

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

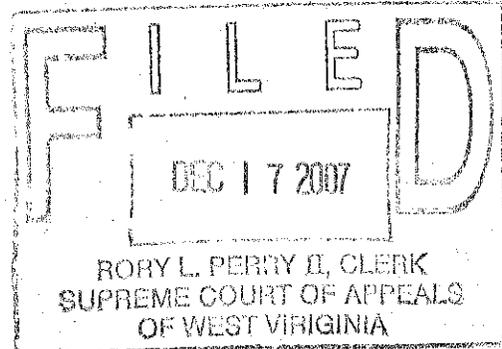
DOCKET NO. 33664

IN RE: FLOOD LITIGATION

**Civil Action No. 02-C-797
Honorable Arthur M. Recht
Coal River Watershed**

APPELLANTS' BRIEF

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 33664

IN RE: FLOOD LITIGATION

Civil Action No. 02-C-797
Honorable Arthur M. Recht
Coal River Watershed

I.

INTRODUCTION.

On January 18, 2007, the Circuit Court Judge (the Honorable Arthur M. Recht, hereafter "Panel Judge") serving as a member of the Flood Mass Litigation Panel responsible for the Coal River Watershed¹, one of a number of identified watersheds involved in this mass litigation, entered an Order dismissing with prejudice all claims relating to the July 8, 2001, flooding within the Coal River Watershed:

"26. Accordingly, pursuant to Rule 12(b)(6) and 12(c) of the West Virginia Rules of Civil Procedure, this Court hereby DISMISSES WITH PREJUDICE each and every claim relating to the July 8, 2001 flooding asserted by each and every Plaintiff within the Coal River watershed."

Memorandum of Opinion and Order, January 18, 2007, page 31.

Appellants seek a reversal of the January 18, 2007, Order, reinstatement of the cases and remand to the Circuit Court of Raleigh County, West Virginia, or such other venue as is appropriate, for trial, all in accordance with the procedural and substantive law in this jurisdiction and in accordance with *In Re Flood Litigation*, 607 S.E.2d 863 (W. Va. 2004).

This appeal must be considered in the larger context of the Mass Litigation Panel case now known as and captioned above: *In Re Flood Litigation* which was the subject of this Court's opinion: *In Re Flood Litigation*, supra. As will be shown below, *In Re Flood*

¹ The Coal River Watershed encompasses all of Boone County and parts of Raleigh and Kanawha Counties.

Litigation, supra, is “the law of this case” pursuant to *The Law of the Case Doctrine*, W. Va. Const. Art. 8, section 4. The Panel Judge’s ruling, which is the subject of this Appeal, must be viewed in light of this overarching litigation which has been pending since 2001, through an appellate process and an eight week trial resulting in a verdict for the Plaintiffs below². Throughout this entire six year period, the Coal River Watershed Appellants (Plaintiffs below), have, by order of the Panel Judge, been denied discovery of any kind prior to the Panel Judge’s dismissal of Appellants’ claims with prejudice. This, despite the finding of this Court in *In Re Flood Litigation* that Appellants should be accorded the opportunity for discovery:

“This Court is aware of no reason why Plaintiffs should be foreclosed from the opportunity to prove that Defendants’ breach of duty caused or contributed to their injuries.”

In Re Flood Litigation, supra, at 873, concerning Appellants’ negligence based allegations; and,

“However, because further development of the evidence below may indicate that Plaintiffs have such a cause of action [nuisance], we find it necessary to briefly discuss our applicable law and the parties’ arguments on this issue.”

In Re Flood Litigation, supra, at 872, brackets added.

The judicially created conundrum Appellants find themselves in is the creation of the Panel Judge’s ruling that Appellants’ complaints, are, as a matter of law, deficient under Rule 12(b)(6) and Rule 12(c) WVRCPC some six years after their filing and a like

² During this six year period, Appellants have spent nearly two million dollars and thousands of hours of lawyer and staff time in the development of their cases. The Defendants, as well, have invested heavily in these cases. The Panel Judge’s ruling was ostensibly based on defects in Plaintiffs’ complaints (which were essentially identical in every watershed); a ruling which, if it has any merit at all, could have been made at the entry, or soon thereafter, of this Court’s Administrative Order dated May 16, 2002, which observed, *inter alia*, “...the Mass Litigation Panel or circuit judge...is directed to be sensitive to the concerns of all litigants with respect to the cost of time and money associated with this litigation....”. Administrative Order, May 16, 2002, at page 6.

time after general denial answers were filed by each Defendant.³ The conundrum is: identical complaints in the Upper Guyandotte Mullens and Oceana sub-watersheds have been found sufficient to get the Plaintiffs past this Court and past the Honorable John A. Hutchison and on to a trial, the design of which was agreed to by this Panel Judge. But, according to the Panel Judge, these same *In Re Flood Litigation* complaints are not sufficient to state a claim in the Coal River Watershed. The conundrum continues: in the Upper Guyandotte Watershed, Plaintiffs were allowed discovery based on their allegations and based on this Court's decision in *In Re Flood Litigation*, but in the Coal River Watershed Appellants were not allowed discovery based on the same allegations and, Appellants presume, based on the Panel Judge's disagreement with this Court's decision in *In Re Flood*. Further, even though Judge Hutchison, in Plaintiffs' view, erroneously took Appellants' jury verdict away and entered judgment for the Appellees, he did so on grounds other than the sufficiency of Appellants' allegations.⁴

The Panel Judge, by his Ruling, has created just the sort of inconsistency (conundrum) Trial Court Rule 26.1 was designed to avoid. Therefore, Appellants urge the Court to take into full account the totality of the procedural history and circumstances of the *Flood Litigation*, as a whole, in considering the merits of this appeal.

³ Beginning January, 2002, each of the defendants filed an answer to the complaints, generally denying the allegations and raising certain affirmative defenses. After this Court's decision in *In Re Flood Litigation*, Appellants moved for leave to file amended complaints for the sole purpose of dropping their class action allegations, which motion was granted. All other allegations remained the same. It was only after the class action amendment that the defendants asserted their Rule 12 motions in lieu of an answer, even though they had previously denied the exact same allegations of liability and damages in Appellants' original complaints.

⁴ Plaintiffs in the Upper Guyandotte Watershed are preparing an appeal of Judge Hutchison's ruling which was a clear invasion of the province the Jury and Plaintiffs' right to have their claims decided by their peers rather than by a Judge. As this Court ruled in *In Re Flood Litigation*, the issue of "reasonableness" in a surface water/nuisance case is always one for the jury. The issue of "reasonableness" was the paramount issue tried in the Upper Guyandotte trial, by design of the Panel Judge, here, and Judge Hutchison.

In all fairness, and with all due respect, an appearance has been created that the time has come to simply dispose of the *Flood Litigation*, given the verdict in favor of the Plaintiffs, and then the subsequent rulings by a majority of the *Flood Litigation* Panel, and the remarkable inconsistencies and remarkable reversals created thereby. Appellants' counsel represents several thousand southern West Virginia coal field families who suffered losses during the July 8, 2001, flooding – some lost everything acquired over a lifetime and some lost their lives – and this notion of unfairness, however incorrect it is, has settled into their communities. What is threatened by this “appearance of unfairness”, is the social contract between a citizen and his government. And there is no more important link between a citizen and his government than a jury - a jury that speaks for the community. When an appearance that the right to plead one's case to his community is taken away by untimely, and in Appellants' view contrived, judicial rulings⁵, then a piece of something of great value to us all has been lost. This is the heart of the matter this Appeal seeks to address.

II.

KIND OF PROCEEDING AND NATURE OF RULING.

