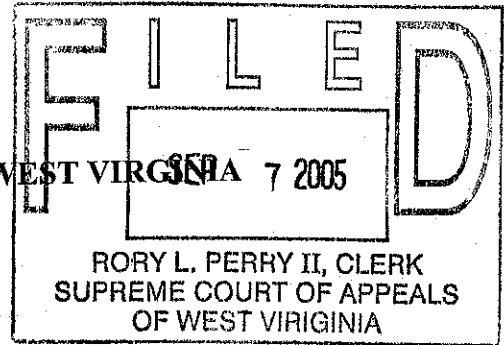


NO. 32672

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



ULRIKA BROWNING, *et al.*,

Appellants,

v.

Upshur County, West Virginia
Civil Action No. 02-C-104
Judge Thomas H. Keadle

JUDITH HALLE, *et al.*,

Appellees.

**BRIEF ON BEHALF OF APPELLEES
JUDITH HALLE AND ANDREAS HALLE**

Curtis G. Power, III, (WV Bar #2962)
BOWLES RICE MCDAVID
GRAFF & LOVE LLP
19 West Cork Street, Suite 102
Winchester, Virginia 22601
540-723-8877
Counsel for Appellees

TABLE OF CONTENTS

I.	THE KIND OF PROCEEDING AND NATURE OF RULING BELOW	1
II.	STATEMENT OF FACTS	3
	TIMBERING.....	3
	FECAL COLIFORM CONTAMINATION.....	6
III.	STANDARD OF REVIEW	9
IV.	POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF THE LAW ...	9
A.	THE HALLES' USE OF THEIR PROPERTY HAS NOT DAMAGED THE APPELLANTS' RIPARIAN RIGHTS NOR CREATED A NUISANCE	9
B.	THE APPELLANTS PRODUCED NO COMPETENT EVIDENCE BEFORE THE TRIAL COURT THAT THE HALLES DAMAGED THEIR RIPARIAN WATER RIGHTS.	12
C.	THE APPELLANTS FAILED TO PRODUCE SUFFICIENT EVIDENCE TO OVERCOME THE UNDISPUTED MATERIAL FACTS WHICH THE TRIAL COURT RELIED UPON IN GRANTING THE HALLES' MOTION FOR SUMMARY JUDGMENT.....	13
D.	THE APPELLANTS FAILED TO BRING THEIR RULE 60(b) MOTION ON FOR HEARING BEFORE THE TRIAL COURT AND HAVE WAIVED THEIR RIGHT TO POST-TRIAL RELIEF.....	15
V.	CONCLUSION	16

TABLE OF AUTHORITIES

Cases

Allstate Wrecker Service v. Kanawha Co. Sheriff's Dept., 212 W.Va. 226, 569 S.E. 2d 473 (2002) 13

Bowyer v. Hi-Lad, Inc., 2004 W.Va. LEXIS 197 (2004) 9

Brady v. Deals on Wheels, Inc., 208 W.Va. 636, 542 S.E. 2d 457 (2004) 9

Carter v. Monsanto, 212 W. Va. 732, 575 S.E.2d 342, 347 (2002) 11

Gallapo v. Wal-Mart Stores, Inc., 197 W.Va. 172, 475 S.E. 2d 172 (1996)..... 9

Gaston v. Mace, 33 W. Va. 14, 23, 10 S.E. 60, 63 (1889)..... 10

Halltown Paperboard Co. v. C. L. Robinson Corp., 150 W. Va. 624, 148 S.E.2d 721 (1966)..... 9

