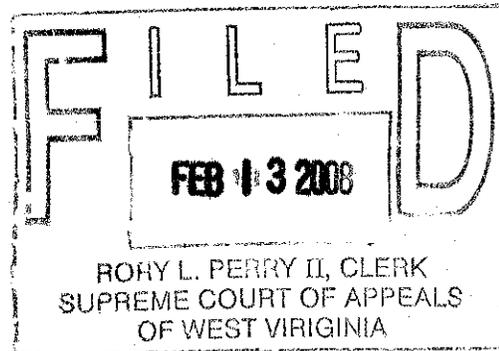


**APPEAL NO. 33664
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

IN RE: FLOOD LITIGATION

Raleigh County Civil Action No. 02-C-797
(Coal River Watershed)



APPELLANTS' REPLY 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**

Appellants' reply brief is limited to the legal issues believed to be relevant in this case. We could discuss the thousands of citizens who lost their homes, suffered serious property damages, and were otherwise seriously effected by the July 8, 2001 Flood, but the real issues here are legal and this reply brief will be limited to those issues only.

Appellants note that Appellees have devoted the majority of their brief to factual issues which, save the history of the procedure of this litigation, should not be considered by this Court. Primarily, Appellees attempt to include facts not of record and not before the circuit court when it ruled in this matter. In large part these factual assertions are an attempt to influence this Court's ruling by matters wholly outside the issues before the Court. Appellees should recall that their successful motion was one under 12(b) and perhaps 12(c) which considers only, according to the circuit judge, the allegations of the complaint and the more definite statements. Knowing this, it seems rather obvious that the Appellees seek to paint a favorable picture for themselves about what they believe the facts might show. Since Appellants were never provided the opportunity for discovery, the recitation of Appellees' facts is, to say the least, slanted. Moreover facts are not in issue here, only the allegations of the complaint and more definite statements,¹ are

¹ Of course, that assumes that a more definite statement was even required.

relevant here and the bleak picture portrayed by Appellees, is clearly irrelevant to the matters before this Court not to mention challenged by the Appellants should they ever get to trial.

Because Appellants believe the relevant issues alone should be addressed, this reply brief addresses only the issues which actually bring us to the Honorable Court.

II.
**THE PANEL JUDGE FAILED TO FOLLOW THE DIRECTIVES OF THIS
COURT SET FORTH IN IN RE: FLOOD LITIGATION**

The first issue this Court should review is whether the Floods' Mass Litigation Panel followed the directives of this Court's opinion in *In Re: Flood Litigation*, 607 S.E.2d. 868 (W. Va. 2004). Glaringly absent in the circuit court's Coal River Watershed ruling is *any* opportunity for Appellants to conduct discovery. Yet as indicated explicitly and implicitly in *In Re: Flood Litigation* and in Appellants initial brief, this is the very directive given by this Court. See *Flood Litigation*, at pages S.E. 2d. pg. 872,

“ . . . Therefore, *as the evidence is further developed below*, the Panel and any trial court should apply the applicable law to the facts in order to decide whether a cause for nuisance lies in this case;

“ . . . Plaintiffs and Defendants concur that Plaintiffs have a cause of action for negligence. This Court agrees.” *In Re: Flood Litigation*, page 869 S.E. 2d.,

And

“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*, page 873 S.E.2d

The failure to permit any Appellant discovery is further magnified with regard to negligence because the Appellees during oral argument conceded that Appellants had sufficiently stated a claim for negligence.

However, once the matter was back before the Mass Litigation Panel, Appellees ignored their previous admissions and successfully convinced the circuit court that the complaints failed under Rule 8(a) of the West Virginia Rules of Civil Procedure to allege sufficient facts to state a claim. The argument was disingenuous to say the least but all efforts by Appellants' counsel to convince the circuit court that discovery was appropriate were summarily rejected.

III.