This Appeal arises from the dismissal with prejudice of Appellants' lawsuit against the Appellees alleging negligence, surface water/nuisance related interference with Appellants' property, and for interference with Appellants' riparian rights. The stated basis for the dismissal was Appellants failure to state a claim pursuant to Rule 12(b)(6) and Rule 12(c) WVRCPC (see R. Part I, No. 105). The Ruling comes after six years of

⁵ Appellants believe the Panel Judge's ruling is contrived, in that he created an un-precedented standard of pleading to allow him to reach back six years to justify dismissing Appellants' claims without the benefit of a trial, and Plaintiffs believe that Panel Judge Hutchison contrived a reason to find, a year after trial and after becoming aware of Judge Recht's opinion, that he had made erroneous pre-trial rulings regarding Plaintiffs' experts such that a jury verdict should be set aside and judgment entered in favor of the Defendants.

expensive and protracted litigation, largely of the Flood Panel's design. The nature of the Ruling could be stated as simply as this: "You know those papers you filed six years ago? Well it turns out they weren't any good after all." But the nature of the Ruling is not so simple. If it were, the fundamental fairness of our system of justice would have required the Panel Judge to rule on the sufficiency of Appellants' allegations soon after this Court's Administrative Order of May 16, 2002. If not then, certainly fundamental fairness would have required a ruling on Appellants' allegations at the time the Panel Judges reviewed them for purposes of certification of the legal issues to this Court in 2003, and if not then, certainly before the jury verdict in favor of the flood Plaintiffs on May 2, 2006.

But the nature of the Panel Judge's Ruling is more complicated than that, although its complexity does not satisfy the requirement of fundamental fairness. The nature of the Ruling may be described as having two elements: one, a stated conclusion that Appellants' allegations fail as a matter of law pursuant to Rule 12; and, two an implied conclusion based on judicial speculation, and innuendo, that Appellants' lawsuit was brought in violation of a quasi-Rule 11 sanctions standard.

The stated Rule 12 reasons for the dismissal, as will be shown below, consist of an unprecedented amalgamation of a Mississippi case, *Harold's Auto Parts, Inc. vs. Mangialardi*, 889 So.2d 493 (Miss. 2004), which dealt with sufficiency of information in a complaint to justify Mississippi permissive joinder somehow applied to West Virginia requirements under Rule 12 regarding the sufficiency of allegations to state a claim. Appellants contend that this amounts to nothing more than an legally unrecognized effort to justify the Panel Judge's stated reasons for dismissing Appellants' claims.

The Ruling's implied conclusion serves as an exemplar of the Panel Judge's editorializing regarding the need for a different pleading standard to govern "mass torts".

The Ruling's editorializing is replete with speculations as to Appellants' bad motivations to engage in a "fishing expedition"⁶ for undeserved riches. It is riddled with expressions of opinion as to how "mass torts" *should* be dealt with under the law, and it is permeated with a moribund conviction that Appellants were *really* in pursuit of a "strict liability" claim to accomplish their unjust goals.

Because the Ruling which Appellants are asking this Court to review goes well beyond the confines of established Rule 12 analysis, Appellants must necessarily address the totality of the Ruling in the context of the larger *Flood Litigation*. It seems to Appellants that the nature of the Panel Judge's Ruling is to urge this Court to adopt a "super rule" of pleading where mass torts are concerned. A different standard for mass torts, in the opinion of the Panel Judge, should obtain, here, retrospectively, and that even though Appellants have not had and still do not have notice of just what that standard is, the Panel Judge concludes that Appellants have not met it.

Finally, assuming *arguendo* that this Court is persuaded that some "super rule" of pleading is warranted in these cases, Appellants point out that the reasoning of the Panel Judge depends on his mantra that Appellants' allegations have no factual basis. But as shown above, this Court has already determined that there exists an adequate factual basis upon which to consider whether Appellants' allegations satisfy Rule 12 (see this Court's adoption of the evidentiary findings of Judge Johnson). Whether the Court should agree or disagree with the Panel Judge's obvious conviction that "mass tort" complaints must plead

⁶ See page 29, paragraph 20 of Panel Judge's Ruling, January 18, 2007, "fishing expedition"; see also page 25, paragraph 10, where it is suggested that mass litigation requires "greater vigilance" regarding sufficiency of pleadings; see page 24, paragraph 8, where Rule 20 WVRCP is cited as controlling in spite of its inapplicability in Trial Court Rule 26 proceedings and in spite of the fact that this Court has already concluded that joinder, based on Appellants' complaint and Judge Johnson's recommendation is proper in these cases.

something more in the way of pre-suit “facts”, this case does not present the opportunity for this Court to address such a policy issue.

III.

STATEMENT OF FACTS OF THE CASE.

Because Appellants contend their claims are governed by the larger case⁷, as aforesaid, it is necessary to recite the pertinent procedural history. Appellants contend that prior rulings in the *Flood Litigation* are binding on the Panel Judge and that his Ruling, which is the subject of this Appeal, is contrary to those prior rulings, hence the following:

Appellants are Plaintiffs who suffered losses during a series of flash floods occurring on July 8, 2001, throughout southern West Virginia including the Coal River Watershed located in Boone and Raleigh Counties. In August, 2001, the Coal River Appellants along with several thousand other Plaintiffs located in the other watersheds where flash flooding occurred began filing class action lawsuits in the several counties in which the watersheds were located. The Coal River Plaintiffs (Appellants) filed civil actions in Boone County and in Raleigh County, against a number of coal companies, timbering companies, and land owning companies. On November 21, 2001, Plaintiffs (including Appellants) moved to transfer all flood cases in all watersheds to the Mass Litigation Panel. In the meantime, beginning in January, 2002, each of the Appellees began filing general denial answers and raising certain affirmative defenses. Thereafter, this Court directed the Honorable Gary L. Johnson to conduct an evidentiary hearing to determine whether the flood cases should be consolidated. On May 16, 2002, after receiving Judge Johnson’s evidentiary findings regarding certain underlying facts giving rise to Appellants’ (Plaintiffs’) allegations and recommendation, this Court entered an

⁷ See this Court’s Administrative Order, May 16, 2002, page 4; see also *In Re Flood Litigation*, supra, at page 869.

Order pursuant to Trial Court Rule 26 consolidating the flood cases and assigning Judge Johnson as presiding Judge and appointing the Honorable John A. Hutchison and the Honorable Arthur M. Recht as supporting Judges (see R. Part I, No. 5). The consolidated cases were then referred by this Court to the Circuit Court of Raleigh County on June 13, 2002, Judge Johnson to preside. In that Order, Judge Johnson was directed to convene a meeting with the parties and with Judges Recht and Hutchison to be held on August 23, 2002, in Raleigh County “to develop a case management plan for the disposition of said Flood Damage cases, and provide the same to the Chief Justice within 30 days of that meeting”.⁸

The Appellants do not know whether a “case management plan for the disposition of said Flood Damage cases” was submitted to the Chief Justice within 30 days of the August 23, 2002, hearing. However, on October 30, 2002, Judge Johnson entered the **FIRST FLOOD LITIGATION CASE MANAGEMENT ORDER** (see R. Part I, No. 17), which continued a stay on all discovery and which required, inter alia, the Plaintiffs to brief their legal theories in order for the Panel Judges to determine “which of the plaintiffs’ legal theories of liability, if any, are viable as a matter of law.”⁹ This effort eventually led to a decision by the Panel Judges to certify a number of questions to this Court on August 1, 2003. At this point discovery had been stayed for approximately 15 months.

Following extensive briefing and two sessions of oral argument, this Court, on December 9, 2004, issued its ruling in *In Re Flood Litigation*, supra, finding that “there is a sufficiently precise and undisputed factual record on which the legal issues can be determined, and that these legal issues substantially control the case (citations omitted)”. *In*

⁸ See **ADMINISTRATIVE ORDER, SUPREME COURT OF APPEALS OF WEST VIRGINIA** (see R. Part I, No. 15), dated June 13, 2002, at page 2.

⁹ See Johnson ORDER page 4 (see R. Part I, No. 5), *In Re Flood Litigation*, CA No. 02-C-797, In The Circuit Court of Raleigh County, West Virginia. This Order, according to its terms, was entered in the interests of time and money.