Hendricks v. Stalnaker, 181 W. Va. 31, 380 S.E.2d 198 (1989) 10

Morris Associates v. Priddy, 181 W. Va. 588, 383 S.E.2d 770 (1989) 10

Painter v. Peavy, 192 W.Va. 189, 451 S.E. 2d 755 (1994)..... 9

Petros v. Kellas, 146 W.Va. 619, 122 S.E.2d 177 (1961)..... 16

Roberts v. Martin, 72 W. Va. 92, 77 S.E. 535 (1913)..... 10

Russell v. Island Creek Coal Co., 389 S.E.2d 194, 203 (W. Va. 1989)..... 10

Snyder v. Callaghan, 284 S.E.2d 241, 246 (W. Va. 1981)..... 9

W.Va. Fire & Cas. Co. v. Stanley, 602 S.E. 2d 483, 489 (2004)..... 9

Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E. 2d 329 (1995)..... 9

Rules

Rule 56 W.Va. R. Civ. P. 9

Rule 60(b) W.Va. R. Civ. P. 3, 16

Rule 22.04 T.C.R..... 15

I. THE KIND OF PROCEEDING AND NATURE OF RULING BELOW

This case had its genesis in a nuisance lawsuit filed by the Appellees herein, Judith and Andreas Halle (hereinafter the "Halles"), against one of the Appellants, Ulrika Browning, wherein they complained that she engaged in various harassing activities which were disruptive of the quiet enjoyment of their property, where they reside and maintain Arabian horses. The trial court entered a temporary injunction order, enjoining all of the parties from engaging in certain activities pending a final hearing in the case.

Subsequent to the entry of the temporary injunction order, Ms. Browning and the other Appellants herein, Timothy and Wendy Higgins, sought to file a counter-claim and third-party claim, respectively, against the Halles.

Although the activities of the Halles of which the Appellants complain in this action were allegedly ongoing since 2000, the Appellants waited until after the Halles filed their action against Ms. Browning to assert a claim against them. Ms. Browning confirmed that the reason for filing her counter-claim was in retaliation for the Halles' institution of an action against her. (Ulrika Browning Deposition, pp. 73-75).¹

Mr. Higgins testified that he had never discussed with Ms. Browning the filing of an action against the Halles, prior to the action filed against her, and that he wanted to "help her" by joining in the lawsuit. (Timothy Higgins Deposition, pp. 67-72). Likewise, his wife, Wendy

¹ Those portions of depositions that are cited in the Brief are attached as exhibits to the Defendants' Motion for Summary Judgment, Docket Entry No. 10.

Higgins, confirmed that it wasn't until Ms. Browning became involved in litigation with the Halles that they decided to join in a lawsuit with her. (Wendy Higgins Deposition, p. 34).

The counter-claim and third-party claim (which are identical to the Appellants' claims in this case) were dismissed without prejudice to re-file them as a separate action. The initial nuisance action is pending before the trial court.²

The Appellants thereafter filed their separate action against the Halles, alleging that the Halles engaged in land use practices which have created a nuisance by affecting their riparian rights as downstream users of Laurel Run, which is a small tributary adjoining the parties' properties.

The case was originally scheduled for trial in January 2004, but was continued on motion of the Appellants. It was reset for trial on September 22, 2004. Following extensive discovery, including multiple inspections of the Halles' premises and sampling and testing of the stream water from Laurel Run by agents of the State Department of Environmental Protection and the parties' own experts, the Halles filed a motion for summary judgment, which was fully briefed by the parties and argued before the trial court during a hearing on September 15, 2004. Following oral argument the trial court granted the Halles' motion for summary judgment, as reflected in its order entered on October 6, 2004.³

² There is nothing in the Circuit Court's file which reflects that the Prosecuting Attorney informed the Court that he had declined to prosecute Ms. Browning for criminal contempt, as stated in the Appellants' Brief (p.3).

³ The characterization in the Appellants' Brief of the trial court's ruling "after a ten minute hearing," (p. 1) is misleading because the parties fully briefed the issues before the hearing. There is no suggestion in the Appellants' Brief that they were not given a full and fair opportunity to brief the issues and to argue them at the time of the hearing.