APPELLANTS COMPLAINTS COMPLIED WITH RULE 8(a) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE

Appellees' recitation of a series of factual allegations not included in the Appellants' complaints suggest a retreat to the days of common law pleading, and represents nothing more than an attempt to engraft additional pleading requirements onto the minimal and liberal standards of Rule 8(a) of West Virginia Rules of Civil Procedure and this Court's consistent interpretation of that rule. With limited exceptions, not applicable here, detailed allegations are not required and notice pleading is sufficient to state a claim under West Virginia law. Appellees cite recent federal cases in support their expansion of factual pleading requirements including *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007),² but this Court has not adopted the more strict pleading requirements

² Both *Twombly* and *DM Research v. College of American Pathologists*, 170 F.3d. 53 (1st Cir. 1999) Fall 2005 addressed specifically what allegations were necessary in a Sherman Antitrust action to state a cause of action. In *DM Research*, the Court held at page 55, "The issue is whether the complaint states a claim under the Sherman Act, assuming the factual allegations to be true and including to a reasonable degree a plaintiff who has not yet had an opportunity to conduct discovery." The Court further stated, "What weight

even assuming that that was the intent of the federal courts. In the recent case of *In Bunch v. Nedpower Mount Storm, supra*, this Court held, citing Syllabus Point 2, *Copley v. Mingo County Bd. of Educ.*, 195 W.Va. 480, 466 S.E.2d 139 (1995),

We also keep in mind that a motion to dismiss on the pleadings should only be granted in very limited circumstances. Specifically,

[a] circuit court, viewing all the facts in a light most favorable to the nonmoving party, may grant a motion for judgment on the pleadings only if it appears beyond doubt that the nonmoving party can prove no set of facts in support of his or her claim or defense.

Accord: Par Mar v. City of Parkersburg 183 W.Va. 706, 398 S.E.2d 532 (1990); *State ex.rel. Leung v. Sanders*, 213 W.Va. 569, 584 S.E.2d 203 (2003); *M.W. Kellogg Co. v. Concrete Accessories Corp.*, 157 W.Va. 763, 772, 204 S.E.2d 61, 67 (1974); *Warner v. Kittle*, W.Va., 280 S.E.2d 276 (1981); Syl., *Oakvale Road Public Service District v. Smith*, W.Va., 276 S.E.2d 218 (1981); Syl., *Flowers v. City of Morgantown*, W.Va., 272 S.E.2d 663 (1980); Syl. pt. 2, *Leasetronics v. Charleston Area Medical Center*, W.Va., 271 S.E.2d 608 (1980); Syl., *Dishman v. Jarrell*, W.Va., 271 S.E.2d 348 (1980); Syl. pt. 1, *Pauley v. Kelly*, W.Va., 255 S.E.2d 859 (1979); Syl. pt. 3, *Mandolidis v. Elkins Industries*, W.Va., 246 S.E.2d 907 (1978); Syl., *John W. Lodge Distributing Co. v. Texaco*, W.Va., 245 S.E.2d 157 (1978) and Syl. pt. 3, *Chapman v. Kane Transfer Company*, W.Va., 236 S.E.2d 207 (1977).

Appellees cite continuously *Fass v. Newsco Well Service, Ltd.* 177 W.Va. 50, 350 S.E.2d 562 (1986) as support for their argument that specific detailed allegations

is to be given to allegations of this character (indirect allegations of conspiracy), and to the general charge of 'conspiracy,' is the central issue in this case.

in a complaint are necessary. But a close review of that case shows first that it was an employment case --- for which this Court required a higher standard of pleading—and what this Court did find to be deficient?

Especially in the *wrongful discharge* context, sufficient facts must be alleged which outline the elements of the plaintiff's claim. In *Harless v. First National Bank*, 162 W.Va. 116, 246 S.E.2d 270 (1978), this Court recognized a cause of action for wrongful discharge when a substantial public policy principle is violated. In the case before us, unlike the complaint in *Harless*, which this Court reviewed in resolving that case, there are no specific statements alleging what precipitated the discharge, other than the fact that the appellants “stopped to eat and relax.”