Re Flood Litigation, supra, at 869.¹⁰ The legal issues seemingly settled, the Panel's first action after this Court's ruling came some two and one-half months later in the form of a hearing held on February 25, 2005. At this point, discovery as to all watersheds had been stayed for approximately 29 months.¹¹ Following the February 25, 2005, hearing, Judge Hutchison, presumably with the concurrence of Judge Johnson and Judge Recht, entered **Case Management Order June 8, 2005**, (see R. Part I, No. 49). (Appellants believe this to be the second *In Re Flood Litigation* case management order).

A. Pertinent Discovery and Disclosure Rulings.

Much of the Panel Judge's Ruling, which is the subject of this Appeal, is concerned with the factual basis for Appellants' allegations. For this reason, the following captures the pertinent "discovery" and information "disclosure" rulings, knowledge of which is necessary to fully comprehend the reasoning of the Panel Judge.

The June 8, Case Management Order concluded that the "...individual cases in this action will be tried by watershed."¹² Claims in three watersheds were set for trial: (1) Upper Guyandotte River, March 6, 2006, Judge Hutchison to preside; (2) Coal River, June, 2006, Judge Recht to preside; and (3) Tug River, September, 2006, Judge Johnson to preside. Further, Appellants were ordered to file factual disclosures, as follows regarding their claims against each defendant in each of three watersheds: Upper Guyandotte, Coal River, and Tug. As will be shown in Appellants' "Argument", below, these Court Ordered

¹⁰ This finding by the Court is important to this petition because in spite of the Court's finding, based on Judge Johnson's evidentiary hearing that there was a sufficient factual basis to find that timbering and mining contributed to increased surface water run off, Judge Recht concluded that Plaintiffs had an insufficient basis to file a lawsuit alleging damages to Plaintiffs as a result of that increase.

¹¹ During this time, beginning within 48 hours of July 8, 2001, Plaintiffs conducted independent investigations involving aerial photography, public record reviews, witness interviews, surface water runoff modeling and the investment of approximately \$400,000 in expert fees and costs in connection therewith. Because discovery was stayed, Plaintiffs had no access to the properties of the defendants for purposes of further investigation.

¹² See June 8, 2005, CASE MANAGEMENT ORDER, *In Re Flood Litigation*, Circuit Court of Raleigh County, West Virginia, CA. NO. 02-C-797, at page 1 (see R. Part I, No. 49).

disclosures became, in Judge Recht's court, a substitution for the discovery process and laid the ground work for untimely Rule 12(e) motions by the defendants and ultimately successful motions to dismiss on the pleadings:

"A. Each plaintiff's attorney will identify the Circuit Court and civil action number for each flood damage case dealing with flooding that occurred on July 8, 2001, in which the plaintiff is a party;

B. Each counsel will provide each plaintiff's full name, social security number and date of birth;

C. Counsel will identify the names of any individuals residing with the plaintiffs, who are parties with the plaintiffs named in the flood damage case dealing with the flood that on July 8, 2001, and the circuit court and civil action number of each case.

D. Plaintiff's counsel will provide complete physical and mailing addresses, including zip code for the plaintiff's residence as of July 8, 2001. The plaintiff's residence today, and the same information for each piece of property that the plaintiff claims was damaged in the July 8, 2001 events.

E. Plaintiff's counsel will identify the major watershed and sub-watershed in which each plaintiff's residence or other property identified above is located.

F. Plaintiff's counsel will identify the streams or tributaries plaintiffs contends flooded and damaged plaintiff's residence or other structure or property, for which damages are being sought.

G. The name, firm (if applicable), telephone number, mailing address, fax number and e-mail of plaintiff's counsel of record."

Basically, each individual Plaintiff household (a number in excess of 2,000) was to provide the exact location of his or her flooded property, its downstream relationship to each individual defendant's operations, and a specific description of each upstream defendant's alleged activity contributing to the alleged flood damage to each Plaintiff's property. Plaintiffs' disclosures for the Upper Guyandotte were due within thirty days, Coal River within 60 days and the Tug within 90 days. The adequacy of Plaintiffs'

disclosures were to become the focus of Judge Recht's reasoning in deciding Appellants' complaints failed to state a claim under Rules 12(b)(6) and 12(c).

Defendants were also ordered to disclose information to the Appellants within 30 days of the June 8 Order. Each Defendant was ordered to provide the following information. But as will be shown, below, in Appellants' "Argument", in Judge Recht's court these disclosures were never adequately made by the Appellees. And further, Judge Recht ordered that the Appellees did not have to respond to Appellants' discovery requests seeking this information.¹³

A. The Circuit Court and civil action number of the flood damage cases in which the defendant is a party.

B. The defendant's name and State of incorporation.

C. If the defendant is a holding company or a parent company, the defendant will identify, for each active holding and/or operation, as of July 8, 2001, that has been identified in plaintiffs' initial disclosure, the following:

(1) The common name or designation of the location of the active holding or operation specifically identified in any specific suit by a specific plaintiff.

(2) The major watershed and sub-watershed of the identified active holding and/or operation.

(3) For each defendant who holds a permit or has filed a forestry notification for the identified active holding or location, if, and as applicable, West Virginia Department of Environmental Protection Mining Permit Number and date of issuance; West Virginia Division of Forestry Timber Notification Form Number and date of filing; and West Virginia Department of Environmental Protection Well Work Permit Number and date of issuance.

(4) For each identified active holding or operation, a description of the nature of the operations being conducted in the location.

¹³ As will be shown below, Judge Recht "opened" discovery between June 1, 2006, and June 21, 2006, when he again stayed discovery and specifically stated the Appellees did not have to respond to the discovery Appellants had served during the brief 20 days that discovery was open (see R. Part I, No. 98).

(5) The name of all companies that are affiliated by subsidiary, parent or sibling relationship with the identified active holding and/or operation that have been named as defendants and properly identified and served together with a Circuit Court and civil action number for each case in which was named, if any....”

Appellees did not fully comply with the directive to provide Appellants with the above described information. Appellants filed a motion to compel the production of the information and requested that the matter be taken up by the entire Panel inasmuch as the Order pertained to all watersheds including the Coal River Watershed (see R. Part IV, No. 2). On September 15, 2005, Judge Hutchison took up Appellants’ motion requesting the entire Flood Panel to hear Plaintiffs’ “Motion to Compel Each and Every Defendant in Each and Every Watershed to Provide, Forthwith, Complete and Factual Disclosures” as Ordered by the Panel in the June 8, 2005, Case Management Order. The Panel declined to consider Appellants’ motion as to all watersheds. Instead, Judge Hutchison Ordered the Defendants in the Upper Guyandotte watershed only to make complete disclosures (see R. Part I, No. 62). The deficiencies in Appellees’ disclosures regarding the Coal River Watershed were never addressed by the Panel or Judge Recht as Panel Judge for Coal River inasmuch as the Panel declined to consider Plaintiffs’ motion. Most of the information regarding the Defendants’ active operations and the identity of and location of the Appellees’ active operations was and is not available from any source other than the Appellees. Appellants availed themselves of whatever public records, but the detail ultimately required by the Panel Judge (Recht) existed nowhere but in the private files of the Appellees.

On June 1, 2006, almost one year after Appellees were ordered to make disclosures, during a hearing the Panel Judge lifted the discovery stay in the Coal River Watershed. In anticipation of this ruling, Appellants had sent, prior to the hearing, a set of

comprehensive interrogatories and requests for production to the Appellees seeking the information Appellees had failed to provide. But at a status conference held on June 21, 2006, just a few days before responses were due from Appellees, the Panel Judge reinstated the stay on discovery. The Panel Judge denied a request by Appellants that the Appellees at least be required to file responses to the discovery which would have been due on July 1, 2006.¹⁴ As will be shown below, this is the very information the Panel Judge now complains is missing from Appelles allegations. And as will be shown, the Panel Judge's stay set up the Appellees' untimely, quasi-Rule 12(e) maneuver as a substitute for discovery which led to their successful motions to dismiss on the pleadings.