The Appellants served a motion for relief from judgment pursuant to Rule 60(b) W.Va. R. Civ. P. on October 14, 2004, upon the grounds that they wanted to submit additional evidence obtained through discovery which they had failed to submit in their opposition to the Halles' motion for summary judgment.⁴ The Appellants at no time requested that the trial court consider and rule upon their Rule 60(b) motion.

II. STATEMENT OF FACTS

The Appellants claim that the Halles have interfered with their riparian rights by (1) their timbering activities which have caused erosion and sediment run-off, and (2) waste water run-off which has increased the level of fecal coliform in Laurel Run. The relevant material facts of each aspect of their claim is discussed as follows.

TIMBERING

Prior to the filing of their action, the Appellants made numerous complaints to the West Virginia Division of Forestry (hereinafter "Forestry"), contending that the loggers with whom the Halles had contracted to perform limited timbering on their property had violated so-called Best Management Practices (hereinafter "BMP"), which in turn caused sedimentation in Laurel Run.⁵

⁴ In their Designation of the Record for Appeal, the Appellants designated their Motion for Relief from Judgment and Notice of Filing of additional discovery. By order entered on May 25, 2005, the trial court struck from the record the materials identified in the Notice of Filing. Although the Appellants have cited in their Brief to the materials which were not certified by the circuit clerk as part of the record, such materials are clearly not a part of the appellate record and should be disregarded by this Court.

⁵ BMP's are Forestry guidelines which loggers are required to follow in order to minimize erosion and sedimentation during logging activities.

James "Jim" Mitchell, who was the Forestry agent in Upshur County for over thirty years before his retirement in 2002, investigated each of the Appellants' complaints.

Mr. Mitchell's multiple complaint investigations did not reveal any significant departures from BMP's and he did not issue any citations to any of the contract loggers who worked on the Halles' property. Mr. Mitchell confirmed that BMP's were used during the reclamation stage of each phase of the timbering operation that he inspected. He also acknowledged that BMP's are designed to minimize, but not eliminate, erosion and sediment run-off from a timbering project.

Following Jim Mitchell's retirement, Nathan "Nate" Kennedy became the Forestry agent for Upshur County.

While Mr. Kennedy observed several areas of potential erosion, he found that the reclamation measures taken to construct filter strips in appropriate locations on the Halles' property were in accordance with BMP's to prevent sediment run-off into the stream. He also observed Laurel Run during a rainfall and noted that a branch of the stream that came into the main stem of the stream below the Halles' property was brownish (*i.e.*, had a higher sediment content) than the water coming off of the Halles' property. (Nathan Kennedy Deposition, pp. 33-40.)

One of the Appellants' experts, Benjamin Stout, who was hired to assess the effect of the Halles' timbering on sediment flow into the Laurel Run watershed, confirmed the findings of the Forestry officials that the reclamation measures following the logging operations had substantially eliminated sediment run-off into Laurel Run.

Q: Does – in your opinion, did the past timbering practices currently have any effect on the sedimentation in Laurel?

A: You mean on the current situation in Laurel Run?

Well, there's some relationship there, but I don't think that it – that the past timbering practices – I think most of that has, you know, healed itself to a point where you don't see the big impact that I kind of thought I was going to see, I guess, when I was retained for the case. (Benjamin Stout Deposition, p. 88.)

Dr. Stout also corroborated Nate Kennedy's finding that there are other sources of sediment run-off into Laurel Run.

Q: There's sediment from a lot of places?

A: I think the DOH (Department of Highways) could do a better job, too, in fairness to everybody.

Q: Okay. And you acknowledged that there are other sources of sedimentation in Laurel Run.

A: Oh, yeah.

(Benjamin Stout Deposition, pp. 91-93.)

The Appellants' other retained expert, Richard Eades, admitted that his assessment of sediment run-off into Laurel Run did not include an investigation of other sources of sedimentation.