See, also, *Owen v Board of Educ.*, 190 W. Va. 677, 441 S.E.2d. 389 (1994) and another employment termination case in which this Court required more specific pleading.

What did the *Fass* Court find to be deficient in the *Fass* complaint?

The allegations in this case are unsupported by essential factual statements. Absent in the complaint is any factual reference to the location of work, the conditions under which the appellants were employed, or the regularity of their working hours. General allegations in this regard are insufficient and those set forth in this complaint are mere sketchy generalizations of a conclusive nature unsupported by operative facts.

Appellants' complaints and subsequent more definite statements, even though not an employment termination case, provide the very information that the Court held in *Fass* was deficient. The complaints allege the dates, the nature of the harm suffered, the defendants which caused or contributed to that harm, the specific defendants that each Appellant is suing, the activities in which Appellees engaged that Appellants believe caused their harm, and the damages suffered by Appellants. Clearly, this Court's holding

in *Fass* is not applicable in the instant case and Appellants were entitled to discovery on all the alleged causes of action.

Since all that the pleader is required to do is to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. The trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail in the action, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings.

Sesco v. Norfolk and Western Ry. Co., 189 W.Va. 24, 427 S.E.2d 458, 460-461 (1993).

The West Virginia Supreme Court in *Sesco*, supra at 460, further stated that:

Because pleadings under our Rules of Civil Procedure are designed to give notice and do not necessarily formulate the trial's issues, the pleadings generally contain insufficient data to provide a sufficient basis for judgment on the merits.

And,

We also held that “[a] motion to dismiss for failure to state a claim is viewed with disfavor, particularly in actions to recover for personal injuries.” *Chapman, id.* See also *Courtney v. Courtney*, 186 W.Va. 597, 413 S.E.2d 418 (1991).
Sesco, 189 W.Va. 24, 25 427 S.E.2d 458, 459

Very recently, this Court in the *per curium* opinion of *Highmark West Virginia, Inc. v. Jamie*, ___ S.E.2d ___, 2007 WL 4150211 (W.Va.) in footnote 4, discussed the very arguments Appellees present here,

FN4. Mountain State cites *Bell Atlantic Corporation v. Twombly*, --- U.S. ----, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), wherein the Supreme Court of the United States indicated that the *Conley v. Gibson* standard, set forth by this Court in *Chapman*, is incomplete. As suggested in *Bell*

Atlantic, the standard, that dismissal should not be granted unless it appears that the plaintiff can prove no set of facts in support of his claim, should be replaced by a standard to the effect that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." --- U.S. at ----, 127 S.Ct. at 1969, 167 L.Ed.2d at 945. We decline to preemptively settle that issue in this opinion. ***The standard expressed in Chapman and repeated in subsequent cases remains good law***, and we note that shortly after the decision in Bell Atlantic this Court, in Burch v. Nedpower Mount Storm, 220 W.Va. 443, 647 S.E.2d 879 (2007), applied a standard similar to that in Chapman in the context of reviewing an order granting judgment upon the pleadings. Highmark West Virginia, Inc. v. Jamie, 655 S.E.2d 509,512 (2007). Emphasis supplied.

Clearly, Appellants' complaints complied with West Virginia Rules of Pleading even without their more definite statement.

IV. APPELLANTS' COMPLAINTS STATED CLAIMS FOR UNREASONABLE USE AND NUISANCE

These cases are, even absent negligence claims, are also based upon property law and the old maxim, *sic utere tuo ut alienum non laedas*. Appellants have alleged claims arising from property in addition to tort law. Both unreasonable use (which this Court agreed was a viable claim) and nuisance (which this Court indicated should be developed – presumptively by discovery) relate as this Court has consistently held first to the harm caused by another's use of his/her land and then whether the social utility of the land's use outweighs the harm such land use caused.