B. Pertinent Pleadings Filed Prior to Panel Judge's Rule 12 Dismissal.

An important Order, for purposes of this Appeal, was entered with the concurrence of the entire Panel on September 30, 2005, *nunc pro tunc* to June 30, 2005 (see R. Part I, No. 61). This Order granted Appellants (and other Plaintiffs) motion to file amended complaints for the purpose of dropping class action allegations and adding the putative Plaintiffs as parties. All other allegations remained the same (see R. Part III, No. 1). Prior to this Order, Appellees had filed general denial answers to Appellants' complaints, beginning in January 2002. But in response to Appellants' Amended Complaints, identical in every respect except as to class allegations and parties, some Appellees, for the first time, filed motions under Rule 12(e) for more definite statements, while at the same time clamoring for permission to file cross-claims and counter claims (this oxymoronic position belies the fact that Defendants were in fact on sufficient notice to file answers to the

¹⁴ Judge Recht Order, July 6, 2006 (see R. Part I, No. 96). Interestingly, this same Order required Defendants to file dispositive motions on or before July 17, 2006, and at the same time required Defendants to file cross-claims and counter claims in spite of the fact that Defendants were claiming that due to the inadequacy of Plaintiffs' allegations Defendants didn't know what Plaintiffs claims were. One wonders on what basis Defendants would file counter claims and cross-claims.

amended complaints as they had filed to the original complaints) to dismiss or alternatively for a more definite statement. Further, several of the Appellees, including, Rowland Land Company and Penn Virginia Operating Company filed general denial answers to Appellants' amended complaints. Further, many of the Appellees, on the one hand claiming no notice of Appellants' claims, also filed motions seeking to file counterclaims and cross claims. All of these pleadings pre-date the Panel Judge's ruling that Appellants' complaints failed to state a claim. As will be shown below, the Panel Judge erroneously considered Rule 12(e) motions after answers had been filed and after the Panel Judge had considered substantial materials outside and in addition to Appellants' allegations. This of course was followed by the Panel Judge's untimely and erroneous dismissal of Appellants' allegations on Rule 12(c) and Rule 12(b) grounds.

C. Trial Plan for *In Re Flood Litigation* Cases Including Coal River Watershed

While this Appeal is focused on Judge Recht's erroneous rulings pertaining to the Coal River Watershed, it is difficult to ignore the Guyandotte trial inasmuch as all three Panel Judges, including Judge Recht, designed the litigation plan that would govern all water sheds, including the Coal River Watershed. To this end, the Panel decided that the "flood litigation" case would be tried by watershed and that each trial would be bifurcated. Three issues would be put to a jury in each watershed:¹⁵ A) whether the defendants' conduct increased peak flow of runoff; B) whether any increase in peak flow materially caused streams to leave their banks; and C) regardless of A and B whether the defendants' use of their property was unreasonable under the circumstances set forth by the Supreme Court of Appeals in the case of *In Re Flood Litigation*. The most onerous of these issues for Appellants, referred to as the "mantra of the case", was the requirement that a jury find

¹⁵ See Trial Plan For Subwatersheds 2A & 2E of the Upper Guyandotte Watershed dated January 26, 2006, at page 3 (see R. Part I, No. 69). This trial plan was formulated by the Panel Judges and the three issues were to be tried in each watershed.

the Defendants' use of their land "unreasonable" in the absence of the jury hearing any evidence of the injury Appellants suffered (a key element in determining reasonable use under *In Re Flood*).

IV.

ASSIGNMENTS OF ERROR

As will be developed below, Appellants seek a reversal and reinstatement of their cases on the following issues:

- A. The Panel Judge is without jurisdiction to rule on the sufficiency of the Appellants' complaints.**
- B. Even if The Panel Judge had the jurisdiction to litigate the sufficiency of Appellants' claims, he erred in his interpretation and application of Rules 8, 12(b)(6), 12(c), and 12(e) WVRCP.**
- C. The Panel Judge's erred in permitting Defendants to pursue Rule 12(e) motions for more definite statement after filing answers and the Panel Judge erred in substituting a quasi-Rule 12(e) procedure for Appellants' right to discovery.**
- D. The Panel Judge abused his discretion by denying Appellants discovery for six years.**
- E. The Panel Judge abused his discretion by denying Appellants discovery in order to justify the fashioning of a new "super rule" of pleading in mass tort cases.**
- F. The Panel Judge erred in denying Appellants' 60(b) motion to reconsider his Ruling dismissing Appellants' claims as untimely filed pursuant to Rule 59(e) WVRCP.**
- G. The Panel Judge's Ruling misstates *THE RULE OF REASONABLE USE* as set forth in *IN RE FLOOD LITIGATION*.**
- H. The Panel Judge's Ruling Disregards this Court's direction in *IN RE FLOOD LITIGATION* with regard to claims for nuisance and negligence.**

V.

STANDARD OF REVIEW

As previously stated, this matter comes to this Court for an appeal of a January 18, 2007, Order granting defendants' motions to dismiss all pending cases in the Coal River Watershed involving matters referred to the mass litigation panel. In this jurisdiction appellate review of motion to dismiss is *de novo*. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W.Va. 770, 461 S.E.2d 516 (1995); Syl. pt. 1, *Bradshaw v. Soulsby*, 210 W.Va. 682, 558 S.E. 681 (2001). Furthermore, this Court has previously held that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)." Syl. Pt. 2, *Dunlap v. Friedman's Inc.*, 213 W.Va. 394, 582 S.E.2d 841 (2003).

VI.

ARGUMENT AND CITATION OF AUTHORITY

A. The Panel Judge is without jurisdiction to rule on the sufficiency of the Appellants' complaints.

The law of this case, as previously alluded to, is set out in this Court's administrative rulings made in the *Flood Litigation*, and is set out in this Court's decision in *In Re Flood Litigation*, *supra*. The *Law of the Case Doctrine*, W. Va. Const. Art. 8, section 4, precludes the Panel Judge from re-litigating the issue of whether the complaint is legally sufficient to state a claim upon which relief can be granted. *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 591 S.E.2d 728 (W. Va. 2004).

Further, *In Re Flood Litigation*, *supra*, is the law of the case in the present action regarding the sufficiency of the plaintiffs' complaints in this action. *Chapman v. Kane*

Transfer Company, Inc., 160 W. Va. 530, 236 S.E.2d 207 (1977) is the law of the case regarding interpretation of Rule 12, WVRCP. Importantly, this Court decided to answer the questions certified by the Panel Judges in part on the basis of Rule 12(c). The conclusion of this Court's 12(c) analysis was, as shown below, to conclude Appellants' complaints stated claims upon which relief could be granted. The Panel Judge's Ruling as, in fact, reversed this Court's decision in *In Re Flood Litigation*.

The *Law of the Case Doctrine*¹⁶ prohibits reconsideration of issues which have been decided in a prior appeal in the same case provided that there have been no material changes in facts since the prior appeal; such issues may not be re-litigated in the trial court or re-examined in a second appeal.

As noted above, *in Re Flood Litigation* was before the West Virginia Supreme Court upon nine questions certified to the Supreme Court by the Panel Judges pursuant to Rule 12(c) of the WVRCP. This Court's review of the Panel's ruling on the certified questions was *de novo*. This Court, assuming that certain facts were true and relying on the record facts adopted by this Court, held, *inter alia*, that the complaints in the present case were sufficiently pleaded to pass muster under Rule 12 (c), WVRCP. In particular, this Court held that Appellants had a cognizable claim for nuisance and that they had causes of action for surface water run-off, negligence, riparian rights and trespass.

At page 870 of *In Re Flood Litigation*, *supra*, this Court concluded:

“We conclude that Plaintiffs have a cause of action under *Morris v. Priddy*.”