Q: And your answer to my question was, you did not attempt to determine whether there were other potential sources of sedimentation from other properties, above Higgins and Browning, that come into the receiving stream [Laurel Run]?

A: No. Not only did I not attempt that, all I did was walk the road, I looked at – I think I looked in drainage ditches much like the Higgins did with their – with their videotape.

(Richard Eades Deposition, p. 97.)

Dr. Eli McCoy, the former Director of the West Virginia Division of Environmental Protection, who was engaged on behalf of the Halles to perform an in-depth investigation and assessment of environmental conditions on their property, concluded in his report of findings (Assessment of Select Environmental Conditions of the Halle Property, Exhibit 4, p. 8; Defendants' Motion for Summary Judgment) that the timbering activities on their property did not substantially contribute to sediment loading of Laurel Run:

The act of logging a watershed increases the runoff coefficient.

The site visit did not reveal the presence of erosion gullies on the Halle property or eroded stream banks downstream of the Halle property. Given that 2003 has been one of the wettest years on record, it would not seem that the logging operations have increased downstream flows to the point of causing harm.

Logging the Halle property has increased the runoff coefficient, but there is no indication that this has caused any harm. This increased theoretical risk of higher peak flows with specific rainfall events, results from any land use which is not mature forest land. The land management practices employed by the Halles are accepted practice throughout the state.

This inspection by Forestry, indicating general compliance with BMPs, means that responsible care was being exercised in the conduct of the logging operation.

FECAL COLIFORM CONTAMINATION

After the Appellants filed their action against the Halles, they filed a complaint with the Upshur County Health Department and the West Virginia Department of Environmental Protection (hereinafter "DEP"), alleging that surface water run-off from the Halles' property into Laurel Run had caused high levels of fecal coliform in the stream.⁶

In response to the Appellants' complaint, the DEP conducted fecal coliform sampling in the Laurel Run watershed and issued a report of its findings (Exhibit 3; Defendants' Motion for Summary Judgment). The report concluded that:

A review of the data suggests that residential, agricultural, and other activity within the investigation area is not contributing a significant source of fecal coliform during the sampling period.⁷

Dr. McCoy also conducted an exhaustive sampling of Laurel Run for the presence of fecal coliform, pursuant to the testing parameters required under the State's water quality rules.⁸

Dr. McCoy and his assistant conducted seven samplings over two months and obtained samples from eight locations on Laurel Run, including locations above, below and on the Halles' part of the stream, during each sampling session.

⁶ The presence of fecal coliform bacteria is not in itself harmful, but is an indicator of the presence of human or animal fecal contamination. (Assessment of Select Environmental Conditions of the Halle Property, Exhibit 4, p. 7; Defendants' Motion for Summary Judgment.)

⁷ A copy of the report was provided to the Appellants' counsel by letter dated December 29, 2003, from Bradley Swiger, the DEP's environmental enforcement inspector supervisor. The Appellants were invited to submit additional data or information relevant to their claim that the Halles' property was the source of fecal coliform contamination in Laurel Run, but they have never provided any additional information to the DEP.

⁸ The Water Quality Rules, Appendix E, Table 1 (Exhibit 5; Defendants' Motion for Summary Judgment), require not less than five samples per month in order to obtain a statistically valid result.

Dr. McCoy's initial report and his supplemental report contained in his letter of December 23, 2003, concluded that:

Results (Table 1 in Appendix C) of the sampling clearly indicate that the fecal coliform concentrations of Laurel Run leaving the Halle property do not exceed the water quality criterion of 200 fecal coliform colonies per 100ml of surface water. The data collected do indicate that Laurel Run is experiencing violations of the fecal coliform water quality criterion below the plaintiffs' properties at station LR-1, but this is not associated with the activities being conducted on the Halle property. These data were sampled during non storm water events. The fact that these violations occur at station LR-1 downstream of the plaintiffs' properties, but not at LR-2 the station downstream of the Halle property, indicates the source of this fecal coliform contamination is not the Halle property.