In Browning v. Hale, 219 W. Va. 89, 92, 632 S.E.2d. 29, 32 (2005), this Court set forth what a nuisance cause of action is,

Concerning our nuisance law, we have recognized that “[t]he crux of a nuisance case is unreasonable land use. *Booker v. Foose*, 216 W. Va. 727, 730, 613 S.E.2d. 94, 97 (2005), quoting *Frank v Environmental Sanitation Management, Inc.*, 687 S.W.2d. 876,880 (MO 1985). This Court has held that [a] private nuisance is a substantial and unreasonable interference with the private use of and enjoyment of another’s land. Syllabus Point 1, *Hendricks v. Stalaker*, 181 W. Va. 31, 380 S.E.2d. 198 (1989). “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 harm. Syllabus Point 2, *Hendricks, supra*.

See, also, Syllabus Points 3 and 4, *Burch v. Nedpower*, 220 W. Va. 443, 647 S.E.2d 879 (2007).

Appellants throughout this litigation have attempted to show the Flood Mass Litigation Panel that they have alleged a property case based upon unreasonable use of land and nuisance. Whether these causes of action are treated as independent or combined³, the initial inquiry is relatively simple. The essential element of an actionable nuisance is that persons have suffered harm that they ought not have to bear. In *Whorton v. Malone*, 209 W.Va. 384,390, 549 S.E.2d 57, 63 (2001), this Court addressed this very issue,

We agree that, in layman's terms, it is “reasonable” for a landowner to want to solve his or her own surface water problems, and that the upstream defendants in this case probably had no intention of harming their downstream neighbors. But again, this is not the test required by our law. In a case with very similar facts to the instant dispute we explained that a defendant's “reasonable” intentions to protect himself did not render his conduct in diverting surface water to the detriment of his neighbor a “reasonable” use under our law.

³ See: Hayes, *In Re Flood Litigation: When It Rains, The Lawsuits Pour: Considering*, 108 WVLR 171, 185 (Fall 2005), where the author suggests that they are actually one cause of action.

Distinguished from negligence liability, liability in nuisance is predicated upon unreasonable injury rather than upon unreasonable conduct. Thus, Appellants may recover in nuisance despite otherwise notorious nature of the conduct which creates the injury.

As this Court confirmed in *Hendricks, supra*, at page 34 W. Va.,

Although balancing tests are always unsatisfactory because they are unpredictable, it nonetheless appears that balancing was at the heart of actions for nuisance from its inception. Early on the law was asked to decide whether activities lawful in themselves, such as putting up a mill, fencing a pasture, or digging a ditch, were so unreasonable that they essentially diminished the estate of a neighbor. It is in this regard that the scholarship concerning the evolution of the doctrine of nuisance from the Assize of Novel Disseisin is relevant: at the heart of nuisance is the notion that the lawful use of the estate has the effect of "ousting" an adjacent landowner from his estate. And, then, inevitably courts need look at the reasonableness of conduct under all of the circumstances.

Private nuisance, then is an invasion of another's interest in the private use and enjoyment of his land. Such invasions must be either intentional⁴ and unreasonable or otherwise independently tortious under the rules governing negligence or strict liability or abnormally hazardous (or dangerous) conditions. In short a private nuisance is a cause of action involving the interference with the ownership, occupation or use of property. Nuisance actually describes the consequence of conduct, the inconvenience or harm caused to others (here Appellants) rather than the type of conduct involved. *Restatement (Second) of Torts*, s 821A cmt. b (1979).

Since this Court has already excluded strict liability as a cause of action in these cases, Appellants, given (finally) some discovery might establish Appellees' negligence,

⁴ Intentionally engaged in the conduct – here timbering, mining and related activities—that caused the harm; not intentionally caused the harm, as that is not an issue.

but even absent such discovery, Appellants have clearly and sufficiently pled their unreasonable use of land and nuisance claims which entitle them to discovery in any event.