At page 872 of *In Re Flood Litigation*, *supra*, this Court concluded that Appellants have a cognizable claim for nuisance:

¹⁶ Const. Art. 8, section 4 provides, in pertinent part: “No decision rendered by the court shall be considered as binding authority upon any court, **except in the particular case decided**, unless a majority of the justices of the court concur in such decision”. (emphasis added).

“Our review of the stipulated facts leads us to conclude that there is not a sufficiently precise and undisputed factual record on which the issue of whether plaintiffs have a cause of action for nuisance can be determined. Therefore, we do not answer the second certified question. However, because further development of the evidence below may indicate that Plaintiffs have such a cause of action, we find it necessary to briefly discuss our applicable law and the parties’ arguments on this issue.”

In Re Flood Litigation, supra, at 872, emphasis added.

At page 872 of *In Re Flood Litigation*, supra, this Court concluded that Appellants have a cause of action for negligence:

“Plaintiffs and Defendants concur that Plaintiffs have a cause of action for negligence. This Court agrees.”

At page 876 of *In Re Flood Litigation*, supra, this Court concluded that Appellants who are riparian owners have claims:

“In addition, those plaintiffs who are riparian owners have claims for damages caused by stream overflows that flooded their land. Therefore, we answer certified question 5, as reformulated by this Court, in the affirmative.”

In Re Flood Litigation, supra, at page 876, footnote omitted.

In essentially reversing this Court’s *In Re Flood Litigation* decision regarding the legal sufficiency of Appellants’ claims, the Panel Judge sought to draw some distinction between “real facts” and “assumed facts” (see R. Part I, No. 105). The suggestion is that this Court’s findings are not binding or conclusive because of “assumed facts”. As wrong as this is as a matter of law, the problem is that the Court’s decision was based not only on assumed facts but also on record facts found by the Court to be true and therefore adopted, as well as based on the parties’ “stipulated facts”. Further, proper Rule 12 analysis requires the reviewing court to assume a plaintiff’s allegations to be true and to further assume before dismissing a plaintiff’s claim that there exists no possible set of facts which would support plaintiff’s allegations. In short, the Panel Judge contrived to get around the *Law of the Case Doctrine* by suggestion and innuendo that “assumed facts” are not

sufficient to judge the sufficiency of an Appellants' claim. As appears in the next argument below, the Panel Judge's reasoning concerning "assumed facts" is clearly wrong.

In summary, the Panel Judge simply had no jurisdiction to revisit or re-litigate the sufficiency of Appellants' claims.

B. Even if The Panel Judge had the jurisdiction to litigate the sufficiency of Appellants' claims, he erred in his interpretation and application of Rules 8, 12(b)(6), 12(c), and 12(e) WVRCP.

The standard for testing the sufficiency of a complaint under Rule 12(c), WVRCP¹⁷ is the same standard as testing the sufficiency of the complaint under Rule 12(b)(6) WVRCP. *Koppelman and Associates, Inc. v. Collins*, 473 S.E.2d 910, 914 (W. Va. 1996) (J. Cleckley), citing *Copley*, 466 S.E.2d at 143, 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* (Wright & Miller) section 1368 at 517-18 (2d ed. 1990) – i.e., "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). Accord, *Chapman v. Kane Transfer Company, Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977). Perhaps more to the point is *McGinnis v. Cayton*, 173 W.Va. 102, *105, 312 S.E.2d 765, 768 (1984), where this Court held:

Therefore, our task in the case at hand is not to decide whether the appellants have a strong case, but rather whether they have any case. If there is a plausible reading of the facts that gives rise to a colorable legal argument, the appellants have met their burden in resisting a motion to dismiss for failure to state a claim upon which relief can be granted. An argument that seems tenuous when first advanced may gain credibility as

¹⁷ Rule 12(c) of WVRCP provides: "Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

testimony and documentation are offered. Although courts cannot afford to entertain frivolous claims, they must give litigants an opportunity to flesh out plausible arguments. It is with such a disposition that we turn to the facts and possible legal theories available to appellants in this case.

What is particularly unfair about the Panel Judge's dismissal at this time, is that Rule 12(c) requires an immediate consideration of the sufficiency of the allegations in the interests of time and money. Here, the Panel Judge certainly had an opportunity to consider the sufficiency of Appellants' complaint at the time of certification, which by the Panel's choice was based on Rule 12(c), or soon after this Court's decision in *In Re Flood Litigation* to consider Appellants' allegations. To delay this inquiry for a total of six years is unconscionable.

Rule 12(e), WVCP, is identical to Rule 12(e), FRCP. It is well-established that Rule 12(e), FRCP, may not be used to frustrate the policy of notice pleading and may not be used as a substitute for discovery in getting the facts in preparation for trial. *Mitchell v. E-Z Way Towers, Inc.*, 269 F.2d 126, 130-31 (1959), citing *Conley v. Gibson*, supra, holding that it would be error for the trial court to grant a motion for a more definite statement after the appellate court has determined that the complaint is sufficiently pleaded. *Id.* At 131.

In light of this authority the Panel Judge was without jurisdiction to rule on the sufficiency of Appellants' complaints and thus clearly misapplied the applicable rules. Further, it is questionable whether the Panel Judges even had jurisdiction to order "supplemental" disclosures at the Appellants' request to "augment" Appellants' complaints.

C. The Panel Judge's erred in permitting Appellants to pursue Rule 12(e) motions for more definite statement after filing answers and the Panel Judge erred in substituting a quasi-Rule 12(e) procedure for Appellants' right to discovery.

As shown above, the Panel Judge's preoccupation with requiring the Appellants to make "more definite disclosures" and at the same time not granting Appellants the right to discovery, amounted to an extra-jurisdictional substitution of Rule 12(e) for discovery.

The Panel Judge used a quasi-judicial Rule 12(e) procedure to circumvent the policy of notice pleading set forth in Rule 8, WVRCP, used 12(e) to prevent Appellants from engaging in discovery and used 12(e) as a substitution for one-sided discovery. The Panel Judge adopted the Appellees' contentions that the complaints failed to set forth specific facts to support their general allegations and that dismissal was, therefore, proper. However, this is specifically rejected by the United States Supreme Court in *Conley*, supra, 355 U.S. 41 at 47. In *Mitchell v. E-Z Way Towers*, supra, the Fifth Circuit Court of Appeals pointed out:

"There is more than a mere procedural distinction between the motion to dismiss for failure to state a claim and the motion for more definite statement. The difference is fundamental as this case demonstrates. If the claim is dismissed because it is too vague or because the plaintiff is unable to supply the details, none of the machinery of discovery whose function it is to ferret out facts and delineate issues before trial can be utilized. On the other hand, with the complaint declared sufficient against a motion to dismiss, the parties, both plaintiffs and defendants, are assured both the right to exploit the flexible rules of discovery which will disclose in advance of trial what the case is all about and, more important, the full protection of a careful circuit judge in the exercise of his wise and considered discretion as the case progresses toward the climax of trial and judgment. 269 F.2d at 130-131.

Procedurally and substantively, the motions to dismiss on the pleadings the Panel Judge invited the Appellees to file in July, 2006, aside from being untimely, went well beyond Rule 12(e) WVRCP. Each of the motions, variously captioned "Motion for more definite statement" or "Motion to dismiss for vagueness" etc were all 12(e) Motions for More Definite Statement which were followed, at the encouragement of the Panel Judge, by Motions to Dismiss on the Pleadings.