Station LR-1, located immediately below the plaintiffs' properties, has a Geometric Mean of 252 Fecal Coliform colonies per 100ml of stream sample. This clearly is a violation of the numeric criterion for Fecal Coliform. This indicates that water quality in the stream as it leaves the Plaintiffs' [Petitioners'] properties is not supportive of the designated uses for that stream. This can in no way be attributed to activities on the Halle property.

This sampling effort demonstrates that activities on the Halle property, relative to the Fecal Coliform concerns, are not rendering the water leaving their property unfit for any designated use.

In contrast to the detailed investigations conducted by the DEP and Dr. McCoy, the Appellants' expert, Dr. Ben Stout, conducted only two samplings of Laurel Run, one under high water conditions and the second nearly four months later. The test results of all 16 of the samples taken by Dr. Stout during his second sampling were within state water quality standards. Dr. Stout's samplings were statistically invalid because he failed to follow the minimum five samplings per month requirement under the state water quality rules.

III. STANDARD OF REVIEW

Pursuant to Rule 56 W.Va. R. Civ. P., summary judgment is proper where the record demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Brady v. Deals on Wheels, Inc., 208 W.Va. 636, 542 S.E. 2d 457 (2004). Summary judgment is appropriate if, from the totality of the evidence presented, the record 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. Brady, *supra* at 641, citing Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E. 2d 329 (1995).

An appellate court applies a plenary review to a circuit court's entry of summary judgment. W.Va. Fire & Cas. Co. v. Stanley, 602 S.E. 2d 483, 489 (2004). A circuit court's entry of summary judgment is reviewed *de novo*. Bowyer v. Hi-Lad, Inc., 2004 W.Va. LEXIS 197 (2004); Gallapo v. Wal-Mart Stores, Inc., 197 W.Va. 172, 475 S.E. 2d 172 (1996); Painter v. Peavy, 192 W.Va. 189, 451 S.E. 2d 755 (1994).

IV. POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF THE LAW

A. THE HALLES' USE OF THEIR PROPERTY HAS NOT DAMAGED THE APPELLANTS' RIPARIAN RIGHTS NOR CREATED A NUISANCE⁹

"The riparian owner has a property interest in the flow of a natural watercourse through or adjacent to his property." Snyder v. Callaghan, 284 S.E.2d 241, 246 (W. Va. 1981)

⁹ Although the Appellants argue (Appellants' Brief, Argument "F," pp. 38-39) that the trial court neglected to address their negligence cause of action, there were no claims developed during discovery other than nuisance and interference with riparian rights, which are addressed herein.

(citing Halltown Paperboard Co. v. C. L. Robinson Corp., 150 W. Va. 624, 148 S.E.2d 721 (1966)). “The right of enjoying this flow without disturbance, interference or material diminution by any other proprietor is a natural right The right of property is in the right to use the flow, and not in the specific water Each proprietor may make any use of the water which does not essentially or materially diminish the quantity, corrupt the quality or detain it so as to deprive other proprietors of the public of a fair and reasonable participation in its benefits.” Snyder, 284 S.E.2d at 246 (quoting Gaston v. Mace, 33 W. Va. 14, 23, 10 S.E. 60, 63 (1889)). Such a right provides protections to streamside property owners in the event of a scarcity of water, and the reasonable use maxim is a flexible standard that allows courts to decide among competing interests.

The standard of proof to establish liability for interference with riparian rights is the “reasonable use” standard. As this Court in Morris Associates v. Priddy, 181 W. Va. 588, 383 S.E.2d 770 (1989) noted, “In a related area of water law, that of riparian rights, we have always utilized the doctrine of reasonable use ‘The right of a lower riparian owner to the natural flow of the stream is subject only to a reasonable use of the water by the upper riparian owners as it runs through their lands before reaching his.’” Morris, 181 W. Va. at 592, 383 S.E.2d at 774 (citation omitted).¹⁰ See also Russell v. Island Creek Coal Co., 389 S.E.2d 194, 203 (W. Va. 1989) (“The obstruction or diversion of water rights is governed generally by the doctrine of reasonable use.”).