Appellants have factually identified the event—the flooding of July 8, 2001 and consequent harm suffered; Appellants have alleged the cause – timbering, mining and related activities that altered the natural surface water runoff; Appellants have identified the Appellees whose conduct caused or may have caused the event as well as which Appellees created or contributed to specific Appellants’ nuisance claims, that is the harm Appellants suffered.

Appellants next suggest that the circuit judge required each Appellant to identify each individual defendant or defendants or group of defendants he or she was suing and provide the basis for the claims against those defendants, making specific reference to the operations of each defendant at issue *and the specific activities upon which those claims were based*. Yet, only a cursory review of what was actually required shows that is not the case at all. What Appellants were required to set forth was “The activities [in] which the defendant allegedly engaged that the plaintiffs claim related to the harm.” See: *Recht Memorandum of Opinion and Order* dated January 18, 2007. Appellants did just that by alleging that Appellees engaged in timbering, mining and related activities and those activities cause the Appellants harm. Moreover, Appellants did provide the information actually required by the Panel in their more definite statements with supplemental disclosures.

Appellees state that this Court held in *In Re: Flood Litigation, supra*, that, “The theory of “reasonable use” is based on the concept of foreseeable harm and a balancing of

interests.” Appellees’ Brief at page 43. But what the Appellees conveniently omit is the following language,

Generally, under the rule of reasonable use, the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility. **Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier of fact.**
Emphasis added.

Thus the balancing test is one solely for the jury.

Next Appellees state “Without a direct and specific statement of what it was about each defendant’s use of land each Appellant contends was unreasonable – *what each defendant did wrong* --- this inquiry is simply impossible to perform.” Appellees’ Brief at page 44. Again, the Appellees and the circuit judge missed the vital point, the conduct alleged does not have to be wrongful conduct in unreasonable use of land and nuisance claims, it only has to be conduct that resulted in harm or contributed to the harm suffered. Moreover, as set forth above, the pleadings were clearly sufficient under any of the alleged causes of action to permit Appellants to proceed to discovery as this Court suggested.

Appellants have stated claims for unreasonable use and nuisance under West Virginia jurisprudence.

**V.
ALL ISSUES ARE PROPERLY
RAISED ON THIS APPEAL**

Appellees suggest that Appellants failed to raise certain issues in their petition for appeal and thereby attempt to exclude consideration of Appellants arguments designated

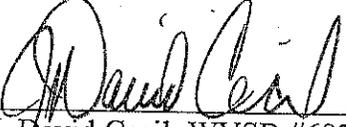
as "H" on their brief.⁵ However, the issues raised in argument H are in fact part and parcel of the overall arguments made by the Appellants throughout this litigation and are most certainly relevant when viewed from this Court's opinion in *In Re: Flood Litigation*. Relying on *Canterbury v. Laird*, ___ S.E.2d. ___, 2007 WL 4165399 (W.Va. 2007), Appellees attempt to have this Court ignore, for example, their admission that the Appellants had stated a claim for negligence.

These issues are properly before this court.

VI. CONCLUSION

For all the reasons stated herein, for the reasons set forth in Appellants' original brief and for such other reasons as should appear proper to the Court, Appellants pray that the Circuit Judge's Order of January 18, 2007 be reversed and set aside, these cases reinstated and a new Case Management Order be required including discovery for Appellants.

Respectfully Submitted,
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⁵ The title of the section H is *The Panel Judge's Ruling Disregards This Court's Direction In In Re Flood Litigation With Regard To Claims For Nuisance And Negligence.*

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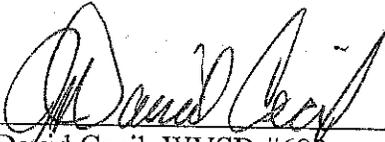
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IN RE: FLOOD LITIGATION

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' REPLY BRIEF** in the above-styled matter upon all counsel of record, via first-class U.S. Mail, this 13th day of February, 2008.



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