The plain language of Rule 12(e) WVRCP, shows that the Appellees' motions for more definite statement were not properly before the Panel Judge (even though the Panel Judge invited them and then invited motions to dismiss based on them):

“If a *pleading* to which a *responsive pleading* is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a *responsive pleading*, the party may move for a more definite statement *before interposing a responsive pleading*. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. WVRCP 12(e) (emphasis added)

Each Appellee moved for judgment on the pleadings based on Appellants' alleged failure to make a satisfactory “more definite statement” or in the Panel Judge's parlance “disclosure of core information”. Each Appellee prior to moving for a more definite statement had filed a general denial answer. By their “flip-flop” pleading, Appellee', with the encouragement of the Panel Judge, amply demonstrated in truth and fact that each was able to admit or deny the allegations in Appellants complaints. The Panel Judge, with all due respect, contrived this “flip-flop” procedure to freeze Appellant in place, without discovery, and then to demand over and over again that Appellant supply the “core information” desired by the Court. Even under the liberality accorded Panel Judges under Trial Court Rule 26.1, this procedure is inappropriate as it denies Appellants due process, as will be shown, under the *Certain Remedies* clause of the West Virginia Constitution.

Appellants are entitled to a reasonable opportunity to develop their cases through the discovery process before their complaints can be lawfully dismissed. Rules 12(b), (c), 56, WVRCP, *Chapman v. Kane*, supra; *Board of Educ. Of the County of Ohio v. Ban Buren & Firestone Architects, Inc.*, 267 S.E.2d 440, 443 (W. Va. 1980); *Drake v. Snider*, 608 S.E.2d 191, 194 (W. Va. 2004).

In the present case, the Appellants made a great effort to comply with the Panel Judge's disclosure Orders and believe they have, in fact, complied with the Orders in spite of the fact that the Panel Judge denied Appellants the discovery this Court found Appellants should have. Spreadsheets linking individual plaintiffs to individual defendant property owners/defendant timbering/defendant mining operations in each of the sub-watersheds of the Coal River Watershed were produced, along with tables summarizing the information and colorful maps delineating the information and memoranda explaining the defendants' activities which plaintiffs alleged substantially caused or contributed to the damages they sustained in the July 8, 2001, flood event (see R. Part IV, No. 3). But the Panel Judge was never satisfied. His dissatisfaction, in part, arose from his misunderstanding of Appellants' case and his refusal to accept as viable the case Plaintiffs successfully proved in the Upper Guyandotte trial.

In dismissing Appellants' complaint, the Panel Judge as levied a *de facto* sanction without the requisite showing of willful disobedience, bad faith, gross negligence or fault and not inability to comply, before sanctions can be imposed for failure to comply with a discovery order under Rule 37, WVCP. See *Cattrell Companies, Inc. v. Carlton, Inc.*, 614 S.E.2d 1 (W. Va. 2005).

D. The Panel Judge Abused His Discretion By Denying Appellants Discovery For Six Years.

As pointed out in some detail above, this Court found that Appellants were entitled to discovery in order to develop their claims. *In Re Flood Litigation*, supra. The Panel Judge without justification ignored this Court's finding regarding discovery and denied Appellants discovery for six years. Fundamental fairness has clearly been denied Appellants. The Panel Judge permitted a contrived Rule 12(e) procedure to eclipse any

chance Appellants had to gather evidence to prove their cases. For this reason alone the Court should grant this appeal and reverse the Panel Judge's decision.

E. The Panel Judge Abused His Discretion By Denying Appellants Discovery In Order To Justify The Fashioning Of A New "Super Rule" Of Pleading In Mass Tort Cases.

The Panel Judge has expressed strong feeling about "mass torts." Appellants believe that those feelings produced a Ruling that implicates the Certain Remedy provision of Article III, Section 17 of the West Virginia Constitution. *State ex rel. Police v. Taylor*, 499 S.E.2d 293, 294 (W. Va. 1997). Article III, Section 17 states "[t]he courts of this State shall be open, and every person for an injury done to him shall have remedy by due course of law...."

Here the Panel Judge has taken away Appellants' remedy without due course of law by fashioning a new standard for Rule 12 WVRCP and then using it to dismiss Appellants' claims. Astonishingly, the Panel Judge turned to a Mississippi case, *Harold's Auto Parts, Inc., v. Mangialardi*, 889 So.2d 493 (Miss. 2004)¹⁸ for guidance in establishing the notion of "core facts" as a requisite element of a complaint. This case was a "mass tort" case consolidated under Mississippi's permissive joinder rule. The appellate Court found that the complaint did not contain sufficient facts from which one could decide if the necessary elements of joinder were present and remanded the case for further proceedings. The case is completely inapposite to the Panel Judge's Rule 12 investigation into the sufficiency of Appellants' claims. Further, the Panel Judge observes in his Ruling that Appellants' complaints do not satisfy Rule 20 WVRCP pertaining to permissive joinder. He so finds in

¹⁸ In *Harold's Auto Parts v. Mangialardi*, supra, the Mississippi Court did discuss rules of the Mississippi Courts concerning sufficiency of complaints; that discussion is instructive here for two reasons. First the complaints in issue had listed 264 plaintiffs exposed to a product over a 75 year period, with 137 manufacturers and 600 different workplaces defendants. Secondly, all the Mississippi Court required was (1) name of defendants against whom a claim was made; (2) the period of time involved in the exposure; and (3) the location of the exposure. As suggested hereinafter, Appellants herein have fully complied even with the *super* Rule 8(a) standards of the Mississippi Court.

spite of the fact that Rule 20 has no application under Trial Court Rule 26.1, and in spite of the fact that this Court has already ruled, on June 13, 2002, that Appellants' cases are appropriate for consolidation under Trial Court 26.

After engaging in this Mississippi analysis, the Panel Judge found that courts must be more vigilant in "mass torts" and that certain "core information" must be demonstrated to be in the possession of the plaintiff before filing his complaint in satisfaction of established Rule 8 requirements. Under the Panel Judge's theory, the defendant is entitled to discover this "core information" through a quasi-Rule 12(e) WVRCP procedure (with the help of a "vigilant" Judge) before the plaintiff is entitled to avail him or here self of discovery. This is not the law in West Virginia and the Panel Judge does not have the jurisdiction to make new law or policy regarding the requirements of pleading.

The hodgepodge of legal rules and theories cobbled together by the Panel Judge to arrive at his new "super pleading" requirement in mass torts is a denial of the Certain Remedy clause protections due the Appellants. After six years, fundamental concepts of fairness surely require this Court to grant this Appeal and return the Appellants' Certain Remedy rights now taken away by a holding in a Mississippi permissive joinder decision.

F. The Panel Judge erred in denying Appellants' 60(b) motion to reconsider his Ruling dismissing Appellants' claims as untimely filed pursuant to Rule 59(e) WVRCP.

In an effort to avoid filing a petition for appeal, Appellants sought the guidance of the Panel Judges, sitting as a Panel, to reconsider the above errors in Judge Recht's Ruling. Judge Johnson on behalf of the Panel declined. Order, March 2, 2007. Further, Judge Johnson advised in his Order that "2. A future hearing concerning the Coal River Watershed will be scheduled by Judge Recht." Order, supra. But instead of a hearing, Judge Recht entered a cryptic Order denying Appellants' Motion for Reconsideration as

untimely filed under Rule 59(e), adding further fuel to the fire that “the time has come to dispose of the *Flood Litigation*” (see R. Part I, No. 117). Appellants had never filed this Motion with Judge Recht and can only presume that the Panel Judge’s assigned him the Motion for ruling. As shown below, Judge Recht’s Order in this regard is entirely wrong and indeed set up the within appeal.

On March 27, 2007, the Panel Judge entered an Order denying a Rule 59(e) motion the he believed was filed by the Appellants and which the he further believed was pending for decision. But the only motion filed by Appellants a Rule 60(b) motion addressed to Judge Johnson as Chief Judge of the MLP. Although the Motion was not designated in its caption as a Rule 60(b)(6) motion, a fair reading of the motion itself leads only to the conclusion that it was filed under that provision. See *Pritt v. Republican National Committee, 2001*, 557 S.E.2d 853 (W. Va. 2004).