The unreasonable diversion of water is a private nuisance. Roberts v. Martin, 72 W. Va. 92, 77 S.E. 535 (1913). A private nuisance is a substantial and unreasonable interference

¹⁰ There is no allegation that the Halles have engaged in an unreasonable “use of the water” when it was flowing through their property. Rather, the Appellants’ allegations focus on the Halles’ use of their *lands*, not the water.

with the private use and enjoyment of another's land. Recovery for a private nuisance is limited to persons who have suffered a significant harm to their property rights. The unreasonableness of the interference must be determined by balancing of the landowners' competing interests. Hendricks v. Stalnaker, 181 W. Va. 31, 380 S.E.2d 198 (1989).

The undisputed facts of this case clearly establish that the activities of the Halles in the use of their land for their residence and for the maintenance of horses and limited timbering are reasonable uses which have caused no harm – much less a significant harm – to the Appellants, who are downstream users of Laurel Run.¹¹

Ironically, the primary use of Laurel Run which the Appellants contend has been damaged by the Halles' activities is their use of the stream water for **drinking** water. *See*, excerpts of Depositions of Plaintiffs, Exhibits 10,11, and 12; Defendants' Motion for Summary Judgment. All of the experts in this case – including those for the Appellants – have testified that drinking untreated stream water – regardless of the presence of domestic and agricultural run-off – is unsafe and ill advised. *See*, Deposition of Benjamin Stout, pp. 13-15; 68; Deposition of Bradley Swiger, pp. 42-44; Deposition of Richard Eades, pp. 130-131; Assessment of Select Environmental Conditions of the Halle Property, Exhibit 4, pp. 6-7; Defendants' Motion for Summary Judgment. Accordingly, the Appellants cannot establish that but for the activities of the Halles, the water in Laurel Run would be safe to drink or to utilize for other domestic purposes.

¹¹ In contrast to the responsible land use practices of the Halles, Mr. Higgins testified during his deposition that his method of human waste disposal is to dump buckets of waste from his privy on to the ground. (Timothy Higgins Deposition, pp. 9-11.)

The Appellants' other concern that there *may be* high water or flooding events or other *potential* conditions on Laurel Run caused by the Halles' land use activities is also unavailing. "It is well-settled, however, that under private nuisance, fear alone is not a sufficient basis for recovery." Carter v. Monsanto, 212 W. Va. 732, 575 S.E.2d 342, 347 (2002).

B. THE APPELLANTS PRODUCED NO COMPETENT EVIDENCE BEFORE THE TRIAL COURT THAT THE HALLES DAMAGED THEIR RIPARIAN WATER RIGHTS.

The Appellants' reliance upon their own deposition testimony and the allegations in their complaint to create material issues of fact was insufficient to overcome the Halles' motion for summary judgment.

The Appellants' depositions contain nothing but anecdotal and speculative testimony about how they *believe* that land use activities on the Halles' property has affected Laurel Run and their use of the water from the stream.

Likewise, the Appellants offered only speculative testimony from their own experts with regard to the *actual* as opposed to *theoretical* impact that the Halles' land use activities have had on Laurel Run. The Appellants' expert, Richard Eades, after expounding on what *might* happen after significant rain falls, admitted that he did no sediment loading studies of Laurel Run which would quantify the amount, if any, of the sediment coming into the stream from various locations – including the Appellants' own properties. Deposition of Richard Eades, p. 107.