On March 2, 2007, Judge Johnson entered an ORDER DENYING PLAINTIFF’S MOTION FOR RECONSIDERATION. It is not clear to Plaintiffs whether Judge Johnson denied the merits of Appellants’ motion or not, although Judge Johnson “reviewed Plaintiff’s Motion and accompanying materials and pertinent legal authorities” and “[a]s a result of these deliberations, the Court has concluded that a hearing before the entire panel is unnecessary and the Plaintiff’s Motion should be DENIED” (see R. Part I, No. 107). At the very least, Judge Johnson denied Appellants a hearing on their’ Rule 60(b) motion.

Regardless, Appellants have never had any intention of asking Judge Recht to reconsider his January 18, 2007, Ruling, and to this date have filed no such motion. Further, the Appellants have never had any intention to file a Rule 59(e) motion before the Panel and to this date never have (Rule 59 deals with trials on the merits, which Appellants have not had in this litigation). Further evidence of Appellants’ lack of intention to file a Rule

59 motion is the simple fact that Plaintiffs' Motion to Reconsider was filed on February 20, 2007, more than 10 days following the Panel Judge's (Recht) January 18, 2007, ruling. As a matter of law, Appellants' Motion to Reconsider, was and is to be considered a motion pursuant to Rule 60. See *Pritt*, supra. Beyond that, the "motion" referred to in the Court's March 27, 2007, Order, was never filed by the Plaintiffs in his Court.

G. The Panel Judge's Ruling Misstates *The Rule Of Reasonable Use As Set Forth In In Re Flood Litigation*.

The rule of reasonable use as set out in *Morris v. Priddy*, 181 W. Va. 588, 383 S.E.2d. 770 (1989) and affirmed and clarified in *In Re Flood* does not require Plaintiffs to plead or show that there existed an alternative way for the defendant to use his land which would have prevented the flooding of plaintiffs' land. In other words, Plaintiffs are not required to plead detailed facts, or any facts for that matter, showing that the defendant did not exercise due care in using his property in such a way as to interfere with Plaintiffs' use of their property to state a claim under *Morris*. Rather, the test is: whether, the plaintiff has alleged that under the circumstances, the Defendant's use of his property is **unreasonably** interfering with the Plaintiff's use of his/her property? It is important for this Court to understand Appellants' view of what "unreasonable interference" is. The focus is not on the conduct or activity of the Defendant. Instead the inquiry is whether the interference with the Appellants use of his or her property is unreasonable. This is an entirely different concept that that which a majority of the Panel Judges' understand. The Panel keeps insisting, and particularly Judge Recht, that unreasonableness is focused on the activity of the Appellee. Hence, the constant admonition that "Coal mining and timbering are not unreasonable activities". Appellants have never alleged that they are. The question is whether the interference with Appellants' property is unreasonable. In short, reasonable acts can lead to unreasonable interferences with a neighbor's property.

The question of **reasonableness** is, under ordinary circumstances, a question of fact for the jury. *Morris Associates, Inc. v. Priddy*, supra at 863. The Recht Order holds that the following allegation is insufficient as a matter of law to state a claim against one of the Defendants, Berwind Land Company (Berwind Land Company is a timbering and coal mining defendant and certain plaintiffs have alleged that this defendant was engaged in timbering and mining on the hillsides above their property):

- a. Defendant BERWIND LAND COMPANY failed to monitor, audit, and inspect timbering activities conducted on its land for compliance with BMPs (Best Management Practices – industry standards);
- b. Defendant...failed to compare BMP compliance of timbering activities conducted on its land with state BMP surveys and failed to set benchmarks for future performance and improvement;
- c. Defendant...failed to ...implement riparian protections measures, such as marking or flagging streamside management zones (SMZs) in advance of timber harvests on its land;
- d. Defendant...failed to develop...a program or plan for protection of streams from timbering; and
- e. Defendant...timbering activities disturbed an unreasonable percentage of drainage area corresponding to one or more of the 21 client clusters set out in Plaintiffs' April 7, 2006, Unified Disclosures.

Appellants made the following allegations against Berwind regarding its coal mining operations being carried out on hillsides above certain of the Appellants¹⁹. Appellants do not believe they had to plead “wrongful” or “unreasonable” conduct at all, but recognizing the seeming futility of focusing on the nature of the interference with Appellants’ property and in an effort to satisfy the court’s moribund focus on the nature of Appellees’ conduct, the allegations were made as follows:

¹⁹ Bear in mind, that the Plaintiffs at the time of the filing of these more definite statements of allegations against Berwind, the Plaintiffs had identified each Plaintiff by GPS coordinates as to their location relative to Berwind’s several operations. Thus each Plaintiff with an alleged claim against Berwind had been identified to the Court and to the Defendant.

- a. Surface mining operations on Defendant BERWIND LAND COMPANY's land violated, and were found to be in violation of, West Virginia mining regulations intended to reduce surface water runoff and/or minimize downstream sediment deposition on July 8, 2001;
- b. Defendant...failed to conduct a surface water runoff analysis before, during, and/or after conducting its surface mining activities;
- c. Defendant...failed to develop...a plan to control surface water runoff from mining operations;
- d. Defendant...failed to develop...a plan to minimize downstream sediment deposition from mining operations;
- e. Defendant...engaged in surface mining activities and the construction of valley fills in an area that was unreasonably close to a local population center and where it was bound to do harm; and
- f. Defendant...failed to reclaim its valley fills during construction by using a more appropriate valley fill construction method such as the "bottom-up" method, and instead used the less stable and more erosion-prone "end-dump" method.

Both the above sets of allegations were then followed by allegations pursuant to

Morris:

- 4. Upon information and belief, the conduct of BERWIND LAND COMPANY...was unreasonable in light of all the factors to be considered under the rule of reasonable use.
- 5. ...the conduct of the Defendant...was the proximate cause of, and/or materially contributed to, the flooding that occurred on July 8, 2001, on the property of those Plaintiffs identified as claiming against the Defendant....
- 6. ...the conduct of the Defendant...unreasonably increased...the risk of flooding of the property of...Plaintiffs....
- 7. ...the Defendant...unreasonably interfered with the use and enjoyment of...Plaintiffs...property...by increasing the risk of flooding.

The Panel Judge's Ruling finds, as a matter of law, that the above allegations in support of Plaintiffs' claims under *Morris* and in support of Plaintiffs' negligence claims are insufficient (see R. Part I, No. 105). Further, the Ruling concluded that, as a matter of law, the Appellants could prove no set of facts in support of their claims. (Recht Order

Conclusions of Law paragraph 2, see R. Part I, No. 105). Appellants' counsel inquired of Judge Recht during the September 30, 2006, hearing on this issue as follows:

MR. McLAUGHLIN: ...if we can show ...that the particular piece of property that [defendant] failed to monitor, audit, and inspect the timbering activities and can prove through expert testimony that, as a consequence of that, their timbering activities on that particular piece of property, through expert testimony and fact witnesses, (inaudible) that their activities on that piece of property were done in a way that caused an increased amount of runoff that connected up with streams, with road systems and caused more flooding downstream, are you going to say that that's not a viable cause of action under West Virginia law. That's the (inaudible) that we state. That's the question.

THE COURT: I'm not going to give an answer.

(Recht Transcript, Sept. 30, 2006, Hearing, page 48, lines 5-20).

The Recht Order, even though Judge Recht refused to answer at the hearing, concluded that the proof of Appellants' allegations would not be sufficient. But the standard Judge Recht contends he applied was that Appellants' complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" (see R. Part I, No. 105). Again, rhetorically, Appellants ask: what more is there to prove? If the Recht Order is correct, the Court is able to say as a matter of law it is not possible that the Appellees could do anything to contribute to the flash flooding and that no Appellant could prove a case that the Appellees did anything to contribute to the flooding and the consequential interference with the Appellants' use of their land.

**Misrepresentation of Appellants' *Morris* Allegations
As *Rylands* Strict Liability Allegations**

Appellants believe it is obvious from a fair reading of the Recht Order, that the Court was bent on recasting Appellants' "reasonable use" claims under *Morris* as strict liability claims under *Rylands*. Strict liability is mentioned 13 times in the opinion (see R. Part I, No. 105). Appellants believe the Recht Order's fixation on strict liability has

confused the issue of “reasonableness” with the idea of *Rylands* type strict liability. This is entirely wrong. *Rylands* is concerned only with cause and effect where unreasonably dangerous activities or conditions are concerned. The issue of “unreasonably dangerous” is an issue of law for the court, leaving only cause, effect, and damages for the jury’s determination. Under *Morris* (and now *In Re Flood Litigation*), however, in addition to cause and effect the jury must find the defendant’s interference with the plaintiff’s property to be unreasonable in light of the circumstances of relative advantage to the actor’s use of his land and disadvantage the interference defendant’s use of his land causes to the plaintiff’s property. *In Re Flood Litigation*, supra, at 871, quoting *Morris*, supra, at Syl. Pt. 2. Contrary to the Court’s unfounded assertion in the Recht Order that “Principal among the legal theories presented by Plaintiffs was one of strict liability....” (Recht Order p.4, paragraph 7), the Appellants have clearly made a claim under *Morris* (as this Court found in *In Re Flood Litigation*, supra).

In this regard, the Appellants have been guided by what the Appellants were advised was the entire Flood Panel’s decision to put the essential *Morris* based questions to the Upper Guyandotte Jury. As the Panel will recall the Jury was asked to answer: (1) Did the Defendants’ use of their land materially increase the peak rate of runoff; (2) Did the Defendants’ use of their land materially contribute to the streams and creeks leaving their banks; and (3) Was the defendants’ use of their land reasonable (this is a slight misstatement, but the inference is was it reasonable to interfere with Appellants’ property by the defendants’ use of their property). The Upper Guyandotte Jury answered yes to the first two questions and no to the third.

To summarize, in *Morris*, the inquiry was whether the construction of a parking lot that changed the elevation of defendant’s property caused an unreasonable interference

with plaintiffs property in light of the circumstances (it reasonableness of the parking lot is determined by the reasonableness or unreasonableness of the interference the parking lot caused the plaintiff due to surface water runoff.. It was not a “fault” case in the sense of negligence or other “wrongful” conduct. The sole question was one of reasonableness in light of the circumstances. In the *Flood* litigation the question is: is it reasonable to timber and mine on steep hillsides above residences and towns when it is foreseeable that the extensive disturbance of the natural increases the risk that surface water runoff will be materially affected in such a way as to materially (unreasonably) interfere with the lower property owners? The same use of Defendants’ property where there are no downstream residences and towns may under those circumstances be entirely reasonable (because no unreasonable interference to another property owners property occurs), but in both circumstances reasonableness is for a jury to say – not a judge. The Recht Order concludes, “indirectly”, that land disturbances in connection with coal mining and timbering on steep hillsides above residences and towns are **inherently reasonable and as such no interference with another’s property, including catastrophic flash flooding could ever be found to be an unreasonable interference under *In Re Flood Litigation*..** As such, in this litigation, in the words of the Recht Order, it [is] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” (Recht Order, Conclusions of Law, paragraph 2, citing *McCormick v. Wal-Mart*, 600 S.E.2d 576 (W. Va. 2004).

H. The Panel Judge's Ruling Disregards This Court's Direction In In Re Flood Litigation With Regard To Claims For Nuisance And Negligence.

a. Nuisance.

This Court in IN RE: FLOOD LITIGATION, *supra* was asked whether the Plaintiffs had a cognizable cause of action upon allegations that the defendants use of their land created a private nuisance under *Hendrickson v Stalnaker*, 181 W. Va. 31, 380 S.E. 2d. 198 (1989).

In response this Court stated,

Our review of the stipulated facts leads us to conclude that there is not a sufficiently precise and undisputed factual record on which the issue of whether Plaintiffs have a cause of action for nuisance can be determined. Therefore, we do not answer the second certified question. However, because further development of the evidence below may indicate that Plaintiffs have such a cause of action, we find it necessary to briefly discuss our applicable law and the parties' arguments on this issue.

In Re Flood Litigation at pages 543 W. Va. and 872 S.E.2d.

The Court then discussed in some detail the jurisprudence in this state relating to nuisance on the assumption, as it clearly indicated, that further facts would be developed during discovery. Yet, the Panel Judge disregarded this Court direction and never permitted any discovery relating to this issue or for that matter any other issues in the case.

This Court's discussion of private nuisance is instructive, however, and citing *Hendricks*, *supra*, opined that:

1. A private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another's land.
2. An interference with the private use and enjoyment of another's land is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm.

Additionally, the Court cited *Mahoney v Walter*, 157 W. Va. 882, 205 S.E.2d 692 (1974) holding that whether a business or particular use of a property constitutes a nuisance is the reasonableness or unreasonableness of the property' use in relation to the particular locality

and under all the circumstances. Indeed this Court's suggestion that further discovery would permit the factual development necessary to determine whether Appellants had a nuisance cause of action remains unrealized. Interestingly again wrongful conduct in and of itself is not relevant when considering whether the use of property is a nuisance. The issue relates more to the result of one's use of its land for determining nuisance. The test as articulated in *Hendricks* for reasonableness when the harm caused by such use when the harm – here Appellants flooded homes--- outweighs the social value of the use alleged to cause that harm. This Court has made clear that this is an issue solely for the fact finder.

Clearly, the Appellants allegations for nuisance are more than sufficient under Rule 8(a) of the West Virginia Rules of Civil Procedure to state a claim for nuisance subject as this Court pointed out to further development through discovery. See, also, *Burch v Nedpower Mount Storm*, 220 W.Va. 443, 647 S.E.2d 879 (2007); *Booker v Foose*, 216 W. Va. 727, 613 S.E.2d. 94 (2005); *Sticklen v Kittle*, 168 W. Va. 147, 287 S.E.2d. 148 (1981).

b. Negligence

This Court also answered the question of whether the Appellants had a cognizable cause of action for negligence. First it is important to note that the Appellees agreed with the Appellants before this Court, that the Appellants had stated a claim for negligence. In *Re; Flood Litigation*, at pg. 872 S.E. 2d. This Court stated, "We had held that 'in matters of negligence, liability attaches to a wrongdoer . . . because of a breach of duty which results in injury to others.'" *Ibid*. Even with this Court's direction, ". . . as the evidence is further developed below . . ." (ie: discovery), the Panel or trial court was to apply the law to those developed facts. Once again, the Appellants were denied any

opportunity by the Panel Judge to develop the facts for their Appellee admitted negligence claims.

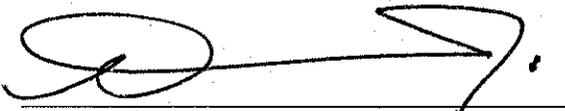
Relying on the unknown and unannounced super pleading requirement for mass litigation first established by the Panel Judge in this watershed, Appellants have been denied their right to conduct the very discovery Appellants believe this Court specifically directed.

VII.

PRAYER FOR RELIEF

For the reasons, arguments, and points of authority above presented, the Appellants pray that this Court enter its order reversing the decision by the Panel Judge dismissing with prejudice Appellants claims in the Coal River Watershed, reinstate the cases, and further direct the Panel Judge or such other Judge as the Court believes appropriate to immediately require discovery responses by the Appellees to outstanding discovery and permit such additional discovery as may be necessary to move these cases forward after six years without any discovery from Appellees, and for such other and appropriate relief as this Court deems fair and just.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 33664

IN RE: FLOOD LITIGATION

**Civil Action No. 02-C-797
Honorable Arthur M. Recht
Coal River Watershed**

CERTIFICATE OF SERVICE

I, J. David Cecil, counsel for the Appellants, do hereby certify that I have served the **APPELLANTS' BRIEF** in the above-styled matter upon all counsel of record, via first-class U.S. Mail, this 17th day of December, 2007.



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