The opinion testimony of the Appellants' other expert, Ben Stout, was equally unreliable because his sampling methodology did not comport with the requirements of the State Water Quality Regulations. Even more remarkably, Dr. Stout readily conceded that there were

extremely high fecal coliform levels obtained below the Halles' property (the source of which he couldn't explain) and that there is natural fecal coliform coming into the stream along its entire course.

The reason that the Appellants want this Court to ignore the investigation findings of the State Division of Forestry and the State Department of Environmental Protection (as well as the findings of Dr. McCoy, which have not been challenged) is not because they are irrelevant but because they are the only *objective*, competent evidence of whether the Halles' land use activities have harmed Laurel Run and thus interfered with the Appellants' riparian water rights.¹²

C. THE APPELLANTS FAILED TO PRODUCE SUFFICIENT EVIDENCE TO OVERCOME THE UNDISPUTED MATERIAL FACTS WHICH THE TRIAL COURT RELIED UPON IN GRANTING THE HALLES' MOTION FOR SUMMARY JUDGMENT.

The Appellants misapprehend their burden of proof in opposing the Halles' motion for summary judgment by arguing that "standing alone" (Appellants' Brief, p.20), the allegations in their complaint and their deposition testimony established a *prima facie* cause of action sufficient to overcome the Halles' motion.

The burden was on the Appellants to (1) rehabilitate the evidence in the record attacked by the Halles, (2) produce other evidence showing the existence of genuine, triable issues, or (3) explain by affidavit why additional discovery was necessary. Allstate Wrecker

¹² The Appellants' allusion in their Brief (pp. 9; 31) to the Mighty Mac (i.e. home aeration) unit as a potential source of fecal coliform discharge into the stream is also unsupported by the record. Mrs. Halle testified in her deposition that the Mighty Mac unit is tied into both a bathroom and floor drain in their barn, the latter of which is not used. (Judith Halle deposition, pp. 107-109.) The *treated* effluent from the unit is discharged onto the ground and not into Laurel Run. (Assessment of Select Environmental Conditions of the Halle Property, Exhibit 4; Defendants' Motion for Summary Judgment.)

Service v. Kanawha Co. Sheriff's Dept., 212 W.Va. 226, 569 S.E. 2d 473 (2002). The Appellants failed on all three counts.

Other than dismissing the material facts relied upon by the Halles in their motion for summary judgment as "selective parsing of words surgically excised" (Appellants' Brief, p.29) from the record, the Appellants did not otherwise dispute the evidence offered by the Halles or attempt to rehabilitate the evidence which the Halles called into question. Except for their own deposition testimony and the uncorroborated opinion testimony of their retained experts, they offered no evidence that there were *material* issues of fact which required resolution. The Appellants also did not contend that the Halles' motion was premature or that additional discovery was required.

The Appellants are also mistaken in their understanding of the applicable substantive law governing this Court's determination of whether the facts in this case support a claim of nuisance based upon an interference with their riparian water rights. The cases cited in their Petition deal with surface water run-off and the relative rights of the property owners from whose property the run-off emanates versus those onto which the water flows. The common law as it has been developed with regard to surface water is distinct from that with regard to riparian water rights.

The Halles strenuously disagree with the Appellants' argument that the standard for determining whether they have interfered with the Appellants' riparian water rights is to be considered in light of how the Appellants have historically used the water from Laurel Run. The Halles are subject to a reasonable use standard as measured against whether the Appellants have suffered significant harm to their use of the stream water. In this case the material facts are not in

dispute – the activities on the Halles’ property have not, by any measurable, objective standard, caused significant sedimentation or fecal coliform levels in Laurel Run. On the other hand, the Appellants’ purported use of the water for drinking and other domestic purposes is not only unreasonable – it is by all accounts potentially injurious to their health and well-being.¹³ It is disingenuous for the Appellants to come before this Court and argue that they should be permitted to have a jury decide whether their ill-advised uses of the stream water should nonetheless be protected from the benign up-stream activities of the Halles.

D. THE APPELLANTS FAILED TO BRING THEIR RULE 60(b) MOTION ON FOR HEARING BEFORE THE TRIAL COURT AND HAVE WAIVED THEIR RIGHT TO POST-TRIAL RELIEF.

The Appellants argue that the trial court erred by failing to consider and grant their motion for relief from judgment under Rule 60(b) W.Va. R. Civ. P. (Appellants’ Brief, Argument “G,” pp. 39-43.) However, the Appellants neglected to advise this Court that at no time did they request the trial court to hear or otherwise rule on their motion. (See Trial Court Rule 22.04, “Any motion requiring immediate disposition shall be called to the attention of the court by the party filing such motion.”)

As the Halles argued below in opposition to the motion (See Defendants’ Memorandum of Authority in Opposition to Plaintiffs’ Motion for Relief from Judgment and Motion to Reconsider the Court’s Prior Order, Docket Entry No. 21.), the only basis that the Appellants asserted for the relief that they sought was that they wanted to submit additional evidence for the trial court’s consideration that they had neglected to submit in their opposition to the motion for summary judgment. If in fact they believed that there were good faith grounds

¹³ The Appellants now concede that West Virginia’s Water Pollution Control Act and its implementing Regulations do not “specifically designate the use of raw stream water for drinking purposes as a recognized use.” Appellants’ Brief, p. 26.

upon which to assert their motion they surely would have requested that the trial court either rule on it without a hearing or promptly schedule a hearing. Instead, the Appellants allowed the motion to remain indefinitely on the court's docket. If the Appellants truly wanted the trial court to re-consider its prior ruling, it was incumbent upon them to bring their motion on for hearing and their failure to do so creates no error attributable to the trial court.

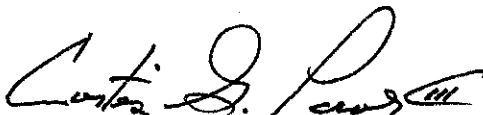
V. CONCLUSION

The Appellants were afforded a full and fair opportunity before the trial court to establish that there were material, triable issues of fact in support of their claims against the Halles and failed to carry that burden. The arguments set forth in their Brief to this Court amount to a mere contention that there are disputed issues of material fact, which are unsupported by the record. A mere contention that there are disputed facts is not sufficient to overcome a motion for summary judgment. Petros v. Kellas, 146 W.Va. 619, 122 S.E.2d 177 (1961).

Wherefore, the Appellees, Judith Halle and Andreas Halle, respectfully request that this Honorable Court deny the relief sought in the Appellants' Brief and affirm the judgment of the Circuit Court of Upshur County.

Respectfully submitted this 6th day of September, 2005.

JUDITH HALLE AND
ANDREAS HALLE, APPELLEES
By Counsel



Curtis G. Power, III, (WV Bar # 2962)
BOWLES RICE MCDAVID GRAFF & LOVE LLP
19 West Cork Street, Suite 102
Winchester, Virginia 22601
540-723-8877
540-450-1535 (Facsimile)

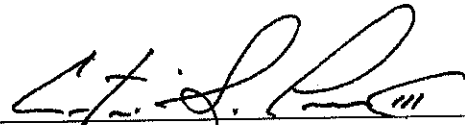
CERTIFICATE OF SERVICE

I, Curtis G. Power, III, counsel for the Appellees, do hereby certify that I have served a true and exact copy of the foregoing BRIEF ON BEHALF OF APPELLEES JUDITH HALLE AND ANDREAS HALLE, upon the below-named counsel on the date indicated by United States mail, first class postage prepaid to them at their addresses as follows:

William E. Ford, III, Esquire
321 West Main Street, Suite 600
Clarksburg, West Virginia 26301

Steven B. Nanners, Esquire
Law Offices of Nanners & Willett, L.C.
45 West Main Street
Buckhannon, West Virginia 26201

this 6th day of September, 2005.



Curtis G. Power, III